

# Forms of Mediation and Law: Cultures of Dispute Resolution

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I. INTRODUCTION .....	322
II. A CONTEMPORARY INTELLECTUAL MAP OF MEDIATION .....	324
A. Anatomy of Styles: An Overview .....	324
B. Worldview .....	328
C. The Parties .....	331
D. Conflict Definition .....	333
E. Process Definition .....	334
F. Definition of Success .....	335
G. The Mediator's Role .....	336
H. Sequence .....	338
III. IMPLICATIONS OF THE DIVISION .....	342
A. Introduction .....	342
B. Imbalance of Power .....	342
C. Mandatory Mediation .....	351
D. Legal Advice in Mediation .....	355
E. Confidentiality in Mediation .....	357
IV. CULTURES OF MEDIATION: COMMONALITIES AND DIFFERENCES .....	360
A. Commonalities .....	360
1. Process Emphasis .....	361
2. Underlying Hidden Layer .....	363
3. Emotions Acknowledgement .....	365
4. Constructive Conflict Intervention .....	366
B. Differences .....	372
V. CONCLUSION .....	375

This Paper provides a map of mediation models and analyzes the intellectual context from which they emerge. Through reference to categories such as the nature of the process, the role of the mediator, the perceptions of the parties, the ideological framework, and other classifications, the Paper portrays contemporary mediation discourse as a multicultural field. The Paper then explores the implications of the division over reevaluating

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discussions within the alternative dispute resolution (ADR) field, and goes on to discuss commonalities and differences among the models. After defining the basic elements of the mediation language, the Paper proceeds to evaluate the theoretical implications of such an interpretive inquiry.

## I. INTRODUCTION

The Paper begins, following Lon Fuller's terminology, by perceiving mediation as a "form of social order."<sup>1</sup> This form is examined as changing over time, and as containing diverse cultures or intellectual traditions. Mediation is not merely an alternative, nor a private process within this framework, but a discourse that carries legal meaning and which can be used to enforce and implement the Rule of Law,<sup>2</sup> encompassing its highest values. Mediation represents the extreme "alternative" to adjudication, and thus can be used as the paradigm of dispute resolution emphasis in law.<sup>3</sup> Thus, the terms "mediation" and "Alternative Dispute Resolution" (ADR)<sup>4</sup> will be alternated throughout this Paper as representing the developing discipline that aspires to transcend the adversarial model, although the ADR field encompasses adjudicative and adversarial processes as well. In a sense, an effective process of realization and internalization of the social order today cannot be imagined without the use of mediation skills.

The move from "forms of mediation" to "cultures of dispute resolution" is another foundational theme in this Paper—culture is defined in many ways, and whole books could be dedicated to its various meanings and their

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<sup>1</sup> See Lon L. Fuller, *The Role of Contract in the Ordering Processes of Society Generally*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF L. L. FULLER* 187, 189 (Kenneth I. Winston ed., rev. ed. 2001).

<sup>2</sup> "The Rule of Law" implies a commitment to control society by law and not by arbitrary force. Within the context of this Paper it implies the symbolic order of the community, which has full formal expression in legal rules and precedents, but which also carries beliefs and ideologies that must be internalized by the subjects of the law.

<sup>3</sup> On mediation as "the sleeping giant of dispute resolution" as described by Sander see Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 55. See also BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE* 189 (2000). On how the "law of ADR" represents the dispute resolution emphasis in law, see Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

<sup>4</sup> The Alternative Dispute Resolution movement in the US (the ADR movement) emerged during the late 1970s, has been institutionalized, and has spread around the country transforming the judicial system to include various mechanisms and alternatives to adjudication as part of its routine services. See Resnik, *supra* note 3, at 216–22.

implications.<sup>5</sup> However, in this Paper, culture is perceived as the material from which the mediation process is built. Culture, to paraphrase a Weberian definition, involves “those webs’ of significance that man spins for himself,”<sup>6</sup> which give meaning to our perceptions and activities. We can perceive the world, and the conflicts within it, through various grids and frames of reference. Basically, it is a self-referential system; i.e., we construct reality through the culture we adopt in perceiving it. Thus, one of the basic arguments of this Paper is that multicultural interaction occurs not only between our “official” cultures, but between our diverse understandings of conflict and mediation. While focusing on ADR and on mediation discourse, the Paper will explore the multicultural aspect of conducting conflict resolution processes and present the practice as carrying diverse cultures. In a sense, when Lon Fuller spoke in his famous mediation article of mediation as “all process and no structure,”<sup>7</sup> he may have meant that mediation produces a self-referential constructive culture which can be weaved into any conflict or substantial clash of interests. This re-reading of Fuller’s emphasis will guide the inquiry in this Paper.

The mediation process, in its deepest meaning, can be presented as a search for a process, or for a “shared culture” of conflict resolution, which at its end determines the nature of the outcome of the conflict and the solution to it. Following from this idea, it will be argued that a developed notion of mediation will strive to actively “read” the multicultural interaction in the most constructive way possible,<sup>8</sup> and not through a “clash of civilizations”<sup>9</sup> lens. The framing of the basic elements of the mediation language in the third part of this Paper will proceed along the lines of mediating between the existing cultures.

Returning to the “cultures of dispute resolution” argument, the Paper will demonstrate how the discourse of mediation in Western thought has developed a few cultures of approaching a conflict, which reflect intellectual

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<sup>5</sup> See KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION* 5–21 (1998) (providing a comprehensive overview of the development of the concept of culture, and for a definition of it within the context of conflict resolution).

<sup>6</sup> See CLIFFORD GEERTZ, *INTERPRETATION OF CULTURES* 3–32 (2000) (introducing the interpretive notion of culture and the definition of Weber).

<sup>7</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971).

<sup>8</sup> The reference here is to Dworkin’s notion of constructive interpretation, imported into the field of mediation. See Ronald Dworkin, *A Matter of Principle* (1985).

<sup>9</sup> SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1st ed. 1997).

ideas and implement, at some levels, a critique of liberalism. The reference to “Western thought” is necessary since the effort is to expose the intellectual roots of modern mediation, while assuming that this is only a preliminary introduction to the more burning multicultural conflicts of our time, including interactions with other cultures such as Islam, Eastern thought, ethnic minority communities, or any other identity-based groups. The diversity and heterogeneity of the Western culture of conflict resolution, discussed below, will help to deconstruct the idea of any clash of rigid civilizations and will come back to the nuanced single interaction which always reflects diverse cultural resources.

Following the multicultural map of mediation that will be presented in the second part, some implications of the division over prominent ADR debates will be offered in the third part, referring to themes such as “imbalance of power,” “mandatory mediation,” and “legal advice in mediation.” The fourth part will extract the common elements of any mediation practice and will focus on the uniqueness of this discipline, phrased in broad terms. As a final discussion, the Paper will return to an analysis of the theoretical and practical implications of the differences between the models, and will offer some preliminary guidelines and preferences to address ADR in its multiplicity.

## II. A CONTEMPORARY INTELLECTUAL MAP OF MEDIATION

### A. *Anatomy of Styles: An Overview*

According to the theoretical scheme suggested in this Paper, on the professional level, mediation is surrounded by lawyers on one side and therapists on the other, each aiming to produce a “mediator identity” that is at once pragmatic and therapeutic. A contemporary third professional identity that might be considered as transcending the pragmatic or therapeutic poles is the anthropological social therapist or visionary, who portrays mediation as a social scene that can be manipulated and reconstructed through storytelling and narratives. On the theoretical academic level, mediation can be perceived as being located between the social sciences and the humanities, between law and psychology. Evolving models of mediation thus reflect the complex location of mediation on the professional and theoretical levels. Two theoretical paradigms define the borders for the developing models. One is the *rational-scientific* paradigm, guided by game theory and the social

sciences.<sup>10</sup> The other is the *interpretive* paradigm, inspired by the humanities and based on storytelling and narratives.<sup>11</sup> Both of them are descriptive, and portray the situation of conflict as open to diverse styles of intervention.<sup>12</sup> The models move from the first paradigm to the latter as they progress, and thus, the broad theoretical picture portrayed by this Paper is connected with a humanizing of the mediation discourse, perceiving it as guided by narratives and conflicting cultures.

The three practical models that will be presented here are the *pragmatic* model, the *transformative* model, and the *narrative* model. The argument surrounding these models explores their evolution as representing intellectual development within the history of ideas, and draws links between legal schools of thought and their equivalent trends in mediation. The claim is that, at the turn of the century, mediation incorporates public qualities of the law (“going public”), and the more contemporary model—the narrative model—embodies legal sensitivities and represents the most “progressive” model of mediation known to date. The shift from one model to another is presented as 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, narratives are considered the materials from which mediation is made, and cultural analysis is a basic tool of mediation work.<sup>13</sup>

The discussion of the models begins from a positivistic, pragmatic approach, continues with a relational construction of the process, and ends with a postmodern view of mediation.<sup>14</sup> The research explores the links

<sup>10</sup> For a preliminary presentation of this paradigm see MICHAL ALBERSTEIN, *PRAGMATISM AND LAW* 323–25 (2002). For a more elaborate discussion of the paradigm see MICHAL ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION* ch. 7 (in Hebrew forthcoming 2007).

<sup>11</sup> For a preliminary presentation of this paradigm see ALBERSTEIN, *PRAGMATISM AND LAW*, *supra* note 10, at 330–40. For a more elaborate discussion of the paradigm see ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION*, *supra* note 10, at ch. 12.

<sup>12</sup> For an illustration of the game theories of bargaining, and thus, rational-scientific paradigm, in conflict resolution, see generally KENNETH J. ARROW, ROBERT H. MNOOKIN, LEE ROSS, AMOS TVERSKY & ROBERT B. WILSON, *BARRIERS TO CONFLICT RESOLUTION* (1999). 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.

<sup>13</sup> See ALBERSTEIN, *A JURISPRUDENCE OF MEDIATION*, *supra* note 10, at 330–40.

<sup>14</sup> For a preliminary definition of postmodernism, see *Encyclopædia Britannica Online*, <http://www.britannica.com> (search for “Ethical relativism and postmodernism”) (last visited Mar. 12, 2006).

between perceptions of the “human” in Western thought and the development of practical models of mediation. It reveals ways in which assumptions regarding the nature of conflict—the basic orientations of the parties, the role of the mediator, the process of mediation, the implications of imbalance between the parties, the relation of mediation to law, and the level of success in mediation—derive from diverse theoretical perceptions of the human condition. Fundamental philosophical questions such as, “Does nature precede culture or vice versa?”, “Are humans by nature egoistic or altruistic?”, “What is the relationship between body and mind?”, and “What is justice?”, receive answers within mediation discourse. These answers are generally divided along the lines of three cultural worldviews: liberalism, critique of liberalism through relational ideas, and postmodernism.<sup>15</sup> Since the entire discourse of mediation and alternatives to courts is relatively new and developing in part as a response to the postmodern condition and as a reflection of distrust of the old professions,<sup>16</sup> it is interesting to see how, in only a few decades, it has managed to embrace the whole circle of liberalism and its critique, including its latest development—an explicit, postmodern practical model. Three practical models will therefore be analyzed herein. First is the *pragmatic* approach: the “classical” problem-solving model of mediation, primarily known from Roger Fisher and William Ury’s bestseller, *Getting To Yes*,<sup>17</sup> and based on classical liberalism.<sup>18</sup> Next is the

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[P]ostmodernism, a complex philosophical movement that questioned the idea of objectivity in many areas, including ethics. Many postmodernists regarded the very idea of objectivity as a dubious invention of the modern—i.e., post-Enlightenment—era. From the time of the Enlightenment, most philosophers and scientists believed that there is an objective, universal, and unchanging truth about everything—including science, ethics, religion, and politics—and that human reason is powerful enough to discover this truth. The eventual result of rational inquiry, therefore, was to be one science, one ethics, one religion, and one politics that would be valid for all people in all eras. According to postmodernism, however, the Enlightenment-inspired idea of objective truth, which has influenced the thinking of virtually all modern scientists and philosophers, is an illusion that has now collapsed.

*Id.*

<sup>15</sup> *Id.*

<sup>16</sup> For more discussion of the relationship between postmodernism and ADR, see *infra* notes 46–51 and accompanying text.

<sup>17</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

<sup>18</sup> For a broad definition of Liberalism as discussed in this Paper, see Encyclopædia Britannica Online, <http://www.britannica.com> (search for “Liberalism”) (last visited Mar. 12, 2006).

*transformative* approach: the therapeutic model of mediation constructed in the mid-1990s by Robert Baruch Bush and Joseph Folger.<sup>19</sup> This approach is based on the relational vision and focuses on process, empowerment and recognition, rather than on problem-solving.<sup>20</sup> Finally, the *narrative* approach is discussed: the storytelling, constructivist model of mediation introduced by Winslade and Monk in 2001, based on a postmodern interpretive worldview.<sup>21</sup>

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Liberalism derives from two related features of Western culture. The first is the West's preoccupation with individuality, as compared to the emphasis in other civilizations on status, caste, and tradition. Throughout much of history, the individual has been submerged in his clan, tribe, people, or kingdom. Liberalism is the culmination of developments in Western society that produced a sense of the importance of human individuality, a liberation of the individual from complete subservience to the group, and a relaxation of the tight hold of custom, law, and authority. The emancipation of the individual can be understood as a unique achievement of Western culture, perhaps its very hallmark. Liberalism also derives from the practice of adversariality in European political and economic life, a process in which institutionalized competition—such as the competition between different political parties in electoral contests, between prosecution and defense in judicial procedures, or between different producers in a free-market economy—is used to generate a dynamic social order. Adversarial systems have always been precarious, however, and it took a long time for the belief in adversariality to emerge from the more traditional view, traceable at least to Plato, that the state should be an organic structure in which the different social classes cooperate by performing distinct yet complementary roles. The belief that competition is an essential part of a political system and that good government requires a vigorous opposition was still considered strange in most European countries in the early 19th century. Underlying the liberal belief in adversariality is the conviction that human beings are essentially rational creatures capable of settling their political disputes through dialogue and compromise.

<sup>19</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

<sup>20</sup> Bush & Folger define the relational vision as:

[A]n emerging, new vision of self and society, one based on *relational connection* and understanding rather than on individual autonomy alone. Scholars and thinkers in many different fields have begun to articulate and advocate a major shift in *moral and social vision*—from an *individualistic* to a *relational and interactive conception*.

ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 23–24 (rev. ed. 2005) (emphasis in original).

<sup>21</sup> JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

A basic argument of this Paper is that mediation discourse represents a rich context in which various styles of mediation develop in response to changing ideas in society and culture. Each style has its own theoretical and ideological background, and adopting any one carries a set of assumptions regarding the nature of human beings, the causes of conflict, the ethical commitments of the mediator, the mediation process, the worldview underlying the process, and other factors.

## B. *Worldview*

Three intellectual worldviews, or cultures, underlie mediation: liberalism, critique of liberalism through relational ideas, and postmodernism.<sup>22</sup>

The first mediation model, the *pragmatic* approach, reflects the mainstream training and professional perception of mediation and represents a liberal culture.<sup>23</sup> The emergence of modern mediation discourse begins with developments arising from studies of negotiation.<sup>24</sup> Negotiation literature describes two primary approaches to negotiation: distributive (adversarial) and cooperative (integrative).<sup>25</sup> The approach used greatly affects the relationship between the parties, the manner of conducting negotiations, and the outcomes.<sup>26</sup> Most early negotiation theories dealt with the distributive style, “a kind of contest in which each party is trying to win,”<sup>27</sup> and investigated the strategies designed to maximize one party’s share of the resources in dispute, to minimize losses for that party, and to achieve domination.<sup>28</sup> These theories presumed an argument over a single matter (such as money) and the parties’ inherently contrasting interests regarding that matter, making one party’s victory the inevitable loss of the other.<sup>29</sup>

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<sup>22</sup> ALBERSTEIN, A JURISPRUDENCE OF MEDIATION, *supra* note 10, at Introduction.

<sup>23</sup> *Id.* at ch. 8.

<sup>24</sup> See 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, 6–18 (1996) (discussing the various barriers as described by negotiation literature and suggesting that mediation should offer more than management of these barriers).

<sup>25</sup> ROY J. LEWICKI, ET AL., NEGOTIATION 74–146 (4th ed. 2003).

<sup>26</sup> *Id.* at 30–73.

<sup>27</sup> THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 3 (1960).

<sup>28</sup> See NEGOTIATION ANALYSIS 1 (Peyton Young ed., 1999).

<sup>29</sup> *Id.*



The cooperative mode of interdependence, well-known in negotiation literature, was considered an alternative motivational orientation to the competitive or individualistic orientation.<sup>30</sup> Though several scholars had earlier emphasized the importance of integrative bargaining or collaborative mediation, it was not until the 1980s, as the Cold War receded, that this integrative style prevailed. Fisher and Ury's 1981 book, *Getting to Yes: Negotiating Without Giving In*, symbolized a shift in the perspective on negotiation from a competitive to a cooperative activity.<sup>31</sup> This approach also inspired the emergence of modern mediation discourse, and framed what may be defined as the "pragmatic" model of mediation, or what some describe as "principled negotiation."<sup>32</sup> The authors distinguish between "positional bargaining," divided between hard and soft (competitive and cooperative) approaches, and the "meta-game" that underlies the negotiation procedure.<sup>33</sup> This second negotiation, usually implicit, may escape notice; but it can prevent the either-or dichotomy of the hard-soft negotiation.<sup>34</sup> Parties in a positional bargaining situation may better perceive themselves as collaborative problem-solvers and, hence, enter into "principled negotiation."<sup>35</sup> The term "integrative bargaining," variously known as cooperative, collaborative, "win-win," or "problem solving," describes a negotiation in which the parties' goals are not mutually exclusive and both sides can achieve their objectives.<sup>36</sup> It remains liberal in its basic assumptions and claims to "prove" the advantage of collaboration.<sup>37</sup> Mediation is a method employed to maximize mutual gain according to this view.<sup>38</sup>

The second mediation model is the *transformative* approach. After fifteen years of the ongoing practice of problem-solving mediation, Bush and Folger offered a new reading of the discourse by refreshing and reframing the "promise of mediation."<sup>39</sup> Their book provides a first moment of

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<sup>30</sup> See LEWICKI, *supra* note 25, at 113–17.

<sup>31</sup> FISHER & URY, *supra* note 17.

<sup>32</sup> See, e.g., LEWICKI, *supra* note 25, at 113.

<sup>33</sup> FISHER & URY, *supra* note 17, at 9–10.

<sup>34</sup> *Id.* at 8–10.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> See LEWICKI, *supra* note 25, at 113.

<sup>37</sup> See, e.g., Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1995).

<sup>38</sup> For a description of Fisher & Ury's method as constituting a mediation model see ALBERSTEIN, A JURISPRUDENCE OF MEDIATION, *supra* note 10, at ch. 8.

<sup>39</sup> This is the name of their book, see BUSH & FOLGER, *supra* note 19.

reflection within the developing discourse of mediation, a kind of a Dworkinian moment of constructive reading, which tries to offer the best interpretation of the evolving practice.<sup>40</sup> These commentators suggest moving away from what they call the “satisfaction story” represented by both negotiation studies ideology and the pragmatic call, and to adopt a positive view of conflict, one which emphasizes “empowerment and recognition” as basic values.<sup>41</sup> Parties in mediation can experience moral growth and improve their communication skills, according to Bush and Folger, regardless of the outcomes of the process and without necessarily satisfying their actual needs.<sup>42</sup> Mediation has a relational dimension that should be emphasized and promoted. The model of *humanistic mediation*, as developed by Umbreit,<sup>43</sup> and the *victim-offender mediation* inspired by ideas of *restorative justice*,<sup>44</sup> can both be located within this stage of critique of liberalism and in its appeal to community and relationship.

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<sup>40</sup> For a presentation of how law is like a chain novel, in which each judge writes a new chapter, see Ronald Dworkin, *How Law is like Literature*, in DWORKIN, *supra* note 8, at 146.

<sup>41</sup> BUSH & FOLGER, *supra* note 19, at 84–94.

<sup>42</sup> *Id.* at 94–95.

<sup>43</sup> Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*, 14 MEDIATION Q. 201 (1997). The principles of humanistic mediation are listed by Umbreit as follows:

- Centering. Clearing the mind of clutter and focusing on the important peacemaking task at hand.
- Reframing the Mediator’s Role. Facilitating a process of dialogue and mutual aid instead of directing a settlement-driven process.
- Conducting Premediation Sessions. Listening to each party’s story, providing information, obtaining voluntary participation, assessing the case, clarifying expectations, preparing for the mediation phase.
- Connecting with the Parties. Building rapport and trust beginning in pre-mediation phase.
- Coaching on Communication. If required, during premediation sessions.
- Using a Nondirective Style of Mediation.
- Face-to-Face Seating of Victim and Offender. Unless inappropriate because of culture of parties or individual request.
- Recognizing and Using the Power of Silence.
- Conducting Follow-up Sessions

*Id.* at 205.

<sup>44</sup> See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS TO CRIME AND JUSTICE* (1990).

The third model, the *narrative* model, developed from a critique of the problem-solving model.<sup>45</sup> It is explicitly based on an approach called “social constructionism,” which is inspired by postmodernism and can be characterized by four features: “antiessentialism, antirealism, language as a precondition thought, and language as a form of social action.”<sup>46</sup> The narrative model, for the first time, produces a postmodern *theory* for a process (mediation) that was previously considered to have been inspired by the postmodern condition.<sup>47</sup> It is interesting that the postmodernist worldview, famous for its attack on modernism and progress accompanied by denial of any program or truth,<sup>48</sup> here produces a constructive, manual-based approach to conflict management. Its training manual, published by Jossey-Bass, is not nihilist as a postmodernist approach might expect, but rather uses deconstruction to heal broken relationships and to weave alternative narratives. Other approaches that emphasize postmodernism as a theoretical foundation to mediation and conflict resolution are Coordinated Management of Meaning (CMM), developed by Shailor,<sup>49</sup> and the Narrative Perspective, as offered by Cobb.<sup>50</sup> The transformation of the postmodern worldview from a nihilist critique into a foundation of practical models of conflict resolution reflects the intellectual mood of our times, and is a culmination of a process that has emerged in equivalence to the development of the ADR movement, which was itself inspired by the postmodern condition.<sup>51</sup>

### C. *The Parties*

Who are the parties to the dispute? How are they perceived and what is their subject position? It turns out that each model portrays its own “parties,” and these are constructed through the diverse worldviews.<sup>52</sup>

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<sup>45</sup> WINSLADE & MONK, *supra* note 21, at 32–37.

<sup>46</sup> WINSLADE & MONK, *supra* note 21, at 37–41.

<sup>47</sup> See, e.g., Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the ‘Storytelling’ Metaphor*, in NEW DIRECTIONS IN MEDIATION, *supra* note 12, at 48.

<sup>48</sup> See *supra* note 14.

<sup>49</sup> JONATHAN G. SHAILOR, *EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION* (1994).

<sup>50</sup> Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOT. J. 245 (1993); Cobb, *supra* note 47, at 48.

<sup>51</sup> See, e.g., Dale Bagshaw, *The Three M’s—Mediation, Postmodernism and The New Millennium*, 18 MEDIATION Q. 205 (2001); see also OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* (2005).

<sup>52</sup> See *supra* Part I of this article.

According to the pragmatic perception, the parties are perceived as rational maximizers who aspire to expand the pie while transcending the distributive framework.<sup>53</sup> As mentioned, Bush and Folger define this attitude as “the satisfaction” story, and emphasize its focus on addressing needs and reaching optimal outcomes.<sup>54</sup>

The transformative model assumes a more altruistic, ethical perception of the parties. Parties are not separate maximizers; instead, they are both related and separate, bounded within a relationship.<sup>55</sup> Their basic interest is to actualize themselves—to empower and express care and recognition—and thereby to experience moral growth.<sup>56</sup> Their motivations are not based on needs but on the “ethics of care,” and mediators should try to promote this dimension of their connectedness.<sup>57</sup> Parties basically aspire to go beyond their needs. On the one hand, they approach the mediation parties as moral agents, capable of transcending their needs and biases by being profoundly human.<sup>58</sup> On the other hand, Gilligan’s<sup>59</sup> foundation of this model<sup>60</sup> suggests that the tendency toward the other is natural and is not a manifestation of pure reason.<sup>61</sup> Parties to mediation are naturally connected to one another and need to strengthen their interrelationship.<sup>62</sup> Related perceptions such as humanistic mediation and restorative justice repeat the same idea of connectedness, sometimes accompanied by religious sensitivities.<sup>63</sup>

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<sup>53</sup> See *supra* Part II.A of this article (discussing evolving negotiation models).

<sup>54</sup> See BUSH & FOLGER, *supra* note 19, at 16–18.

<sup>55</sup> *Id.* at 243.

<sup>56</sup> *Id.* at 81–84.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); see also *supra* notes 39–44, at the accompanying text.

<sup>60</sup> BUSH & FOLGER, *supra* note 19, at 255.

<sup>61</sup> For a discussion of the moral ethics in negotiation in terms of the models, see Michal Alberstein, *On Biases, Partiality and Bounded Rationality: Anatomy of Decision Making’s Framings in Negotiation and Law*, in *LAW, SOCIETY AND CULTURE* 657 (Orna Ben Naftali & Hanna Naveh eds., Ramot-Tel Aviv University 2005) (in Hebrew).

<sup>62</sup> See BUSH & FOLGER, *supra* note 19, at 248–49.

<sup>63</sup> See, e.g., Umbreit, *supra* note 43, at 5.

Prior to initiating contact between people in conflict, the mediator(s) is encouraged to take a few moments of silence, through reflection, meditation, or prayer, to reflect on the deeper meaning of his or her peacemaking work and the needs of the people in conflict. The centering of the mediator throughout the entire process of preparation and mediation also helps the parties in conflict to experience it as a safe, if not sacred, journey toward genuine dialogue and healing.

Under the perception of the narrative model, parties are not angels, but neither are they motivated by internal existing natural needs. They are “creatures of discourse,” i.e., constructed by language and operating according to the rules of language games. The parties are trapped by discourse and speak only through its scripts and narratives, such that the only way to escape their situation is for them to deconstruct their narrative and move to a different discursive framework.<sup>64</sup> When the language game changes, so will the parties’ self-perception. A narrative view of conflict assumes “multiple subjectivity,”<sup>65</sup> depicting identities for the parties that are flexible enough to be elastically shaped to reach constructive goals. Sara Cobb defines this social constructionist perception of the parties as “the second-generation” mediation practice,<sup>66</sup> which emphasizes “careful ongoing observation of self-in-interaction.”<sup>67</sup>

#### D. Conflict Definition

The conflict perception of the pragmatic model assumes a frustration of needs presented as a fight over positions.<sup>68</sup> Underneath the positional level, which is the surface of the conflict, Fisher and Ury describe the interest-based level, which is the real core of the conflict: “The basic problem in a negotiation lies not in conflicting positions, but in the conflicts between each side’s needs, desires, concerns and fears . . . . Interests motivate people. They are the silent movers behind the hubbub of positions.”<sup>69</sup> Once the parties to the conflict learn to balance their unmet needs, homeostasis is restored.<sup>70</sup> The consequential emphasis of this search is clear. The mediation ideal is to

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*Id.*

<sup>64</sup> WINSLADE & MONK, *supra* note 21, at 52–53.

<sup>65</sup> *Id.* at 44.

<sup>66</sup> Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1028–29 (2001).

<sup>67</sup> *Id.* at 1026.

<sup>68</sup> For this account of the pragmatic model see WINSLADE & MONK, *supra* note 21, at 33–34.

<sup>69</sup> FISHER & URY, *supra* note 17, at 40–41.

<sup>70</sup> The reference to “frustration of needs” and to the “biological metaphor of homeostasis” is based on WINSLADE & MONK, *supra* note 21. They offer this description and criticize it in the introduction to their narrative model. “Conflict is assumed to happen because individual needs are not being met. Disputes transpire when individuals in the attempt to fulfill their needs, encounter others who believe that their own need fulfillment goals are threatened.” *See id.* at 33–34.

restore the balance of needs, and to help the parties “solve the problem” while addressing their underlying interests.<sup>71</sup>

The transformative school takes a different view of conflict. Conflict represents a rift in the relational texture within which the parties are located, and thus, the ideal response to it is to restore the relationship between self and other, encouraging empowerment and recognition.<sup>72</sup> Bush and Folger perceive conflict not as a problem, as the pragmatic approach might claim, but as an opportunity to experience moral growth in both dimensions of relation, to self and to other.<sup>73</sup> Conflict in mediation is neither the frustration of needs nor the struggle over limited resources, but reflects the inability to negotiate these problems efficiently due to emotional and relational barriers.<sup>74</sup>

The narrative model assumes that conflict exists only within the narratives of the parties and not “outside.”<sup>75</sup> The parties are socially constructed and their conflict exists due to their clashing perceptions of entitlement.<sup>76</sup> A conflict tends to escalate and develop into an infamously rigid,<sup>77</sup> closed narrative, which resists counter-interpretations and spills over into other conflicts and problems.<sup>78</sup>

### E. *Process Definition*

The pragmatic model views the process as collaborative problem-solving, based on objective principles and operated through de-personalization.<sup>79</sup> It is a search for win-win solutions based on interests or needs.<sup>80</sup> It is a collaborative, facilitated negotiation that assumes full flow of information and a cooperative motivational business-like approach.<sup>81</sup>

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<sup>71</sup> *Id.* at 33–34.

<sup>72</sup> BUSH & FOLGER, *supra* note 19, at 13–14.

<sup>73</sup> BUSH & FOLGER, *supra* note 19, at 82–84.

<sup>74</sup> This interpretation can be inferred from various texts discussing transformative mediation. *See, e.g.,* Bush, *supra* note 24.

<sup>75</sup> *See* WINSLADE & MONK, *supra* note 21, at 38–39, 52–54.

<sup>76</sup> *Id.* at 94–96.

<sup>77</sup> *See* Cobb, *supra* note 47, at 52–59.

<sup>78</sup> WINSLADE & MONK, *supra* note 21, at 58–61.

<sup>79</sup> *See* FISHER & URY, *supra* note 17, at 10–14.

<sup>80</sup> *Id.*

<sup>81</sup> *See* LEWICKI, *supra* note 25, at 113–17.

The transformative model aspires to transform from weakness to strength while improving the relational context of the dispute.<sup>82</sup> After such a process, the parties will be sufficiently empowered to negotiate the problem by themselves.<sup>83</sup> This could be described as preparation for problem-solving. In terms of other models guided by the relational-communal worldview, mediation has a ceremonial aspect of community empowerment, and sometimes even religious symbols play into the process.<sup>84</sup>

Under the narrative perception, the shift to an alternative narrative is the core of mediation.<sup>85</sup> Parties criticize the discourse that conditions their choices, and they decide to actively reread until the narrative is changed and the situation transformed.<sup>86</sup>

### F. *Definition of Success*

The question of what constitutes success in mediation is crucial for evaluation of ADR programs and for improving the training and conduct of mediators. Each model offers its own notion of success, and thus, each evaluation should consider the various measures offered by these models. The pragmatic model is the most utilitarian and efficiency oriented model.<sup>87</sup> It is considered the most classical criterion for the evaluation of ADR programs.<sup>88</sup> Because the main incentive for the development of alternatives to courts with caseloads and full dockets is considered to be a pragmatic concern, the practical question of whether the parties have reached an agreement, and what the qualities of it are, is very important.<sup>89</sup>

The transformative model was initially inspired by an effort to go beyond

<sup>82</sup> BUSH & FOLGER, *supra* note 19, at 82–84.

<sup>83</sup> *Id.*

<sup>84</sup> See Umbreit, *supra* note 43, at 3–6. “Prior to initiating contact between people in conflict, the mediator(s) is encouraged to take a few moments of silence, through reflection meditation or prayer, to reflect on the deeper meaning of his or her peacemaking work . . .” *Id.* at 4.

<sup>85</sup> WINSLADE & MONK, *supra* note 21, at 57–62.

<sup>86</sup> *Id.*

<sup>87</sup> For discussion of the worldview and values which inspires the pragmatic model see *supra* Part II.B. of this article.

<sup>88</sup> See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 760 (1984) (offering criteria for evaluations of ADR programs).

<sup>89</sup> For evaluations of ADR programs in terms of the efficiency criteria see MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 873–92 (2005).

the satisfaction story and to look for more qualitative criteria for evaluating success of ADR programs.<sup>90</sup> Following this assumption, the main emphasis of this model is on the transformative value of the process, rather than the actual outcomes of it.<sup>91</sup> The criteria offered by Bush and Folger suggest that “small steps count,”<sup>92</sup> and thus, even limited signs of empowerment or recognition constitute a success in mediation.

The narrative model involves a distinct perception of reality as socially constructed,<sup>93</sup> and thus, satisfaction in terms of material conditions or actual agreement is not its main concern. Since the mediation process happens in discourse, its success can be measured by referring to linguistic changes which reflect a shift from the dominant to the alternative story.<sup>94</sup> Winslade and Monk thus search for conversational moves which occur within “the landscape of meaning,” while weaving them into “the landscape of action.”<sup>95</sup> They measure “unique outcomes” in terms of history telling, being present at the mediation, meanings, thoughts, and other dimensions.<sup>96</sup> They also call for documentation of progress as part of the mediation process, and encourage mediators to write letters to the parties to articulate their progress.<sup>97</sup>

### G. *The Mediator's Role*

The pragmatic model assumes that the mediator's role is to manage the inter-subjective encounter of the conflict and to overcome the strategic and cognitive biases of the parties, while adopting a process orientation and applying the four principles of the *Getting To Yes* model.<sup>98</sup> The mediator is a problem solver and fits the image of a smart, sophisticated, pragmatic lawyer who knows how to close a deal.<sup>99</sup> These lawyers aspire to rational management of the parties' needs and interests, and to achieve integrative

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<sup>90</sup> See BUSH & FOLGER, *supra* note 19, at 94–95.

<sup>91</sup> *Id.* at 248–51.

<sup>92</sup> Bush & Folger, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Mediation Practice*, 13 *MEDIATION Q.* 263, 275–76 (1996).

<sup>93</sup> WINSLADE & MONK, *supra* note 21, at 37–41.

<sup>94</sup> *Id.* at 61–62.

<sup>95</sup> *Id.* at 163–65.

<sup>96</sup> *Id.* at 173–77.

<sup>97</sup> *Id.* at 227–47.

<sup>98</sup> FISHER & URY, *supra* note 17.

<sup>99</sup> For reference to the pragmatic approach as corresponding with a lawyer's state of mind, see ROGER FISHER, ELIZABETH KOPPELMAN, & ANDREA KUPFER SCHNEIDER, *BEYOND MACHIAVELLI* 11–12 (1994).



win-win solutions. They are considered objective, professional, and external to the parties, and have the neutrality that enables them to balance the parties' inter-subjective worlds.<sup>100</sup>

The transformative model envisions a therapist mediator whose role is to help the parties reach transformation through listening and self-reflection.<sup>101</sup> The mediator is considered the most facilitating among the models, and thus the transformative view is considered the "ideal type" of mediation.<sup>102</sup> It follows the process orientation of mediation as introduced by Fuller.<sup>103</sup> The mediator can be perceived as preparing the parties for direct negotiation, which will take place "outside."<sup>104</sup>

Within the narrative approach, the mediator may be perceived as an anthropologist with therapeutic sensitivities, or a therapist with a cultural or perhaps legal perspective. This is the most theoretical model of mediation and may not be applicable in some conflict situations, such as business interactions or monetary disputes.<sup>105</sup> The mediator encourages the parties to question their exaggerated entitlement perceptions, and to replace their taken-for-granted ideologies with new narratives that they choose.<sup>106</sup> The mediator is a coauthor with the parties and uses writing as means of transformation. The mediator is not considered neutral or "objective" under this perception, and is expected to expose cultural biases when approaching the parties.<sup>107</sup> Operating through curiosity and deferral of judgment, the mediator must also constantly question his or her own prejudice and stereotypes.<sup>108</sup>

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<sup>100</sup> See ALBERSTEIN, *supra* note 10, at ch. 8.

<sup>101</sup> *Id.* at ch. 9.

<sup>102</sup> This conclusion can be inferred also from Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999). The author uses Bush and Folgers' relational emphasis in their transformative mediation model as a paradigm for defining the kind of autonomy which exists in mediation.

<sup>103</sup> See Fuller, *supra* note 7, at 307.

<sup>104</sup> See Bush & Folger, *supra* note 92, at 273.

<sup>105</sup> See Alberstein, *supra* note 10, at ch. 11.

<sup>106</sup> WINSLADE & MONK, *supra* note 21, at 111–15.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 35–36, 51–54.

## H. Sequence

Fisher and Ury suggest basing their *pragmatic* negotiation on four principles—which also constitute the stages of the integrative negotiation and mediation processes. The mediation process includes: an opening session, the shift from positions to interests, the shift from positions to generating options through brainstorming, choice among options, and the construction of an agreement.<sup>109</sup> The four principles are:

1. *Separate the people from the problem.* Fisher and Ury advise negotiators to be soft on the people and hard on the problem, to depersonalize, save face, and maintain the relationship.<sup>110</sup>
2. *Focus on interests, not positions.* The anti-foundational assumption of the “principled negotiation” approach is that positions in negotiation veil the true “movers”—needs, desires, concerns, and fears—the parties’ interests.<sup>111</sup> Later approaches differentiate between types of interests, some focusing on needs and values as the key to understanding interests.<sup>112</sup> An important stage in each mediation session is the shift from positions to interests.<sup>113</sup>
3. *Invent options for mutual gains.* After discovering the interests and exploring them, the parties begin to invent options without committing to any specific solution.<sup>114</sup> Maintaining a collaborative, respectful atmosphere enables parties to brainstorm and generate creative options to expand the pie before dividing it. Parties should work on minimizing their differences and avoid premature judgment or fixating on one solution in order to “expand the pie,” create alternatives, and construct a “bridge solution” to the problems they encounter.<sup>115</sup>

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<sup>109</sup> This can be inferred from the principled negotiation framework. See FISHER & URY, *supra* note 17, at 10–14.

<sup>110</sup> *Id.* at 17–39.

<sup>111</sup> *Id.* at 40–42.

<sup>112</sup> See LEWICKI, *supra* note 25, at 122–23 (referring to ‘Lax & Sebenius’ differentiation between interests).

<sup>113</sup> See FISHER & URY, *supra* note 17, at 40–42.

<sup>114</sup> *Id.* at 56–80.

<sup>115</sup> LEWICKI, *supra* note 25, at 128.

4. *Insist on using objective criteria.* This last stage involves choosing among the options and regulating the negotiation through the parties' own enactment.<sup>116</sup> They can choose a standard of fairness, efficiency, science, or even law, and avoid the dominance battle.<sup>117</sup> After choosing the objective criteria, the parties can frame their agreement with the mediator and resolve the dispute.

The transformative approach can be perceived as preparation for a straightforward problem-solving negotiation that will be performed elsewhere.<sup>118</sup> It focuses on listening, reflecting, and enabling the parties to expose emotions and deal with past events.<sup>119</sup> The various dimensions of empowerment and recognition described by Bush and Folger can be interpreted as measuring the ability of the parties to separate the people from the problem, acknowledge interests, invent options, and improve their decisionmaking capacity.<sup>120</sup> In contrast to the pragmatic approach, which focuses on forward-looking deal-making while managing the emotional aspects through venting and "going out on the balcony," this model treats emotions as rich signals of information that should be dealt with directly.<sup>121</sup> The process reaches tentative closures, and "success" can be marked when the parties experience empowerment and recognition, and move from self-embeddedness to strength and responsiveness.<sup>122</sup> The three primary patterns of transformative mediation are:

1. *Micro-focusing on parties' moves.* The mediator keeps a responsive posture and plans each move according to the prior moves of the parties.<sup>123</sup>

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<sup>116</sup> FISHER & URY, *supra* note 17, at 81–94.

<sup>117</sup> *Id.* at 85.

<sup>118</sup> See ALBERSTEIN, *supra* note 10, at ch. 6.

<sup>119</sup> See Bush & Folger, *supra* note 92.

<sup>120</sup> See, BUSH & FOLGER, *supra* note 19, at 85–94 (describing the various dimensions of empowerment and recognition). In the 2005 revised edition this description is omitted and instead empowerment is described in more general terms. See BUSH & FOLGER, *supra* note 20, at 75–77. Perhaps the omission reflects an interest in detaching the transformative model from the pragmatic one.

<sup>121</sup> Bush & Folger, *supra* note 92, at 271.

<sup>122</sup> BUSH & FOLGER, *supra* note 19, at 95–99.

<sup>123</sup> BUSH & FOLGER, *supra* note 19, at 192–94.

2. *Encouraging deliberation and choice-making.* The mediator “helps the parties clarify their needs and goals and reflect and deliberate about options with a full awareness of their potentials and limits.”<sup>124</sup>
3. *Fostering perspective-taking.* Here, “[t]he mediator looks for openings—places where one party can consider the other’s situation . . . from the other’s perspective and where a more positive . . . view of the other might be entertained.”<sup>125</sup>

Within the narrative perspective, the sequence begins with “engagement,” which establishes relationships and builds trust between the parties.<sup>126</sup> At this stage, the mediator attends to the physical setting in which the mediation is to take place, to the nonverbal behavior of the parties in early interactions, and to the discursive positions to which the mediators and the parties are called.<sup>127</sup> The process moves on to “deconstruct the conflict-saturated story,” trying to undermine the certainties on which the conflict relies while emphasizing “elements that contradict the ongoing persistence of the dispute, such as moments of agreement, cooperation, and mutual respect.”<sup>128</sup> The concluding stage of narrative mediation is “constructing the alternative story,” which includes “crafting alternative, more preferred story lines” with the parties.<sup>129</sup> The demarcation between the stages is not neat, and stages can occur simultaneously or in a different order. The prevalence of writing is emphasized within this model, as in post-structural thought in general, and the mediator writes letters for the parties summarizing each session, trying to reflect on their progress and location within the discourse.<sup>130</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>131</sup>

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<sup>124</sup> *Id.* at 194.

<sup>125</sup> *Id.* at 196.

<sup>126</sup> WINSLADE & MONK, *supra* note 21, at 62–72.

<sup>127</sup> *Id.* at 62–70.

<sup>128</sup> *Id.* at 72.

<sup>129</sup> *Id.* at 83.

<sup>130</sup> Letters and other documents produced during mediation can serve a variety of purposes, according to Winslade and Monk, including acknowledgement, mapping the influence of the problem, historicizing the problem, holding up unique outcomes to the light, and other purposes. *Id.* at 233–44.

<sup>131</sup> WINSLADE & MONK, *supra* note 21, at 52–53.

**Chart I: Cultures of Mediation—Basic Concepts**

	<b>Pragmatic Mediation</b>	<b>Transformative Mediation</b>	<b>Narrative Mediation</b>
<b>Perception of Parties</b>	<ul style="list-style-type: none"> <li>• Separate individuals</li> <li>• Rational maximizers</li> </ul>	<ul style="list-style-type: none"> <li>• Relationally-embedded</li> <li>• Ethically-committed</li> </ul>	<ul style="list-style-type: none"> <li>• Socially-constructed</li> <li>• Multiple identities</li> </ul>
<b>Conflict Definition</b>	<ul style="list-style-type: none"> <li>• Satisfaction of complementary needs</li> <li>• Masked by the declaration of positions (a formula influenced by American pragmatism)</li> </ul>	<ul style="list-style-type: none"> <li>• A rift in the relational texture of the parties</li> <li>• An opportunity for moral growth in two dimensions—empowerment and recognition</li> <li>• A positive notion of conflict</li> </ul>	<ul style="list-style-type: none"> <li>• A closure of a dominant discourse of conflict</li> <li>• A clash of entitlements based sometimes on unearned privilege or a conservative ideology</li> </ul>
<b>Process Definition</b>	<ul style="list-style-type: none"> <li>• Problem-solving based on principles</li> <li>• A search for win-win solutions based on interests or needs</li> </ul>	<ul style="list-style-type: none"> <li>• Improving the relational context of the dispute</li> <li>• A process of strengthening the self and improving the response to others</li> </ul>	<ul style="list-style-type: none"> <li>• A shift from the dominant discourses of conflict to alternative discourses of mediation</li> <li>• An educational process from taken-for-granted positions to chosen ones</li> </ul>
<b>Worldview</b>	<ul style="list-style-type: none"> <li>• Liberalism</li> <li>• Economic-utilitarian</li> </ul>	<ul style="list-style-type: none"> <li>• Relational</li> <li>• Critique of liberalism</li> </ul>	<ul style="list-style-type: none"> <li>• Postmodernism</li> <li>• Social constructionism</li> </ul>
<b>Definition of Success</b>	<ul style="list-style-type: none"> <li>• A Pareto optimal solution</li> <li>• Addressing all involving interests</li> </ul>	<ul style="list-style-type: none"> <li>• Relational growth</li> <li>• Empowerment and recognition in any dimension</li> </ul>	<ul style="list-style-type: none"> <li>• Alternative narrative of relationship</li> <li>• “Unique outcomes” which reflect weaving of meaning and actions</li> </ul>

<b>Role of the Mediator</b>	<ul style="list-style-type: none"> <li>• Efficient rational management of interests and needs</li> <li>• An inter-subjective balance of inherently biased perceptions</li> </ul>	<ul style="list-style-type: none"> <li>• Empowering the parties and improving their conflict management skills</li> <li>• Enabling the parties to solve their conflict “outside the room”</li> </ul>	<ul style="list-style-type: none"> <li>• Co-authoring the alternative narrative with the parties</li> <li>• Offering interpretive reading while remaining curious and assuming a storytelling position</li> </ul>
<b>Sequence</b>	<ul style="list-style-type: none"> <li>• Listening to positions</li> <li>• De-personalization</li> <li>• A shift from positions to interests</li> <li>• Inventing options</li> <li>• Agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Listening</li> <li>• Reflecting</li> <li>• Summarizing</li> <li>• Moving from weakness and a self-embedded situation to strength and responsiveness</li> </ul>	<ul style="list-style-type: none"> <li>• Engagement</li> <li>• Deconstructing the conflict-saturated story</li> <li>• Constructing the alternative story</li> </ul>

### III. IMPLICATIONS OF THE DIVISION

#### A. *Introduction*

The following section will explore a few implications of the suggested intellectual map of cultures of mediation on some prevailing discussions within the mediation discourse. The lack of reflection on the various possible intellectual foundations for mediation may result in a limited picture of the problems at stake. An analysis from one intellectual perspective may collide with one from a different intellectual tradition, and a true dialogue between parties can develop only after exposing the inherent cultural bias that characterizes their encounter. Moreover, sometimes the mere presentation of a few distinct perspectives may enrich our understanding of a debate, presenting it in its multiplicity.

#### B. *Imbalance of Power*

One of the most familiar challenges for the development of mediation practice and, in fact, for the growth of the entire field of conflict resolution, is the implication these processes have on power imbalances. What are the consequences of introducing a process that aspires to settlement and encourages collaborative negotiation into a social environment which may

include inherent economical, sociological, or psychological gaps? How can a process that assumes freedom of contracts and self-determination address situations which are inherently unequal and imbalanced? How can an ADR system, as it becomes more common and public, preserve the procedural safeguards and the substantial formal protections for weak groups in society? These concerns have accompanied mediation since its birth and were specifically emphasized during the foundational and early stages of the development of the ADR movement during the 1980s.

A group of legal scholars, mainly from the center and left of the political legal academic map, viewed mediation as an effort to privatize justice and to nullify the achievements of the Human Rights Movement.<sup>132</sup> Since a culture of rights promotes progress through consciousness-raising and law making, the call for settlement and ADR was perceived as contrary to progress.<sup>133</sup> Calling people to reconcile and reach harmony in a world filled with oppression and injustices was thus portrayed by some critics as motivated by conservative sentiments.<sup>134</sup> Only public promotion of justice can help weak groups, according to this view, and the call to mediate might prevent these groups from developing political consciousness or from reaching courts in order to protect their rights.<sup>135</sup> The most famous legal scholar to raise this argument in its most familiar and provocative formula was Owen Fiss in his well-known 1980s article, *Against Settlement*.<sup>136</sup> In his article, Fiss rejects

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<sup>132</sup> 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>133</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 124 (1983).

<sup>134</sup> *Id.*

<sup>135</sup> BUSH & FOLGER, *supra* note 19, at 22-24.

<sup>136</sup> Fiss, *supra* note 132.

the call to develop ADR programs and to encourage settlements by emphasizing the public value of litigation as a way to sharpen political values and to politicize private relationships.<sup>137</sup> Law is not about neighbors' squabbles, says Fiss; thus, settling legal disputes as if they are private encounters prevents society from promoting justice through value discussions.<sup>138</sup>

In terms of the intellectual map offered, Fiss' writing already represents a deviation from classical liberalism, though he does not explicitly acknowledge the influence of Neo-Marxist thought upon his arguments.<sup>139</sup> As part of the group of scholars defined as "the new public law movement," Fiss is inspired by "the interpretive turn"<sup>140</sup> and by postmodernist thought, and he incorporates some of the critiques offered by these intellectual movements into his writings. He perceives adjudication as "the social process by which judges give meaning to our public values,"<sup>141</sup> defines adjudication as "interpretation,"<sup>142</sup> and is inspired by *Brown v. Board of Education*<sup>143</sup> as a

<sup>137</sup> *Id.* at 1073–76.

<sup>138</sup> *Id.*

<sup>139</sup> For an accurate characterization of the political theoretical foundations of Fiss's group of legal intellectuals, see William Eskridge Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1990).

[T]he "center" chosen by the New Public Law is a distinctly *postmodern* center; the New Public Law is one manifestation of a new quasi-cultural social form that is associated with the appearance of postmodernism as a presence in American intellectual life. In other words, the postmodernism condition is constituted, not only by its radical avant garde—CLS in law, for example, or deconstruction, in literary criticism—but also by a particular, recognizable attempt to moderate and stabilize, to constitute a center sophisticated enough to comprehend the postmodern stance but nevertheless reformist enough to believe that it doesn't make all that much difference after all.

*Id.* at 789. In other words: There is a critical pressure on the public law movement scholars to make them adopt an interpretive perspective, but there is also a stronger aspiration by them to preserve a constructive and objective perception of the work of judges and the law in general.

<sup>140</sup> Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991); see also Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 873 (1989). Moore defines "interpretivism" as "my label for a view that denies either sense or practical significance to *any* metaphysics (be it realist, idealist, or skeptical) because of some supposed need for 'interpretation.'"

<sup>141</sup> Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

<sup>142</sup> Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).



paradigm of justice and progressivism.<sup>144</sup> His location within this intellectual legal context explains his interest in defending weak groups only through court decisions and his reluctance toward promoting any privatization of conflicts that have so far been handled in the political public medium. Other progressive or liberal scholars like Trina Grillo and David Luban express equivalent responses to ADR, and suggest that mediation can oppress women<sup>145</sup> or create erosion of the public sphere.<sup>146</sup>

The imbalance-of-power argument, in its strongest version, reflects a critique of liberalism and of the private-public demarcation of the mainstream ADR movement.<sup>147</sup> It does not simply represent a concern for weak individuals in a private conflict, but instead perceives the conflict as a social interaction that will reinforce structural imbalances if not treated in public terms.<sup>148</sup> The response to this strong version reflects the intellectual location of each model of mediation.

*The Pragmatic Model:* The pragmatic model is founded on classical liberalism, assumes a classical notion of contract law, and accepts individualism as the prevailing paradigm.<sup>149</sup> Under such a perception, no acknowledgement of the strong imbalance argument is possible because people sharing the pragmatic worldview are blind to the Neo-Marxist critique which points to the repressed legal consciousness in ADR.<sup>150</sup> According to this culture of conflict resolution, each legal dispute is a private matter and addressing the imbalance between parties is not a political concern, but a pragmatic one that should be addressed by offering new tools and evaluation mechanisms for each individual case.<sup>151</sup> In this spirit, Frank Sander—considered to be the founder of the ADR movement—responds to Fiss' argument in *Against Settlement*. Sander suggests that a seminar be conducted

<sup>143</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>144</sup> For an indication of Fiss's focus on *Brown* as an inspirational case see Fiss, *supra* note 141.

<sup>145</sup> Grillo, *supra* note 132.

<sup>146</sup> David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

<sup>147</sup> See ALBERSTEIN, *supra* note 10, at ch. 4.

<sup>148</sup> BUSH & FOLGER, *supra* note 19, at 22–23.

<sup>149</sup> See the discussion of worldviews in mediation, *supra* Part II.B of this article.

<sup>150</sup> See ALBERSTEIN, *supra* note 10, at ch. 4.

<sup>151</sup> 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* (1999).

to discuss the implications of ADR programs on weak parties,<sup>152</sup> and ignores the strong ideological claims in Fiss' *Against Settlement*. This response reflects a basic pragmatic gesture, typical of mediation, which tries to deconstruct big positional claims and examine them in context.<sup>153</sup> It also reflects the worldview of a modern liberal individualist who cannot grasp the postmodern claims and the appeal to consciousness.<sup>154</sup>

In fact, the liberal-pragmatic response of mediation to imbalance of power can be divided into three levels:

1. *The contractual account*: In terms of classic contract law, the insistence on informed consent is meant to ensure that parties are empowered enough to know what they are signing or giving up.<sup>155</sup> Mediators are supposed to monitor and control manipulation and abuse while working on the private level of the singular disputes. They are supposed to reject settlements which reflect genuine meetings of the wills. According to a classical liberal view, because oppression is only a consequence of private circumstances, dealing with it can focus on the private elements of contract law and informed consent without referring to law or ideology.<sup>156</sup>
2. *The pragmatic account*: A basic idea of *Getting To Yes*, which reflects deep sentiment in pragmatic thinking, is to turn what seems to be a power struggle between opposing positions into a collaborative deal based on interests. Within this sequence, weak parties can avoid submission by insisting on objective criteria and working to strengthen alternatives to the agreement (Best Alternative to a Negotiated Agreement or BATNA).<sup>157</sup> In the ADR literature, some projects focus, as Sander suggested,<sup>158</sup> on empirical evidence in order to evaluate the effect of ADR on weak groups. Other articles

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<sup>152</sup> Frank E.A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229, 232 (1984). "Similarly some of the recent works critical of the alternatives movement could be used for a searching examination of the impact of noncourt processes on the disadvantaged—whether, in the parlance of the critics, these processes constitutes a form of 'second-class justice' and serve to coopt the poor." *Id.*

<sup>153</sup> See discussion *infra* Part IV.A of this article.

<sup>154</sup> See ALBERSTEIN, *supra* note 10, at ch. 4.

<sup>155</sup> See generally Nolan-Haley, *supra* note 102.

<sup>156</sup> See ALBERSTEIN, *supra* note 10, ch. 4.

<sup>157</sup> See FISHER & URY, *supra* note 17, at 177.

<sup>158</sup> See *supra* text to note 152.

offer guidelines and measures to overcome the imbalance problems.<sup>159</sup>

3. *The ethical account:* The more substantive response to the imbalance claim attempts to acknowledge it, while constructing ethical principles that aim to address this situation as a private case demanding mediators' intervention. The ethical standard of "fairness," as discussed in the ADR literature, requires mediators to empower weak parties (as a part of empowering all parties to the extent that circumstances allow), and to enhance the efficient administration of justice<sup>160</sup> and procedural fairness. While litigation has built in procedural protections for the weak and strong alike, as a process, it cannot shift the parties' inherent endowments anymore than mediation can.

*The Transformative Model:* As mentioned above, this model incorporates some critique of liberalism and introduces a relational scheme to address the situation of conflict.<sup>161</sup> In fact, one of the main incentives for the development of this model was the need to offer a better response to the challenge offered by the imbalance argument.<sup>162</sup> In Bush and Folger's writings, this challenge is called The Oppression Story, and is presented as one of the dominant stories defining the field of mediation.<sup>163</sup> "The Oppression Story," according to their analysis, claims that "mediation has turned out to be a dangerous instrument for increasing the power of the strong to take advantage of the weak,"<sup>164</sup> and in a stronger version "the overall effect of the movement has been to neutralize social justice gains achieved by the civil rights, women's, and consumer's movements, among others."<sup>165</sup> Efforts to address the Oppression Story have affected the practice, according to Bush and Folger, and have induced mediators to forget one of

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<sup>159</sup> Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995). The author offers key questions regarding the limits of parties' consent to settlement and provides preliminary guidelines to evaluate the public aspects of disputes.

<sup>160</sup> See, e.g., Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 922 (1998); Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29 (2000).

<sup>161</sup> See discussion *supra* note 18, Part II.B.

<sup>162</sup> BUSH & FOLGER, *supra* note 17, at 22–27.

<sup>163</sup> *Id.* at 22–24.

<sup>164</sup> *Id.* at 22.

<sup>165</sup> *Id.* at 23.

the basic promises of mediation. Mediators have become paternalistic; their intervention has become too invasive and judgmental, and their aspiration to balance efficiency and rights protection<sup>166</sup> has resulted in a very invasive practice lacking the initial ethos which had promised self-determination and empowerment.<sup>167</sup>

The better way to cope with the imbalance argument, according to Bush, is to emphasize the distinct values behind mediation, which are different from those of adjudication and do not include redistribution and protection of weak groups in society.<sup>168</sup> Adjudication should be considered the best process to protect rights, while mediation should be allowed to promote its own internal values of empowerment and recognition. This means that mediators should not aspire to protect weak parties and should stay clear of expressing any judgment or defending any right.<sup>169</sup> Within the mediation session, where the intervention takes place only “in the room”<sup>170</sup> and the relational level of the conflict is the only one that counts, no reference to legal rights should be made, unless it is made by the parties themselves, and no aspiration to external balance of powers between parties should be encouraged. The parties alone are supposed to determine their rights and duties. “The parties know best,” as one transformative mediation hallmark states.<sup>171</sup> In an adjudication process, the social dimension of the relationship will be addressed and the decision in the case will reflect broad public policy. In a mediation process, parties are free to take their relationships in any direction by adopting any rules, legal or others, with the goal that they experience empowerment and recognition and enjoy moral growth in so

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<sup>166</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>167</sup> BUSH & FOLGER, *supra* note 19, at 33–40.

<sup>168</sup> Bush, *supra* note 166, at 259–66.

<sup>169</sup> Bush & Folger, *supra* note 92, at 266–69.

Awareness, control, and suspension of judgment thus constitute a clear hallmark of transformative practice. The mediator is helped in this habit of practice by another kind of awareness that also flows from the transformative framework. That is, the mediators constantly remain aware that, no matter how much information is revealed, they actually know very little for sure about the parties, their situations, and their lives as a whole—and immeasurably less than the parties themselves.

*Id.* at 268.

<sup>170</sup> One of the principles of transformative mediation is that “The action is ‘in the room’; remaining focused on the here and now of the conflict interaction.” *Id.* at 273.

<sup>171</sup> *Id.* at 268.

doing.<sup>172</sup> The relational mediator, described by Bush and Folger,<sup>173</sup> who tries to promote “ethics of care,” is not interested in redistribution or in legal rights—all of which reflect the same old paradigm of “ethics of justice.” Instead, the mediator aspires to operate under a new paradigm in moral thinking which carries its own epistemology and measures.<sup>174</sup> Imbalance is a concept that does not fit the vision of ethics of care.<sup>175</sup>

To summarize, the transformative model addresses the imbalance of power by denying it altogether and by portraying an extreme private image of mediation as based on relationship and care, without any concern for rights or social consequences. Mediation models that follow the transformative model and adopt a relational-communitarian<sup>176</sup> perception of parties, such as “humanist mediation”<sup>177</sup> and “restorative justice,”<sup>178</sup> repeat the same mode of response to the imbalance of power argument, ignoring it or perceiving it as an expression of an inferior stage of perception within liberal thinking.

*The Narrative Model:* The narrative model provides a postmodern response to the imbalance of power challenge.<sup>179</sup> Winslade and Monk declare that the model does not seek to efface power, to equalize it, to empower the parties, or even to accept resistance to mediation because of the

<sup>172</sup> See Michal Alberstein, *Negotiating for Justice, Fighting for Law: The Dialectic of Promoting and Settling Disputes in the Current Global Era*, 31 *STUD. L. POL. & SOC'Y* 45 (2004).

<sup>173</sup> Bush & Folger, *supra* note 92.

<sup>174</sup> See Alberstein, *supra* note 172, at 68–73.

<sup>175</sup> *Id.*

<sup>176</sup> For a definition of Philosophical Communitarianism see Wikipedia, Communitarianism, [http://en.wikipedia.org/wiki/Communitarianism#Philosophical\\_communitarianism](http://en.wikipedia.org/wiki/Communitarianism#Philosophical_communitarianism) (last visited Nov. 5, 2006).

Philosophical communitarianism considers classical liberalism to be ontologically and epistemologically incoherent, and opposes it on those grounds. Unlike classical liberalism, which construes communities as originating from the voluntary acts of pre-community individuals, it emphasizes the role of the community in defining and shaping individuals. Communitarians believe that the value of community is not sufficiently recognized in liberal theories of justice.

*Id.*

<sup>177</sup> Umbreit, *supra* note 43.

<sup>178</sup> See ZEHR, *supra* note 44, at 182. “Crime then is at its core a violation of a person by another person, a person who himself or herself may be wounded. It is a violation of the just relationship that would exist between individuals.” *Id.*

<sup>179</sup> WINSLADE & MONK, *supra* note 21, at 47–51.

existence of power relations.<sup>180</sup> These commentators use Foucault's notion of power<sup>181</sup> to address questions of imbalance in mediation, and thus oppose viewing it as a commodity that can be held by one side or another.<sup>182</sup> Power, according to them, "pervades the entire social body."<sup>183</sup> Since all social life is viewed as a network of power relations, and these relations are always capable of being reviewed, it does not make sense to speak of a party as lacking any power. The notion of empowerment is also problematic, since it relies on the commodity metaphor of power.<sup>184</sup> Instead of balancing between the parties as the pragmatic model suggests, or ignoring their imbalance while treating them as fully competent and equal as the transformative model suggests, the narrative model offers to perceive power as in constant play and as given to reframing and resistance within the mediation process:

Narrative mediators would rather talk about how people can take up opportunities to resist the operation of power in their lives. Such mediators start from the assumption that this is always possible. Equality of power may never be achievable, or even desirable, because it is a notion that brings us back into an individualistic, commodity-based reading of power relations. Rather, the power relations that exist might be viewed as the ongoing product of struggles and contests.<sup>185</sup>

In adopting this post-structural notion of power, the narrative model provides the strongest response to imbalances in society; it claims a possibility for even the most oppressed and defeated person to "demonstrate some level of psychological resistance to an oppressive or constraining circumstance."<sup>186</sup> Once we acknowledge the imbalance critique and perceive it as an invitation "to a particular conversational pattern"<sup>187</sup> within mediation, the power relation can shift and change following that

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<sup>180</sup> *Id.* at 118.

<sup>181</sup> MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (C. Gordon, ed., C. Gordon, L. Marchall, J. Mepham & K. Soper trans., 1980); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977).

<sup>182</sup> WINSLADE & MONK, *supra* note 21, at 51.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 51.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 118.

conversational pattern, and a new power dynamic may be produced.<sup>188</sup> This can be true even in situations of violence and fundamentalism.<sup>189</sup>

### C. Mandatory Mediation

Another debated subject within the ADR field is the question of whether mediation or other dispute resolution processes aside from adjudication should become mandatory. Is it justified to refer divorcing parents to mediation when debating custody of their children?<sup>190</sup> Can parties be forced to attend mediation as a preliminary process in order to promote efficiency and to clear court dockets?<sup>191</sup> Can workers be forced to participate in an alternative process such as mediation before applying to labor court?<sup>192</sup> All these questions go deeply into the roots of ADR philosophy, and they become even more important as the institutionalization of ADR grows and develops. The question of whether compelling people to participate in an ADR process is legitimate goes back to basic questions about the underlying perceptions of the discourse, and analyzing this debate in terms of the models suggested here might contribute to the existing discussion.

The idea of choice and self-determination is foundational to the field of conflict resolution and is a source of inspiration for the ADR movement.<sup>193</sup> Some say that the call for mediation as the preferred dispute resolution mechanism<sup>194</sup> reflects a return to the old belief in freedom of contract, which

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<sup>188</sup> WINSLADE & MONK, *supra* note 21, at 217–26.

<sup>189</sup> *Id.*

<sup>190</sup> See, e.g., Grillo, *supra* note 132, at 1549–50 (discussing the opposition to mandatory mediation in divorce cases).

<sup>191</sup> Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 133 (2002).

<sup>192</sup> Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005).

<sup>193</sup> For an elaborate discussion of the principle and the way it should be implemented in mediation see Nolan-Haley, *supra* note 102, at 787–93.

<sup>194</sup> The centrality of mediation as the prevailing dispute resolution form is reflected in many ways, including the familiar basic formula of *Fitting the Forum to the Fuss* by Goldberg and Sander, which provides a guide for selecting an ADR procedure. 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 Sander & Goldberg, *supra* note 151, at 291–95.

was challenged during the twentieth century in contract law.<sup>195</sup> Others emphasize the conservative elements of returning to consensual processes and ascribe ideological motives to the ADR movement.<sup>196</sup> From a slightly different direction, the ADR focus is considered a kind of “new formalism”<sup>197</sup> which elevates mediation over adjudication and arbitration, just as old formalists celebrated contract and marginalized tort.<sup>198</sup> In any case, it can be argued that one of the main inspirations for the development of the ADR movement and for the thriving of mediation within it is the return to ideas of control, autonomy, and self determination.

Philosophically speaking, what do these concepts mean? Can a person really experience “self-determination,” and is “real autonomy” possible at all? One of the more passionate and polemic debates during the twentieth century focused mainly on the critique and reevaluation of notions such as “autonomy,” “self-determination,” “private,” and “consent.”<sup>199</sup> Starting with Nietzsche, and going back even to pre-Socratic thinking, challenges to western notions of autonomy have promoted a more heteronomic and connected image of the self.<sup>200</sup> The human self is considered to be determined by many outside forces within new perceptions of the self; the identity is multiple, interdependent, and sometimes dispersed and challenged. Feminist scholars have expressed this understanding in our era through expressions such as “the private is public,” “self in relationship,”<sup>201</sup> and “the relational self.” In mediation and negotiation studies, these debates have not

<sup>195</sup> PATRICK SALIM ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); Marc Galanter, *Contract in Court: or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577; Mark Pettit Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263 (1999).

<sup>196</sup> See AUERBACH, *supra* note 133; Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL 1 (1993); Laura Nader, *The ADR Explosion—the Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269 (1988).

<sup>197</sup> Austin Sarat, *The ‘New Formalism’ in Disputing and Dispute Processing*, 21 LAW & SOC’Y REV. 695, 696 (1988).

<sup>198</sup> *Id.* at 705.

<sup>199</sup> LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., New York University Press 1984).

<sup>200</sup> For discussions of different perception of identities, see Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118–72 (Oxford University Press 1969); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 (1989); and Fred Dallmayr, *The Politics of Nonidentity, Adorno, Postmodernism, and Edward Said*, 25 POLITICAL THEORY 33 (1997).

<sup>201</sup> Carol Gilligan, *Remapping the Moral Domain: New Images of Self in Relationship*, in *MAPPING THE MORAL DOMAIN* 3–19 (Carol Gilligan et al. eds., 1988).



been explicitly discussed, and thus, some incorporation of these new ideas has been accomplished unsystematically and in a contradictory way.

In broad terms, the three forms of mediation presented in this Paper may address mandatory mediation along the lines of the worldviews of liberalism, the critique of liberalism and relational values, and postmodernism. Pragmatic mediation, which assumes an old liberal notion of freedom of contract and self-determination, might emphasize the dichotomy between substance and process and claim that an obligation to mediate or negotiate is not an obligation to agree to substantial conditions.<sup>202</sup> Thus, freedom of contract is not affected and mediation norms are not breached.

Transformative mediation emphasizes the relational aspects of mediation, and thus, the contract ideal and autonomy considerations are not its main concerns. Nevertheless, transformative mediation emphasizes self-determination and calls for an improved decisionmaking process to be employed by parties in mediation.<sup>203</sup> A deep belief in empowerment and self-determination, and a perception of consent not only as a formal process, requires an active agreement to each stage in the mediation process, and thus goes against the imposition of a mandatory mediation process. In a paradoxical way, a model that is based on the critique of liberalism, and although a possible application of it can justify mandatory mediation,<sup>204</sup> it

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<sup>202</sup> See, e.g., Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997). According to the article, there is little support for concerns about pressures to accept unfair settlements in mandatory mediation.

<sup>203</sup> See, e.g., Bush & Folger, *supra* note 92, at 263 (defining mediation according to the hallmarks of transformative mediation).

<sup>204</sup> Michaela Keet, *The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation*, 68 SASK. L. REV. 313, 320–21 (2005).

For the most part, theorists have focused on the individual dimensions of transformation: the potential for collaborative processes to result in transformation for individuals or, in Lederach's case, communities who are participants in that conflict; and the potential for conflict, properly handled, to transform people and communities in positive ways, resulting in growth, increased understanding and awareness, and the rehabilitation of relationships. The analysis presented in this article shifts the attention from moral questions such as the impact of the mediation process on personal growth, to systemic questions such as the impact of the mediation program on the institution of civil justice which surrounds it. Without assuming that mediation is itself functioning in a peace-oriented or morally transformative way, I will explore the proposition that an adversarial-based civil justice system can be transformed through the introduction of an interest-based dispute resolution program. Mandatory mediation can have an enormous impact on individuals and communities involved in conflict. However, one of its largest legacies may be its impact on the way the civil justice system operates.

seems, in reality, to promote the most extreme perception of the autonomy of parties in mediation by emphasizing the notions of empowerment and self-determination.<sup>205</sup> In other words, at a deep level, the transformative model is inspired by a liberalist “bias” in favor of empowerment by insisting on the non-paternalistic passive role of the mediator and on the strength of self as preceding the care for other.

Finally, the narrative model takes a unique approach to mandatory mediation because the whole idea of consent and contract is doubted by it as an old liberal notion.<sup>206</sup> Aspiring to the alternative story while attempting to deconstruct the dominant one fits together with a diffused perception of a self that is reconstructed with each stage of the process according to the changing narrative.<sup>207</sup> The party who enters the mandatory mediation can transform and re-emerge, the party’s discursive existence being a function of the setting, the context, and the current exchange between the parties. Under this perception, there is no objection to mandatory mediation because there is no inherent or coherent value in defending values of autonomy and self-determination. People are never fully agents, but also are not always subject to external conditions. Instead, they should be seen as creatures of language and discourse who can transform along with the mandatory mediation discourse. Thus, mandating parties to mediate requires new skills for mediators,<sup>208</sup> and a social constructionist perspective will resist “internalizing conception of motivation . . . in favor of a definition of motivation as a ‘state of readiness’ produced in . . . the conversations in which the mediation process is being discussed.”<sup>209</sup> A different question to ask is whether people who oppose mediation are emotionally and intellectually ripe to experience some of the deep processes of reeducation and transformation aspired to by narrative mediation. However, this does not affect the principled opinion that will generally be in favor of mandatory mediation due to the elasticity and constructability of the human self.

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*Id.*

<sup>205</sup> See, e.g., Nolan-Haley, *supra* note 102, at 789–91. Although the author defines the idealized vision of autonomy in mediation as grounded in relational and communal values, she continues to examine the conditions for informed consent according to classic liberal individualistic terms.

<sup>206</sup> This perception can be inferred from the postmodernist worldview which inspires the narrative mediation model.

<sup>207</sup> WINSLADE & MONK, *supra* note 21, at 209–11.

<sup>208</sup> WINSLADE & MONK, *supra* note 21, at 66.

<sup>209</sup> *Id.* at 210.

### D. Legal Advice in Mediation

What is the role of legal rules within mediation? What is the relationship between law and mediation in general? Should a lawyer inform the parties of the legal situation? Should the lawyer make sure that their agreement complies with the law? How should a mediator respond to requests to give a legal opinion? Should some cases be referred only to lawyer-mediators, and what is the overall relationship between law and mediation? The three models offer diverse answers to these questions, which are fundamental to ADR discussions and reflect the intellectual horizons from which they arise.

The pragmatic model gives the familiar straightforward response to the questions by defining, first of all, the role of legal rules within the problem-solving process. In Fisher and Ury's *Getting to Yes*, the only reference to legal rules is made during the last stage of choosing between the creative options. This is the stage which applies the principle of "insist on objective criteria." Legal rules are not initially relevant to go beyond positions, separate people from feelings, or create options. They become relevant only as one among other sets of objective criteria which may be used by the parties to divide the pie at the last stage. Such a limited role does not require a full legal career or education. In most of the cases, obtaining external legal advice might provide the information needed for the comprehension of the objective legal criteria at stake. The evaluative process itself might in fact jeopardize the whole creative process of problem-solving, and some scholars claim that, where mediators take the arbitral role of evaluating the process, the process should not be called mediation at all.<sup>210</sup> *The Model Standards of Conduct for Mediators*<sup>211</sup> repeats this position by emphasizing the facilitative role of mediation.<sup>212</sup> Still, from another perspective, the pragmatic model can

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<sup>210</sup> See MENKEL-MEADOW ET AL., *supra* note 89, at 399–409; Lela P. Love & Kimberlee K. Kovatch, *ADR: An Eclectic Array of Processes Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 296–98; Kimberlee K. Kovatch and Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 22 DISP. RESOL. MAG., Winter 2003 [hereinafter *Rethinking the Grid*]; Leonard L. Riskin, *Retiring and Replacing the Grid of Mediator Orientations*, 21 ALTERNATIVES TO HIGH COST LITIG. 69 (2003); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

<sup>211</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>.

<sup>212</sup> See, for example, the preface to the Model Standards of Conduct for Mediators: "Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by

conceptually allow mediations with more legal orientation when the subject at stake cannot be resolved effectively without proper legal knowledge. Such is often the case in environmental mediation,<sup>213</sup> divorce mediations that require some familiarity with the law, and conflicts over legal matters, particularly when the mediation takes place under the auspices of a court.

The transformative model does not require legal advice in any stage of the mediation. The relational and therapeutic character of Bush and Folger's model, and the equivalent version of victim-offender mediation or truth committees, aims to detach mediation from the distributional pragmatic focus, and to make it a spiritual and emotional experience which will promote interpersonal relationships. While there is doubt as to whether such a role can be fulfilled by lawyers at all,<sup>214</sup> it is clear that legal advice, even if only providing legal knowledge, is forbidden, and no exclusivity is given to lawyers in handling such mediations.

The narrative model returns in some sense to an acknowledgment of the role of law within the conflict, but it does so by adopting a different notion of law than the one adopted by the pragmatic model. Formal legal rules or principles are not the concern of the narrative mediator who can be an anthropologist, sociologist, or a philosophic intellectual. Still, the deeper senses of law as providing ideologies, and especially as constructing perceptions of entitlements, are very interesting to the contemporary mediator. Deconstructing ideological narratives and perceptions of reality is a manner of performing the highest function of law in society—amelioration through education.<sup>215</sup> The narrative mediator thus perceives the process as

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the parties to the dispute." MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 1 cmt. (2005). [*S*]elf determination: "The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options." *Id.*

<sup>213</sup> See Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, in MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 110 (2005); see also Joseph B. Stulberg, *Symposium: Facilitative Versus Evaluation Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

<sup>214</sup> See, e.g., Mellisa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn about Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420 (1996).

<sup>215</sup> For discussions of the law as consisting of three faces, see Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68 (1991). See also Clark Freshman, *Privatizing Same-Sex Marriage Through Alternative Dispute Resolution: Community Enhancing v. Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) (proposing a community-enabling mediation process which "enables individuals to make informed

being located within political and legal contexts, but views these contexts as the ideologies underlying the law. The approach toward the debate over providing formal legal information or legal advice would be to oppose any reduction that might jeopardize the potential narrative transformation between the parties. Legal determinations will be the natural consequences of a successful process, but remaining on the legal level or attributing too much significance to it is no process at all. Thus, lawyers should develop cultural and theoretical sensitivities to law, while non-lawyers should aspire to gain some legal sensitivity, but the main process occurs at the level of the relationship and underlying ideologies.

### E. Confidentiality in Mediation

The original promise of mediation, as phrased by the pragmatic model, has emerged as the return to the private contract and to self-determination. Parties were referred to facilitated negotiations outside of the courtroom, and information regarding their bargaining processes was considered confidential and private. Following this assumption, many mediation codes and the basic model of mediation repeated the principle of confidentiality.<sup>216</sup> The pragmatic model, which is based on a contract model, assumes that liberal parties support this rule and promote it. Confidentiality of negotiations over settlement terms is efficient, and exclusions are allowed only when the costs are high to preserve this rule and require an exception, such as in cases of crimes that can be avoided or when there is need to prove professional misconduct or malpractice.<sup>217</sup> Some, however, claim that even the need to

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choices about the kinds of communities they value and what weight, if any, to give to the norms such individuals may associate with that community.” This “public” notion of mediation illustrates one of its functions as helping to internalize norms and public values.).

<sup>216</sup> The Model Standards of Conduct for Mediators provides that:

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties’ expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

See *Symposium, Standards of Professional Conduct in Alternative Dispute Resolution*, 50 J. DISP. RESOL. 95, 125 (1995).

<sup>217</sup> See UNIF. MEDIATION ACT § 6 (2001) (“Exception to privilege”). For a discussion of the contradictions between the confidentiality rule and the misconduct duties, see Pamela A. Kenra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality*

make settlements more “public” in terms of the social sphere might justify more publicity of mediation agreements.<sup>218</sup>

The transformative model has “less to hide” in terms of its internal principles. If most of the process occurs on the relational level and involves a therapeutic process of empowerment and recognition, the protection it requires is more from the professional therapeutic aspect of therapy, and less in the sense of legal bargaining confidentiality. Because this model aspires to go beyond efficiency and to promote the moral aspect of mediation, it will be more reluctant to make exceptions to the confidentiality rule in cases where such exceptions are required for efficiency purposes.

Narrative mediation begins by emphasizing the social aspect of the human experience, and insists on deconstructing the image of the individual as a choice-making stable unit of analysis.<sup>219</sup> Individual experiences are consequences of discursive practices, and thus, focusing on rights and confidentiality rules is meaningless and distracting. “Documenting change” is thus an important aspect of the process of constructing an alternative story.<sup>220</sup> Coauthoring written documents is “part of the mediation process, not just a functional record of the process.”<sup>221</sup> The parties and the mediator should exchange narratives in a free and open space, and part of the coauthorship in the mediation should include the written notes of the mediator and his letter to the parties.<sup>222</sup> Writing, under a post-structural perception, has prevalence as to constructing reality and overcoming the obsession of Western metaphysics with presence.<sup>223</sup>

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*and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU. L. REV. 715. For a discussion whether uniformity in mediation confidentiality rules is required, see Ellen E. Deason, *Reply: The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001).

<sup>218</sup> See David Luban, *supra* note 146; David Luban, *Legal Ethics: Limiting Secret Settlements by Law*, 2 J. INST. STUD. LEGAL ETHICS 125 (1999).

<sup>219</sup> WINSLADE & MONK, *supra* note 21, at 44–47.

<sup>220</sup> WINSLADE & MONK, *supra* note 21, at 90.

<sup>221</sup> *Id.* at 91.

<sup>222</sup> *Id.* at 227–47.

<sup>223</sup> JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravotry Spivak trans., The Johns Hopkins University Press 1976) (1967).

**CULTURES OF DISPUTE RESOLUTION**

**Chart II: Cultures of Mediation: Implications of the Division**

	<b>Pragmatic Mediation</b>	<b>Transformative Mediation</b>	<b>Narrative Mediation</b>
<b>Imbalance of Power and Social Context</b>	<ul style="list-style-type: none"> <li>• A private contract</li> <li>• Imbalance exists in the positions level</li> <li>• Imbalance monitored from the outside through “fairness”</li> </ul>	<ul style="list-style-type: none"> <li>• Deferral of judgment</li> <li>• Parties will treat imbalance only if they choose to do so</li> <li>• Mediation is private and does not aim at redistribution</li> </ul>	<ul style="list-style-type: none"> <li>• Conflict is a power struggle based on entitlements and ideologies</li> <li>• Mediation educates the parties to more advanced entitlement perceptions</li> </ul>
<b>Mandatory Mediation</b>	<ul style="list-style-type: none"> <li>• Self-determination contradicts a mandatory process</li> <li>• Differentiating between entering the process (mandatory) and conducting it (voluntary)</li> </ul>	<ul style="list-style-type: none"> <li>• Strengthening the decisionmaking power of the parties requires voluntary choice throughout the entire process</li> </ul>	<ul style="list-style-type: none"> <li>• Refusing mediation at the entrance point, while occupying one subject position, does not entail the same response while reconstituted again at a later point in time in the conflict</li> </ul>

<p><b>Legal Advice</b></p>	<ul style="list-style-type: none"> <li>• Legal advice has a limited role as one source of objective criteria</li> <li>• In some conflicts legal knowledge should be required</li> </ul>	<ul style="list-style-type: none"> <li>• Relationship is at the core of the conflict and legal advice is irrelevant for addressing that aspect</li> </ul>	<ul style="list-style-type: none"> <li>• Cultural knowledge and critique of ideology are more crucial than the knowledge of legal rules, though there is relevance to the deep principles of the law</li> </ul>
<p><b>Confidentiality</b></p>	<ul style="list-style-type: none"> <li>• Settlement negotiations should be confidential for pragmatic reasons</li> </ul>	<ul style="list-style-type: none"> <li>• Mediation meetings are confidential as therapeutic sessions</li> </ul>	<ul style="list-style-type: none"> <li>• Written narrative of the mediation is open before the parties and its exchange is part of the coauthorship of the process</li> </ul>

IV. CULTURES OF MEDIATION: COMMONALITIES AND DIFFERENCES

A. *Commonalities*

As the previous sections have aimed to demonstrate, mediation can be practiced by using diverse languages, different images of the human, various definitions of conflict, and a range of metaphors. Mediators can search for efficient and optimal outcomes (the pragmatic model), psychological strengthening and growth (the transformative model), and might even aspire to the transformation of the socially constructed parties of the conflict (the narrative model). In spite of the variations which characterize the distinct intellectual foundations that inspire mediation, the claim here is that a



distinct language of mediation can be traced through all models.<sup>224</sup> Central elements remain unique for each mediation practice and can be phrased as the “universal language of mediation.”<sup>225</sup> These are the elements that differentiate mediation from any other form of bargaining for settlement and which locate it as a unique profession existing between therapy and law.<sup>226</sup> The unique elements of the language of mediation are: process emphasis, an underlying hidden layer, emotions acknowledgement, and constructive positive intervention.

### 1. *Process Emphasis*

The relationship between mediation and process orientation was acknowledged in Fuller’s declaration that mediation “is all process no structure.”<sup>227</sup> Under the pragmatic perception of mediation, the initial incentive for developing a new style of negotiation relates to entering a second order negotiation over the process itself:

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.”<sup>228</sup>

The recognition of the futility of distributive bargaining and of the useless position struggle that characterizes the substantive negotiation game calls for a negotiation over process, which results in devising a “principles based negotiation.”<sup>229</sup> Within this problem-solving framework, process is regulated in an explicit way and requires attention and training.

The transformative model emerges as a critique of the problem-solving framework’s overemphasis on substance and efficiency, and offers to emphasize procedural justice over substantive elements in conducting

<sup>224</sup> See also ALBERSTEIN, *supra* note 10, at ch. 6.

<sup>225</sup> *Id.*

<sup>226</sup> For the debate over the definition of mediation and the questions whether it includes evaluative process in search of settlements, see Lela P. Love & Kimberlee K. Kovatch, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295 (2000); Kimberlee K. Kovatch & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Riskin, *Rethinking the Grid*, *supra* note 210.

<sup>227</sup> Fuller, *supra* note 7, at 307.

<sup>228</sup> FISHER & URY, *supra* note 17, at 10.

<sup>229</sup> *Id.*

mediation.<sup>230</sup> Instead of aspiring toward satisfaction and promoting utilitarian outcomes, conflict should be perceived not as a problem but as an opportunity for moral growth.<sup>231</sup> The measures of success provided by this model are all related to process, and are reflected in the indications for both empowerment and recognition suggested by Bush and Folger: parties are empowered in mediation when they realize more clearly what their goals and interests are, when they become aware of the range of options available to secure their goals, when they increase or add to their own skills in conflict resolution, when they gain new awareness of resources already in their possession to achieve goals and objectives, and when they reflect, deliberate, and make conscious decisions for themselves about what they want to do regarding their conflict.<sup>232</sup>

Looking closely at the measures of empowerment reveals resonance between the pragmatic principles of *Getting To Yes* and the indicators for transformation: parties who can realize their interests and separate them from the positions are empowered—they are capable of applying the principle, “focus on interests, not positions;” if they become aware of more options, they are capable of “inventing options for mutual gain.” The improvement of their dispute resolution skills and decisionmaking abilities empowers them to become efficient pragmatic negotiators. The indicators for recognition offered by Bush and Folger reflect a process orientation regarding the pragmatic principle of “separate the people from the problem.” They delineate the psychological process of transcending the self-embedded condition of the conflict while reaching out gradually to acknowledge the other: parties give recognition in mediation when they realize their capacity

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<sup>230</sup> On the presentation of the transformative model as focusing on process see Part IV.A.1. See also, Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893. For an examination of dispute settlement through the dichotomy of distributive and procedural justice as paralleling the pragmatic and transformative dichotomy, see Tina Nabatchi & Lisa B. Bingham, *Expanding our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* (Social Science Research Network, Working Paper, Feb. 7, 2002) (The author’s survey at the United States Postal Service (USPS) shows that the procedural justice model better fits the data from a national employment transformative mediation program than the distributive justice model. They also suggest that an interactional model of justice, which includes measures of empowerment and recognition in a transformative index, in addition to measures of process and resolution, can better explain participant satisfaction with this program.).

<sup>231</sup> BUSH & FOLGER, *supra* note 19, at 81–84.

<sup>232</sup> BUSH & FOLGER, *supra* note 19, at 84–87.

to reflect on the situation of the other and consider it, when they have desire for giving recognition, when they give actual recognition by reinterpretation and rethinking, when they express their recognition in words, and when they are willing to give recognition in action.<sup>233</sup> The process offered by this model reflects the transformation of the biased, self-interest motivated subject of game theory and social psychology<sup>234</sup> into a process-oriented pragmatist subject of *Getting to Yes*.

The emphasis of the narrative model on process has unique implications. The “dominant discourse” is, according to this model, a network of narratives and ideologies that produce a conflict story in which the parties are caught. Moving to the “alternative discourse,” where stories of peace and coexistence can prevail, requires an active process of deconstruction, reinterpretation and rewriting the relationship between parties.<sup>235</sup> Since conflicts exist only as products of narratives and texts, and do not reflect real underlying needs (pragmatic) or ill relationships (transformative), the only process to overcome them requires engaging in an ongoing constructive interpretive process, which deconstructs perceptions of entitlement.<sup>236</sup> Thus, under the narrative model, existence itself is related to an ongoing process of interpretation and re-narration.

## 2. Underlying Hidden Layer

A basic conceptual gesture that repeats itself in each of the mediation models is the idea that there is an underlying phase of conflicts disguised by the surface of contradicting claims. Moving from the superficial misleading surface of the conflict to the “real” underlying substance enables a “win-win” unique mediation outcome which transcends distribution and competition. The pragmatic model defines this underlying phase as containing *interests or needs*, while the transformative model refers to *emotions* and the narrative model addresses *entitlements*. The three models of mediation repeat the message that “things are not as they appear,” and all aspire to resolve conflict while addressing a level which is below the surface of the conflict and what currently appear to be the parties’ concerns. As Avruch points out in his book

<sup>233</sup> BUSH & FOLGER, *supra* note 19, at 89–91.

<sup>234</sup> For a description of the negotiator image as reflected in theoretical studies of negotiation, see Michal Alberstein, *Negotiating Through Paradoxes: Rationality, Practicality, and Naïve Realism (Or: “Enjoy your Biases”)*, 22 STUD. L. POL. SOC’Y 197 (2001).

<sup>235</sup> WINSLADE & MONK, *supra* note 21, at 82–92.

<sup>236</sup> *Id.* at 52–54.

*Culture and Conflict Resolution*, there are two possible conceptions of conflict from which the emerging studies of negotiation and dispute resolution (what is referred to as ADR) have taken only one.<sup>237</sup> The first definition regards conflict as “a struggle over values and claims to scarce status, power, and resources, a struggle in which the aims of opponents are to neutralize, injure, or eliminate rivals.”<sup>238</sup> The second definition provides that “conflict means perceived divergence of interest, or a belief that parties’ current aspirations cannot be achieved simultaneously.”<sup>239</sup> The second definition, which emphasizes perception and belief, is the one adopted by all three models of mediation as part of the basic inclination of the whole emerging discipline (or “quasi discipline,” as Avruch suggests)<sup>240</sup> of dispute resolution. Avruch explains that the new discourse favors strategies of collaboration and problem-solving over avoidance, competition or any other bargaining strategy: “Resolution aims somehow to get to the root causes of a conflict, and not merely to treat its episodic or symptomatic manifestation, that is, a particular dispute.”<sup>241</sup>

Getting to the root causes of a conflict is accompanied by an optimistic construction of these causes as given to manipulation and conciliation. Under the pragmatic model perspective, the needs are compatible and given to mutual satisfaction, unlike the positions that are exclusive and oppositional. According to the transformative model, behind the unspoken needs lay the untreated feelings and the wounded relationships that are the core of the conflict. The narrative model claims that the exaggerated entitlement perceptions of the parties produce the conflict by composing the dominant discourse. The key element of mediation is to go beyond the surface of the conflict and to deny its appearance as contradictory and competitive, while aspiring to reach the underlying true sources of it and to manage them toward resolution. Instead of searching for “true” feelings or addressing unmet needs, the postmodern agenda “is about opening up previously unavailable worlds of meaning.”<sup>242</sup> The construction of the conflict as “perception

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<sup>237</sup> See AVRUCH, *supra* note 5, at 24–47.

<sup>238</sup> *Id.* at 24 (quoting L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 8 (1956)).

<sup>239</sup> *Id.* at 24 (quoting J. RUBIN ET AL., *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENTS* 5 (2d ed. 1994)).

<sup>240</sup> *Id.* at 26.

<sup>241</sup> *Id.*

<sup>242</sup> WINSLADE & MONK, *supra* note 21, at 125: “If something is a problem within the dominant narratives with which the parties to a dispute are making sense of things, the challenge becomes to deconstruct the narrative itself, to see it as a framework of meaning rather than an essential and enduring truth . . . .”

based,” and the reference to a manageable level that conditions it, is shared by all models of mediation and is typical to the modern study of conflict resolution.<sup>243</sup>

### 3. *Emotions Acknowledgement*

A unique characteristic of mediation, as compared to adjudication, arbitration, and other processes, is its emphasis on emotions and interpersonal relationships, aspects that are traditionally not addressed directly through adjudicative processes. Under a classical perception of modern law, emotions and relationships are considered matters of the individuals in their private lives outside the courts, and conflicts should be handled based on rational arguments and evidence that the parties choose to bring before the judge.<sup>244</sup> The modern interest in dispute resolution reflects a growing interest in emotions and presents them as integral parts of the conflict picture.<sup>245</sup> Following developing research on the importance of emotions as sources of information<sup>246</sup> and as having a rational level which is given to understanding, mediation studies increase the focus on emotions and provide explicit manuals to handle them and to understand their role within a conflict.<sup>247</sup>

The pragmatic model defines the first principle of integrative negotiation as “separating the people from the problem.” The principle of depersonalization is reflected in this formula and is related to the constructive management of emotions.<sup>248</sup> In later formulations of the Harvard Negotiation Project’s pragmatic offer, emotions receive further reflection. In the 1999 book *Difficult Conversations*, the emotions conversation is considered a difficult challenge for parties who must try to “have their feelings.”<sup>249</sup> The

<sup>243</sup> See CONFLICT RESOLUTION: CROSS CULTURAL PERSPECTIVES 1–3 (Kevin Avruch et al. eds., 1991).

<sup>244</sup> See Fuller’s definition of adjudication in Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

<sup>245</sup> See EXPLAINING EMOTIONS (A. Rorty ed., 1980); Daniel. L. Shapiro, *Negotiating Emotions*, 20 CONFLICT RESOL. Q. 67 (2002).

<sup>246</sup> See Shapiro, *supra* note 245, at 67–82.

<sup>247</sup> ROGER FISHER & DAVID SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

<sup>248</sup> See FISHER & URY, *supra* note 17, at 29–32.

<sup>249</sup> See DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (Penguin Group 1999). In response to the feeling conversation, the advice is “have your feelings (or they will have

latest book by the project, written by Ury and Shapiro, is dedicated entirely to emotions and tries to treat them as positions which cover real concerns that can be answered if only addressed.<sup>250</sup> Management of emotions and reference to them as representing other elements of the conflict is central to the three pragmatic phases of handling difficult conversations.

The transformative model suggests an even more central role for emotions in mediation. Bush and Folger define one of the hallmarks of transformative mediation as the idea that “there are facts in the feelings.”<sup>251</sup> This principle suggests that, in contrast to the initial pragmatic suggestion to vent emotions, parties “have” them but then move on to the substantial discussion which aims to rationally resolve the conflict based on interests and creative invention. The transformative model offers to view emotions as real resources of information.<sup>252</sup> Emotions signify past relationships between self and other, and understanding them might help to transform dysfunctional patterns and to promote empowerment and recognition.<sup>253</sup>

According to 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>254</sup> The mediator aspires to deconstruct the narratives of the parties and perceives them as frameworks of meaning rather than essential truths.<sup>255</sup> Emotions and facts are intertwined within this framework of meaning and are treated as equally important.

#### 4. *Constructive Conflict Intervention*

The emphasis on process and emotions, and the depiction of an underlying true layer that conditions conflicts, are not enough for an

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you).” *Id.* at 85. The authors advise parties to negotiate with their feelings, describe them carefully, and avoid judgment. *Id.* at 99–105.

<sup>250</sup> See FISHER & SHAPIRO, *supra* note 247.

<sup>251</sup> Bush & Folger, *supra* note 92, at 271.

<sup>252</sup> *Id.* “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>253</sup> *Id.* at 271–72.

<sup>254</sup> WINSLADE & MONK, *supra* note 21, at 125.

<sup>255</sup> *Id.* at 72.

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. Insofar as the models differ from one another, they all share a unique preference for constructive positive intervention, even if the theoretical foundation assumed by each might lead to destructive “resolutions” as well.

The pragmatic model, at least in the way Fisher describes it, is motivated by an urge to become “activist” and to engage in 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 and that it all depends on the “motivational orientation” of the parties.<sup>256</sup> He does not accept the claim of a tension existing between claiming and creating values in negotiation as a reflection of the inherent prisoner dilemma that characterizes the bargaining situation,<sup>257</sup> and is not

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<sup>256</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 ones 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 take a cooperative, competitive, or individualistic mode. 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>257</sup> See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 30 (1986). Lax and Sebenius present a prisoner’s dilemma inherent in any negotiation, based on the tension between creating and claiming value:

A deeper analysis shows that the competitive and cooperative elements are inextricably entwined. In practice, they cannot be separated. This bonding is fundamentally important to the analysis, structuring, and conduct of negotiation. There is a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantages. This tension affects virtually all tactical and strategic choice. Analysts must come to grips with it; negotiators must manage it. Neither denial nor discomfort will make it disappear.

interested in the balanced formula of “the mixed motive” in negotiation.<sup>258</sup> He aspires to transcend the academic stance of a spectator, and to engage in reality in a problem-solving mode.<sup>259</sup> As he and his coauthor claim in his book *Beyond Machiavelli*:

Most university courses and scholarly texts approach international relations from the standpoint of a spectator. They seek to produce an explanatory structure . . . . If we want knowledge in order to improve the world, then predictability is the wrong standard. We need to turn from what is inevitable to those things we can change.<sup>260</sup>

Fisher himself emphasizes this prescriptive view when he admits that he is more concerned with “what intelligent people ought to do” than with “the way the world is.”<sup>261</sup> When he states that *Getting to Yes* “blurs a desirable

*Id.*; see also ROBERT H. MNOOKIN, SCOTT R. PEPPET, & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (Belknap Press of Harvard University Press 2000).

<sup>258</sup> See Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 218 (Morton Deutsch & Peter Colman eds., 2000).

If you view the world through the lens of a fixed-pie vision, the choices are pretty clear: either hold out to protect your own interests, which are by definition opposed to the other’s, or cooperate with the other party so that some kind of compromise can be reached. Cooperation and competition are thought to be the yin and yang of conflict resolution, and it is true that most conflicts are mixed-motive in the sense that we are motivated to get as much of the pie as we can for ourselves, but at the same time motivated to work together with the other person to ensure we reach mutual agreement. We argue, though, that this is a false dichotomy in most instances, because we need *not* choose to behave purely cooperatively or purely competitively. There a third, enlightened strategy, which we call strategic creativity.

*Id.*

<sup>259</sup> See FISHER ET AL., *supra* note 99, at 4 (“In this book we have adopted the style of a handbook or how-to manual, to encourage an activist and problem-solving approach among people who like to—or must—think about tough problems.”). The reference to Machiavelli as a model was already made by Fisher in 1969 in Roger Fisher, *Improving Compliance with International Law* 1–4 (1969) (unpublished, with permission of the author, on file in Harvard Law School Special Collection) (“In trying to understand international affairs it is useful to ask: what is the advice which a wise and up-to-date Machiavelli would give to a modern prince?”).

<sup>260</sup> FISHER ET AL., *supra* note 99, at 8–9.

<sup>261</sup> See Roger Fisher, *Reply to, The Pros and Cons of ‘Getting to Yes,’* 34 J. LEGAL EDUC. 115, 120–24 (1984). Fisher, while responding to a book review by White, claims that his book excludes the competitive inevitable aspect of bargaining. *Id.*



distinction between descriptive analysis and prescriptive advice,”<sup>262</sup> in fact, he claims that he borrowed this orientation from legal advocacy: just as a lawyer arguing a case, the pragmatic mediator promotes a constructive approach to conflict resolution without considering the other possible dynamics.<sup>263</sup>

The transformative model of mediation defines the constructive orientation of the process using its own distinct intellectual background: that of the relational worldview. Bush and Folger perceive the pragmatic model as promoting the value of satisfaction, which is based on the individualist worldview,<sup>264</sup> and hence, the constructive leap of *Getting to Yes*, in denial of the prisoner dilemmas, is not their concern. Their own “leap” is performed

<sup>262</sup> *Id.* at 123–24.

*Getting to Yes* as a whole, I believe, blurs a desirable distinction between descriptive analysis and prescriptive advice. Descriptively, it sorts facts into useful categories: positions vs. interests; people issues vs. substantive ones; inventing vs. deciding; discussing what negotiators will or won’t do vs. discussing what they ought to do. Those distinctions, like distinctions between reptiles and mammals, or between short snakes and long snakes, are objectively true and, despite possible difficulties in drawing lines, exist as facts in the real world. Whether or not they are useful is another question. We go beyond suggesting these descriptive categories by advancing some prescriptive rules of thumb, indicated by the chapter heading in the book.

*Id.*

Using this natural-science image of biology, and making the fact-clue distinction while the facts are considered “objective truth,” locates Fisher even earlier than the 1950s and the Legal Process materials. Hart and Sacks believed, according to their *Zeitgeist*, that the social sciences were different from the natural ones in being more judgmental. See PRAGMATISM: FROM PROGRESSIVISM TO POSTMODERNISM 227 (Robert Hollinger & David Depew eds., 1995); see also HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 107 (1994). “These materials proceed upon the conviction that the science of society is essentially a judgmental, or prudential, science demanding modes of inquiry and reflection which are sharply at variance with the procedures conventionally thought to be appropriate in the natural sciences.” *Id.*

<sup>263</sup> See Fisher, *supra* note 99.

Like a lawyer arguing a case, I may sometimes get carried away with the merits of the position being urged. This does not trouble me much. As a firm believer in the adversary system I am convinced that wise decisions are more likely to result from having competing views advanced forcefully than from having everyone play the role of judge.

*Id.* at 12.

<sup>264</sup> BUSH & FOLGER, *supra* note 19, at 234–37.

by constructing their unique understanding of the relation worldview. They posit it as transcending the dichotomy between the individualist and organic worldviews:

Indeed, the central feature of human nature, when perceived from the starting place of the transformation value, is neither individuality nor connectedness (and their associated qualities) but the element that relates the two in an integrated, whole humane consciousness—the relational capacity. Human beings are thus simultaneously separate and connected, autonomous and linked, self-interested and self-transcending.<sup>265</sup>

According to the relational worldview, human beings are indeed considered simultaneously separated and connected, but positive transformation is not necessarily the horizon of this condition. A more “balanced” presentation of this worldview is indeed offered by Ian Macneil regarding contract law.<sup>266</sup> Macneil diagnoses an inherent tension between solidarity and individual utility that underlies modern contract law and human behavior, and describes in different ways the play between discrete norms and relational norms in specific contractual situations.<sup>267</sup>

The narrative model has its own constructiveness, which is framed within the postmodern worldview, but carries its unique optimistic bias equivalent to the three models. Having emerged from a worldview which

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<sup>265</sup> *Id.* at 243.

<sup>266</sup> See 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 (Apr. 1986); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980). For a critique of the biased and limited relational claim of Bush and Folger, see Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 L. SOC. INQUIRY 737 (1996).

<sup>267</sup> See Macneil, *Values in Contract*, *supra* note 264, at 348, 349–66:

Man is, in the most fundamental sense of the word, irrational, and no amount of reasoning, no matter how sophisticated, will produce a complete and consistent account of human behaviors, customs or institutions. Two principles of behavior are essential to the survival of such a creature: solidarity and reciprocity. Man, being a choosing creature, is easily capable of paralysis of decision when two conflicting desires are in equipoise . . . . While all the contract norms operate in the behavior and in the internal principles and rules of all kinds of contracts, some assume special importance in discrete transactions and others assume special importance in contractual relations.

*Id.* at 348.

reflects a critique of liberalism and irony toward constructive modernist projects,<sup>268</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>269</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>270</sup> In other words, the narrative model uses the worldview as a tool to improve mediation practice, and in that sense, it assumes the constructive task of resolving conflict as a foundation for the whole theoretical engagement. It is interesting to see how Winslade and Monk respond to writers representing the same worldview, who expose the “dark side” of postmodernism by offering a critique of mediation practice. In response, for example, to Cobb’s description of the coercive potential of the first narrative in mediation as determining the rest of the process,<sup>271</sup> the authors suggest that every utterance in mediation can operate in the same way and change the power dynamic between the parties.<sup>272</sup>

People can choose simply not to respond to what the first speaker has said but to choose their own narrative trajectory. If the act of speaking is an act of construction in a power relation, then it is not the structural position of speaking first that makes speaking powerful but the way people operate on each other all the time in conversation, of which speaking first is but one example.<sup>273</sup>

In the same mode, Winslade and Monk use Foucault, who was deeply suspicious of any pretension to transcend power or to build constructive progressive models, to balance it.<sup>274</sup> Foucault would probably mock the claim that harmony and justice may be reached through narrative

<sup>268</sup> For a discussion of postmodernism and its tenets, including irony, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

<sup>269</sup> MICHAEL WHITE & DAVID EPSTON, *NARRATIVE MEANS TO THERAPEUTIC ENDS* (1990).

<sup>270</sup> See WINSLADE & MONK, *supra* note 21, at 37; David. A. Pare, *Culture and Meaning: Expanding the Metaphorical Repertoire of Family Therapy*, 35 *FAM. PROCESS* 21–42 (1996).

<sup>271</sup> Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the ‘Storytelling’ Metaphor*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES* 48 (Joseph P. Folger & Tricia S. Jones eds., 1994).

<sup>272</sup> WINSLADE & MONK, *supra* note 21, at 138.

<sup>273</sup> *Id.*

<sup>274</sup> *THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT 1954–1984* (Paul Rabinow and Nikolas Rose eds., 2003).

mediation,<sup>275</sup> yet still the authors view his claims of power, knowledge, and discipline as opening up opportunities<sup>276</sup> or as “invitations to a particular conversational pattern.”<sup>277</sup>

**Chart III: Cultures of Mediation—Commonalities and Differences**

	<b>Pragmatic Mediation</b>	<b>Transformative Mediation</b>	<b>Narrative Mediation</b>
<b>Process Emphasis</b>	A meta-negotiation regarding the process	Transcending satisfaction while focusing on process	Storytelling and narrative as producing a new reality
<b>Underlying Hidden Layer</b>	Interest and needs as the silent movers of the conflict	Emotions and self-other relationship as the core of conflicts	Exaggerated entitlement perceptions
<b>Emotions Acknowledgement</b>	Separating emotions from the real issues	Emotions signify facts and should be examined	Emotions as having meaning within a narrative
<b>Constructive Positive Intervention</b>	Preferring the activist constructive mode over the intellectual balanced position of the social sciences	Preferring the constructive side of the relational worldview	Preferring the constructive view of postmodernism

### B. Differences

What is the relation between the models, and what is the theoretical hierarchy between them? How can we decide which culture of mediation is suitable for a certain conflict? How should a situation be evaluated when

<sup>275</sup> For a basic presentation of the “discipline” characterizing the human condition, and especially the professions, according to Foucault, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977).

<sup>276</sup> WINSLADE & MONK, *supra* note 21, at 50.

<sup>277</sup> *Id.* at 118.

each one of the models offers a different account of the conflict? What happens if each party to the conflict requires a different model? This section can offer only a preliminary inquiry into these questions while thickening the theoretical layers described in the previous parts.

Referring to the theoretical “hierarchy” between the models, on the one hand, the sequence described reflects an intellectual development in which each model contains the other in a sense, while providing a new paradigm to deal with mediation. The transformative model claims to transcend the satisfaction story by providing a more advanced perception of the human subject, and by offering the relational worldview and ethics of care as prior to any needs or material necessities.<sup>278</sup> This model might be perceived as a preparation for a problem-solving process that will occur “outside the room,”<sup>279</sup> or simply as a more moral and complex approach as compared to the problem-solving formula.<sup>280</sup> The narrative model is another effort to enrich the mediation discourse by combining relational sensitivity with narrative focus. It claims to go beyond the needs and the emotions per se, and exposes the underlying ideology that informs the entitlement perception of the parties. In a sense it provides the highest theoretical account of the conflict as a socio-political-emotional event, which can be handled through an interpretive scheme. It reflects the shift of mediation between the social sciences and the humanities: the pragmatic model is still embedded within a theoretical scientific-rational paradigm of conflict resolution<sup>281</sup> as related to biases and management, the transformative model challenges this notion of conflict, and the narrative model takes the full step toward an interpretive paradigm of addressing conflicts<sup>282</sup>—a paradigm which assumes the narrative to be the material from which mediation is made.

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<sup>278</sup> BUSH & FOLGER, *supra* note 19, at 253–59.

<sup>279</sup> See Bush & Folger, *supra* note 92, at 273 (“To put it differently, the transformative practitioner realizes that, while the parties work on defining and solving the problem ‘out there,’ the intervener should be trying to enrich the working process—the disputants’ decision making and perspective taking—in the room.”).

<sup>280</sup> For a discussion of the transformative mediation as a reflection of a theoretical development within the mediation discourse see Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545 (2002).

<sup>281</sup> For an illustration of the main principles of the rational paradigm and its relation to biases see ARROW ET AL., *supra* note 12, at 3–24.

<sup>282</sup> For a preliminary understanding of the interpretive paradigm, see LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958). For a discussion of such a turn in the legal field see Feldman, *supra* note 140.

On the other hand, assuming each model to represent a culture requires accepting that the internal values of mediation entail an equal treatment of each model while assigning all equivalent worth as representing legitimate worldviews. "Cultural relativism" should be the guiding rule when dealing with intercultural negotiation,<sup>283</sup> and respecting the internal point of view of each model cannot coexist with the assumption that any one is more advanced theoretically. In some sense, the problem we have here is not atypical of any democratic system that searches for a conception of the good without a consensual basis for judgment, and the tension between the hierarchy and equality will probably keep pervading the play between models.

In terms of "fitting the forum to the fuss,"<sup>284</sup> the pragmatic model seems to fit business oriented conflicts, solution oriented problems, and individuals who experience their identity in the classic liberal sense. The transformative model suits more relational contexts and cases that involve deep interdependence and emotional intensity. Forms of justice, such as truth committees or victim-offender mediation, are most suitable for transitional justice situations, where a whole population must go through a healing process and a rebuilding of the social order. These are situations where a strong element of identity is involved. The narrative model is best applicable to conflicts between intellectuals or in cases where a clear progressive new regime is prevailing in the public sphere, such as divorce cases. These are cases where the transformation of the legal regime in the last few decades has been so tremendous that parties can advance within the existing transformed regime. Significant symbolic transformations in the broad society, from the kind achieved by the feminist movement and encouraged by other economic and political conditions, positively affect the capacity of the parties to educate themselves and to reenact their guiding entitlements. Such an opportunity seems to exist much less in other identity struggles, where imbalances are much stronger and the minority group has not achieved enough judicial and symbolic recognition. Parties in the private mediation session do not seem capable of transforming the prevailing regime through

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<sup>283</sup> See, e.g., EVERETT M. ROGERS & THOMAS M. STEINFATT, *INTERCULTURAL COMMUNICATION* 231 (1999).

<sup>284</sup> See Sander & Goldberg, *supra* note 151. The expression is taken from the famous article by Goldberg and Sander, which provides the basic measures to sort out conflicts that enter an ADR system or arrive before the ADR lawyer.

their narrative reenactments. Such interactions might lead to oppression or reproduction of the prevailing order.

### V. CONCLUSION

Referring to the mediation field as a multicultural sphere in which various intellectual traditions provide distinct formulas for handling conflict situations, enriches the prevailing theoretical discussions in mediation and provides a more systematic account of some of the burning questions of this developing area. Discussions of mediation in criminal cases, transitional justice, public ADR, and international rules of law can be inspired by cultures of mediation which are analyzed in this Paper and can engage diverse accounts of institutional methods to achieve consent in contemporary conflicts. From a theoretical point of view, the exploration of the different formulas suggested by the three intellectual worldviews—liberalism, the critique of liberalism through transformative or communal values, and postmodernism—suggests an example of the potential of critique of liberalism to produce practical constructive models to address emerging conflicts. Relational ideals of ethics of care and postmodern perceptions of social constructionism are common in our everyday practice, but mediation studies aspire to implement them into concrete situations by suggesting the proper procedures to do so.

In spite of the differences between the intellectual traditions and their versions of mediation, this Paper also suggests that mediation has unique discursive elements that exist in each model. Acknowledging the commonalities and differences between the models will hopefully contribute to an enriched practice and a more comprehensive theory of mediation.

