Forms of Mediation and Law: A Jurisprudence of Mediation

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This paper is continuation of a previous work that defined three main forms of mediation, which represent evolving cultural perceptions. The paper exposes the theoretical link between schools of mediation and schools of law by examining their theoretical foundations. By weaving together discussions of rights, the rule of law, legal decision-making and formalism, with elements of dispute resolution as studied today, the paper will demonstrate the centrality of mediation as a form of social order. It also demonstrates the significance of philosophical jurisprudential debates for the development of ADR programs. Ascribing "jurisprudence" to the application of ADR processes contributes to a deeper understanding of them as forms of social order. The paper combines political philosophy with dispute resolution theory and presents the more advanced jurisprudence of mediation as an identity discourse that incorporates a dialectic between rights, needs and process sensitivity.

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A. INTRODUCTION

This paper proceeds from the notion that mediation is a form of social order and that understanding the field of dispute resolution as consisting of diverse intellectual traditions and as conveying different ideologies and worldviews is crucial for the enrichment of the field. The relationship between intellectual streams of thought in
legal scholarship and in mediation is at the core of this paper. The next part of the paper combines political philosophy with dispute resolution theory and presents the more advanced jurisprudence of mediation as the incorporation of communication based on an identity discourse into the common legal discourse that is usually based on rights. Mediation in all its forms is presented in this part as an identity discourse that incorporates a dialectic between rights, needs and process sensitivity.

B. CULTURES OF MEDIATION

According to the theoretical scheme which underlies this paper, and which was elaborated elsewhere, evolving models of mediation reflect the complex location of mediation on the theoretical and professional levels. On the theoretical level, mediation is located between the social sciences and the humanities. On the level of professional identity, the three models that are the focus of this paper evolve from pragmatic lawyering, to therapeutic sensitivity, and finally to an anthropological cultural therapy approach.

Three practical models discussed here represent three "cultures of mediation": the pragmatic model, the “classic” problem-solving model of mediation, primarily known from Roger Fisher and William Ury’s bestseller, *Getting To Yes*; the transformative model, the therapeutic relational model of mediation constructed in the mid-1990s by Robert Baruch Bush and Joseph Folger; and the narrative model, the storytelling, constructivist model of mediation introduced by Winslade and Monk in

2 Id, at 324-325.
2001, and based on a postmodern interpretive worldview. The *pragmatic* model views the process of mediation as collaborative problem-solving, based on objective principles and operated through de-personalization. It is a search for win-win solutions based on interests or needs, guided by four principles: separate the people from the problem; focus on interests, not positions; invent options for mutual gains; insist on objective criteria. It is a cooperative facilitated negotiation that assumes full flow of information and a cooperative motivational business-like approach. The *transformative* model aspires to transform parties from weakness to strength while improving the relational context of the dispute. After such a process of moral growth through the dimensions of empowerment and recognition, the parties will be sufficiently empowered to negotiate the problem by themselves. The transformative process moves through Micro-focusing on parties’ moves, encouraging deliberation and choice-making and fostering perspective-taking. Under the *narrative* model, the shift to an alternative narrative is the core of mediation. Parties criticize the discourse that conditions their choices, and they decide to actively re-read until the narrative is changed and the situation transformed. The sequence begins with “engagement,” which establishes relationships and builds trust between the parties. 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,

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5 JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2000).
6 See FISHER & URY, supra note 3, at 10-14.
7 Id.
8 See ROY J. LEWICKI, ET AL, NEGOTIATION 74-146 (4th ed. 2003), at 113-117.
9 BUSH & FOLGER, supra note 4, at 82-84.
10 Id.
11 BUSH & FOLGER, supra note 4, at 192-194.
12 Id. at 196.
13 WINSLADE & MONK, supra note 5, at 57-62.
14 Id.
15 WINSLADE & MONK, supra note 5, at 62-72.
cooperation, and mutual respect.” The concluding stage of narrative mediation is “constructing the alternative story,” which includes “crafting alternative, more preferred story lines” with the parties. 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.

The argument concerning these three 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 incorporated the 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. Nevertheless, all the models share some common elements and embrace a form of communication based on “identity discourse” as a supplement to rights discourse, which is usually encouraged in legal disputes. The shift from one model to the other is presented as a shift between two theoretical paradigms in the field of conflict resolution. It is a gradual move away from the rational-scientific paradigm inspired by the social sciences, toward a more interpretive paradigm inspired by the humanities. Under the interpretive paradigm of mediation, narratives are the materials from which mediation and legal decision-making are made, and cultural analysis is an essential tool of mediation and legal work.

16 Id. at 72.
17 Id. at 83.
18 WINSLADE & MONK, supra note 5, at 52-53.
A basic argument of this paper is that mediation as "a form of social order," in Lon Fuller's term,\textsuperscript{20} embodies jurisprudential assumptions that vary and evolve throughout its development. In contrast to Fuller's perception that mediation has a unique form which embodies one logic, the idea in this paper is that there are multiple logics and at least three forms of mediation, and that mediation can incorporate public values and cultural sensitivity. Each style of mediation has its own theoretical and ideological background, and adopting any model carries a set of assumptions regarding the nature of human beings, the causes of the conflict, the ethical commitments of the mediator, the mediation process, the worldview underlying the process, and other factors.\textsuperscript{21} The three models share underlying principles that recur in diverse intellectual frameworks. The shared principles, expressed differently in each model, are process emphasis, constructive positive intervention, the search for an underlying hidden layer and emotion-acknowledgement.\textsuperscript{22}

C. LEGAL CULTURES AND MEDIATION

1. Legal Schools of Thought

Understanding mediation as a multicultural field reflects the richness of the emerging discipline, which has undergone several intellectual phases over only a few decades of existence. The legal field has been struggling with questions of identity and process for centuries, and equivalent intellectual streams of thought can be identified within it. In this section, the models of mediation will be presented as equivalent to schools of law. The overall claim will be that American legal thought


\textsuperscript{21} For an elaboration on each one of these parameters, see Alberstein, \textit{supra} note 1., at

\textsuperscript{22} For a detailed analysis of these principles and the way they unfold in each model, see Alberstein, \textit{supra} note 1., at 360-373.
can be portrayed, at least according to some accounts,\textsuperscript{23} as developing along the intellectual lines of formalism, a critique of formalism through process emphasis, reliance on relational values, and postmodernism. The shift from a scientific-rational paradigm to an interpretive one will be described as underlying intellectual developments in the legal field just as it underlies the developments in the mediation field.\textsuperscript{24} The relevant schools of thought are Legal Formalism, The Legal Process School, Relational Feminism, CLS and Law and Society, and Interpretivism.

2. Legal Formalism and the Rational Scientific Paradigm

The idea that law is composed of a body of formal legal rules and that mastering its internal language is the main business of the lawyer and the legal intellectual, is very prevalent in law, and has many versions and implications.\textsuperscript{25} It is customary to attribute a strong commitment to such a view to Christopher Columbus Langdell, dean of the Harvard Law School at the turn of the 19th century.\textsuperscript{26} Langdell promoted the ideas of detachment and theoretical contemplation of legal concepts as the main goals of the legal scholar, and is viewed as having contributed to the professionalization of legal education by positing it as an academic and scientific field, not as a practice or a craft. His notion of legal decision-making proposed that rules be applied in non-problematic ways, and his manner of thinking was considered


\textsuperscript{24} For a discussion of the relationship between evolving worldviews and the development of mediation, see Alberstein, supra note 1, at ..

\textsuperscript{25} For a critical evaluation of legal formalism, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (fin de siecle) (1997). For a presentation of both Oliver Wendell Holmes Jr., Duncan Kennedy and Llewellyn as sharing some aspect of legal formalism, see MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION (Ashgate, 2002) 41-99.

\textsuperscript{26} See, for example, Dennis Patterson, 

European and abstract. The formalist perspective, as promoted by Langdell and others, has always been under attack, and part of the American culture has called for a challenge to "European formalism" and promoted a "revolt against formalism." As a powerful image of law, however, this concept continues to inspire legal education and, to this day, has a strong presence in law, through notions such as freedom of contract, *ultra vires*, *stare decisis*, and other canonical concepts. Everyday legal practice continues to accept the idea of law as an objective science, and to assume the basic characteristics of rationality and agency that exist in an individualized world. As a descriptive phenomenon, such a classic liberal perception of law suits the rational-scientific paradigm of conflict resolution. Both of the approaches assume autonomous subjects underlying conflicts; both celebrate the freedom of contract; both perceive reality as external to the mediators or legal actors; and both focus on understanding the conflict or the legal case and less on resolving it. The classic formalist perception of law focuses on describing the legal phenomenon; cases of discretion and indeterminacy are considered exceptions. The rational scientific model of conflict resolution focuses on describing the situation of conflict, analyzing the biases which characterize it, and is more concerned with accurate accounts of negotiation behaviors than on overcoming the impasses they create.

Most forms of alternative dispute resolution respond to a notion of law based on legal formalism: The idea of negotiation as performed "in the shadow of the law;" and of mediation as performed in light of "objective criteria" that include

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28 MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1947).
29 See the description of the scientific paradigm, see Alberstein, supra note 1., at 325.
31 Arrow et al., BARRIERS TO DISPUTE RESOLUTION (1999) 3-24.
accurate legal predictions; the sharp distinction between "efficiency and protection" provided by law and "empowerment and recognition" provided by mediation – are all based on a rigid perception of the law, which is highly controversial among most legal scholars today. When Lon Fullers justifies the supremacy of adjudication over mediation in a society that adheres to the Rule of Law and says that avoiding grey situations, and preserving black and white distinctions, are promoted by functioning legal systems, we can say that, after internalizing the critique of formalism, grey might be considered the more prevalent color in most legal decision-making.

Nevertheless, almost no model of mediation existing today responds to the complexity of law after the critique of formalism.

3. The Legal Process School of Law and the Pragmatic Model

The attack on legal formalism has produced several critical trends in legal thought, the most famous of which is considered to have been suggested by Legal Realism. The post-World War II era represents a constitutive moment in American legal thought, when the Realist critique was domesticated and framed in a more

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33 Fisher & Ury, supra note 3 at …
34 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).
36 As an exception, see Gary Friedman and Jack Himmelstein (2004). “The understanding-based Approach to Mediation” The Center for Mediation in Law, at http://www.mediationinlaw.org/about.html. Their perception of law, as it emerges from their video simulations as well, is of an unstable mechanism, which seems objective, but is actually given to the subjective preferences of the judges, indeterminate legal rule application, and a detached notion of fairness. See also “scenes of a mediation,” by Gary Friedman.
37 AMERICAN LEGAL REALISM (William W. Fisher, Morton J. Horwitz & Thomas A. Reed, eds., 1993). Some legal scholars claim that the image of formalism was mainly portrayed by its opponents, but in reality, no legal system could adhere to the rigid assumptions that were considered the tenets of formalism. See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593; Brian Z. Tamanaha, The Realism of the "Formalist" Age, http://ssrn.com/abstract=985083; (last visited Aug. 13, 2007); Frederick Schauer, Formalism 97 YALE L.J. 509, 510 (1989): “Indeed, the pejorative connotations of the word "formalism," in concert with the lack of agreement on the word's descriptive content, make it tempting to conclude that "formalist" is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.”
constructive formula of decision making in law.\textsuperscript{38} The Legal Process School of Law provided “the last great attempt at a grand synthesis of law in all its institutional manifestations.”\textsuperscript{39} Its main emphasis was on process as a way to overcome the indeterminacy of rules exposed by Legal Realists.\textsuperscript{40} The emphasis on legal decision making as a "reasoned elaboration,"\textsuperscript{41} along with references to "settled law"\textsuperscript{42} and to neutral principles,"\textsuperscript{43} inspired basic ideas of the pragmatic model of mediation, and its principles of problem solving.\textsuperscript{44} Roger Fisher himself acknowledged the influence of the Legal Process School on his work, and claimed to adopt their attitude.\textsuperscript{45} Analyzing the pragmatic model indeed reveals a few common elements. First, the model begins with a process emphasis, with suggestions to intervene in reality and not to remain an external spectator.\textsuperscript{46} Second, his overall approach to the model, which is presented in the format of a "how-to" guide, is optimistic and constructive in the 1950s’ spirit of the Legal Process School. Even the idea of expanding the pie\textsuperscript{47} and overcoming the gap between descriptive and prescriptive expressions already appears in the Legal Process pragmatism of the 1950s.\textsuperscript{48} Third, the model’s idea of "objective criteria" as capable of overcoming the distributive struggle recalls the legal process belief in

\textsuperscript{39} Peller, \textit{id.} at 568.
\textsuperscript{40} See Horwitz, \textit{The Transformation of American Law}, supra note 23, at 247-268.
\textsuperscript{43} Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).
\textsuperscript{44} For an elaboration of this claim, see Alberstein, supra note 25 at 251-320.
\textsuperscript{45} Id.
\textsuperscript{46} See Fisher and Ury, supra note 5, \textit{Error! Bookmark not defined.}, at 8-10; see also Roger Fisher, \textit{Improving Compliance with International Law} (2\textsuperscript{nd} draft, 1969) (unpublished, with permission of the author, on file in Harvard Law School Special Collection) 1-4: "I find that when I discuss the process by which law affects governments, a typical reaction of a student or friend is, “I don’t think it will work.” Then I reply that I am trying to be practical and that therefore it is irrelevant whether the particular idea “will work,” our misunderstanding becomes almost complete.”
\textsuperscript{47} See Hart and Sacks, at 103: “These materials proceed upon the conviction that this is a fallacy—'the fallacy of the static pie'. The fact—the entirely objective fact—seems to be that the pie—that is, the total of actually and potentially available satisfactions of human wants—is not static but dynamic. How to make the pie larger, not how to divide the existing pie, is the crux of the long-range and primarily significant problem.”
\textsuperscript{48} Alberstein, Pragmatism and Law, supra note 25., at 136-143.
neutral process and in the possibility of reflecting a consensus, based on "the maturing of collective thought"\textsuperscript{49} in a harmonious society.\textsuperscript{50} To summarize, the pragmatic model of mediation that developed in the early 1980s corresponds to a school of law that prevailed in the 1950s at Harvard. The belief in neutral principles and in institutional settlement of public values, so common in the 1950s, suffered from a sharp decline in legal thought during the 1970s and was no longer acceptable in public law.\textsuperscript{51} It was resurrected in a private version in negotiation studies during the 1980s, producing a problem-solving model of mediation that is pragmatic and efficient.

4. Relational Feminism and the Transformative Model

The feminist movement has a very rich history in legal thought. The various schools of feminism convey contradicting messages regarding the significance of "the woman question" and ways to deal with it in law.\textsuperscript{52} One of the unique streams of thought in feminism is the relational one, as offered in the 1980s by Carol Gilligan. This second wave feminism celebrates the difference of women and calls for an acknowledgement of their different moral voices.\textsuperscript{53} The "ethics of care" exercised by women is considered a new moral paradigm through which legal questions may be addressed, and judges are called upon to listen to "the voice" of women and of other

\textsuperscript{50} For an elaborate discussion of the intellectual roots of the writing of Roger Fisher and for an analysis of the relation between both and the American philosophy of pragmatism and the Legal Process Scholarship, see Alberstein, PRAGMATISM AND LAW, supra note 25., at 251-320.
\textsuperscript{52} See FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett and Rosanne Kennedy, eds., Westview Press, 1991). For an evaluation of the relationship among the various streams of feminisms and the models of mediation, see ALBERSTEIN, A JURISPRUDENCE OF MEDIATION, supra note 19, ch. 5.
\textsuperscript{53} CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
weak groups in society. Although some scholars have identified the pragmatic model as supporting a feminist mode of negotiation, the more explicit influence of feminism in mediation occurred during the 1990s. The transformative model is inspired by the infiltration of Gilligan's ideas into law. In describing the theoretical foundation of their model, Bush and Folger rely explicitly on Gilligan, and take the relational worldview as their guiding perspective. They posit the relational worldview as overcoming the dichotomy between individualism and collectivism, by providing a nuanced notion of self and other. When the goal of the mediation is to transform the interaction, and to empower selves in relationships, a cultural feminist approach to conflict becomes more familiar. The transformative model takes the process emphasis of the pragmatic mode further, and instead of focusing on efficient solutions and overcoming biases, it re-emphasizes the process and the "ethics of care" values in mediation. Another alternative school in legal thought that takes ethics of care concepts as inspirational and applicable in legal practice is the Therapeutic Jurisprudence school of law.

5. CLS, Law and Society and the Narrative Model

The 1970s and 1980s were characterized by a split in legal academia, when diverse schools of thought promoted different perceptions of the Rule of Law and of

54 For an overview of cultural feminism in law, see Bartlett.
55 See Menkel Meadow, Toward Another View of Negotiation: The Structure of Problem Solving....
56 BUSH AND FOLGER, supra note 4 at
57 BUSH AND FOLGER, supra note 4 at..
legal decision-making. From the left side of the political map came legal intellectuals inspired by neo-Marxist thought, who promoted a vision of the human being as socially constructed. The Critical Legal Studies movement posited legal education as leading to false consciousness and, in general, aimed to expose the ideological bases of the neat legal structure. This call to reveal the ideology behind formal rules is equivalent to the narrative model’s exposure of the sense of entitlement underlying conflict stories. In the CLS picture, nevertheless, there is no private optimistic way to reconstruct social reality, and the view of the possibility for change is more agnostic.

In the Law and Society school of law, we find a more balanced "postmodern" version of human behavior in conflicts, and additional scientific models for addressing disputes supplement the Marxist emphasis. In fact, the 1980s model of "the transformation of disputes," which presented them as socially constructed and as developing in stages (naming, blaming, claiming), challenged the ADR perspective of "the litigation explosion" and attempted to give a more balanced picture of disputes in American society. Under this perception of law and society, progress in law is achieved through internalizing rights consciousness and giving people more access to justice. The narrative model adopts the social constructionist view of conflicts, without referring to the specific stages of transformation as suggested by the law and

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63 William L. Felstiner, Richard L. Abel and Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming 15 Law & Society Rev. (1980-1981) 631. This research was conducted as part of the Civil Litigation Research Project – CLRP. See also David Trubek, “Studying Courts in Context” 15 Law & Soc’y (1980) 485: “The Civil Litigation Research Project (CLRP) is one effort to increase knowledge about the role of civil courts in the United States and the nature and function of other institutions which deal with the sorts of disputes typically found in our civil courts, as well as factors that influence decision making in litigation. CLRP was set up under a contract between the University of Wisconsin and the United States Department of Justice.”
64 See Marc Galanter, “The Day after the Litigation Explosion,” 46 Maryland L. Rev. (1986) 3; Marc Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about our Allegedly Contentious and Litigious Society,” 31 UCLA L. Rev. (1983) 4.
society school. According to this model, progress in conflict resolution is achieved through co-authoring an alternative narrative and by overcoming an exaggerated perception of entitlements that parties to conflict hold.\textsuperscript{65} Their examples, which mainly come from family disputes, depict mediation as helping parties to internalize the more advanced legal norms.

6. Interpretivism in Law and the Interpretive Paradigm of Conflict Resolution

At the center of the political map of legal academia in the 1970s, an interpretive jurisprudence was shared by "public law" intellectuals,\textsuperscript{66} law and society researchers and critical scholars. The shift to a more humanist view of law was part of a broad movement toward interpretive schemes in other academic disciplines and a reflection of the loss of faith in science and other classic liberal ideas, following their failure to prevent World War II.\textsuperscript{67} The most prominent jurisprudential theory representing this shift to an interpretive perspective of law is that of Ronald Dworkin, who described how "law is like literature."\textsuperscript{68} Dworkin described law in his writing as a chain novel and rejected the search for correspondence between objective reality and decision making in law. His Hercules was a very interpretive judge who weighed conflicting values while aspiring to present law in its integrity.\textsuperscript{69} To this image, Robert Cover added the violent aspects of law as a text that bridges a normative expression with a given reality.\textsuperscript{70} The interpretive paradigm of mediation and dispute

\textsuperscript{65} Winslade & Monk, supra note 5., at ..
\textsuperscript{67} Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse? 41 Stan. L. Rev. 871 (1989).
\textsuperscript{68} Ronald Dworkin, "How Law is like Literature" in: RONALD DWORdIN, A MATTER OF PRINCIPLE, supra note Error! Bookmark not defined..
\textsuperscript{69} Ronald Dworkin, Law’s Empire (Fontana Press, 1986).
\textsuperscript{70} Robert Cover, Nomos and Narrative: Narrative, Violence and the Word (1986). In: Martha Minow, Michael Ryan and Austin Sarat, eds., Narrative, Violence and the Law: Essays of Robert Cover, 95 (University of Michigan Press: Ann Arbor, 1992). See, for example, id., at 101 "Law may be viewed as
resolution shares Dworkin’s view and aims to develop it in conflict resolution. In contrast to the narrative model, it acknowledges the dangerous aspects of mediation aspiration and supplements them with legal emphases on rights and law making, exploring the paradoxical aspects of mediation work. Mediation as a social constructionist notion does not help to internalize existing norms. It also has a mode of norm creation and, in fact, carries a double call: The first commitment represents the construction of dispute settlement as a realization and rationalization of chaotic worlds of desires, needs and emotions. The second commitment is to the legal aspiration to resist the settlement drive per se, considering each dispute as an opportunity to set new law through a pragmatic violent intervention in a world based on eternal and structural conflicts, which can never be fully resolved or rationalized. This drive means a constant reality search for actual settlements, settlements between non-contemporaneous scripts and narratives, within the existing singular materialization of reality and fiction, public and private.

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

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### Chart: Cultures of Law – Cultures of mediation

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<thead>
<tr>
<th><strong>Legal Formalism</strong></th>
<th><strong>The Rational Scientific Paradigm</strong></th>
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<tbody>
<tr>
<td>- A descriptive approach to legal decision making</td>
<td>- A descriptive approach to conflict decision making</td>
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<tr>
<td>- Individualism and restraint</td>
<td>- Individualism and restraint</td>
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**The Legal Process School of Law**
- A problem solving approach to legal work
- A constructive perception and an effort to expand the pie
- A belief in "neutral principles" as overcoming public controversies

**The Pragmatic Model**
- A problem solving approach to negotiation
- A constructive perception and an effort to expand the pie
- A belief in "objective criteria" as overcoming private controversies

**Relational Feminism Jurisprudence**
- An emphasis on the relational framework which underlies legal disputes

**The Transformative Model**
- An emphasis on the relational framework which underlies disputes

**Critical Legal Studies and The Law and Society Movement**
- A social constructionist view of law
- Legal conflicts as evolving through naming, blaming, claming
- Progress as achieved through more access to law and norm internalization

**The Narrative Model**
- A social constructionist view of conflict
- Conflicts as evolving around exaggerated perception of entitlement
- Progress as achieved through writing an alternative narrative

**Legal Interpretivism**
- Law as chain novel

**The Interpretive Paradigm**
- Mediation as a complex practice which entails a paradox

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**D. Jurisprudence of Mediation: Toward an identity discourse**

The previous section explored various connections between legal schools of thought and models of mediation and conflict resolution, but what is the underlying
framework that explains the significance of process and communication for existing public conflicts? I suggest perceiving contemporary mediation as acknowledging and trying to overcome a dichotomy between rights discourse and identity discourse.\footnote{72} This dichotomy posits two familiar genres of discourse in moral thought – that of rights and that of identity – against one another. In a nutshell, I will describe these two discourses as capturing the difference between a classical liberal mode of thinking and a multicultural global ideology.

A discourse of rights assumes an alienated encounter between individuals who carry different interests and beliefs, guided by legal rules, which determine the contours of their activities. It is an interaction based on safe contact, where claims and challenges regarding the other’s possessions and acts are determined by a third party, represented by the law. The parties do not address one another directly, and in that sense, they remain subject to a monologic style of communication. The law functions here, in Isaiah Berlin’s term, as the protector of people’s “negative liberty”: defending their borders, preventing intervention.\footnote{73} This discourse is concerned with restraining the formal limits of human interaction.

At the core of identity discourse, on the other hand, stands a Levinassic face-to-face encounter with the other. It is a dialogic engagement and a much more dangerous experience, since at the heart of this meeting is the idea that we know how we enter the dialogue, but never know who will conclude it. The borders of identity itself defuse within these meetings, and hence the danger and fear that the parties experience can be sustained. The interactions can, in other words, turn into a Hegelian struggle, since identity-based conversations inherently contain questioning one’s own identity and thus risking losing it. Challenging an identity of any sort – gender-based,
professional, ethnic, religious or national – by a counter-identity, often also involves master-slave or victim-victimizer relations, and on many occasions, a reciprocal projection of these relations. The discursive game, which characterizes the orientation of the participants in this engagement, is one of active listening, of the search for a voice and for a direct touch that cannot be achieved through a monitoring scheme. There is no law that tells the two parties how to interact, and moving halfway toward the other does not guarantee the merging of horizons, since a similar gesture should be made by the other side as well, and with no expectation of rewards. It is a game where the different identity of the speaker is assumed, but the entire interaction aims to challenge the prejudice and stereotypes, which are related to the different identities at stake. In other words, handling an identity conversation and participating in a dialogical engagement, which this discourse calls for, represents working on the difference while assuming that new frames of reason and law will emerge through this effort.

It is easy to see from what has already been presented that the two styles of discourse live in dialectic with one another: in order to enter an identity discourse, the rights and boundaries of the parties should be acknowledged, and once a dialogic progress has been established and developed, a new articulation of it in rights may emerge. The history of the West, of the feminist movement, of post-colonial ideas, of queers studies, can be represented as following these lines and oscillating between the different poles of identity and rights: The West’s construction of its own identity regarding the east and the colonies; the different waves of feminism trying to promote rights while entering into dialogic and identity conversation (like relational feminism) with their considered alienated enemy; the post-colonial struggle against an identity definition imposed by the Western hegemony; and the post-structural ideas of
logocentrism of Western philosophy were all based on exposure to cultural critique inspired by Other identities. All these phenomena represent a challenge to a rights discourse, conducted from a certain identity, which provides a genuine other perspective. This Other perspective calls for acknowledgment and legitimacy of its own logic, which reflects the significance of speaking from a place and of having a unique cultural location. The contemporary ideal of multiculturalism, globalization and pluralism can be presented in this context as shifting the center to the peripheries, or perhaps, in better words, as providing an ideology of no center, of multifarious genres of discourse, which emerge from the diverse identity positions of the parties. Mediation in this context is no longer a peripheral process that supplements and complements a discourse of rights. Instead, it becomes a primary mode of law making, which acknowledges withdrawal to rights discourse as a temporary means in an ongoing process of dialogue. The idea of mediation in all forms as conducting an identity discourse brings together practical models of conflict resolution and ideas of political philosophy, and is part of constructing a contemporary jurisprudence of mediation as a primary process of law making. Mediation, even in its pragmatic form, borrows from non-western ideas,\textsuperscript{74} and promotes a high context interaction, which goes beyond adversarial arguments. In its transformative mode, it borrows from relational feminism as suggested above, and challenges individualistic perceptions that assume separation and self-maximization. In its narrative version, mediation assumes postmodern epistemology. All forms of mediation avoid direct confrontation based on rights and provide a space for dialogue and communication.

\textsuperscript{74} For an account of the ADR movement as influenced by anthropological studies on aboriginal modes of dispute resolution, see Carrie Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR", 16 \textit{Ohio St. J. on Disp. Resol.} (2000) 1.
VII CONCLUSION

Mediation as a form of social order can contain legal sensitivities and incorporate diverse jurisprudential cultures. In this paper, I have illustrated the links between evolving schools of law and evolving schools of mediation. Although most legal practice assumes formalism as a working hypothesis, and most mediation practice assumes the pragmatic model as the working hypothesis of conflict resolution, which operates in the shadow of a formalistic law, this paper tried to provide a more complex picture of mediation as a multicultural and intellectual phenomenon. The paper delved into critical modes of law and mediation and explored the correspondence between the intellectual streams that influenced them. It showed that both legal thinking and mediation studies had a relational phase and a social constructionist model, and that mediation provided evolving formulations of relations between law and settlement. Finally, an intercultural, identity-based perception of mediation as a form of law, based on ideas of political philosophy, was presented here as a dialectic between rights discourse and identity discourse.