

# THE JURISPRUDENCE OF MEDIATION: BETWEEN FORMALISM, FEMINISM AND IDENTITY CONVERSATIONS

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*The paper explores the ties between schools of mediation and schools of law through an examination of their theoretical foundations. By weaving together discussions of rights, the rule of law, and formalism, with elements of dispute resolution as it is studied today, this article will demonstrate the importance of Alternative Dispute Resolution (“ADR”) and mediation as a form of social order. It will also demonstrate the influence of philosophical jurisprudential debates on the development of mediation programs. The paper begins by exploring the ties between different jurisprudential traditions and evolving models of mediation. Scholars portray mediation models as incorporating diverse ideologies that inform diverse jurisprudential traditions. Aside from the differences between the models, which correspond to diverse legal intellectual traditions, the models also share a number of fundamental principles, which this work outlines. The paper also proposes a distinctive jurisprudence of mediation, which differentiates it from the legal worldview. The “identity conversation” jurisprudence, which this paper develops for the practice of mediation, corresponds to the three models of mediation described here and captures the uniqueness of dispute resolution as a theoretical development in law.*

## I. INTRODUCTION: CRITICISM OF MEDIATION AND RESPONSES TO IT

Over the last decades, the ADR movement has spread across the United States, and, in recent years, it has entered the phase of institutionalization.<sup>1</sup> Nevertheless, criticism of ADR in general

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<sup>1</sup> For a periodization of the ADR movement and presenting it as reaching the stage of institutionalization, see Frank E. A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, J. DISP. RESOL. 3 (2000). For a discussion and evaluation of the stage of institutionalization, see Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613 (1997). For a critique of the consequence of this development, see Nancy A. Welsh, *The Thinning Version of Self-Determination in Court-Con-*

and, in particular, accusations that the movement offers privatized justice, have always been part of the movement's history<sup>2</sup> and still prevail in some circles.<sup>3</sup> Critics perceive ADR programs as undermining civil justice and regard the phenomenon of the "vanishing trial,"<sup>4</sup> which is often regarded as one of the consequences of ADR's success, as diminishing the ability of judicial adjudication to fulfill one of its key functions: the promotion of the public good.<sup>5</sup> This paper challenges such pessimistic views of ADR institutionalization by exploring the theoretical foundations behind the most important ADR process: mediation.<sup>6</sup> Critics of ADR have never

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*nected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929 (2004); Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984).

<sup>2</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); see also, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989-1990); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

<sup>3</sup> See, e.g., Judith Resnik, *Whither and whether adjudication?*, 86 B.U. L. REV. 1101 (2006); Bruce E. Meyerson, *The Dispute Resolution Profession Should Not Celebrate The Vanishing Trial*, 7 CARDOZO J. CONFLICT RESOL. 77 (2005); Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735 (2006); REX R. PERSCHBACHER & DEBRA LYNN BASSETT, *The End of Law*, 84 B.U. L. REV. 1 (2004); Robert M. Ackerman, *Vanishing Trial, Vanishing Community?*, 2006 J. DISP. RESOL. 165; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). For a description of the critique phase as over in terms of the ADR movement, see Eric K. Yamamoto, *ADR: Where Have The Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

<sup>4</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>5</sup> On the relation between adjudication and "public good," see Resnik, *supra* note 3.

<sup>6</sup> For the centrality of mediation among ADR processes see Fitting the Forum to the Fuss by Goldberg and Sander, which provides a guide for selecting an ADR procedure. F. Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 291-95 (1999). According to the authors' chart, the process which scores the best results in achieving most of the goals of parties in a conflict, and which is capable of overcoming most of the impediments to settlement is mediation. See also Frank A. Sander & Lukasz

seriously addressed the theoretical and moral values that the processes of mediation embody.<sup>7</sup> It has been easier for critics to view ADR as promoting settlement and efficiency on narrow, technical grounds than to examine the manner in which it promotes a different view of justice. The critics have not explored the various processes of ADR: least of all, its complex concept of mediation. The image of mediation as a private, contractual phenomenon—settlement-driven bargaining based on power relations—has resulted in a condemnation of the process as an oppressive mechanism that reinforces the inequalities between the parties.<sup>8</sup> This paper proceeds from the notion that mediation is a form of social order<sup>9</sup> and from the understanding that the field of dispute resolution consists of diverse intellectual traditions reflecting different ideologies. Although some applications of mediation may contribute to oppression and provide privatized justice for legal disputes, there are internal ethical and procedural mechanisms in place whose purpose is to prevent such outcomes. Moreover, similar concerns of injustice exist with respect to conventional methods of adjudication.<sup>10</sup>

The discussion of the relationship between intellectual streams of thought in legal scholarship and in mediation helps to enrich the debate on resistance to mediation and to explore the theoretical complexity underlying alternatives to adjudication. The paper first explores the intellectual links between legal schools of thought and models of mediation. Following this presentation, it surveys a number of common characteristics of mediation as a theoretical discourse that are distinct from the legal ones. Then, this piece presents an advanced jurisprudence of mediation as the develop-

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Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 40 (2006).

<sup>7</sup> See, for example, Fiss, *supra* note 2, for Fiss' reference to ADR on this basic article. For Fiss' reply to critics, see Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

<sup>8</sup> For an articulation of this view of mediation as "the oppressive story" within the history of the movement, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). Their answer to the oppression story is to develop a neglected story—the transformative one—which posits mediation as promoting morality of care and not as a "satisfaction story." *Id.* For an evaluation of the inequality claim, see Carrie Menkel-Meadow, *Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

<sup>9</sup> See Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971).

<sup>10</sup> For a critique of conventional litigation processes and the ways they promote injustices, see Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. L. REV. 95 (1974).

ment of communication based on an identity discourse. This communicational mode is different from the “discourse of rights” characterizing legal practice and theory. Mediation in all its models is typically presented as an identity discourse that incorporates a dialectic relationship between rights, needs and process sensitivity. As a new form of justice with its own values, mediation can itself be perceived as a civil good. A “public” mediation perspective, in terms of a thick theoretical perspective of this process, will expand the academic debate on new reforms and on structural transformation within the legal system.

## II. CULTURES OF MEDIATION

According to the theoretical scheme underlying this paper, which I have elaborated elsewhere,<sup>11</sup> evolving models of mediation reflect the complex location of mediation on the theoretical and professional levels. On the theoretical level, mediation is located between the social sciences and the humanities. Two theoretical paradigms delineate the developing models described here: the rational-scientific paradigm, guided by game theory and the social sciences,<sup>12</sup> and the interpretive paradigm, inspired by the humanities and based on storytelling and narratives.<sup>13</sup> Both are descriptive and portray the situation of conflict as open to diverse forms of intervention.<sup>14</sup>

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<sup>11</sup> Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321 (2007).

<sup>12</sup> For a preliminary presentation of this paradigm, see MICHAL ALBERSTEIN, PRAGMATISM AND LAW 323–25 (Ashgate Publ’g 2002). For a more detailed discussion of the paradigm, see MICHAL ALBERSTEIN, A JURISPRUDENCE OF MEDIATION ch. 7 (2007).

<sup>13</sup> For a preliminary presentation of this paradigm, see ALBERSTEIN, PRAGMATISM AND LAW, *supra* note 12, at 330–40. For a more detailed discussion of the paradigm, see ALBERSTEIN, A JURISPRUDENCE OF MEDIATION, *supra* note 12, ch. 12.

<sup>14</sup> For an illustration of the game theories of bargaining (and thus, the rational-scientific paradigm) in conflict resolution, see generally KENNETH J. ARROW ET AL., BARRIERS TO CONFLICT RESOLUTION 3–24 (1999). See also James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 MGMT. SCI. 26 (1991); ROY J. LEWICKI ET AL., NEGOTIATION: READINGS, EXERCISES AND CASES (5th ed., Irwin McGraw-Hill 2005); MORTON DEUTSCH AND PETER COLMAN, THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Jossey-Bass 2000). The interpretive model, or paradigm, can be traced in books such as NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES (Joseph P. Folger & Tricia S. Jones eds., 1994). It remains underdeveloped in terms of academic literature. See also Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOT. J. 245 (1993); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991).

The three practical models discussed here represent three perceptions of mediation: the pragmatic model, which is the classic problem-solving model of mediation, primarily known from Roger Fisher and William Ury's bestseller, *Getting To Yes*;<sup>15</sup> the transformative model, which is the therapeutic relational model of mediation constructed in the mid-1990's by Robert Baruch Bush and Joseph Folger;<sup>16</sup> and the narrative model, the storytelling, constructivist model of mediation introduced by Winslade and Monk in 2001 and based upon a postmodern interpretive worldview.<sup>17</sup>

On the level of the professional identity of the mediator, the three models evolve from pragmatic lawyering (pragmatic model), to therapeutic sensitivity (transformative model), and finally to an anthropological cultural therapy approach (narrative model).<sup>18</sup> These models move from the theoretical scientific rational paradigm to the humanist paradigm as they progress. They become less positivistic and reliant on the social sciences and game theory and more humanistic and based on narrative and interpretation. The shift from one model to another reflects a gradual move away from the rational-scientific paradigm of conflict resolution, inspired by the social sciences, toward a more interpretive paradigm inspired by the humanities. Under the interpretive paradigm of mediation, the reality of the conflict does not exist outside the perceptions of the parties, and the parties themselves are repeatedly reconstituted through the process of mediation. Narratives are the materials from which mediation is made, and cultural analysis is a basic tool of mediation work.<sup>19</sup>

Under the pragmatic model, the process of mediation is a collaborative problem-solving enterprise that is based on objective principles and operates through de-personalization.<sup>20</sup> It is a search for win-win solutions based on interests or needs.<sup>21</sup> Four principles guide this inquiry: separating the people from the problem; focusing on interests, not positions; imagining inventive solutions that can benefit both sides; and insisting on objective criteria. Such a cooperative, facilitated negotiation assumes the existence of a full

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<sup>15</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3–14 (Bruce Patton ed., 1983).

<sup>16</sup> BUSH & FOLGER, *supra* note 8, at 12, 84–85, 192–97.

<sup>17</sup> JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* 57–92 (Jossey-Bass Inc. 2000).

<sup>18</sup> *Id.* at 324–25.

<sup>19</sup> See ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION*, *supra* note 12, at 330–40.

<sup>20</sup> See FISHER & URY, *supra* note 15, at 10–14.

<sup>21</sup> *Id.*

flow of information and a motivational, business-like approach.<sup>22</sup> The transformative model aspires to transform parties from weakness to strength, while improving the relational context of the dispute.<sup>23</sup> The model is based upon the belief that mediators should facilitate a process of moral growth through the dimensions of empowerment and recognition. The process should sufficiently empower the parties to negotiate the problem without outside help.<sup>24</sup> The transformative process focuses on the parties' moves,<sup>25</sup> encouraging deliberation, choice-making, and fostering perspective-taking.<sup>26</sup> Under the narrative model, the core of the mediation process is a shift to an alternative narrative.<sup>27</sup> Parties criticize the discourse that conditions their choices, and they decide to actively re-read the "dominant discourse" of the conflict until the narrative transforms and the conflict is resolved.<sup>28</sup> The sequence begins with "engagement," which establishes relationships and builds trust between the parties.<sup>29</sup> The process moves on to "deconstructing the conflict-saturated story," trying to undermine the certainties on which the conflict relies, while emphasizing "[e]lements that contradict the ongoing persistence of the dispute, such as moments of agreement, cooperation, and mutual respect."<sup>30</sup> The concluding stage of narrative mediation is "constructing the alternative story," which includes "crafting alternative, more preferred story lines" with the parties.<sup>31</sup> The assumption is that the change in narratives and the move to alternative stories will inevitably change "reality," which is only a projection of the parties' narratives.<sup>32</sup>

The evolution of the three models represents an intellectual development within the framework of the history of ideas. It is possible to draw links between legal schools of thought and parallel trends in mediation. Mediation emerges as an efficiency-oriented process that strives to overcome the biases inherited in the compet-

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<sup>22</sup> See LEWICKI ET AL., *supra* note 14, at 113–17.

<sup>23</sup> BUSH & FOLGER, *supra* note 8, at 82–84.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 192–94.

<sup>26</sup> *Id.* at 196.

<sup>27</sup> WINSLADE & MONK, *supra* note 17, at 57–62.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 62–72.

<sup>30</sup> *Id.* at 72.

<sup>31</sup> *Id.* at 82.

<sup>32</sup> WINSLADE & MONK, *supra* note 17, at 52–53.

itive bargaining situation.<sup>33</sup> It continues to promote an ethics of care and to empower the parties, while improving their conflict-resolution skills.<sup>34</sup> Later it becomes a deconstructive interpretive tool to help parties realize the social construction of their needs.<sup>35</sup> The claim is that at the turn of the 21st Century mediation incorporates the public qualities of the law and the current model—the narrative model—takes into account contemporary legal sensitivities and represents the most “progressive” model of mediation to date. When parties choose to re-narrate their conflict according to new cultural perspectives, they become more aware of progressive legal developments, which often reflect new cultural perceptions. The mediation process helps parties to overcome their exaggerated entitlement perceptions, and through this process, they internalize a more advanced legal regime.

### III. LEGAL CULTURES AND MEDIATION

#### A. Legal Schools of Thought

Mediation is a multicultural field, which has gone through several intellectual phases in the space of a few decades. Legal thought has been struggling with questions of identity and process for centuries, passing through phases of positivism and formalism; relational ideas, developing feminist schools of thought, social constructionist writing and neo-Marxist thought. All these movements have influenced legal thought, and an interpretive paradigm shift has been discussed in law for the last decades. Since the 1970's, legal discourse has developed into an interdisciplinary field comprised of diverse intellectual perspectives.<sup>36</sup> This section will present the models of mediation as sharing the same ideologies and principles of existing schools of law. The intent is to portray American legal thought<sup>37</sup> as developing along the intellectual lines of

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<sup>33</sup> For an overview of the competitive bargaining style of negotiation, see LEWICKI, *supra* note 14. For an overview of strategic and cognitive biases as barriers to conflict resolution, see ARROW, *supra* note 14.

<sup>34</sup> BUSH & FOLGER, *supra* note 8.

<sup>35</sup> WINSLADE & MONK, *supra* note 17.

<sup>36</sup> See Arthur Allen Leff, *Law And*, 87 *YALE L. J.* 989 (1978).

<sup>37</sup> On the development of legal schools of thought in the North American tradition, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (Harvard Univ. Press 1969); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRU-*

formalism, a critique of formalism based on an emphasis of legal process, reliance on relational values, and postmodernism. These phases represent major theoretical developments in legal thought, which correspond to major developments in society. This section will describe the shift from a scientific, rational paradigm to an interpretive one as underlying intellectual developments in the legal field just as such a shift underlies developments in mediation theory.<sup>38</sup> The relevant schools of thought which are discussed here are legal formalism, the legal process school, relational feminism, Critical Legal Studies (“CLS”), Law and Society, and interpretivism.

## B. Legal Formalism and the Rational Scientific Paradigm

The idea that law is composed of a body of formal legal rules, and that mastering its internal language is the main business of the lawyer and the legal intellectual, is a prevalent notion with a litany of versions and implications.<sup>39</sup> It is customary to attribute a strong commitment to such a view to Christopher Columbus Langdell, Dean of Harvard Law School, at the turn of the 20th Century.<sup>40</sup> Langdell promoted the detachment and theoretical contemplation of legal concepts as the main goals of the legal scholar. He is regarded as having contributed to the professionalization of legal education by treating it as an academic and scientific field rather than as a practice or a craft. His view of legal decision-making as a set of rules for judges to apply mechanically to the issues at hand be-

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DENCE (Oxford Univ. Press Inc., 1995); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

<sup>38</sup> For a discussion of the relationship between evolving worldviews and the development of mediation, see Alberstein, *supra* note 11, at 328–32.

<sup>39</sup> For a critical evaluation of legal formalism, see H.L.A. Hart, *Positivism and The Separation of Law and Morals*, 71 HARV. LAW. REV. 593, 610 (1958). See also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1989) (“Indeed, the pejorative connotations of the word ‘formalism,’ in concert with the lack of agreement on the word’s descriptive content, make it tempting to conclude that ‘formalist’ is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.”) For a presentation of Oliver Wendell Holmes Jr., Duncan Kennedy and Llewellyn as sharing some aspect of legal formalism, see ALBERSTEIN, *PRAGMATISM AND LAW*, *supra* note 12, at 41–99.

<sup>40</sup> See, for example, Dennis Patterson, *Langdell’s Legacy*, 90 NW. U. L. REV. 196, 196 n.1 (1995); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). For a critical evaluation of the formalist account of Langdell, see, for example, W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1 (1997).

came the paradigm for a scientific, detached approach to law.<sup>41</sup> Although the formalist perspective, as promoted by Langdell and others, had a profound influence on legal thinking and legal practice and is still influential today, it has always been under attack. From its inception, American legal culture has challenged what it saw as European formalism.<sup>42</sup> As a powerful image of law, however, this concept of formalism continues to inspire legal education and practice to this day. Principles such as freedom of contract, ultra vires, stare decisis, and other canonical concepts continue to play an important role in legal training, and most of legal education focuses on a formal analysis of legal questions. Everyday legal practice continues to accept the idea of law as an objective science, although this notion has undergone systematic attacks for over a century. Lawyers assume the basic characteristics of rationality and agency that exist in an individualized world, although these ideas have been criticized as unrealistic and misleading.<sup>43</sup> Formalism as a classic liberal descriptive perception of law parallels the rational-scientific, descriptive paradigm of conflict resolution. Both of the theoretical approaches assume autonomous subjects who are part of legal conflicts; both celebrate freedom of contract; both perceive reality as external to both the legal actors and the mediators; and both focus on understanding the conflict or the legal case, rather than on resolving it.<sup>44</sup> The classic formalist perception of law focuses on describing the legal phenomenon; cases of discretion and indeterminacy are exceptions.<sup>45</sup> The rational scientific model of conflict resolution focuses on describing the situation of conflict, analyzing the biases that characterize it,<sup>46</sup> and is more concerned with providing an accurate account of negotiation behavior than with overcoming any impasse it creates.<sup>47</sup> This equiva-

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<sup>41</sup> See HORWITZ, *THE TRANSFORMATION OF LAW*, *supra* note 37, at 9–31. For a critique of “mechanical jurisprudence,” see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

<sup>42</sup> MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1947).

<sup>43</sup> For a discussion of the realist movement and its theoretical attack on formalism see the next section. See also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1989); Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 467 (1988).

<sup>44</sup> For a description of the scientific paradigm, see Alberstein, *supra* note 11, at 325.

<sup>45</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. HART, *THE CONCEPT OF LAW* 124–30 (1961); HANS KELSEN, *PURE THEORY OF LAW* 353–56 (Max Knight trans., Lawbook Exchange 2002) (1967).

<sup>46</sup> ARROW ET AL., *BARRIERS TO DISPUTE RESOLUTION* 3–24 (1999).

<sup>47</sup> See, for example, the response of Roger Fisher to critics of “Getting to Yes” who pointed out the extreme emphasis on collaboration in his book: Roger Fisher, *Reply to the Pros and Cons of ‘Getting to Yes,’* 34 J. LEGAL EDUC. 115 (1984).

lence between the theoretical paradigms implies that formalism in dispute resolution is the application of social science theory in a mechanical way, without assuming any significance to process, relational aspects or ideologies.

Most forms of ADR respond to a conception of law based on legal formalism. The idea of negotiation as performed “in the shadow of the law”<sup>48</sup> and of mediation as performed in light of “objective criteria” that include accurate legal predictions;<sup>49</sup> the sharp distinction between the efficiency and protection provided by law and the empowerment and recognition provided by mediation<sup>50</sup>—all these are based on a rigid formal perception of law and legal decision-making as objective and predictable. This view is controversial and is rejected by most legal scholars today. Lon Fuller, considered one of the fathers of mediation, justified the supremacy of adjudication over mediation in a society that adheres to the rule of law.<sup>51</sup> Fuller stated that avoiding gray situations and preserving black-and-white distinctions were goals promoted by functioning legal systems. But bargaining cannot be done against the background of clear legal rules because clarity is unattainable due to the impossibility of strict legal formalism in law. Nevertheless, almost no model of mediation responds to the complexity of post-formalist law.<sup>52</sup> Therefore, from a theoretical perspective, legal formalism shares basic assumptions with the descriptive rational-scientific paradigm of mediation. In terms of the way in which parties perceive legal rules inside the mediation process, formalism underlies the classic image of law held by mediators.

### C. The Legal Process School and the Pragmatic Model

The intellectual attack on legal formalism has led to the emergence of several critical trends in legal thought, the most famous of

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<sup>48</sup> Robert H. Mnookin & Lewis Koornhauser, *Bargaining in The Shadow of The Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>49</sup> FISHER & URY, *supra* note 15.

<sup>50</sup> Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259–60 (1989).

<sup>51</sup> See Fuller, *supra* note 9.

<sup>52</sup> As an exception, see The Understanding-Based Approach to Mediation, The Center for Mediation in Law, <http://www.mediationinlaw.org/about.html>. Gary Friedman's and Jack Himelstein's perception of law, as it emerges from their video simulations, is of an unstable mechanism, which seems objective, but is actually given to the subjective preferences of the judges, indeterminate legal rule application, and a detached notion of fairness. See also SCENES FROM A MEDIATION (Center for Development of Mediation in Law 1983).

which legal realism has suggested.<sup>53</sup> The post-World War II era represented a constitutive moment in American legal thought, when the realist critique was domesticated and framed in a more constructive formula of legal decision-making.<sup>54</sup> The legal process school provided “the last great attempt at a grand synthesis of law in all its institutional manifestations.”<sup>55</sup> Its main emphasis was on process as a way to overcome the indeterminacy of rules that the legal realists exposed.<sup>56</sup> The emphasis on legal decision-making as a “reasoned elaboration,”<sup>57</sup> along with references to “settled law”<sup>58</sup> and to “neutral principles,”<sup>59</sup> inspired the basic ideas of the pragmatic model of mediation and its principles of problem solving.<sup>60</sup> Roger Fisher himself acknowledged the influence of the legal process school on his work, and claimed to have adopted their attitude.<sup>61</sup>

Analysis of the pragmatic model in light of the tenets of the legal process school reveals a few common assumptions. First, the pragmatic model begins with an emphasis on process and on practical intervention in the real world, rather than on passive observation.<sup>62</sup> Second, the overall approach of the pragmatic model,

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<sup>53</sup> AMERICAN LEGAL REALISM (William W. Fisher, Morton J. Horwitz & Thomas A. Reed, eds., 1993). Some legal scholars claim that the image of formalism was mainly portrayed by its opponents, and that in reality, no legal system could adhere to the rigid assumptions that were considered the tenets of formalism. See Hart, *supra* note 45; Brian Z. Tamanaha, *The Realism of the “Formalist” Age*, <http://ssrn.com/abstract=985083> (last visited Sept. 27, 2009); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1989) (“Indeed, the pejorative connotations of the word ‘formalism,’ in concert with the lack of agreement on the word’s descriptive content, make it tempting to conclude that ‘formalist’ is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.”).

<sup>54</sup> See Gary Peller, *Neutral Principles in the Fifties*, 21 U. MICH. J.L. REFORM 561 (1988).

<sup>55</sup> *Id.* at 568.

<sup>56</sup> See HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW*, *supra* note 37, at 247–68.

<sup>57</sup> G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

<sup>58</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 109 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

<sup>59</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>60</sup> For an elaboration of this claim, see ALBERSTEIN, *PRAGMATISM AND LAW*, *supra* note 12, at 251–320.

<sup>61</sup> *Id.*

<sup>62</sup> See FISHER & URY, *supra* note 15, at 8–10; see also Roger Fisher, *Improving Compliance with International Law* (2d draft, 1969) (unpublished, with permission of the author, on file in Harvard Law School Special Collection) 1–4 (“I find that when I discuss the process by which law affects governments, a typical reaction of a student or friend is, ‘I don’t think it will work.’ Then I reply that I am trying to be practical and that therefore it is irrelevant whether the particular idea ‘will work,’ our misunderstanding becomes almost complete.”).

presented in the form of a “how-to” guide, is optimistic and constructive, as befits the 1950’s spirit of the legal process school. Even the idea of expanding the pie<sup>63</sup> and of overcoming the gap between descriptive and prescriptive expressions already appears in the legal process pragmatism of the 1950’s.<sup>64</sup> Third, the idea, found in the pragmatic model, of objective criteria as capable of overcoming the distributive struggle recalls the legal process belief in neutral process and in the possibility of reflecting a consensus, based on “the maturing of collective thought”<sup>65</sup> in a harmonious society.<sup>66</sup>

In summary, the pragmatic model of mediation that developed in the early 1980’s corresponds to a school of law that prevailed at Harvard University in the 1950’s. The belief in neutral principles and in institutional settlement of public values was part of the legal process school. This optimistic constructivist attitude, so common in the 1950’s, suffered from a sharp decline in legal thought during the 1970’s and was no longer acceptable in public law.<sup>67</sup> The legal process approach was, to a certain extent, resurrected as a private version in negotiation studies during the 1980’s, producing a problem-solving model of mediation that is pragmatic and efficient. Process jurisprudence of mediation is thus an important theory that underlies the most prevalent model of mediation until today—the pragmatic one.

#### D. Relational Feminism and the Transformative Model

The feminist movement has a very rich history in legal thought. The various schools of feminism convey important messages regarding the significance of the “woman question” and

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<sup>63</sup> See HART & SACKS, *supra* note 58, at 102–03 (“These materials proceed upon the conviction that this is a fallacy—the fallacy of the static pie.’ The fact—the entirely objective fact—seems to be that the pie—that is, the total of actually and potentially available satisfactions of human wants—is not static but dynamic. How to make the pie larger, not how to divide the existing pie, is the crux of the long-range and primarily significant problem.”).

<sup>64</sup> ALBERSTEIN, *PRAGMATISM AND LAW*, *supra* note 12, at 136–43.

<sup>65</sup> Henry Hart, *Foreword: The Time Chart of the Justices: The Supreme Court 1958 Term*, 73 HARV. L. REV. 100 (1959).

<sup>66</sup> For an extensive discussion of the intellectual roots of the writing of Roger Fisher and for an analysis of the relation between the American philosophy of pragmatism and legal process scholarship, see ALBERSTEIN, *PRAGMATISM AND LAW*, *supra* note 12, at 251–320.

<sup>67</sup> William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Post-Modern Cultural Form*, 89 MICH. L. REV. 707 (1990).

how to deal with it in law.<sup>68</sup> One of the unique streams of feminist thought is relational feminism, as offered in the 1980's by Carol Gilligan. This second-wave feminism celebrates the difference of women from men and calls for an acknowledgement of their distinct moral voice.<sup>69</sup> In contrast to liberal feminism, which emphasizes equal opportunity for women and celebrates their sameness to men, and in contrast to radical feminism that emphasizes women's oppression, the relational feminists listened to women with a search for their unique voice. The "ethics of care" exercised by women was viewed as a new moral paradigm through which legal questions could be addressed, and judges were called upon to listen to the voice of women and of other weak groups in society.<sup>70</sup> The new logic of relational thinking, which defines the self and the other as inherently connected and responsible for each other,<sup>71</sup> provided challenges for formalistic and individualistic perceptions of law, and has inspired new developments that incorporate this new worldview.<sup>72</sup> Although some scholars have identified the pragmatic model of mediation as supporting a feminist mode of negotiation,<sup>73</sup> the more explicit influence of feminism in mediation occurred during the 1990's. The transformative model is described by its authors as founded on Gilligan's ideas. Bush and Folger rely on Gilligan for their description of the theoretical foundation of the transformative model,<sup>74</sup> and they adopt her relational worldview, which they see as overcoming the dichotomy between individualism and collectivism by providing nuanced notions of self and of other.<sup>75</sup> When the goal of the mediation is to transform the interaction between the parties and to empower selves in relationships, a relational feminist approach to conflict becomes relevant

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<sup>68</sup> See *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett and Rosanne Kennedy, eds., Westview Press, 1991). For an evaluation of the relationship between the various streams of feminism and models of mediation, see ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION* *supra* note 12, ch. 5.

<sup>69</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

<sup>70</sup> For an overview of cultural feminism in law, see Bartlett, *supra* note 68.

<sup>71</sup> CAROL GILLIGAN, *MAPPING THE MORAL DOMAIN* 3-19 (Carol Gilligan et al. eds., 1988).

<sup>72</sup> See, for example, the relational contract as developed by Macneil. Ian R. Macneil, *Values in Contract: Internal and External*, 78 *NW. U. L. REV.* 340 (1983); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 *VA. L. REV.* 947 (1982); Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 *ETHICS* 567 (1986); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

<sup>73</sup> See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. REV.* 754 (1984).

<sup>74</sup> BUSH & FOLGER, *supra* note 8.

<sup>75</sup> *Id.*

and present. Although Bush and Folger maintained some liberal classic assumptions and have not established a radical relational view of mediation,<sup>76</sup> their call has remained the most famous relational perception of mediation. The transformative model takes the pragmatic model's emphasis on process further and, instead of focusing on efficient solutions and overcoming biases, it re-emphasizes the process and the values of "ethics of care" in mediation.<sup>77</sup> An alternative school of legal thought that takes ethics of care concepts as inspirational and applicable in legal practice is therapeutic jurisprudence.<sup>78</sup> This emphasis on relational worldview has also been described by others as part of the Comprehensive Law Movement which contains different additional vectors including restorative justice, collaborative law and holistic law.<sup>79</sup>

To summarize, the relational feminist movement influenced legal theory and mediation practice in the 1990's, and the transformative model of mediation explicitly relies on feminist ideas of ethics of care and self in relationships as theoretical bases for the model. Although the relational implications of the transformative model of mediation are not perfect, the focus on self and the other in relationship, as well as the acknowledgement of the importance of emotions, are unique characteristics that the model borrows from relational feminism.

#### E. CLS, Law and Society, and the Narrative Model

The 1970's and 1980's were characterized by a split in legal academia as different schools of thought promoted new and differ-

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<sup>76</sup> Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 L. & SOC. INQUIRY 737 (1996); Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation*, 22 NEGOT. J. 331-50 (2006).

<sup>77</sup> Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology [Reprint]: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

<sup>78</sup> See BRUCE J. WINICK AND DAVID B. WEXLER (EDS.), *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Carolina Academic Press 2003). For a critique of this approach, see Michal Alberstein, *Therapeutic Keys of Law: Reflections on the Power and Limitations of an Alternative Movement, A Book Review of Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts* (Bruce J. Winick and David B. Wexler, eds.), 39 ISR. L. REV. 140 (2006).

<sup>79</sup> Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006)

ent perspectives on the rule of law and of legal decision-making. On the left, there were legal intellectuals who, inspired by neo-Marxist thought, promoted a view of the human being as socially constructed. The CLS movement held that legal education led to false consciousness,<sup>80</sup> and, more generally, they had, as one of their central goals, the exposure of the ideological basis of the neat legal structure.<sup>81</sup> This call to reveal the ideology behind formal rules paralleled the narrative model's exposure of the sense of entitlement underlying conflict stories. The narrative model portrays individuals in conflict as socially constructed. Mediation becomes the process through which parties can reeducate themselves to adopt more advanced ideologies and frames of justice. Nevertheless, in the CLS picture, there is no private optimistic way to reconstruct social reality, and the view of the possibility for change is more agnostic. In the Law and Society school, we find a more balanced "postmodern" approach to how individuals behave in situations of conflict,<sup>82</sup> and additional scientific models for addressing disputes supplement the Marxist emphasis. In fact, the 1980's model of "the transformation of disputes,"<sup>83</sup> which presented them as socially constructed and as developing in stages (naming, blaming, claiming), challenged the ADR perspective of the litigation explosion, and attempted to give a more balanced picture of disputes in American society.<sup>84</sup> Under this perception of law and society, progress in law is achieved through the internalization of rights consciousness and by providing people with greater access to justice. Since conflicts transform and change gradually, most of them

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<sup>80</sup> MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (Harvard Univ. Press 1987); ROBERT GORDON, *LAW AND IDEOLOGY*, in MICHAEL FREEMAN & DENNIS LLOYD LLOYD, *LLOYD'S INTRODUCTION TO JURISPRUDENCE 950-959* (6th ed., 1994).

<sup>81</sup> ROBERTO MANGABRIA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

<sup>82</sup> Silbey Suzan S. and Sarat Austin, *Critical Traditions in Law and Society Research*, 21 *LAW & SOC'Y REV.* 165 (1987). David M. Trubek, *The Construction and Deconstruction of a Dispute Focused Approach: An Afterword*, 15 *LAW & SOC'Y REV.* 727 (1980).

<sup>83</sup> William L. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* 15 *LAW & SOC'Y REV.* 631 (1980-1981). This research was conducted as part of the Civil Litigation Research Project ("CLRPP"). See also David Trubek, *Studying Courts in Context*, 15 *LAW & SOC'Y REV.* 485 (1980) ("The Civil Litigation Research Project (CLRPP) is one effort to increase knowledge about the role of civil courts in the United States and the nature and function of other institutions which deal with the sorts of disputes typically found in our civil courts, as well as factors that influence decision making in litigation. CLRPP was set up under a contract between the University of Wisconsin and the United States Department of Justice.").

<sup>84</sup> See Marc Galanter, *The Day After the Litigation Explosion*, 46 *MD. L. REV.* 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983).

do not reach the level of disputes, and, therefore, accusing society of being over-litigious, as some proponents of ADR have done, is inaccurate.<sup>85</sup> The narrative model of mediation adopts the social constructionist view of conflicts without referring to the specific stages of transformation as suggested by the Law and Society school. According to this model, progress in conflict resolution is achieved through co-authoring an alternative narrative and by overcoming an exaggerated perception of entitlement that parties to conflict hold.<sup>86</sup> Winslade and Monk's examples, which come mainly from the field of family disputes, depict mediation as helping parties to internalize the more advanced legal norms. To summarize, perceptions of social constructionism and of neo-Marxism penetrated law during the 1970's and have influenced mediation development only in the last decade. According to these perceptions, legal disputes reflect power struggles and ideological disagreements. While legal approaches based on the social constructionist view hold a pessimistic or at least an external perspective toward this phenomenon, narrative mediators try to take it seriously and to work with it.

#### F. Interpretivism in Law and the Interpretive Paradigm of Conflict Resolution

At the center of the political map of legal academia in the 1970's, an interpretive jurisprudence was shared by public law intellectuals,<sup>87</sup> Law and Society researchers, and critical scholars. The shift to a more humanist view of law was part of a broad movement toward interpretive schemes in other academic disciplines, and a reflection of the loss of faith in science and other classic liberal ideas, following their failure to prevent World War II.<sup>88</sup> The most prominent jurisprudential theory representing this shift to an interpretive perspective of law is that of Ronald Dworkin, who described the manner in which "law is like literature."<sup>89</sup> In his writings, Dworkin described law as a chain novel, and he rejected the search for correspondence between objective reality and decision-

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<sup>85</sup> Galanter, *The Day after the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

<sup>86</sup> WINSLADE & MONK, *supra* note 17, at 58.

<sup>87</sup> William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Post-Modern Cultural Form*, 89 MICH L. REV. 707 (1990).

<sup>88</sup> Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

<sup>89</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 146-166 (Harvard Univ. Press 1985)

making in law. His Hercules was an interpretive judge, an author in a chain novel, who balanced conflicting values while aspiring to present law in its integrity.<sup>90</sup> To this image, Robert Cover added the violent aspects of law as a text that bridges a normative expression with a given reality.<sup>91</sup> The interpretive paradigm of mediation and dispute resolution shares Dworkin's view, and it aims to apply it to conflict resolution. In contrast to the narrative model, it acknowledges the dangerous aspects of mediation aspiration and supplements them with legal emphases on rights and law making, exploring the paradoxical aspects of mediation work.<sup>92</sup> Mediation as a social constructionist notion not only helps to internalize existing norms, but also has a mode of norm creation and, in fact, carries a double call: The first commitment represents the construction of dispute settlement as a realization and rationalization of chaotic worlds of desires, needs and emotions. The second commitment is to the legal aspiration to resist the settlement drive *per se*, considering each dispute as an opportunity to set new law through a pragmatic violent intervention in a world based on eternal and structural conflicts, which can never be fully resolved or rationalized. This drive means a constant reality search for actual settlements, settlements between non-contemporaneous scripts and narratives, within the existing singular materialization of reality and fiction, public and private.

Since an interpretive paradigm does not assume a possibility to remain descriptive and treats conflict resolution as a complex process of storytelling and law making, it represents the most legally sensitive approach to dispute resolution, though it provides the basic principles without framing a practical model.

The interpretivist paradigm in law can be seen as corresponding to a complex notion of mediation that is based on a combination of interpretivism and progressive sentiments. These

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<sup>90</sup> RONALD DWORKIN, *LAW'S EMPIRE* (Fontana Press 1986).

<sup>91</sup> ROBERT COVER, *NOMOS AND NARRATIVE*, in *NARRATIVE, VIOLENCE AND THE LAW: ESSAYS OF ROBERT COVER* 95 (Martha Minow, Michael Ryan & Austin Sarat, eds., Univ. of Mich. Press 1995). See, e.g., *id.* at 101 ("Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.").

<sup>92</sup> For an elaboration of this approach, see Michal Alberstein, *Mediating Paradoxically: Complementing the Paradox of 'Relational Autonomy' with the 'Paradox of Rights' in Thinking Mediation*, in *PARADOXES AND INCONSISTENCIES IN LAW* 225 (Oren Perez and Gunther Teubner, eds., Hart Publ'g 2006). See also Michal Alberstein, *Negotiating for Justice Fighting for Law: The Dialectic of Promoting and Settling Disputes in the Current Global Era*, 31 *STUD. IN LAW, POL. & SOC'Y* 45 (2004).

approaches focus mainly on describing the situation of conflict and not on their resolution.

### **Cultures of Law—Cultures of Mediation**

<p><b>Legal Formalism</b></p> <ul style="list-style-type: none"> <li>- A descriptive approach to legal decision-making</li> <li>- Individualism and restraint</li> </ul>	<p><b>The Rational Scientific Paradigm</b></p> <ul style="list-style-type: none"> <li>- A descriptive approach to conflict</li> <li>- Individualism and restraint</li> </ul>
<p><b>The Legal Process School</b></p> <ul style="list-style-type: none"> <li>- A problem-solving approach to legal work</li> <li>- A constructive perception and an effort to expand the pie</li> <li>- A belief in “neutral principles” as overcoming public controversies</li> </ul>	<p><b>The Pragmatic Model</b></p> <ul style="list-style-type: none"> <li>- A problem-solving approach to negotiation</li> <li>- A constructive perception and an effort to expand the pie</li> <li>- A belief in “objective criteria” as overcoming private controversies</li> </ul>
<p><b>Relational Feminism Jurisprudence</b></p> <ul style="list-style-type: none"> <li>- An emphasis on the relational framework underlying legal disputes</li> </ul>	<p><b>The Transformative Model</b></p> <ul style="list-style-type: none"> <li>- An emphasis on the relational framework underlying disputes</li> </ul>
<p><b>Critical Legal Studies &amp; the Law and Society Movement</b></p> <ul style="list-style-type: none"> <li>- A social constructionist view of law</li> <li>- Legal conflicts as evolving through naming, blaming, claiming</li> <li>- Progress as achieved through greater access to law and norm internalization</li> </ul>	<p><b>The Narrative Model</b></p> <ul style="list-style-type: none"> <li>- A social constructionist view of conflict</li> <li>- Conflicts as evolving around exaggerated perception of entitlement</li> <li>- Progress as achieved through writing an alternative narrative</li> </ul>
<p><b>Legal Interpretivism</b></p> <ul style="list-style-type: none"> <li>- Law as chain novel</li> </ul>	<p><b>The Interpretive Paradigm</b></p> <ul style="list-style-type: none"> <li>- Mediation as a complex practice which entails a paradox</li> </ul>

#### IV. JURISPRUDENCE OF MEDIATION: COMMON PRINCIPLES AND IDENTITY DISCOURSE

The previous section explored various connections between legal schools of thought and models of mediation and conflict resolu-

tion by focusing on the difference between the models. This section focuses on the common theoretical foundations that characterize the three models. Each style of mediation has its own theoretical and ideological background, and contains a different set of assumptions regarding human nature, the causes of conflict, the ethical commitments of the mediator, the mediation process, and other factors.<sup>93</sup> Nevertheless, the three models share underlying principles that recur in diverse intellectual frameworks. These principles define mediation as a practical discourse, which offers an alternative to mainstream jurisprudential thinking. The shared principles, expressed differently in each model, are emphasis on process, the search for an underlying hidden layer, acknowledgment of emotions, and constructive positive intervention.<sup>94</sup> Each principle has its own jurisprudential and theoretical roots, which will be briefly presented here. Each principle differentiates the discourse of mediation from that of jurisprudence.

#### A. Emphasis on Process

Emphasis on process is the idea that mediation begins with a reflexive structured mode of intervening in a conflict. Whether it is the pragmatic model's description of a second-order negotiation,<sup>95</sup> the importance, within the framework of the transformative model, of procedural justice instead of satisfactions and substantive measurements, or the narrative model's active process of deconstructing, reinterpreting, and rewriting the relationship between parties—all the models share the belief that focusing on process is a crucial aspect of mediation. Jurisprudential thought, on the other hand, whether it is formalism, relational feminism or CLS, usually focuses on a descriptive, external view of the legal phenomenon. Law is presented as a system of rules (formalism), as a world of connectedness (relational feminism), or of oppression (CLS), but processing legal disputes is not a central focus of such descriptions and is secondary to them. Nevertheless, there are two jurisprudential schools of law, influenced by American philosophical pragma-

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<sup>93</sup> For an elaboration on each one of these parameters, see generally Alberstein, *supra* note 11, at 321–60.

<sup>94</sup> For a detailed analysis of these principles and the way that they unfold in each model, see Alberstein, *supra* note 11, at 360–73.

<sup>95</sup> FISHER & URY, *supra* note 15, at 10 (“The second negotiation concerns how you will negotiate the substantive question: by soft positional bargaining, by hard positional bargaining, or by some other method. This second negotiation is a game about a game—a “meta-game.”).

tism and in which there is an emphasis on process. Pragmatism, as a central identity formula of American thinking, inspires mediation development.<sup>96</sup> One style of process emphasis is traceable to legal process writing, which views legal rules as purposive tools between facts and norms (is and ought):

Insistence on the distinction between law and morals can at times be understood as an expression, in substance, of the principle of institutional settlement. That principle requires that a decision which is the due result of duly established procedures be accepted whether it is right or wrong—at least for the time being. Thus, it seems to call for a distinction between settled law and the law-that-is-not-but-ought-to-be.<sup>97</sup>

Dworkin presents the other style of emphasis on process:

Law as integrity denies that statements of law are either the background-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward-and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.<sup>98</sup>

The Herculean judge resolves hard cases through emphasis on a process of interpretation that combines legal analysis with current political morality. This process is the answer to the danger of relativism and bias, which exist under a formalist approach. The judge is committed to an interpretive endeavor to find the right answer, which is commitment is enough to reestablish the credibility and centrality of law—making for the development of democratic societies.<sup>99</sup> In law, in contrast to mediation, the process aims to reach one right answer.

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<sup>96</sup> For an elaboration of this idea, see ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION*, *supra* note 12, ch. 2 (referring to the legal process relation to pragmatism), ch. 4 (referring to Dworkin's relation to pragmatism).

<sup>97</sup> HART & SACKS, *supra* note 58, at 109.

<sup>98</sup> DWORKIN, *supra* note 90, at 45–53, 225–27.

<sup>99</sup> Ronald Dworkin, *The Judges New Role: Should personal Convictions Count?*, J. INT'L CRIM. JUST. 1, 4 (2003).

## B. The Search for an Underlying Hidden Layer

The search for an underlying hidden layer reflects an essential phase of conflicts disguised by the surface of contradicting claims. Moving from the superficial and misleading surface of the conflict to the “real” underlying substance is the first step toward being able to reach a “win-win” unique mediation outcome that transcends distribution and competition. The pragmatic model does so by moving from positions to interests and needs while the transformative modes work on hidden emotions and psychological rupture, and the narrative model focuses on perceptions of exaggerated entitlements that the parties need to overcome. The only school of legal thought that adopts this approach is the legal process school, which depicts legal decision-making as a reasoned elaboration of principles and policies, rather than as a straightforward application of mechanical rules.<sup>100</sup>

## C. Acknowledging Emotions

A unique characteristic of mediation, as compared to adjudication, arbitration, and other legal processes, is its emphasis on emotions and interpersonal relationships—aspects not traditionally addressed directly in adjudicative processes. Under a classical perception of modern law, emotions and relationships are private issues that do not belong in the courtroom, and conflicts are handled based on rational arguments and evidence that the parties choose to bring before the judge.<sup>101</sup> The modern interest in dispute resolution reflects a growing interest in emotions and treats them as an integral part of the conflict itself.<sup>102</sup> In light of existing research on the importance of emotions as a source of information<sup>103</sup> and as having an identifiable rational level, mediation studies have increased their emphasis on emotions, and even provide manuals on handling and understanding their role within a conflict.<sup>104</sup>

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<sup>100</sup> HART & SACKS, *supra* note 58.

<sup>101</sup> For a definition of adjudication, see Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

<sup>102</sup> See EXPLAINING EMOTIONS (A. Rorty ed. 1980); Daniel. L. Shapiro, *Negotiating Emotions*, 20 CONFLICT RESOL. Q. 67 (2002).

<sup>103</sup> *Id.* at 67–82.

<sup>104</sup> ROGER FISHER & DAVID SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

The pragmatic model defines the first principle of integrative negotiation as “separating the people from the problem.”<sup>105</sup> This formula reflects the principle of de-personalization, related to the constructive management of emotions.<sup>106</sup> The emphasis on emotions is evident in the most recent works of scholars who are involved in the Negotiation Project.<sup>107</sup>

The transformative model suggests an even more central role for emotions in mediation. For Bush and Folger, one of the hallmarks of transformative mediation is the idea that “there are facts in the feelings.”<sup>108</sup> This principle suggests that, in contrast to the initial pragmatic suggestion to vent emotions, parties “have” them, but then move on to a substantive discussion in which the goal is the rational resolution of the conflict based on interests and creative invention. The transformative model offers to view emotions as real resources of information: “In transformative practice, third parties view the expression of emotions—anger, hurt, frustration, and so on—as an integral part of the conflict process . . . since the expression of emotions often indicates important opportunities for empowerment and recognition.”<sup>109</sup> Emotions signify past relationships between self and other, and understanding them may help to transform dysfunctional patterns and to promote empowerment and recognition.<sup>110</sup>

Under the narrative model, emotions are meaningful expressions within a narrative. Winslade and Monk suggest that the postmodern turn implies a search for meaning: “Rather than searching for resolution through the expression of ‘true’ feelings or by addressing essential interests . . . the postmodern agenda is about opening up previously unavailable worlds of meaning.”<sup>111</sup> Emotions and facts are intertwined within this framework of meaning and are treated as equally important.

Jurisprudential writing rarely emphasizes emotions, and only relational feminist ideas of ethics of care correspond to this princi-

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<sup>105</sup> FISHER & URY, *supra* note 15, at 14.

<sup>106</sup> See FISHER & URY, *supra* note 15, at 29–32.

<sup>107</sup> See DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (Penguin Group 1999); FISHER & SHAPIRO, *supra* note 104. For a discussion of these books see Alberstein, *supra* note 11, at 365–366.

<sup>108</sup> Bush & Folger, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Mediation Practice*, 13 *MEDIATION Q.* 263, 271–72 (1996).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 271–72.

<sup>111</sup> WINSLADE & MONK, *supra* note 17, at 125.

ple.<sup>112</sup> Mainstream legal thought does not consider applying moral judgments while relying on emotions, manifesting empathy and exercising broad discretion forms of proper judicial decision-making. Some emphasis on emotions and communication is developing today through the interest in “procedural justice”<sup>113</sup> and as a by-product of the spread of problem-solving courts.<sup>114</sup> In new courts judges should show empathy, acknowledge emotions and show ethics of care, but this new role is still considered marginal, though innovative, within their judicial activity.

#### D. Constructive Positive Intervention

Emphasis on process and emotions, and revealing the underlying layer that conditions conflicts are not enough for an understanding of the unique language of mediation. The constructive positive gaze that characterizes this engagement represents an element of choice which does not have a theoretical foundation and is explained differently within each model. Although the models differ from each other, they all share a preference for constructive positive intervention, even if the theoretical foundation assumed by each one leads to destructive “resolutions” as well. The motivation behind the pragmatic model, at least as Fisher describes it, is the urge to become “activist” and to engage with reality in a constructive mode. Fisher is not interested in the theoretical external account of negotiation, which maintains that negotiations can be either competitive or collaborative depending on the “motivational orientation” of the parties.<sup>115</sup> Instead, he adopts a descriptive pre-

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<sup>112</sup> See GILLIGAN, *supra* note 69.

<sup>113</sup> See JUDGE KEVIN BURKE & JUDGE STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION, A WHITE PAPER OF THE AMERICAN JUDGES ASSOCIATION (2007), <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf>.

<sup>114</sup> SUSAN GOLDBERG, JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH (Nat'l Judicial Inst. 2005), <http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>.

<sup>115</sup> In social psychology terms, the interdependence which exists in any bargaining situation can exhibit three kinds of dynamics:

*Motivational orientation* (MO) refers most generally to one bargainer's attitudinal disposition toward another and may be usefully described in terms of three extreme cases . . . . A bargainer has a *cooperative* MO to the extent that he has a positive interest in the other's welfare as well as in his own. A *competitive* MO denotes an interest in doing better than the other, while at the same time doing as well for oneself as possible. A bargainer with an *individualistic* MO is simply interested in maximizing his own outcomes, regardless of how the other fares.

JEFFERY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 198 (1975). According to this view, the negotiation can be cooperative, competitive, or

scriptive approach which prefers the collaborative orientation. The transformative model of mediation defines the constructive orientation of the process using its own distinct intellectual background: the relational worldview. Bush and Folger view the pragmatic model as promoting the value of satisfaction, which is based on the individualist worldview;<sup>116</sup> the constructive leap of *Getting to Yes*, in denial of the prisoner's dilemma is not their concern. They perform their own "leap" by constructing their unique understanding of the relational worldview, which they view as transcending the dichotomy between the individualist and organic worldviews. The narrative model has its own constructiveness, framed within the postmodern worldview, but carries a unique optimistic bias equivalent to the three models. Having emerged from a worldview, which reflects a critique of liberalism and irony toward constructive modernist projects,<sup>117</sup> Winslade and Monk must first justify their initial claim to derive a practical constructive model from a critical relativist worldview. They manage to do so by building on a preliminary stage developed in narrative therapy<sup>118</sup> and by suggesting that "social constructionism offers a useful set of ideas on which to base an approach to mediation that is both theoretically robust and intensely practical."<sup>119</sup> Winslade and Monk even use Foucault, who was deeply suspicious of any pretension to transcend power or to build constructive progressive models, to balance it.<sup>120</sup> They view his claims of power, knowledge, and discipline as opening up opportunities<sup>121</sup> or as "invitations to a particular conversational pattern."<sup>122</sup> In doing so, they might return to Nietzsche, the first postmodernist, who explained that choosing a pessimistic standpoint after acknowledging the critique of truth and knowledge is not the necessary and correct choice. The elements of will and motivation choice become central when no objective guidelines exist to direct us.

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individualistic. Descriptively, these three possibilities capture the variety of choices for the parties involved. The actual dynamic in each case is a matter of the bargainer's "attitudinal disposition."

<sup>116</sup> BUSH & FOLGER, *supra* note 8, at 234–37.

<sup>117</sup> For a discussion of postmodernism and its tenets, including irony, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

<sup>118</sup> MICHAEL WHITE & DAVID EPSTON, *NARRATIVE MEANS TO THERAPEUTIC ENDS* (1990).

<sup>119</sup> See WINSLADE & MONK, *supra* note 17, at 37; see David A. Pare, *Culture and Meaning: Expanding the Metaphorical Repertoire of Family Therapy*, 35 *FAM. PROCESS* 21–42 (1996).

<sup>120</sup> *THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT 1954–1984* (Paul Rabinow and Nikolas Rose eds.)

<sup>121</sup> WINSLADE & MONK, *supra* note 17, at 50.

<sup>122</sup> *Id.* at 118.

## E. Identity Conversations

In addition to the common characteristics I have summarized above, there is another quality shared by the models, one that is unique to the intersection of law and mediation. This quality emerges from the focus of mediation on facilitating consent, in contrast to the authoritative mode of decision-making in law. Mediation, in all its forms, attempts to develop an identity discourse between the parties and to overcome the discourse of rights which characterizes legal thinking and practice. The dichotomy between a discourse of rights and an identity discourse, which I will summarize in brief below, captures the difference between a classical liberal mode of thinking and a multicultural global ideology.<sup>123</sup>

A discourse of rights assumes an encounter between alienated individuals who have different interests and beliefs determining their activities. It is an interaction based on safe contact, where a third party, represented by the law, determines the claims and challenges regarding the others' possessions and acts. The parties do not address one another directly, and, in that sense, they remain subject to a monologic style of communication. To use Isaiah Berlin's terminology—the law functions here as the protector of the individual's negative liberty: it defends the borders of this liberty and prevents intervention.<sup>124</sup> This discourse concerns restraining the formal limits of human interaction.

At the core of identity discourse, on the other hand, lies a Levinassic face-to-face encounter with the other.<sup>125</sup> It is a dialogic engagement and a much more dangerous experience since at the heart of this meeting is the idea that we know how we enter the dialogue but never know who will conclude it. The borders of identity itself diffuse within these meetings; hence the danger and fear that the parties experience can be sustained. The interactions can, in other words, turn into a master and slave Hegelian struggle<sup>126</sup> since identity-based conversations imply a questioning of

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<sup>123</sup> Avi Sagi, *Law and Society: Rights Discourse and Identity Discourse in BAR-ILAN L. STUD.* 37 (2000) (in Hebrew).

<sup>124</sup> *Id.* at 41.

<sup>125</sup> Emmanuel Levinas was a French philosopher who constructed a philosophy based on the ethics of "the other." He made personal ethical responsibility to the other in a face-to-face encounter as the starting point and primary focus for philosophy. *See, e.g.,* EMMANUEL LEVINAS, *ETHICS AND INFINITY: CONVERSATIONS WITH PHILIPPE NEMO* (Richard A. Cohen, trans., Duquesne Univ. Press, 1st ed. 1985).

<sup>126</sup> G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 111, para. 179 (A.V. Miller trans., Oxford: Clarendon Press 1977).

one's own identity and thus risking losing it. Challenging an identity of any sort—gender-based, professional, ethnic, religious or national—by a counter-identity often involves master-slave or victim-victimizer relations and a reciprocal projection of these relations. The discursive game, which characterizes the orientation of the participants in this engagement, is one of active listening: the search for a voice and for a direct touch that parties cannot achieve through a monitoring scheme. There is no law that tells the two parties how to interact. Moving halfway toward the other does not guarantee the merging of horizons since a similar gesture should be made by the other side with no expectation of reward. It is a game where the different identity of the speaker is assumed by each side but the entire interaction aims to challenge prejudice and stereotypes, which are related to the different identities at stake. In other words, handling an identity conversation and participating in a dialogical engagement, which this discourse calls for, represents working on the difference while assuming that new frames of reason and law will emerge through this effort.

From the above, it is clear that there is a dialectic relationship between the two styles of discourse. In order to enter an identity discourse, both sides need to acknowledge the basic rights and boundaries of the parties, and, once a dialogic progress has been established and developed, a new articulation of it in rights may emerge. The history of Western Civilization, of the feminist movement, of post-colonial ideas, of queer studies, can be represented as following these lines and oscillating between the different poles of identity and rights. The West's construction of its own identity regarding the East and the colonies, the different waves of feminism trying to promote rights while entering into dialogic and identity conversation (like relational feminism) with their considered alienated enemy, the post-colonial struggle against an identity imposed by the West and the post-structural ideas of logocentrism of Western philosophy—all these were based on exposure to cultural critique inspired by other identities. All these phenomena represent a challenge to a rights discourse, conducted from a certain identity, which provides a genuinely different perspective.

This other perspective calls for acknowledgment and legitimacy of its own logic, reflecting the significance of speaking from a place and of having a unique cultural location. The contemporary ideals of multiculturalism, globalization and pluralism can be presented in this context as shifting the center to the peripheries, or perhaps as providing an ideology of no center emerging from

the diverse identity positions of the parties. Mediation in this context is no longer a peripheral process that supplements and complements a discourse of rights. Instead, it becomes a primary mode of law making and acknowledges the withdrawal to rights discourse as a temporary means in an ongoing process of dialogue. The idea of mediation conducting an identity discourse brings together practical models of conflict resolution and ideas of political philosophy and is part of constructing a contemporary jurisprudence of mediation as a primary process of law making. Mediation, even in its pragmatic form, borrows from non-Western ideas<sup>127</sup> and promotes a “high context” interaction<sup>128</sup> that goes beyond adversarial arguments through developing an identity discourse. In its transformative mode, mediation borrows from relational feminism and challenges individualistic perceptions that assume separation and self-maximization. An identity discourse is fundamental for interaction within a relational framework since self and other transform while acknowledging their connectedness. Rights are irrelevant for the process of empowerment and recognition. In its narrative version, mediation assumes postmodern epistemology and explicitly touches elements of cultural identities and face-to-face dialogue. One of the theoretical tenets of the social constructionist theory that the narrative model holds is the multiplicity and elasticity of identity within mediation processing.<sup>129</sup> All forms of mediation avoid direct confrontation based on rights and provide a space for dialogue and communication.

## V. CONCLUSION

Mediation as a form of social order can contain legal sensitivities and incorporates diverse jurisprudential cultures. In this article, I have illustrated the links between evolving schools of law and

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<sup>127</sup> For an account of the ADR movement as influenced by anthropological studies of aboriginal modes of dispute resolution, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

<sup>128</sup> A “high-context” culture is one in which the meanings of a communication message are found in the situation and in the relationships of the communicators or are internalized in the communicators’ beliefs, values and norms. The communication context (particularly the relationship with the other individuals in the communication situation) plays an important part in the interpretation of a communication message. A “low-context” culture is one in which the meanings of a communication message are stated clearly and explicitly, without depending on the context of the communication situation. EVERETT M. ROGERS AND THOMAS M. STEINFATT, *INTERCULTURAL COMMUNICATION* 92 (Waveland Press, Inc. 1999).

<sup>129</sup> WINSLADE & MONK, *supra* note 17.

mediation. Although the working hypothesis of most legal practice is formalism and that of most mediation practice is the pragmatic model, operating in the shadow of a formalistic law, this piece tries to provide a more complex, nuanced picture of mediation as a multicultural and intellectual phenomenon. Both legal thought and mediation studies had a relational phase and a social constructionist model. Mediation provided evolving formulations of relations between law and settlement. Finally, a distinct jurisprudence of mediation is developed through the analysis of common assumptions of mediation in all its models and through the elaboration of the notion “identity conversation.” An identity conversation is a mode of communication based on dialogue and mutual transformation. It challenges the discourse of rights that characterizes legal thinking in general and is central for mediation in all its forms.