

**THE POWER IN MEDIATION AND MEDIATING POWER: TOWARDS A  
CRITICAL THEORY OF ALTERNATIVE DISPUTE RESOLUTION**

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This dissertation investigates the role of power and theory in alternative dispute resolution (ADR), with a focus on mediation. As a scholarly field, mediation presents a heterogenous picture in which notions of expertise, neutral instruments, efficiency arguments and game theory are meshed with psychologically- and cognitively-informed methods that aim to address conflict resolution in a more holistic manner. Although it is a deeply public and political activity, much of mediation theory and practice is framed as normatively neutral, a technical “tool” among many for addressing disputes. More abstract and theoretical debates have largely been confined to critiques of mediation, with the exception of scholarship that uses deliberative democracy. Mediation, especially in its Law School iteration, is a prime example of the lasting influence of legal realism, philosophical pragmatism, and liberal political thought more generally. This has left little disciplinary space for developing a critical and self-reflexive theory of mediation, the politics of ADR, the standard of justice at work in mediation, and the question of power and authority more generally.

The dissertation scrutinizes transformative mediation, an outlier to the relative political neutrality, by probing its foundational literature and the translation of its relational worldview in the context of mediator training. It concludes that despite its criticism of liberal norms around individualism and (forced) consensus, TM relies heavily on individual choices and general process belief.

Mediation theory rarely addresses the question of power, understood as structural and productive, not only as coercive and institutional. This absence reflects liberal political norms around rationality, proceduralism and control. Turning to critiques of liberal political thought and deliberative democracy drawn from political theory, I argue that mediation is an instantiation of liberalism's inability to address productive and structural power, and it risks obscuring forms of domination and control by integrating disparate dynamics into one privatized tool. Finally, I point to a different political imaginary that would require theory to be worldly but not pragmatist and that would take the "underlying needs" of a conflict seriously without imbuing them with the pathos of the private.

## BIOGRAPHICAL SKETCH

Theresa Krueggeler is a Senior Associate with the Institute for Negotiation and Engagement at the University of Virginia. She holds a LL.M. in European and International Law from Universidade Catolica de Lisboa (Portugal) and a BA in European Studies from Maastricht University (Netherlands). Her research focuses on questions of alternative dispute resolution theory, specifically the question of power, justice and accountability in different forms of ADR, including mediation. She is trained as a mediator and has experience in community mediation and public dispute facilitation. Theresa has an international professional and educational background and is fluent in Portuguese, French and Spanish, next to English and German.

For Salwa-

may you always know love, may you always know freedom, may you always fight for  
justice.

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## LIST OF ABBREVIATIONS

ADR: Alternative Dispute Resolution

DD: Deliberative Democracy

PON: Project on Negotiation

TM: Transformative Mediation

## Introduction

### *1 Mediating Power and Disputing Resolution*

Disagreement and conflict are, to use a controversial term, universal social experiences. They are an endemic part of social experience; it is no coincidence that the classics of legal, social, and political thought imagine their management or analyze their operations while utopian thinking imagines their end. Living in society means living in conflict. There does not appear to be a manner to live with others, both those familiar to us and those to whom we are connected only by virtue of existing at the same time, in which interests and experiences do not regularly diverge to the point of conflict. The common experience of rupture connects and binds as much as it divides. Many of these conflicts are based on real or perceived harms, ranging from incidental to systematic injustices, and oftentimes both. They are simultaneously normal and abnormal in social order, carrying a potential for escalation into violence, or what Enlightenment philosophers imagined as a return to what they called the “state of nature.”

In the modern state, under the state’s monopoly of violence, on-going conflicts -beyond simple disagreements- between citizens and institutions are expected to be solved by formal—and increasingly, less formal—processes. Individuals or entities who have a conflict are encouraged to bring themselves before the Law, and to employ lawyers and legal categories to channel them into “cases” and “disputes”: these condensed units promise to be more manageable and solvable than all of social, racial, or class conflict at once. They also allow the state to have a

much greater degree of control over the outcomes, as well as re-entrenching the necessity of the state and its (legal) institutions.<sup>1</sup>

The resolution of disputes is one of the Law's primary functions. But despite the social and political centrality of law, settling and resolving disputes is by no means an exclusively legal undertaking. Rather, it has increasingly become the arena of a host of actors, methods and interests merged under the banner of "alternative dispute resolution" (ADR). In contrast to "traditional" law, ADR is far less frequently analyzed for its wider social and political implications, its underlying theory of justice and notion of conflict, or its position within the modern state. It is, with some important exceptions, a pragmatist endeavor. Its normative agendas are often hard to distinguish from its methodology; indeed, in many styles of mediation, the method, the process, becomes the idea.

This dissertation explores primarily questions regarding the role of *power* in alternative dispute resolution theory. What are the politics of ADR? And what are the politics of ADR scholarship? While I am interested in developing answers, and do indeed suggest avenues for doing so towards the end, I find it imperative and illustrative to first investigate the modes of self-theorizing that the field has engaged in. Given that some of the most rigorous theorizations of ADR have come from its critics, I also engage with those and extend them toward considering the relationship of mediation to structures of power. I understand the criticisms of ADR to be primarily that a) on a procedural and legal level, mediation lacks the public oversight and process

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<sup>1</sup> To foreshadow an argument I discuss in Chapter 4, dispute resolution institutions create what might amount to an illusion of safety: violence is not part of the means by which we resolve our disagreements. Except, of course, structural inequality, the centering of power in the hands of state and private elites, might be considered its own form of violence.

rights of formal adjudication<sup>2</sup> and b) on an ideological level, it is used as a way to “keep the peace” and obfuscate power relations where ongoing conflict and contestation would be both more reflective of reality and helpful for transforming these realities where they are unfair or unjust.<sup>3</sup> The latter sets of critiques mirror analysis of liberal political thought and deliberative democracy theory and practice. I analyze the conceptual and discursive overlap between ADR and these bodies of thought and find there to be significant commonalities.

There is a deep paradox between the claim of mediation to be a technique that aims to get at the underlying, unrevealed, and internal motives at play behind the visible dispute, and its disciplinary shortcomings at self-examination, particularly examining its own internal, underlying commitments, concerns, and motivations. Put succinctly, much of the scholarly work has involved "theories" *for* mediation and theories about *how to* mediate, rather than theories *of* mediation and the theories *in* mediation.

I argue that the ways in which the ADR field at large has answered—or evaded—critics can be read in parallel to the ways in which many ideological debates in the same time period seem to go: developing piece-meal, focused on processes and procedures, with a set of policy reforms as acknowledgments, internal—and at times protracted—debates in the scholarship, but rarely a head-on debate between opposing normative values and their proponents. Mediation uses the image of the toolbox to neutralize debates: a different approach need not disturb the whole. It can simply be made into a technology, to be added into the neutral toolbox and employed in accordance with the needs of a given situation.<sup>4</sup>

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<sup>2</sup> For instance: Harrington, C. B. (1985). *Shadow Justice. The Ideology and Institutionalization of Alternatives to Court*. Westport: Greenwood. This literature is also discussed at length in section 1.3.2. below.

<sup>3</sup> As a paradigmatic example see Nader, Laura (1990) *Harmony ideology: justice and control in a Zapotec mountain village*. Stanford University Press

<sup>4</sup> See Section 2.8 for a discussion of the “mediator’s toolbox”.

This discursive focus on process, neutrality, and rationality in forms, on piecemeal solutions to concrete problems based on observable real-world examples rather than grand theories based on political ideologies, also tracks both liberal political thought and, as I discuss in Chapter 2, with the intellectual heritage of philosophical pragmatism—chiefly its notion of inquiry and evolution—at the base of legal realism and the legal process school.<sup>5</sup>

That sense of disciplinary neutrality is why I turn to the practice and theory of Transformative Mediation (TM). Its chief authors, Baruch Bush and Joe Folger, saw mediation, especially court-annexed mediation, as a process living dramatically beneath its potential.<sup>6</sup> They depart from an openly ideological basis, namely a relational worldview that holds that human beings want to and should live in balanced relations with others, to argue that mediation can help to achieve a relational world. Their argument for transformative mediation is a critique of the liberal state and the pacification tendencies in problem-solving mediation. As we will see, however, I find in my case study and fieldwork in Chapter 3 that the two hallmarks of liberalism, specifically the focus on individual choices and the general belief in the power of process, limit TM's ability to develop a different political and moral imaginary than other forms of mediation.

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<sup>5</sup> Alberstein, M. (2002). *Pragmatism and law: From philosophy to dispute resolution*. Aldershot: Ashgate Dartmouth.

<sup>6</sup> Bush, R. B. & Folger, J. P. (1994) *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. Jossey-Bass.

## ***2 Focus and scope: Spectrums and Specters***

Alternative Dispute Resolution is a hybrid and diverse field, both in its multi-faceted practice, as well as in its interdisciplinary research background.<sup>7</sup> As a result, researching ADR as a whole is challenging and risks ignoring the breadth of the field and the width of its internal differences. This is even more true in delineating the boundary between “legal” and “alternative” forms of negotiation and settlement. After all, plea bargaining is arguably a practice that makes use of negotiation rather than adjudication, and yet it is intimately linked to the adjudicatory process.

These scope questions, therefore, need to be seen both in their disciplinary and practical dimensions. This section briefly surveys the range of practices, substantive practice areas, and styles of mediation. It critically examines the popular image of the “spectrum of dispute resolution,” arguing that it obscures the actual social practices of responding to conflict, by paying scant attention to more radical forms of conflict, such as violence.

The range of ADR includes a number of methods and their combinations, as well as a number of different “styles” in which these methods are carried out, which represent distinct styles of mediation. Practices of alternative dispute resolution traditionally fall into three broad categories: arbitration, negotiation and mediation. Arbitration is the resolution of a dispute by a neutral third party, who comes to a binding conclusion in ways that are similar to a judge; this third party, however, is privately selected according to their substantive or process expertise.

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<sup>7</sup> Though it has been an interdisciplinary field since the beginning. See Lieberman, J. K., & Henry, J. F. (1986). Lessons from the Alternative Dispute Resolution Movement. *The University of Chicago Law Review*, 53(2), 424 bemoan the lack of a unified theory.

Because of its similarity to the court process, it is sometimes referred to as “private justice.”<sup>8</sup>

Arbitration is popular in international and national commercial contexts, where parties enjoy the increased efficiency, predictability and expertise of the process as compared to litigation before (foreign) courts. Its mandatory use in many consumer contracts has come under criticism for concerns that it places consumers at a structural disadvantage.<sup>9</sup>

Negotiation is the least formal of the processes. It can simply mean the exchanges between parties in a dispute, without the involvement of any third party. Measuring it is difficult due to this informality. However, most people engage in some form of negotiation regularly. It is studied, in the ADR context, as a practice that benefits from a specific set of techniques. The most popular among them is principled negotiation, also known as integrative bargaining, as popularized by the Harvard Project on Negotiation.<sup>10</sup> Negotiations are under the control of the parties and might be taken up in addition to or instead of other, more formal ways of settling a dispute. Typically, negotiations involve only the parties to a dispute, and they take place in an ad-hoc setting.

Mediation, the focus point of my study, shares some characteristics of negotiation and arbitration. A third party, who is neutral with regards to the dispute, is selected based on either process or substantive expertise. They work with the parties in order to find a mutually acceptable resolution. They cannot issue a binding settlement. This can mean that they offer a form of assisted negotiation, where a mediator supports the process of parties working out a resolution or, in the case of evaluative mediation, a more active role for the mediator, who

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<sup>8</sup> Doré, L. K. (2006). Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution. *Chi.-Kent L. Rev.*, 81, 463; Ware, S. (2013). Is Adjudication a Public Good? ‘Overcrowded Courts’ and the Private-Sector Alternative of Arbitration. *Cardozo Journal of Conflict Resolution*, 14.

<sup>9</sup> Sternlight, J. R., & Jensen, E. J. (2004). Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse? *Law and Contemporary Problems*, 67(1/2), 75.

<sup>10</sup> I discuss the PON approach at length in Chapter 1.

provides the parties with insights into the respective strengths and weakness of their prospective legal cases and evaluates their claims. Evaluative mediation, in that sense, is a form of non-binding arbitration. The focus for my work is on facilitative mediation, that is, forms of mediation where a mediator facilitates agreement through the use of various process techniques, such as reframing issues, encouraging exchange between the parties, and the strategic sharing of information, among others.<sup>11</sup>

The term “facilitation” refers to a range of processes to help negotiate a consensus, without taking the form of a mediation to a dispute. This often means multi-party scenarios, or that the facilitation takes place before the emergence of a concrete dispute, for instance in public planning and hearing processes, that are increasingly designed with attention to the insights of dispute resolution techniques.<sup>12</sup>

Beyond these fairly standard processes, there is a host of combinations of processes as well other institutional innovations that are shaped by the overall logic of ADR. Examples include settlement conferences, where judges encourage parties to come to some form of agreement prior to pursuing further litigation;<sup>13</sup> regulatory negotiation (“reg-neg”), also referred to as regulatory rulemaking or shared decision-making, uses negotiation and facilitation techniques to intervene between public actors and stakeholders;<sup>14</sup> the uses of ADR in the

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<sup>11</sup> For a discussion of evaluative versus facilitative mediation styles, see Riskin, L. L. (2003). Retiring and replacing the grid of mediator orientations. *Alternatives to the High Cost of Litigation*, 21(4), 69–76.

<sup>12</sup> Innes, J. E. (2004). Consensus Building: Clarifications for the Critics. *Planning Theory*, 3(1), 5–20.

<sup>13</sup> For an early critique, see Menkel-Meadow, C. (1985). For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference. *Ucla L. Rev.*, 33, 485.

<sup>14</sup> Coglianesi, C. (1997). Assessing consensus: The promise and performance of negotiated rulemaking. *Duke Law Journal*, 1255–1349. Freeman, J., & Langbein, L. I. (2000). Regulatory negotiation and the legitimacy benefit. *NYU Env'tl. LJ*, 9, 60.

employment and labor arena—which is a subfield onto itself;<sup>15</sup> emerging fields such as restorative justice and other forms of conflict resolution that make use of ADR techniques and vocabulary.<sup>16</sup>

One popular and historically influential way to visualize this dizzying array of different practices while affirming their connectedness has been the image of a “continuum” or spectrum, such as the one reproduced below (Figure 1). The openness of the gamut, with the suggestion of flexibility and connection between the “options,” presents ADR as a consumer-friendly product. The range of choices to be made according to individual needs is neither a positivistic description,<sup>17</sup> nor, usually, a normative prescription. The image has allowed a diversity of practices, as well as their combination and the potential for scaling up their processes (i.e. from less to more formal according to how a dispute is going), to be situated under the same umbrella term, all with the ensuing institutional associations.<sup>18</sup>

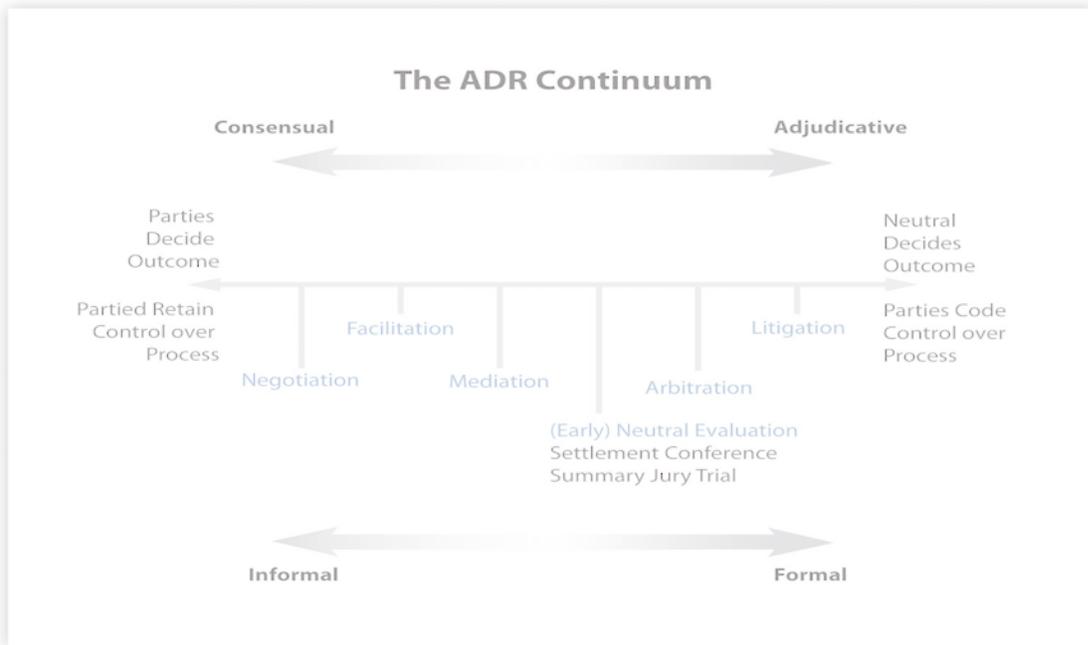
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<sup>15</sup> For a general discussion of ADR, focusing on the field of labor relations and organizational behavior, see Ury, W., Brett, J. M., & Goldberg, S. B. (1993). *Getting disputes resolved: Designing systems to cut the costs of conflict*. Cambridge, Mass: Program on Negotiation at Harvard Law School,

<sup>16</sup> Zehr, H. (2002) *The Little Book of Restorative Justice*. Intercourse, PA: Good Books. For an overview of ideas of “justice” in restorative justice, see Paul, G. D., & Borton, I. M. (2014). Exploring Communities of Facilitators: Orientations toward Restorative Justice. *Conflict Resolution Quarterly*, 31(2), 189–218.

<sup>17</sup> The term “alternative” has been subject to debate at times as well. Arguably, litigation isn’t a form of alternative, but indeed the standard dispute resolution. For a discussion of using “appropriate” rather than “alternative” dispute resolution, see Wolfe, J. S. (2000). *Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate) Dispute Resolution*. *Tulsa LJ*, 36, 785. Despite these occasional debates, the standard term seems to remain “alternative”.

<sup>18</sup> The supply of such processes also constitutes a supply of ever new professional specializations with the ensuing questions regarding expertise, training, gatekeeping: who calls the shots, who defines in- and outsiders?



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One concern with the continuum is developmental. All processes become more and more formal, costly, binding and court-like if their use, especially commercial use, increases.<sup>20</sup> This is to some extent already taking place in arbitration, and there are some fears that it is occurring increasingly in mediation, chiefly via the use of evaluative mediation; in other words, there is a concern that lawyers “co-opt” processes and make them more legalistic.<sup>21</sup>

My interest in the spectrum is, however, in terms of its function as an ideological instrument. The spectrum is, as mentioned above, an image that is comfortable to contemporary

<sup>19</sup> Image taken from Lau & Johnson (2011) *The Legal and Ethical Environment of Businesses*. Flatworld Knowledge

<sup>20</sup> See also J. Resnik (2015). The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR. *Nevada Law Journal*, 15, 1631. for an assessment of the increasing ways Courts regulate ADR in non-transparent ways.

<sup>21</sup> Dezalay, Y., & Garth, B. (1996). Fussing about the forum: Categories and definitions as stakes in a professional competition. *Law & Social Inquiry*, 21(2), 285 researched this for the case of international commercial arbitration and warned that it might happen for mediation twenty years ago.

sensitivities and increased interest in exploring questions, such as the resolution of conflicts, from a plurality of viewpoints. It brings with it the growth of inter- and intra-disciplinarity as well as a hybridity of approaches and bodies of thought. While this flexibility allows for creativity and can potentially accommodate the complexity of conflicts, it also serves to make ADR a diffuse and somewhat non-committal field of practice and thought. The terms conflict and dispute are significant here. I discuss the disciplinary separation into “conflict” (more general and social science-based understanding) and “dispute” resolution (more specific and legalistic) in chapter 2 when discussing the internal literature, but for present purposes, note that an expansive understanding of conflicts would mean that their resolution is also diverse and would include, for instance, political participation.

There is also a plethora of processes, beyond the traditional negotiation-mediation-arbitration-adjudication axis:<sup>22</sup> in the dyadic parties setting alone, there are negotiations, pre-settlement conferences, judicial conciliations, mediation in its manifold shapes, restorative justice techniques, etc.<sup>23</sup> Conflicts and disputes with larger groups of parties or those that involve different levels of government agency also increasingly employ alternative dispute resolution techniques: from regulatory negotiation (“reg-neg”), bargaining, to more facilitative processes: collaborative planning, community engagement, peace building, etc. And then there is the question of the extent to which the use of mediation techniques in other arenas makes those activities at least connected to ADR; for example, our current political moment sees an increased

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<sup>22</sup> Menkel-Meadow has published extensively about the plurality of processes and their place in and next to the legal system. For a recent example, see Menkel-Meadow (2015). *Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes*. In: *The Handbook of Conflict Resolution*. Chapter 50.

<sup>23</sup> To make matters even more complex, the implementation of such methods is often far from straight forward. One of the selling points for ADR, its “remedial creativity” beyond that which a judge might be able and willing to order, has the potential of providing more pragmatic and potentially more humane. However, such agreements are notoriously hard to enforce, and judicial oversight not guaranteed.

call for communicating across ideological, political, geographic, racial, gender, and other divides. The capacity to sit with differences, to use active/reflective listening, are skills that many ADR professionals have and see as useful tools across a variety of situations. Furthermore, *Getting to Yes*, in part due to its design as a self-help book, was a bestseller: integrative bargaining and the logic of mutual gains has diffused into all sorts of social arenas.

The diversity of approaches continues within subfields and mediation is no exception: from different types of mediation styles (chiefly categorized into facilitative, transformative, and narrative mediation), to the spheres of their use—from employment, commercial, family, divorce, custody mediation, to mediators present at small claims court, mediation concerning e.g. special education rights, at the Equal Employment Opportunity Office, in neighborhoods and communities, in international settings (as well as mediators with niche practices such as a mediator I met at a recent professional conference who specializes in conflicts involving animals).

A telling problem with the spectrum imaginary is where we choose to draw its outer boundaries: though perhaps necessary, and certainly useful for the discipline, it is incorrect that the resolution of disputes and conflicts ends at adjudication. Disputes that do not get solved along the spectrum can either dissolve without any form of intervention, over time, or they can escalate into violence. By violence here I mean again the full range, from structural to direct. The state's monopoly on violence, crucial to the development of the modern state, leads to a distinction along three types of violence: prohibited, allowed/sanctioned, and mandated

violence.<sup>24</sup> While this structure serves to limit overt and direct experiences of violence to exceptional situations for most citizens, violence and indeed war remain spectral undercurrents to all of social life, as that which is to be avoided, to be pacified away, but which, invariably, exist in the very structure of our society. Its exclusion on the spectrum is a refusal to acknowledge this risk and to see the way that violence and power effect other institutions of dispute resolution.<sup>25</sup>

Given all these points, how can one say anything about ADR (and can one even use that term?) that is true or significant across the board? What is the common theme? The differences are significant, as are the consequences for their study. Any analysis, but most especially the kind I offer in this dissertation, as one that is concerned with the political and normative stakes of dispute resolution, requires attention to a host of factors, from the relative power of the parties to the forum and the form of the resolution. One fairly easy answer to this is a discursive or nominal criterion: if something is treated or labeled as alternative dispute resolution, it should be included in the scope. While this is an important practice benchmark, it does not necessarily achieve sufficient specificity in terms of disciplinary dimensions. For purposes of this dissertation, therefore, I am following the current European scope and largely exclude arbitration.

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<sup>24</sup> In “*Politics as Vocation*”, Weber claims that the monopoly on violence is the strongest defining characteristic of the modern state. See Weber, M., Owen, D. S., & Strong, T. B. (2004). *The vocation lectures*. Hackett Publishing. German sociologist Jan-Phillip Reemtsma argues that this monopoly led not to the disappearance of other forms of violence, but to their stratification into these three categories in the public imaginary. Reemtsma, J. P. (2012). *Trust and Violence: An Essay on a Modern Relationship*. Princeton University Press.

<sup>25</sup> For a counterexample, see Drew Peterson, Getting Together: The Continuum of Dispute Resolution, *AK BarRag* 10 (1999), as quoted in Wolfe, J. S. (2000) at 786.

I am most interested in the ways in which decisions are reached when they are not imposed by a third party, that is, when they are (seemingly) voluntary. This still encompasses a great deal of variation, and readers will undoubtedly find counterexamples to the scenarios I describe, for instance along the gamut of party sophistication (i.e. lower socioeconomic status parties in mediation for a custody agreement vs corporate mediation of, say, a construction contract dispute). However, as my focus is less on party level interactions and more on the structural features that determine how power is performed and how it influences the processes and institutions of ADR, I am less concerned with these differences in specific cases. Nonetheless, the debate about what constitutes “resolving” versus managing versus handling a dispute or conflict continues, and should indeed continue, decades after the founding vision of the multi-door-courthouse.<sup>26</sup> It is in this debate that the tension between the pacifying and the social reform tendencies within ADR become apparent.

### ***3 Methodology: Power and descriptions***

Though I turn to Max Weber later and employ his levels of authority to parse the different spheres of power in TM, and indeed for wider mediation, I propose here a more contemporary reading of power for the purposes of framing the term. I suggest exploring the intervention in the subfield of International Relations (IR), by two political scientists, namely Michael Barnett and Raymond Duvall.<sup>27</sup>

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<sup>26</sup> Sander, Frank (1979) *Varieties of Dispute Processing*, in Leo Levin & Russell R. Wheeler (Eds.), *The Pound Conference: Perspectives On Justice In The Future* 65, 67 A.

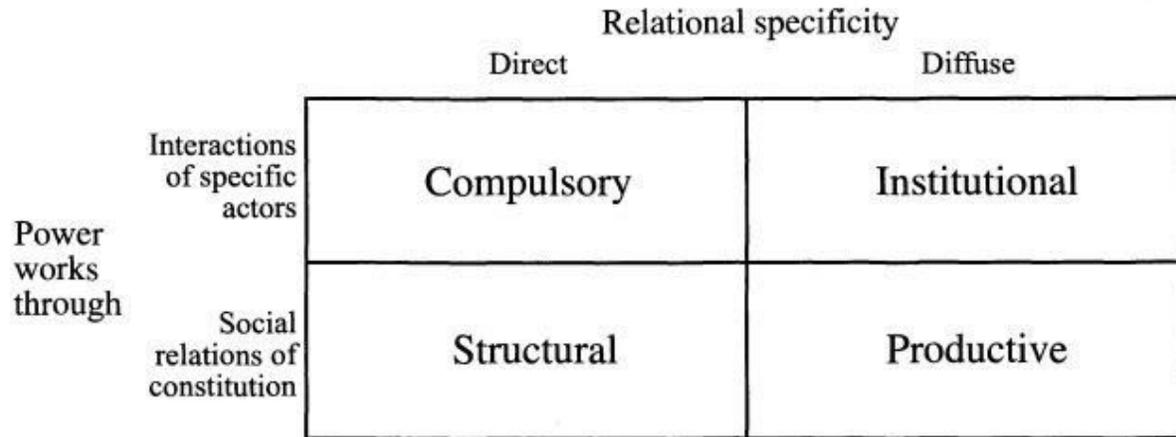
<sup>27</sup> Barnett, M., & Duvall, R. (2005). Power in International Politics. *International Organization*, 59(1), 39-75.

While situated in a different field, their approach yields great insight for dispute resolution because the disciplinary structure in IR, i.e. the on-going distinction between “realists” and “idealists” or everybody else is present in other social science subfields as well, including ADR. Barnett and Duvall hold that the realists have managed to discursively occupy the term “power” to mean simply one’s ability to force someone else to do something, at the expense of developing more sophisticated notions of power in other, for instance, liberal or constructivist theories of IR. In an attempt to widen the concept of power, Barnett and Duval posit four types of power, namely 1) compulsory, 2) institutional, 3) structural, and 4) productive power. These forms of power relate to each other according to a taxonomy of the social relations that actors have (interactional or constitutive) and how specific that relation is (direct or diffuse). Note that analytically speaking, these need not be mutually exclusive. By interactional relations, social scientists mean that actors are previously constituted and power is a more or less static attribute that they have in society (theirs is “power over”). There is a focus on *actions* in interactional relations. Constitutive social relations on the other hand antecede the social position of actors, and their power is created socially: in other words, the way things are is explained by the structures in which they exist, and their “power to” do certain things. Constitutive relations focus on *identities*. Direct social relations connote an “immediate causal and generally tangible connection between subject and object or 2 subjects.”<sup>28</sup> Finally, indirect/diffuse social relations “can be detached and/or mediated, operate at physical, temporal or social distance.” Examples would be the indirect, discursive, genealogical power between systems of knowledge and discursive practices, including informal ones.<sup>29</sup>

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<sup>28</sup> *Id.*, at 47.

<sup>29</sup> *Id.*, at 48



**FIGURE 1.** *Taxonomy of power*

The *type* of the relation is then the measure of how power works i.e. whether on the level of action or the level of identity, whereas the specific link between the subjects will determine how the *effects* of power are produced, i.e. directly or in more diffuse settings. *Compulsory* power would be most closely aligned with a Weberian understanding of power as the “probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability exists.”<sup>30</sup> For our purposes, this would certainly include the power of the law or, as it were, its shadow.<sup>31</sup>

Meanwhile, *institutional* power is what links socially distant actors by virtue of their interactions in a common, formal or informal, institution. These can be spatially and temporally removed, and function in discreet ways, as in, for instance, the power of agenda setting or the relations of (inter-)dependence created by sharing in networks such as exchange rings.

Institutional power in ADR might refer to the shared professional, legal and academic networks or the systems of consensus and scholarly exchange.

<sup>30</sup> Weber, Max (1947) *The Theory of Social and Economic Organization*, as quoted in Barnett and Duval (2005), at 49.

<sup>31</sup> Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *The Yale Law Journal*, 88(5), 950.

However, if actors are directly linked in relations that operate on the level of identity, the power one has over the other is *structural*. Critical studies have been concerned with this type of power (along with an interest in productive power): structural power circumscribes the “determination of social capacities and interests” (at 53), with the classic examples being relations of domination such as master-slave and capital-labor relations. Structural power in ADR might include the often-mentioned power differentials between participants with differing access to social capital.

*Productive* power, finally, is the relation between constituted groups that are linked by diffuse social links. It affects the “boundaries of all social identity, and the capacity and inclination for action for the socially advantaged and disadvantaged alike, as well as the myriad social subjects that are not constituted in binary hierarchical relationships”.<sup>32</sup> Barnett and Duval mention as examples the discursive production of subjects such as the civilized, the Westerner, the Other, etc.<sup>33</sup>The contestation of these categories, and the accepted meaning of certain concepts generally (consider “settlement,” “peace,” “empowerment”) would also be an instance of productive power.

For the purposes of this dissertation, then, it is important to keep these dynamics in mind when discussing power and the notions of power with which the different schools operate, not so much to classify them within each category, but in order to illuminate the extraordinary dynamicity of power of which the taxonomy reminds us. Power requires relation, but that

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<sup>32</sup> Post-structuralist approaches, such as the ones employed by the critics of ADR summarized at the end of Chapter 1, as well as the political scientists mentioned in Chapter 4 are, needless to say, deeply shaped by Michel Foucault’s notion of power. For Foucault, power does not necessarily have to have a core, rather, he sees two main forms of power, one, a centralized “juridical state power” and two, dispersed and paradigmatic forms such as the “disciplinary power of modern science”. For a discussion of Foucauldian approaches to the social power in law, see de Sousa Santos, B. (2002). On modes of production of social power and law. In *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, at 405.

<sup>33</sup> Barnett & Duval (2005), at 56.

relation need be restricted neither to the link between disputing parties nor to observable “imbalances in power.”

My approach in this dissertation is to pursue mediation theory primarily for the sake of mediation theory. This is to say, the following chapters do not use theory as a tool for a directly “better” practice. Rather, my aim is to interrogate mediation’s self-understandings, whether as a serious political project for some approaches or as a more covert political project for others.

I carried out a field study that is more in the spirit rather than the letter of ethnography. My ethnographic site offers data points for critical questions about power struggles, rather than as inductive verification for my initial concerns. As such, the case study is less about finding imperfectly practiced theory, and more about observing the ways in which power is negotiated, highlighted, ignored, and conceptualized in the discursive sites of dispute resolution and training. I thus extend the site of the inquiry to include the way in which the relational “worldview” is invoked in the training of mediators, and to a different extent, how “theory”—and critical theory’s absence—shapes the “field.” By this I mean that rather than focusing on mediation sessions, for reasons I discuss in Chapter 3, I highlight the training transformative mediators receive in the Ithaca Dispute Resolution Center, one of the few fully transformative mediation centers in the US. I make use of my experience as a participant-observer in several training units (detailed below) and trainings with Joseph Folger, which I offer alongside a re-examination of this training’s manual and the foundational text for the TM movement. *The Promise of Mediation*, both a manual and a manifesto, continues to inform the practice and aspirational self-

understanding of transformative practitioners, and it also functions as the negative heuristic against which other “styles” can conceptualize themselves.

### **A few words on Ethnography**

These questions on the boundary of methodologies and theory are also at play when thinking about what it means to observe, to participate, and to describe an activity- and how one should do it.

In his essay on “Ethnography after Postmodernism,” British anthropologist Jonathan Spencer<sup>34</sup> reflects on the balance between accessibility, representation, reflexivity and self-awareness following the application of general post-structural theory (chiefly Foucauldian and Derridean in origin) and more specifically, the influential edited volume *Writing Culture*<sup>35</sup> in the 1980s. Spencer traces the origin of this internal debate on how to think about ethnographic work to the article by Geertz, which discusses the influential concept of “thick descriptions” and in it a footnote bemoans the lack of anthropology’s “self-consciousness.”<sup>36</sup> What followed in anthropology is a long and protracted journey into theorizing its methodology.

What does it mean, following Geertz, to describe a scene in an ethnographic site? Aware of the influence both of the observer on the events, and the external influences on the observer, or one’s biases and perspectival limits, the idea of neutral “descriptions” seemed both impossible and insufficient. Given that we can neither trust nor learn much from a “thin description,” the ethnographer’s work is to interpret and thicken their description. The criterion, then, is not

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<sup>34</sup> Spencer, J. (2014) “Ethnography after Postmodernism” In Atkinson, P., Coffey, A., & Delamont, S. (Eds.) *Handbook of ethnography*. Los Angeles: SAGE.

<sup>35</sup> Clifford & Marcus (Eds.) (1986) *Writing Culture: The Politics and Poetics of Ethnography*. University of California Press

<sup>36</sup> Geertz, C. (1973) at 19, n.3 as quoted in Spencer (2014).

precision, but rather the interpretative clarity of the ethnographic text (not to be confused with textual clarity, which was arguably becoming less common). Geertz thus started a stylistic departure that introduced literary devices, chiefly the metaphor, in the ethnographic text. This, in turn, laid the groundwork for applying literary theory to ethnographic work. Ethnographers became skeptical of “facts” and “raw data”, focusing instead on the interpretative work done to a particular situation. Spencer holds that

Geertz’s argument in ‘Thick description’ has important implications for the relationship between theory and practice in anthropology. (...) There are facts, found in variable quantities in different ethnographies, and there are theories which attempt to make general statements based on those facts. Facts which don’t fit can disprove a theory; odd facts can be used for new theoretical synthesis (p. 446)

Of course, one’s theoretical biases, just like any other bias, limit what is perceived of as a fact--but this is where self-awareness risks becoming paralyzing. For anthropology in this vein, then, the best that a researcher can do is highlight specificity, complexity, and local boundedness and present an interpretation that does not attempt to be extractable from that which they have observed. As Geertz puts it: “theoretical formulations hover so low over the interpretations they govern that they don’t make much sense or hold much interest apart from them”.<sup>37</sup>

Historically, this thinking both helps explain and causes the current distastes for grand theories—*a la* Marxism—that I also found to be present during my investigation into mediation theory. Even more discrete universalist worldviews, like the ones earlier works of anthropology had proposed, such as Mauss’s famous exchange/gift concept, are suspected of being essentialist.<sup>38</sup> Instead, contemporary theoretical thinking<sup>39</sup> operates in a more careful mode of

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<sup>37</sup> Ibid, at 446.

<sup>38</sup> Mauss, Marcel (2002) [1925]. *The Gift: The form and reason of exchange in archaic societies*. London: Routledge.

<sup>39</sup> At least of the qualitative research method, the growth of quantitative methodologies is subject for another book.

inquiry: the relation of the particular and the general, contexts, fragmented, highly specific, plural and piece-meal theories seem to hold more promise and match our contemporary sensitivities better.

In the refusal to engage with seemingly universal political theories, they neglect, however, even the *particularity* of the political conditions. Few fields are more tragically aware than ethnographic anthropology that all interpretations, while insisting on their particularity, are still shaped by wider normative commitments. At one extreme then, we see texts that are so self-aware that they range on self-obsessed and become so internal as to become confessional for the author. On the other hand, this “turn” was a necessary reaction to methodological positivism, and on the sociopolitical level, to elitism, orientalism, and colonial mindsets that cemented the perspective of the powerful.

Beyond these political debates, it is important for my methodology, sources, and sites to ask: what can we learn from a method that is not generalizable, does not follow “scientific standards,” cannot be repeated, and is necessarily skewed by the person doing the observing? “Self-aware” ethnography can be so interspersed with reflexivity that it hampers not only attempts to theorize but any “flow” or confidence in one’s research. But the advantages of such an internalized critical approach, when used with some methodological creativity, are still important. Take the awareness of one’s as well as the field’s biases. For instance: historically, consensus has been taken as “defining feature of primitive society, at least since Durkheim’s mechanical solidarity, while difference is read as the sign of the modern.”<sup>40</sup> A mere description

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<sup>40</sup> Spencer (2014), at 449.

of “facts on the ground” wouldn’t acknowledge the way anthropology can be used, both domestically and abroad to exoticize, essentialize, orientalize, etc. a people.

Laura Nader’s study of harmony law is an example of a successful legal ethnography: a thick description of a specific, historic, post-colonial site, focused on power relations and operations, undertaken to speak to the specific first and not primarily concerned with taking its findings to other sites.<sup>41</sup>

#### ***4 Overview of the structure***

This dissertation proceeds as follows: Chapter 1 introduces and describes three “schools” (PON, deliberative mediation, and transformative mediation) on their own terms. It closes with a summary of the most influential outside critiques of ADR, i.e. the harmony ideology critique, the “access to justice” literature and post-constructivist critiques of informal justice.

Chapter 2 then analyzes the modes of theorizing within mediation scholarship and the wider intellectual discourses they are a part of, specifically legal and philosophical pragmatism. I assert that the resulting methodology is one marked by normative neutrality, i.e. where practices are often dealt with as technologies and tools. The chapter concludes with the assertion that these theorizations have left important lacunae.

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<sup>41</sup> Nader, L. (1990) *Harmony ideology: justice and control in a Zapotec mountain village*. Stanford University Press. Another example would be Moore, S. F. (1987). Dividing The Pot Of Gold: Social and Symbolic Elements in an Instrumental Negotiation. *Social Analysis: the International Journal of Social and Cultural Practice*, (22), 118–131, discussing Gluckman’s “evolution” from blunt functionalism to more specific interest in the ways that conflict structures society not as a crisis but ultimately, a stabilizing factor and uses a CDRC as a site of investigation.

Chapter 3 investigates the case study of Transformative Mediation, as a way of investigating what happens to the theory of power in accounts of mediation that are not normatively neutral, as those described in the previous chapter are. I describe the underlying theoretical and normative commitments of TM, with special regards to the relational worldview that Folger and Bush espouse, a stated rejection of liberal values of individualism. I then describe ethnographic elements of the study and my findings and analyze them according to two major motives the observant brought to the fore, namely a theme of individual choice and a theme of process belief. I argue that these themes show an enduring influence of liberal political values, in contrast to the stated goals of relationality as a project of self-transcendence.

Finally, chapter 4 hones in on political theories of liberalism and deliberative democracy as they relate to ADR. I trace the parallels, including the deliberative notion of procedural justice in Rawls and -as a deliberative application of the liberal theory, if you will- in mediation scholarship. I review critiques of deliberative democracy that are relevant for mediation and suggest that a more radical critique of liberal processes of depoliticization and pacification is possible. To this end, I examine the political theorist Wendy Brown's account of liberalism's depoliticization<sup>42</sup> and a reading from International Relation theory (Baron et al) that frames "pacification" as a form of structural and productive power that works to make violence and harm unobservable in the world.<sup>43</sup> I apply these critiques to the parallel critiques of ADR, i.e. pacification via harmony ideology and depoliticization through the absence of political power from the analysis, highlighting the potentials and limits of these critiques. I finish the chapter by

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<sup>42</sup> Brown, W. (2009). *Regulating Aversion*. Princeton University Press

<sup>43</sup> Baron, I. Z., Havercroft, J., Kamola, I., & Komen, J. (2019). Liberal Pacification and the Phenomenology of Violence. *International Studies Quarterly*, 1–14. Hereafter referred to as Baron et al.

an attempt at answering these critiques via an ethos of *worldliness* (taking up Max Weber again)  
and a call to *disintegrate* the study of mediation.

## 1. ADR's Own Terms

### *1.1 Approaches to Dispute Resolution*

In what follows, I will introduce three major schools of thought in the field of alternative dispute resolution. The field has seen a sizable amount of internal discussion, which I briefly summarize here before describing the different schools below. Section 1.2. then discusses the areas of commonality and difference between the schools. In 1.3. I summarize the main strands of critique leveled against mediation scholarship as a whole, as opposed to internal discussions.

There are two important axes to keep in mind when describing the field. The first is stylistic and/or methodological variation between different techniques of dispute resolution practice.<sup>44</sup> The second is theoretical and/or ideological variation between different schools of thought. As the focus of this dissertation is the practice and theory of mediation, as opposed to other ADR techniques, I do not discuss the more formal processes on the continuum (for example, arbitration). Instead, my focus is on the methodological variation within mediation practice and the theoretical variation within mediation scholarship.

Goldberg, Green and Sander present a powerful historical framing of the early ADR movement in 1985. The increased interest in alternative forms of disputing, they indicate, had been pegged

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<sup>44</sup> For a detailed summary of the internal “styles” debate in mediation, see Riskin, L. L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harv. Negot. L. Rev.*; Riskin, L. L. (2003). Decision-making in mediation: The new old grid and the new new grid system. *Notre Dame Law Review*. Riskin, L. L. (2005). Replacing the mediator orientation grids, again: Proposing a “new new grid system.” *Alternatives to the High Cost of Litigation*, 23(8), 127–132.

to the “considerable strife and conflict” that marked the 1960s. It also represented an expression of frustration with courts, despite the growth in legal rights such as the 1964 Civil Rights Act and the overall growth of the rights discourse, as well as frustration with the cost of litigation and “a growing mood of anti-professionalism.”<sup>45</sup> There is then, from the get-go, a host of apparently conflicting dynamics at play in ADR: in the wish to find or make better mechanisms for dispute resolution, “better” can mean any of cheaper, more just, less institutionalized, less formal, more humane, more idealistic, or less idealistic, among others. The marketplace of dispute resolution—a growth market with no signs of ever becoming outdated—produced a number of co-existing approaches that express these conflicting dynamics, largely without erupting into open conflict with one another.

To describe different subfields exclusively according to their self-descriptions and terms of art presents a number of difficulties. For instance, both the PON (Project on Negotiation) and Carrie Menkel-Meadow lay claim to the term “problem-solving.” Rather, I distinguish between them a) by institutional affiliation and b) by focus area. Thus, PON’s focus area is negotiation as a basic technique to be applied in any number of circumstances, from commercial and business disputes to international relations and peace talks, whereas Menkel-Meadow focuses more on mediation as a legal institution that needs scholarly and critical examination. Meanwhile, Transformative Mediation describes itself as part of a wider social reform agenda based on a relational worldview. It is distinct in both self-description and its scholarly reception by the ADR field at large.

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<sup>45</sup> Goldberg, Stephen B., Eric D. Green, Sander, Frank A. (1985). *Dispute resolution*. Boston: Little, Brown, at 3.

### 1.1.1 Project on Negotiation:

Although it is closely associated with Harvard Law School, the Project on Negotiation (PON) is an inter-university consortium that comprises faculty members, students and staff from different departments at Harvard, MIT, Simmons and Tufts University. It concerns itself with the practice, teaching and study of negotiation and dispute resolution. Its founding harks back to the popular success of the “problem-solving” approach to negotiation epitomized in *Getting to Yes*<sup>46</sup> by William Ury and Roger Fisher, revised by Bruce Patton. These three scholars founded the Harvard Negotiation Project (HNP) in 1979; following the 1981 publication of *Getting to Yes*, they expanded it into the broader Project On Negotiation. The PON has been an influential actor in both the development and popularization of ideas surrounding integrative bargaining and the application of negotiation techniques to a wide array of settings, from personal conflicts to commercial disputes and international crises.

This capacious framing of negotiation and what it can achieve continues to characterize PON in the present day. The program offers many forms of training, from negotiation seminars for law students to various skills and executive trainings, and to an array of teaching materials for negotiation trainers. Its faculty members publish popular books on negotiation in all sorts of international and national contexts,<sup>47</sup> often for business uses, but also, for instance, with regards to environmental and public dispute resolution aspect as in the work of Larry Susskind, who is

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<sup>46</sup> There are several editions of *Getting to Yes*, the first in 1981. In what follows, my citations are based on the electronic version of the third edition: Patton, Bruce; Ury, William and Fisher, Roger. (2011) *Getting to Yes: negotiating agreement without giving in*. New York: Penguin Books.

<sup>47</sup> Raiffa, Howard. 1982. *The art and science of negotiation*. Cambridge, Mass: Belknap Press of Harvard University Press, as an example.

located at MIT. On the scholarly level, the *Negotiation Journal* (published by the PON) is an influential reference point and tackles a similarly broad range of questions.<sup>48</sup>

While the PON approach is widely recognized for establishing a distinct style of negotiation, its contribution to other ADR techniques, specifically mediation, are somewhat more indirect. Following Harvard Law School professor (and, later, member of PON) Frank Sander’s address at the 1979 Pound Conference,<sup>49</sup> the idea of the “multi door court house,” or process plurality and the systematic use of ADR techniques to partially replace adjudication, gained greater and lasting attention.<sup>50</sup> The foundational focus on negotiation --rather than the role of the mediator, the dynamics of impartiality, or mediation in a formal sense—might make it seem like contrasting the PON with mediation schools is an inapt comparison at first. However, much of the PON methodological thinking about mediation is closely linked to negotiation research and vice versa. In other words, mediation is often framed as “assisted negotiation,” in which a third party helps parties use the techniques of principled bargaining.<sup>51</sup> In *Getting to Yes*, for example, mediators are only discussed in the context of a failure to shift the negotiation from positional to principled by the parties themselves, and even then, the role of the mediator is presented as the actor who

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<sup>48</sup> Menkel-Meadow, C. (2009). Chronicling the Complexification of Negotiation Theory and Practice. *Negotiation Journal*, 25(4), 415–429.

<sup>49</sup> Frank Sander (1976), Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 70 *F.R.D.* 79, 111.

<sup>50</sup> The concept of the multi door court house continued to generate academic debate, for instance: Stempel, J. W. (1996). Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood. *Ohio St. J. on Disp. Resol.*, 11, 297. Hedeem, T. (2011). Remodeling the Multi-Door Courthouse to Fit the Forum to the Folks: How Screening and Preparation Will Enhance ADR. *Marq. L. Rev.*; Hernandez-Crespo, M. (2012). From Noise to Music: The Potential of the Multi-Door Courthouse Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America. *J. Disp. Resol.*;

<sup>51</sup> For example, Sherman, E. F. (1997). Good Faith Participation in Mediation: Aspirational, Not Mandatory. *Disp. Resol. Mag.*, 4, 14.

can introduce the “one-text technique.”<sup>52</sup> While the range of ADR mechanisms is discussed in the context of Disputes Systems Design (see below), the details of mediation are generally not subject to as much detail as negotiation.

#### *1.1.1.1 Chief concepts: Integrative bargaining, position/interests, win-win*

Although it is marketed as a practical guide for a broad public and shelved with self-help books, *Getting to Yes* summarizes the PON school of thought fairly well. The authors introduce the concept of “principled negotiation” as an alternative to so-called “positional bargaining,” “soft” negotiation that champions relationships, and agreement at all costs. Principled negotiation rests on four central principles:

1. “People”: Separate<sup>53</sup> people from the problem
2. “Interests”: Focus on underlying interests, not stated positions
3. “Options” Invent options for mutual gain - also referred to as “expanding the pie”
4. “Criteria”: Insist on using objective criteria

The purpose behind these principles is to reach a “wise outcome,” which Fisher and Ury describe as “one that meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable and takes community interests into account.” Their description of a wise outcome thus invokes external standards of fairness and public interests.

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<sup>52</sup> See Chapter 7 of *Getting to Yes*, titled “What if they won’t play?” Patton, Bruce; Ury, William and Fisher, Roger. (2011) at 168.

<sup>53</sup> The introduction to the third edition mentions that the authors had considered changing the wording in the first principle from “separating” to “disentangling”, as they were concerned with being misunderstood as dismissive of the human aspect of mediation. Patton, Bruce; Ury, William and Fisher, Roger. (2011), at 17.

Of the four principles, the explorations of interests and options for mutual gains are perhaps the most enduring contributions to how negotiation is understood both popularly and scholarly. Their key move is “enlarging the pie,” which is also called integrative bargaining; as opposed to distributive negotiating, the goal is not to strategize so as to amass gains for oneself, but instead to make additional gains by “integrating” the other party’s perspective. The basic idea is that the negotiating parties can break out of a fixed zero-sum mindset and, rather than bargain about distributing portions, they can cooperate to create more value. This realization is powerful and has far-reaching implications. Creating additional value in this way rests on game theoretical models about non-zero-sum games, famously studied in the context of conflict resolution by Harvard’s Thomas Schelling in the 1950s.<sup>54</sup> Another popularized formula for this phenomenon is “win-win” models,<sup>55</sup> which promise the overcoming of adversarial structures with a clear winner and loser, without any need to sacrifice one’s own benefits.

Another important PON principle is the recommendation to know and leverage one’s BATNA (“Best alternative to negotiated agreement”). Here, the authors encourage parties to distribute the risk of failure in order to reach a favorable negotiated agreement. The party would have to keep in mind, and if possible, work to improve their situation in a scenario where negotiations break down. For instance, mediation following the principled negotiation model might lead to agreement *X*, but it is important to the parties that they explore what possible outcomes, for example, adjudication might yield. If one’s BATNA is likely to be better than the

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<sup>54</sup> Schelling, T. C. (1958). The Strategy of Conflict Prospectus for a Reorientation of Game Theory. *The Journal of Conflict Resolution*, 2(3), 203–264.

<sup>55</sup> Lytle, A. L., Brett, J. M., & Shapiro, D. L. (1999). The strategic use of interests, rights, and power to resolve disputes. *Negotiation Journal*, 15(1), 31-51.

mediated agreement, the rational thing would be to leave negotiations, or at least, to mention one's BATNA in the negotiation as an incentive for the other party to concede on crucial points.

At a disciplinary level, the assertion that "behind opposed positions lie shared and compatible interests, as well as conflicting ones" allows for a strategic approach to integrating stated, rational positions with internal, less obvious, often emotional needs. In other words, by teaching negotiation as an exercise in working with the underlying issues, *Getting to Yes* takes seriously forms of psychological and emotional analysis, as well as the use of empathy and other "soft skills" that might otherwise not be discussed in the context of business bargaining or taught in law school courses. Their other two and more rationally focused principles ("people" and "criteria") are crucial in the balancing act of presenting practical advice that is both analytically sound and intuitive.

Ury, Brett, and Goldberg's 1993 book, *Getting Disputes Resolved*, represents the equivalent of *Getting to Yes* for the field of dispute resolution more broadly. It introduces the nascent field of institutional and organizational dispute systems design (DSD). For purposes of this discussion, I will focus on their framework of "interests, rights, and power" for dispute resolution, which is transferable beyond the employment and labor area on which the book mostly draws. The authors state that disputes begin when a claim (based on, for example, a perceived harm or need) is rejected. There are then three principal ways to resolve the ensuing dispute, namely by focusing on either "reconciling the interests of the parties, determining who is right, and determining who is more powerful.". The advantages of the "interests" approach, or the use

dispute resolution mechanisms, are framed in terms of lower disputing costs: "transaction costs, satisfaction with the outcomes, effect on the relationships and the recurrence of disputes."<sup>56</sup>

Interests, Rights, and Power form interrelated and concentric circles of influence, with interests at the center, influenced by the legal rights that structure a dispute, and rights in turn influenced by the power dynamics that, for instance, determine the possibility of enforcement of a given court order.<sup>57</sup> The authors propose an order of preference, identifying which process is "better" following the same criteria: reconciling interests is less "costly" than determining who is right (i.e. adjudication), which in turn is less costly than fighting things out based on power struggles. While the authors grant that there are circumstances where reconciliation procedures are not the most advantageous, the argument is that a properly designed, effective system for dealing with disputes first and primarily in an interests framework actually limits the number of instances in which rights or power approaches are more effective.<sup>58</sup> In other words, Ury, Brett and Goldberg do advocate the use of integrative dispute resolution mechanisms but wish to situate these as part of a flexible "menu of processes"<sup>59</sup> that spans, for example, prevention procedures, negotiation, and mediation by peers or experts; "rights" processes such as advisory arbitration, mini-trials, summary jury trials, med-arb and final offer arbitration; and "power" processes such as cooling-off periods, voting, limited strikes, among others. This very framing, too, is an act of balancing the use of seemingly "soft" methods in disputes with a nod to the "hard" reality of, in this case, labor disputes.

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<sup>56</sup> Ury, W., Brett, J. M., & Goldberg, S. B. (1993). *Getting disputes resolved: Designing systems to cut the costs of conflict*. Cambridge, Mass: Program on Negotiation at Harvard Law School, at 4.

<sup>57</sup> *Id.*, at 9.

<sup>58</sup> *Id.*, at 19.

<sup>59</sup> *Id.*, at 63.

### 1.1.1.2 *The framing of power in PON literature*

PON tackles the question of power in a distinctive and ambivalent fashion. It has a particular understanding of power, and with this understanding, it seeks to both neutralize power as the way in which parties engage in negotiations *and* to change the parties' understanding of power as a non-zero-sum game that is articulated by reframing.

The PON literature emphasizes expanding the pie where both parties “win” and it emphasizes its interest-based approach as a more effective and less costly set of options in a larger menu. It is directed at ensuring that negotiations and their outcomes are not simply reflections of the powerful winning or the less powerful losing. It also offers as its ideal outcome the possibility that, by getting to yes, both parties emerge more powerful through the process. This framing of power encourages parties not to make asymmetries in power central to their encounter, and to thereby reframe their own engagement not as a confrontation between two forces but as a give-and-take that expands the options on the table by identifying and seeing where the interests of both parties can be met in mutually beneficial ways.

In all these senses, power in PON has a few significant features, in which the aim is to shift how parties understand power from an antagonistic clash to the ability to persuade the other party to do something. First, power is presented as a capability, as *negotiation power*. In other words, power can be acquired cognitively and it is relative; some have it, and this means that they have it more than others. Truly capable negotiators realize that they can break out from zero-sum distribution and instead seek mutual gains, and this ability makes them powerful. Second, the confrontation of two parties who do not follow integrative bargaining techniques usually designates *clashing* power, where some lose and some gain. In this understanding, then,

power is also *coercive*. The clash of parties sees those with power attempt to force their will, and those with less power attempt to resist; the negotiation may see them fail and in turn lose. This understanding of power as a clash of interests, stated positions, wills, demands, emotions, inventiveness, etc. presents it as the ability to impose as much of one's will or interests on the other party; the expression "power play" aptly describes how power here operates.

In question 10 of the second edition of *Getting to Yes*, the authors directly address power in a way that indicates these senses described here. On the one hand, they caution,

Don't ask, "Who's more powerful?" Trying to estimate whether you or your counterparts are more "powerful" is risky. If you conclude that you are more powerful, you may relax and not prepare as well as you should. On the other hand, if you conclude that you are weaker than the other side, there is a risk that you will be discouraged and again not devote sufficient attention to how you might persuade them." (p. 324)

To be too concerned with power, in other words, can be distracting and detrimental to getting to the best outcome.

On the other hand, *Getting To Yes* encourages its reader to think of power in terms of specific techniques or tactics that can enhance one's negotiating position. The question of power there is, to paraphrase, 'how do I get what I want even if I have less power?' They list the techniques of integrative bargaining as domains of power, noting, for instance, "There is power in understanding interests."<sup>60</sup> In this sense, the second edition indicates that power asymmetry is simultaneously a reality that should be acknowledged and considered *and* something that can be better exercised or even gained by understanding one's own and others' interests. The third

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<sup>60</sup> Patton, Bruce; Ury, William and Fisher, Roger. (2011), at 269.

edition of *Getting To Yes*, mentions in the introduction that this section was again revised to be “fully consistent with the seven elements of negotiation framework we teach at Harvard Law School.” This includes the addition of “effective communication, including process management”, i.e. negotiation power, as what they identify as the seventh source of power, and clarifying that the ability to “make game-changing moves increases your negotiation power”; unlike positional bargaining’s approach to power, which can result in “odd, arbitrary results” and can “bruise relationships,” the authors highlight the power in game-change by reframing the discussions so as to highlight interests, options, standards and BATNA.

For PON, power is a capability that anyone can acquire, and negotiations should not be seen as a clash in forces of power or as the coercive imposition of one party’s will on another. Approaching power in this set of ways is a costly, less efficient, and perhaps even counterproductive expression of real interests. Rather, they place the emphasis on the power to persuade and influence others and on identifying such tactics as might enhance one’s negotiating position and the overall negotiation. (To briefly signal the arguments of the later chapters in this dissertation, this understanding of power has little room for thinking structurally, about the role of the mediator, or about the relationship of the field to social relations or histories of power.)

### 1.1.2 Carrie Menkel-Meadow: Dispute Resolution as Problem Solving in a Postmodern World

Carrie Menkel-Meadow is a prolific scholar and a central figure in the theorizing of alternative dispute resolution (or as she sometimes calls it, appropriate dispute resolution). She summarized her own “life's work... to try to see and/or when others see only either/or.”<sup>61</sup> Since the 1980s, Menkel-Meadow has explored both the intricacies of dispute resolution mechanisms and their legal and ethical boundedness. Here, I offer a sketch of her approach and intellectual range; in the next chapter, I engage more directly with the implicit notions of power in her theorization of “problem-solving.”

Menkel-Meadow has shown an extensive interest in the genealogy of the field and its implied normative commitments, as well as questions of social justice broadly. An illustrative instance of this methodological commitment is her article titled “Mothers and Fathers of Invention: The Intellectual Founders of ADR.”<sup>62</sup> It attempts to trace “keystone” ADR concepts to their earlier intellectual sources in order “to elaborate a ‘jurisprudence of ADR’,” but is also concerned with shedding light on “forgotten” female contributors to the field. The explicit goal of such a genealogy is “both to justify and explain the special ‘morality’ and ‘logic’ of different processes of dispute resolution and to prepare us better to defend what we are trying to accomplish against continuing critiques of what is often perceived as a less ‘just’ way of resolving disputes and settling cases,” while also remaining committed to a feminist methodology of historicizing the field.<sup>63</sup>

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<sup>61</sup> Menkel-Meadow, C. J. (1999). When Winning Isn't Everything: The Lawyer as Problem Solver. *Hofstra L. Rev.*, 28, 905 at 911.

<sup>62</sup> Menkel-Meadow, C. (2000). Mothers and fathers of invention: The intellectual founders of ADR. *Ohio St. J. Disp. Resol.*, 16.

<sup>63</sup> *Id.*, at 2.

Menkel-Meadow, possibly due to her training and experience as an attorney, tends to situate ADR in relation to law and legal theory. She relates dispute processes to an ongoing “larger project of explicating a theory of law in jurisprudential terms.” However, she sees such a project as unlikely to succeed without employing other fields of knowledge, such as “anthropology, sociology, international relations, social and cognitive psychology, game theory and economics, and most recently, political theory.”<sup>64</sup> She then structures the intellectual histories according to major themes and figures. The first of these is “the social function of conflict,” with discussions of Mary Parker Follett’s early dispute resolution theories which were influential on a variety of fronts such as the concept of “integrating” conflict; and equally importantly, the legacy of labor/employment negotiations as a driving force for negotiations. She tackles sociological understandings of the role of disputing by Georg Simmel, Morton Deutsch, and especially Lewis Coser’s conceptualization of “constructive” conflict.

A second area of research, according to Menkel-Meadow, is found in the “social and cultural contexts of disputing.” Here, she discusses legal anthropologists such as Laura Nader.<sup>65</sup> A third section discusses the “functional and moral integrity of dispute processes.” Central here are authors such as Lon Fuller and his foundational account of the internal and legal moralities of the mediation process, and Soia Mentschikoff who studied commercial arbitration in the 1950s. Menkel-Meadow’s fourth area focuses on the increasing institutionalization of dispute resolution processes, that is, “the institutional settlement principles of legal process” via the legal process theorists Hart and Sacks, as well as more contemporaneous pragmatist and deliberative notions of process, as in the work of Habermas, Thompson and Gutman and other deliberative

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<sup>64</sup> *Id.*, at 3.

<sup>65</sup> For a discussion of how Menkel-Meadow frames Nader, an outspoken critic of ADR, as a “mother” of the field, see below, section 1.3.

democracy scholars. Finally, a fifth influential line of thought is represented by economists and decision-making and game theorists concerned with the quality of outcomes in dispute resolution. This line of thinking reaches back to Pareto and is nowadays associated with authors such as Axelrod, and generally with the PON approach of win-win negotiations.

All these approaches, she suggests, serve “to create more flexible and varied processes for dispute handling.” Menkel-Meadow’s own work often addresses the twin dynamics of flexibility and process pluralism, as well as their limits and consequences.<sup>66</sup>

Beyond describing the broader field and her own, deliberately inclined,<sup>67</sup> approach to dispute resolution, Menkel-Meadow has published a series of articles chronicling her own intellectual and personal development, including her struggle with critiques of dispute resolution, both general<sup>68</sup> and specific. These include her late friend Trina Grillo’s famous warning about the “Process Dangers”<sup>69</sup> for women in divorce mediation.<sup>70</sup> I discuss her particular conceptualization of “problem solving” below in comparison to the PON use of the phrase, but for the purposes of describing the school of thought that Menkel-Meadow both spearheads and epitomizes, the

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<sup>66</sup> Menkel-Meadow, C. (2014). Cultural Variations in Restorative/Transitional Justice: Process Pluralism, Not One Size Fits All. *UC Irvine School of Law Research Paper*. Menkel-Meadow, C. (2012). Introduction, *Foundations of Dispute Resolution: Vol. I of Complex Dispute Resolution*.

<sup>67</sup> Menkel-Meadow, C. (1996). Trouble with the Adversary System in a Postmodern, Multicultural World, *The. Wm. & Mary L. Rev.*, 38, 5; Menkel-Meadow, C. (2005). The Lawyer’s Role (s) in Deliberative Democracy. *Nevada Law Review*. Menkel-Meadow, C. (2002). When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering. *Wash. UJL & Pol’y*, 10, 37.

<sup>68</sup> Menkel-Meadow, C. (1988). Feminist legal theory, critical legal studies, and legal education or the fem-crits go to law school. *J. Legal Educ.*, 38, 61, reflecting on the possibility of “integrating” a feminist perspective into legal education; Menkel-Meadow, C. (2012). Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving. *Unbound*, 8: discussing the relationship of formal law to the achievement of human/social justice and the tensions between peace and justice.

<sup>69</sup> Grillo, T. (1991). The mediation alternative: Process dangers for women. *The Yale Law Journal*, 1545–1610.

<sup>70</sup> Menkel-Meadow, C. (1996). What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life. *Minn. L. Rev.*, 81, 1413.

commitment to finding both just and peaceful<sup>71</sup> ways of dealing with conflict is arguably central. Her belief in the power of mediation and other deliberative processes, their value and limitations,<sup>72</sup> produces a complex and sophisticated understanding of ADR, spanning domestic and international<sup>73</sup> arenas and diverse practice areas, as well as the teaching of ADR.

So far I have focused on Menkel-Meadow's work here, but there are a number of other mediation scholars whose work falls broadly in this category. Many of them make an appearance throughout this dissertation, and listing them here would go beyond the confines of space. A number of names come to mind, however, even by restricting the focus on scholars with a Law

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<sup>71</sup> For her full awareness of the inevitable tension between the two, see Menkel-Meadow, C. (2001). Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice. *Fordham L. Rev.*, 70, 1761.

<sup>72</sup> Menkel-Meadow, C. (1991). Pursuing Settlement in an Adversary Culture: a Tale of Innovation Co-opted or the Law of ADR. *Fla. St. UL Rev.*, 19, 1.

Menkel-Meadow, C. (1985). For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference. *UCLA Law Rev.*, 33, 485.

<sup>73</sup> Menkel-Meadow, C. (2013). The Historical Contingencies of Conflict Resolution. *Intl J. of Conflict Engage. Resol.*, 1, 32–55. Menkel-Meadow, C. (2003). Correspondences and contradictions in international and domestic conflict resolution: Lessons from general theory and varied contexts. *J. Disp. Resol.*, 319.; Menkel-Meadow, C., & Nutenko, I. (2009). The Next Generation: Creating New Peace Processes in the Middle East. *Negotiation Journal*, 25(4), 569–586.

School affiliation, from scholars such as as Lela P. Love,<sup>74</sup> Andrea Schneider,<sup>75</sup> Joseph Stulberg,<sup>76</sup> Jean Sternlight,<sup>77</sup> etc.

### 1.1.3 Transformative Mediation

Transformative mediation, both as a practice and as a scholarly commitment, is distinct from PON and from the facilitative/Menkel-Meadow school, both in terms of its self-image and its reception by the field. The impact of Joseph Folger and Robert Baruch Bush's foundational book *The Promise of Mediation*<sup>78</sup> notwithstanding, TM is often considered an outlier in the mediation world.

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<sup>74</sup> Love has been a frequent co-editor with Menkel-Meadow as well as an active participant in internal discussions within ADR, including regarding the styles debate - Kovach, K. K., Love, L.P. (1998). Mapping Mediation: The Risks of Riskin's Grid. *Harvard Negotiation Law Review*; (1996) Evaluative Mediation is an Oxymoron, 14 *Alternatives To The High Cost Of Litig.* 31; on questions of justice in mediation, see Hyman, J. M.; Love, L. P. (2002). If portia were mediator: An inquiry into justice in mediation. *Clinical Law Review* 9(1), 157-194. Love, L. P. (2000). Images of Justice. *Pepp. Disp. Resol. LJ*, 1(1). And more general reflections of the history of the field, such as Love, L., & Waldman, E. (2016). The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation. *Ohio St. J. on Disp. Resol.*, 31.

<sup>75</sup> On her time at the PON: Schneider, A. K. (2013). Beyond Theory: Roger Fisher's Lessons on Work and Life. *Negotiation Journal*, 29(2), 171-177; Schneider, A. K. (2013). Pracademics: Making Negotiation Theory Implemented, Interdisciplinary, and International. *International Journal of Conflict Engagement and ...*, 1(2), 188. On hesitation to talk about "softer" issues, see Nelken, M. L., Schneider, A. K., & Mahaud, J. (2010). If I'd Wanted to Teach About Feelings, I Wouldn't Have Become a Law Professor. Marquette University Law School Legal Studies Research Paper Series Research Paper No. 10-41; more generally, see Schneider, A. K., & Honeyman, C. (2006). *The negotiator's fieldbook*. American Bar Association.

<sup>76</sup> On the styles debate: Stulberg, J. B. (1997). Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock". *Fla. L. Rev.*, 24; on mediator neutrality: Stulberg, J. B. (2011). Must a Mediator Be Neutral-You'd Better Believe It. *Marq. L. Rev.*, 95.

<sup>77</sup> Jean Sternlight has published extensively on questions regarding the relation between law and ADR, see for example Sternlight, J. R. (2002). ADR is here: Preliminary reflections on where it fits in a system of justice. *Nev. LJ*, 3, 289. Sternlight, J. R. (2007). Is Alternative Dispute Resolution Consistent with the Rule of Law?; Sternlight, J. R., & Resnik, J. (2004). Competing and Complementary Rule Systems: Civil Procedure and ADR. *Notre Dame L. Rev.*

<sup>78</sup> Bush, R. B. & Folger, J. P. (1994).

The feeling is mutual: Folger and Bush are outspoken in how they want to situate *The Promise of Mediation* (POM) in the wider field. They recount their experience of being reflective practitioners, studying the existing literature and coming up short:

We realized that the prevailing view of conflict has shaped mediation practice and limited people's expectations of what the process can and should achieve. We tried to articulate an alternative vision of conflict, based on a framework that values both personal strength and compassion for others (XVII).

TM's foundational premise is a theory of conflicts as sites of potential development and improvement for society at large: "disputes can be viewed not as problems at all but as opportunities for moral growth and transformation."<sup>79</sup> The field of TM is also characterized by a particular set of terms, distinct from the "problem-solving mediation" that both PON and Menkel-Meadow et al use to describe their own approaches. The goal of a transformative mediation is, by contrast, primarily "empowerment and recognition", that is, self-advocacy and agency in a dispute paired with an awareness of the other party as a human being who is worthy of respect and consideration. Rather than the resolution of the dispute at hand, this sense of a self being balanced with a sense of community and connection becomes the focal point of TM.

*The Promise of Mediation* is meant to be "not a manual for practice" but an exploration of their vision for transformative dispute resolution, based on the key concepts of empowerment and recognition. Folger and Bush provide a distinct reading of the ADR movement and its critics, as divided in four "stories." These are: 1) the satisfaction story, mostly consisting of the thinkers and practitioners around the Project on Negotiation at Harvard; 2) the social justice story, meaning the community mediation movement; 3) the transformation story, which spans Menkel-

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<sup>79</sup> *Id.*, at 81.

Meadow, Riskin, and earlier work by Folger and Bush; and finally, 4) the oppression story, or different critical scholars, such as Abel, Harrington, as well as “minority critics” such as Richard Delgado and “feminist critics” like Martha Fineman.<sup>80</sup>

In response to their survey of a “diverse and pluralistic” (25) field, Bush and Folger conclude that while the field lacks common direction, the dominance of approaches for “solving problems and getting settlements” is clear. For them, the “stories” simply account for the “what is”, rather than offering a normative quandary into “what should be” (26)—that is, the unfulfilled “promise” of mediation. Their suggestion is that although “satisfaction” is the dominant narrative and accurate at present, this does not mean that one has to continue with it. After all, Bush and Folger suggest, it fails to think about equality. In contrast, they argue, transformative mediation does.

Bush and Folger highlight the need for the mediation movement to choose a normative direction: “Only the premise that transformation is the most important goal would lead us to argue for less attention to settlement and protection and more focus on transformative opportunities and ways to capture them”.<sup>81</sup> Their own normative commitments, which I explore in greater detail when discussing the political theory implications of mediation in Chapter 3, are centered around a relational worldview. It holds that human beings are defined by both their desire for constructive social connections as well as personal autonomy, that is, empowerment and recognition and is further connected to ideas about human development and capacity. This

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<sup>80</sup> Other critics such as Laura Nader or Owen Fiss are grouped together as “those concerned with equality”.

<sup>81</sup> Bush & Folger (1994), at 27.

view is in contrast to liberal and neoliberal ideologies that center individualism and state/legal power.<sup>82</sup>

In terms of mediation methodology, which is also discussed in greater detail in the ethnographic study of TM training in chapter 3, Folger and Bush advocate for mediators to employ a “micro focus” on the parties and their utterances. This means following the conversation as it unfolds, as opposed to the macro focus (big picture thinking) in problem-solving mediation that seeks to guide the parties to areas of possible agreement. They also encourage mediators to look for “opportunities” and openings for empowerment and recognition while maintaining a focus on deliberation and choices for the parties. One way to do this is by clarifying and highlighting the parties’ choices at “all key junctures” in order to ensure empowerment. The recognition is encouraged by active perspective taking, where a mediator can “reinterpret, translate, and reframe parties’ statements” in the hope of the newly empowered parties being able to connect with the other parties, especially as they are being “translated” via a mediator.

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<sup>82</sup> For more on relational ideology in TM, see for instance Noce, Della, D. J. (2003). From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model. *Ohio St. J. on Disp. Resol.* Noce, Della, D. J. (1999). Seeing Theory in Practice: An Analysis of Empathy in Mediation. *Negotiation Journal*, 15(3), 271–301.

## ***1.2 Problems and the improvement of the world: Common themes and differences in ADR schools***

It is true that there is some overlap between the different practice styles and the differing theoretical schools. Indeed, the different methods are commonly seen as being along a continuum, without firm boundaries and with plenty of combinations possible.<sup>83</sup> Generally speaking, However, it is important to note that the *scholarly commitments* of the different theoretical approaches are less easily combined. There are some obvious differences that have no doubt become clear already. For example, Menkel-Meadow focuses on law and resolution and on mediation as a legal institution whereas PON is focused on, often in an ad-hoc manner, negotiations. Meanwhile, TM is concerned entirely with mediation as a tool for achieving a more relational social order.

In the following section, I compare and contrast some shared areas of interest between the three approaches: specifically, the normative goals of dispute resolution, the concept of “integration,” the notion of problem-solving, and the different conceptions of interests versus positions versus human needs.

The stated normative goals of the three approaches are not, indeed, so far apart. There is a common desire for change in dispute resolution<sup>84</sup> on an institutional level and, ultimately, a

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<sup>83</sup> For a discussion of the malleability of the methods, see above the scope section of the introduction to this text.

<sup>84</sup> “Changing the game” is phrase used frequently in *Getting to Yes* to indicate the change in overall approach integrative bargaining brings about and necessitates.

desire for change in society by improving the quality of conflict interaction and resolution, assisting people in moments of great stress and sorrow. They also depart from a shared assumption that conflict is unavoidable but not in and of itself an insurmountable problem.

Another shared premise is the concept of “integration”, or that it is basically necessary to combine disparate and different interests and impulses in disputing parties, as well as their conflicting goals, into a productive and intact whole that can withstand the destructive potential of conflict. But further, on the theoretical level, integration also refers to the coordination of conflicting norms, or the desire to achieve resolution without giving up too much. This is the case with the integration of empowerment and recognition for TM, the balance of individual gains with the creation of joint gains in principled negotiation, and the balancing between the demands of peace and justice for Carrie Menkel-Meadow.

On a discursive level, the dynamics of integration are tricky. Take for example the discursive balancing act that the PON undertakes in its construction of a theory that connects psychological or would-be soft, holistic (or as Alberstein remarks, feminine associated qualities) approaches into a discursive format that derives no strong normative lessons from them, but transforms them into a tool. *Getting to Yes* thus affirms that “the most powerful interests are basic human needs,” which include “security, economic well-being, a sense of belonging, recognition, control over one’s life.”<sup>85</sup> If one were to apply these as serious standards for a successful resolution, it would require very radical agreements, and here one might consider the international disputes on which the PON comments. However, these are treated as emotional needs, ones that a savvy negotiator knows to hint at, to nod at, to keep in mind, or to imply, in

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<sup>85</sup> Patton, Bruce; Ury, William and Fisher, Roger. (2011), at 93.

order to signal to the other side that they recognize them fully and have empathy with them on a human level. They are a strategic tool. If a process manages to make reference to them, even implicit, it is more likely to be successful. They write:

One useful rule of thumb is to give positive support to the human beings on the other side equal in strength to the vigor with which you emphasize the problem. This combination of support and attack may seem inconsistent. Psychologically, it is; the inconsistency helps make it work. A well-known theory of psychology, the theory of cognitive dissonance, holds that people dislike inconsistency and will act to eliminate it. By attacking a problem (...) and at the same time giving the company representative (...) positive support, you create cognitive dissonance for him. To overcome this dissonance, he will be tempted to dissociate himself from the problem in order to join you in doing something about it. (102)

This is not to say that PON has no normative aspirations. On the contrary, its members express an earnest belief that negotiation can and should make the world a better place.<sup>86</sup> What is notable for present purposes is the manner in which they balance such aspirations with the need to appeal to quantitatively-minded audiences, such as participants in their (costly) business negotiation classes. PON is successful at smoothing over differences here, too.

By contrast, consider the language TM employs. Folger and Bush similarly are interested in integration and balance, but their terminology is not concerned with signaling normative ambivalence or with not alienating those most interested in hard and fast results. In this way, empowerment and recognition are fairly *sui generis*. Elsewhere, they call it “compassionate strength”: this is not a skill for the negotiator’s toolbox, but a, to their mind, holistic way of being a balanced human being in a relational world, earnestly committed to “change people for the better.”<sup>87</sup> Conscious of their values and goals, Bush and Folger refuse to become a method

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<sup>86</sup> See for instance William Ury’s reflections of his international conflict resolution work which hinges on the importance of a third party employing integrative bargaining techniques. Ury, William. “The Walk from ‘no’ to ‘yes’.” Filmed 2010. TED video, 14:00. [https://www.ted.com/talks/william\\_ury?language=en#t-266562](https://www.ted.com/talks/william_ury?language=en#t-266562)

<sup>87</sup> Bush, R. B. & Folger, J. P. (1994), see preface.

divorced from ideology, let alone to accommodate the marketing of TM by employing more open-ended terminology.

### 1.2.1 Problem-solving

TM, as mentioned above, situates itself against all other styles of mediation, be they evaluative and facilitative, integrative or principled. For TM, these are all “problem-solving,” that is, concerned with the resolution of a problem rather than the improvement of human relations. The origin of this term is somewhat unclear, and it has been attributed to different authors. Carrie Menkel-Meadow<sup>88</sup> first introduced “problem-solving” as an approach in a 1984 article, in part as a reaction to non-legal literature on negotiation. *Getting to Yes* had been published only a few years prior. Menkel-Meadow employs the term "problem solving" to describe non-zero-sum approaches to negotiation; she refers to Lon Fuller as the inventor of the phrase in the context of mediation. Mnookin et al<sup>89</sup> reference Menkel-Meadow when they mention their own problem-solving approach: “For the first analysis of how lawyers might be problem-solving negotiators, see Carrie Menkel-Meadow...”

In a 1999 lecture given at Hofstra Law School,<sup>90</sup> Menkel-Meadow makes a plea for lawyers and law professors to let go of the adversarial mindset and the need to “win.” She argues that it produces pyrrhic victories and is based in epistemological, structural and behavioral forces that produce this win-lose logic. This, she writes, should be replaced with the more creative

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<sup>88</sup> Menkel-Meadow, C. (1983). Toward another view of legal negotiation: The structure of problem solving. *UCLA Law Review*, 31, 754.

<sup>89</sup> Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. 2000. *Beyond winning: negotiating to create value in deals and disputes*. Cambridge, Mass: Belknap. at 325.

<sup>90</sup> Menkel-Meadow, C. J. (1999). When Winning Isn't Everything: The Lawyer as Problem Solver. *Hofstra Law Review*, 28, 905.

problem-solving approach. Menkel-Meadow describes advances in the study of cognitive decision-making processes, heuristic biases etc. and the spread of the problem-solving model to some institutions, such as “problem-solving courts.” She encourages the audience to “imagine if lawyers were not only the protectors of rights, but also the architects and engineers of justice and the satisfaction of human needs. I hope you will all join me in the efforts we make to teach and do problem solving.”<sup>91</sup>

Meanwhile, the PON website does not trace this lineage and focuses more directly on interests; problem-solving is ultimately solving the problem of apparently conflictual interests by reframing:

problem solving approach: An approach to negotiation first articulated in the book *Getting to YES* written by Roger Fisher and William Ury. The problem-solving approach argues that (1) negotiators should work together as colleagues to determine whether an agreement is possible that is better for both of them than no agreement, (2) in doing so they should postpone commitments while exploring how best to maximize and fairly distribute the value of any agreement, and (3) it makes sense for one party to take this approach even if the other does not. The problem-solving approach emphasizes parties’ underlying interests rather than their positions, and encourages parties to maintain and build their relationship even if they disagree rather than creating an adversarial process.<sup>92</sup>

### **1.2.2 Underlying/human needs: the great beyond**

Despite their normative differences, all schools here described affirm the capacity of mediation to reach beyond the mere improved allocation of resources, or simply a quicker, cheaper way of settling a dispute. The idea that mediation can address more than the symptoms of a dispute, and that this is the principal added value of the form is common amongst them. For PON, I have described the idea of interests versus positions above. Menkel-Meadow’s goes beyond interests

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<sup>91</sup> Id, at 923.

<sup>92</sup> As retrieved from <https://www.pon.harvard.edu/tag/problem-solving-approach/>

to affirm a more holistic understanding of “needs”. In her scholarship, it has evolved from the optimistic affirmation that negotiating allows “unearthing” needs that parties might not otherwise admit or that simply wouldn’t fit the limited remedial creativity of litigation,<sup>93</sup> to an ideal of lawyers as “peacemakers” who should pursue resolutions that touch upon the various needs of their clients while also addressing as many of the opponents needs as possible.<sup>94</sup> Such doubling of peace and justice extends the notion of underlying needs as a purely individual, largely internal factor (such as the supposed necessity to win a given dollar amount in a settlement, not primarily for the financial benefit, but for the sense of respect, saving face in front of the other party or desire to exact revenge on them) to a larger normative framework. The real need, for Menkel-Meadow, is to stop thinking in adversarial terms and instead to create processes that allow for more diverse and complex solutions.<sup>95</sup>

For Transformative Mediation, the vocabulary of needs versus interests does not play a role, though they share Menkel-Meadow’s sense that dispute resolution is a way of changing norms beyond the parties to a given dispute. The chief concepts of “empowerment and recognition” are precisely aimed at connecting the events in mediation to larger, underlying needs. At their core, human beings, according to Folger and Bush, want to be in relation with one another in a way that allows them to be connected, compassionate, in recognition, if you will. But they simultaneously need to feel strong, safe and empowered, only then can they self-transcend. The primary goal of transformative mediation is therefore “compassionate strength”:

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<sup>93</sup> Menkel-Meadow, C. (1983). Toward another view of legal negotiation: The structure of problem solving. *Ucla L. Rev.*, 31, 754 at 796 ff.

<sup>94</sup> Menkel-Meadow, C. (2001). Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice. *Fordham L. Rev.*, 70, 1761.

<sup>95</sup> Menkel-Meadow, C. (1996). Trouble with the Adversary System in a Postmodern, Multicultural World, *The Wm. & Mary L. Rev.*, 38, 5.

the balance of those two fundamental needs. This is both an individual need for a person's self-actualization, and a broad social need for the achievement of a better world.

### *1.3 Summary of critiques*

While ADR is a growing field, a main argument of this dissertation is that its disciplinary standing is far from established. The body of literature it has produced is to a large extent pragmatic; typically, the literature asks “how does mediation work?” or “which techniques help making negotiation successful?” rather than, for example, “how is arbitration constitutionally justified?”<sup>96</sup> or “what effects does ADR produce for the legal order?” To a surprising extent, the most systematic and sophisticated theorization of ADR has been undertaken by its critics. Menkel-Meadow, referring to anthropologist Laura Nader, remarks that “[i]t is somewhat ironic that one of the most influential ‘mothers’ of our field has demonstrated a complex, if ambivalent, perspective on disputing processes.”<sup>97</sup> This summary of Nader's work is understated, to say the least. Indeed, one could easily argue that Nader is not ambivalent about ADR so much as deeply suspicious of it. The criticism she has delivered on multiple occasions has been, as I discuss below, rather harsh, and, so far, it remains largely unanswered.<sup>98</sup>

Recall that one of the goals for this dissertation is to engage with critiques of ADR in order to attain a greater theoretical understanding of questions of power in relation to mediation. But what are the points of contention and who brings them forward? In what follows, I first summarize the view, chiefly proposed in legal anthropologist literature, that ADR enables

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<sup>96</sup>A notable exception being Reuben, R. C. (1999). Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice. *Ucla L. Rev.*

<sup>97</sup>Menkel-Meadow (2000) Mothers and Fathers of Invention: The Intellectual Founders of ADR. *16 Ohio St. J. on Disp. Resol.* 1-37.

<sup>98</sup>A very rich summary of her work is: Nader (2002) *The Life of the Law. Anthropological Projects.* University of California Press.

injustice on a structural and social level by “preaching” agreement and harmony. Second, I offer an overview of legal scholars who argue that on an institutional level, ADR limits access to the kind of justice that only adjudication can bring about. Third, I briefly turn to authors who explore the political and social ramifications of a seemingly “therapeutic,” confessional state that would have its citizens “work out” their “problems” rather than adjudicate disputes about legal rights for them.

### **1.3.1 Harmony ideology:**

Laura Nader pioneered the study of conflict and mediation in the field of legal anthropology with a monograph devoted to indigenous and colonial mediation practices in a Zapotec community in Mexico.<sup>99</sup> From there, she develops the concept of “harmony ideology”—that is, the valuing of social peace and cohesion at the expense of justice and social progress. Her work is deeply critical of ADR tools. Nader describes how the “privatization” of conflicts, for instance via court-mandated mediation instead of trials, turns people’s rights into private “problems” that are to be “solved” by the individuals rather than judged by a publicly appointed judge. She also tracks the emergence of ADR rhetoric in the United States as a reaction to the activist, civil rights-oriented 1960s, and she finds that ADR functions as “pacification” and social control. If people were to fight for their rights in courts, she suggests, social injustices and systemic problems would likely become evident as a bigger picture emerges. By sending people into the individualized situation

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<sup>99</sup>Nader, Laura (1990).

of mediation, where there is no public control—and indeed, no record or precedent system—the systematic infringement of rights is turned into individual “problems”.<sup>100</sup>

Nader comments on the non-theoretical nature of ADR—a point I expand in Chapter 2—when she observes that the initial movement was indeed directed against legal practice rather than theory.<sup>101</sup> It was, she contends, possible in part due to the American view of the justice system. In a country where lawyers suffer from an extraordinarily bad public image,<sup>102</sup> she suggests, any “alternative” could be marketed as superior. This self-image, ironically, included jurists on the Supreme Court. Chief Justice Warren Burger, according to Nader, played on this negative portrayal by painting a contrasting picture of the new lawyer as “healer” and “peacemaker.” It’s interesting to note that this dislike for jurists by American leaders is an old and powerful discourse. In his “Lecture on Law”, Abraham Lincoln advised lawyers to strive to be peacemakers and noted, with some bite:

There is a vague popular belief that lawyers are necessarily dishonest-- I say vague, because when we consider to what extent confidence, and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty, is very distinct and vivid. Yet the expression, is common -- almost universal-- Let no young man, choosing the law for a calling, for a moment yield to this popular belief-- Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer-- Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave—<sup>103</sup>

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<sup>100</sup> Building on the Foucauldian notion of governmentality, James Nolan portrayed in 1998 the state as using therapeutic mechanisms to exercise its power in subtle ways. See Nolan (1998) *The Therapeutic State: Justifying Government at Century's End*. New York: New York University Press.

<sup>101</sup> Nader (2002) *The Life of the Law*. Berkeley and Los Angeles: University of California Press.

<sup>102</sup> Galanter (1998) Faces of mistrust: the image of lawyers in public opinion, jokes and political discourse. 66 *U. Cin. L. Rev.* 805

<sup>103</sup> Abraham Lincoln, Draft of a Lecture on Practicing Law, [1860] available via the Library of Congress: <http://myloc.gov/Exhibitions/lincoln/vignettes/PracticingLaw/Pages/Transcription.aspx?ex=1@e3eaa2f9-3b01-448d-a4fd-57aeb7a1e84b@2&asset=e3eaa2f9-3b01-448d-a4fd-57aeb7a1e84b:0b0b1967-3253-42a0-b404-77609c4355e6:1>

The poor public image of lawyers, together with the general negative social connotation of conflict, was then amplified by the dark narrative of the “litigation explosion”. Although this idea has been largely debunked by research that<sup>104</sup> shows that, in net effect, there were fewer law suits brought, it has ripple effects to this day.<sup>105</sup> Indeed, it is a crucial piece in explaining the popularity of ADR. After all, it is when opposed to the perception of a society whose members are hell bent on dragging each other in front of powerful judges, aided by crooked lawyers, that harmony and cooperation seem like such a refreshing, even idyllic alternative. Conflict, fights, and- as Nader would argue- the very fight for individual rights represent the same “bickering” that lawyers supposedly exercise. To the extent that any legal system is a manifestation of larger social ideas, it is not surprising, then, that courts stand in for an unpleasant one: a deeply divided, quarreling, fighting society where each man looks out for himself only- including those we trust to represent our interests in court, our attorneys.

Other legal anthropologists have studied the community dispute resolution movement, such as Merry, finding that “popular justice” occupies a structural spot at the intersection between state law and local law, with the state sponsoring and overseeing the centers, while its popular nature was being culturally constructed as “natural” and close to “authentic” conciliatory community practices, associated with female qualities. In practice, however, popular justice’s procedures and sources of authority are much more comparable with state law.<sup>106</sup>

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<sup>104</sup> Marc Galanter has published widely on this subject, see e.g. (1986). Day after the Litigation Explosion. *Md. L. Rev.*, 46, 3. or, on the prevalence of settlements as opposed to full trials (together with M. Cahill) (1994). “Most Cases Settle”: Judicial Promotion and Regulation of Settlements. *Stanford Law Review*.

<sup>105</sup> For instance, calls for tort law reform rely on the idea of the US as an absurdly litigious state. See Lechner F.J. (2017) “Equal Justice under Law”: The American Legal Exception. In: *The American Exception, Volume 1*. Palgrave Macmillan, New York.

<sup>106</sup> Merry, S. E. (1992). Popular Justice and the Ideology of Social Transformation. *Social & Legal Studies*, 1(2), 161–176.

### 1.3.2 Legal scholars and “Access to Justice literature:

Owen Fiss of the Yale Law School delivered an influential critique of ADR in his 1984 article titled “Against Settlement.”<sup>107</sup> He argued that settlements are not cause for celebration, but rather that they are “truces” that emerge from the failure of the judicial system to deliver a proper outcome. Litigation, for Fiss, is a public value; it should be maintained and open to citizens. These claims clearly hit a nerve in the scholarly world, because his article is still revisited<sup>108</sup> and referred to frequently, even years after what had been an intense debate upon the original publication.<sup>109</sup>

In a similar vein, scholars like Judith Resnik<sup>110</sup> and Deborah Rhode<sup>111</sup> are concerned that access to justice (meaning both access to the justice system as well as the desired outcome of litigation) is substantially altered by the implementation of ADR mechanisms. Marc Galanter contributed to the debate by questioning some of the assumptions implicit in the Pound conference discourse, such as the supposed “litigation explosion” in American courts.<sup>112</sup> He critically assesses

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<sup>107</sup> Fiss, Owen (1984) *Against settlement*, 93 *Yale Law Journal* 1073

<sup>108</sup> For example, Cohen (2009a) *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*. 78 *Fordham L. Rev.* 1143. Moffitt (2009) *Three Things To Be Against ("Settlement" Not Included)*, 78 *Fordham L. Rev.* 1203.

<sup>109</sup> As an exemplary early –and very mediative- response, see Menkel-Meadow (1985) *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, *UCLA L. REV.* 485, 500. For a later response, see Menkel-Meadow, C. (1994). *Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases)*. *Geo LJ*, 83, 2663. A good summary of the debate can also be found in Cohen, (2009a), at 1144.

<sup>110</sup> For instance Resnik (1995) *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*. 10:2 *Ohio St. J. on Disp. Resol.* 211- 265. Or Resnik (1986) *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Cm. L. REV.* 494.

<sup>111</sup> Rhode (2004) *Access to Justice*. New York: Oxford University Press; Rhode (2001) *Access to Justice*, 69 *Fordham L. Rev.* 1785.

<sup>112</sup> Galanter argues that contrary to the popular perception, trials are increasingly “vanishing”. *Cv.* (1987) *The day after the litigation explosion*. 46 *Md. L. Rev.* 3 ; (1994) *News from Nowhere: The debased debate on civil justice*. 71 *Denver University Law Review*; (2003) *The Turn Against Law: The Recoil Against Expanding Accountability*. 81 *Tex. L. Rev.* 285. (2004) *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*.1 *Journal of Empirical Legal Studies*, 459.

the trend towards and the research on judicial settlements.<sup>113</sup> Furthermore, in line with the growing trend towards the use of economic methods in US legal scholarship, a commonly made critique is that the benefits of ADR for citizens are not empirically proven.<sup>114</sup>

Christine Harrington traces “informal” justice reforms back to Roscoe Pound and the idea that legal formalism betrays an instrumental, proceduralistic view of the law, or what he had referred to as the “sporting theory of justice,”<sup>115</sup> as opposed to a wider, more profound concern with underlying questions of justice. She also notes, however, that movements that have argued for more informal procedures still share the emphasis on process. They simply want them to be less legalistic (at 37). As Harrington writes, “It would be misleading to suggest that the delegalization reform movements throughout this century have sought to *replace* the legalistic paradigm of dispute processing (Sliklar, 1964). On the contrary, they tend to complement the existing mechanisms of adjudication rather than to displace them or to challenge them fundamentally.”

The predominant response to the access to justice critique by ADR scholars has been to acknowledge that not all disputes should be resolved by alternative methods and that the contribution of ADR is one of adding to and supplementing -rather than replacing- existing institutions. This is why a number of ADR proponents have changed the meaning of ADR from

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<sup>113</sup> Galanter & Cahill (1994) “Most cases settle”: Judicial Promotion and Regulation of Settlements. 46 *Stan. L. Rev.* 1339.

<sup>114</sup> See Hensler’s calls for empirical proof: (2002) Suppose It’s Not True: Challenging Mediation Ideology. *J. Disp. Resol.* 81 or Todd Jones (2004) Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution. *108 Penn St. L. Rev.* at 282, summarizing an ADR conference and noting that “[t]he need for empiricism was at least one thing on which we could agree”. Examples of empirical studies include: Shestowsky (2008) Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little. *23 Ohio St. J. on Disp. Resol.* 549.

<sup>115</sup> Harrington, C. B. (1982). Delegalization Reform Movements: A Historical Analysis. In *The Politics of Informal Justice: The American experience*, at 36-7.

“alternative” to “appropriate” dispute resolution.<sup>116</sup> The shift suggests a clear tilt towards accepting and fixing rather than dramatically reforming or even overhauling the legal system.

However, I argue that this kind of response still does not offer an explicit or sufficient answer to the critique. After all, the critiques are aimed at the vision of justice that is either promoted by the use of ADR, or how questions of justice are elided by it. When the response is that ADR is a method that supplements without challenging the legal structure, it simultaneously keeps the structure intact and would, even in those handful of cases where it is appropriate, represent a movement away from publicly appointed officials. Most importantly, however, is that the critique is addressed at the ideological underpinning, historical grounding, and the social structures that enable ADR and that provide the imaginary in which it can exist. The critique, in other words, is not that ADR is overused or that it is applied to the wrong cases. In Chapters Three and Four, I reframe the critique in the contexts of mediation training and political theory, and attempt to offer a response.

Abel powerfully summarizes the effects of state control by means of informal justice when he writes that<sup>117</sup>

[i]nformal institutions control by disorganizing grievants, trivializing grievances, frustrating collective responses. Their very creation proclaims the message that social problems can be resolved by fiddling with the control apparatus once once more, that it is unnecessary to question basic social structures. But informal institutions also foster disorganization much more directly, by instructing each party that he can, and must, resolve the controversy alone. (p. 6/7)

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<sup>116</sup> But even Carrie Menkel-Meadow, who advocates the term “appropriate“, on occasion holds lectures provocatively titled “What will we do when adjudication ends?”, in which however, she argues that the ADR from the times of the multi-door-courthouse always aimed at achieving both: “efficiency and docket-clearing potential, as well as a claim for a better quality of justice with designated processes providing more tailor-made solutions to legal problems.” Menkel-Meadow (1997) Introduction: What Will We Do When Adjudication Ends-A Brief Intellectual History of ADR. *44 UCLA L. Rev.* 1613, at 1616.

<sup>117</sup> *The Politics of Informal Justice, Vol. 1: The American Experience* (edited by Richard L. Abel). Academic Press (1982) at 6/7.

## 2. ADR scholarship: Practice and Theory

### Introduction

In the contemporary United States, theory and practice relate to each other not as the classical dichotomy, but rather in forms of complementary and interdependent meshing. On the one hand, criticizing mediation scholarship for being “light on the theory” is a misunderstanding of philosophical pragmatism’s lasting influence, primarily in its notion of “problem solving.” The case for pragmatism’s influence is made by Michal Alberstein, as I discuss in section 2 below. After all, pragmatism prescribes the position that citizens work through conflict resolution, particularly over values, where theorizing begins with how people think; their own thinking is honed to facilitate resolution without deferring to external or transcendental standards. On the other hand, the “light on the theory” charge is nonetheless *simultaneously* an accurate assessment of the history of ADR scholarship.<sup>118</sup> The purpose of the following chapter is to investigate this apparent paradox of “practical theory”, and to critically assess the answers the field itself has generated.

Recall from Chapter 1 that this dissertation focuses on exploring the political and normative imaginations of dispute resolution, as enabled by its pragmatist basis, and the concepts of power that have developed as a result. There are many questions that do not get asked or answered in mediation theory and the ADR literatures. It is their absence that drew my attention

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<sup>118</sup> For instance, when reviewing three major monographs on ADR, Kenneth Fox resumes that while all books describe and analyze the field skillfully, they do not engage the worldviews that shape the meaning attributed to conflicts: “[a]ll three books under review fail to address theory development in the dispute resolution field at this deeper ideological level”. Fox, K. H. (2006). In Search of a Canon: Three Texts on Dispute Resolution. *Negotiation Journal*, 22(2), at 233.

to this curious, promising yet vague, method in the first place. How can such a field exist: one about which Law Schools teach, but almost exclusively as skills-focused classes? When one process (i.e. mediation) is employed at the expense of a formerly more prevalent one (i.e. traditional adjudication),<sup>119</sup> where does that leave the body of thought that accompanied the latter? What becomes of its social functions? What of the power invoked, managed by, inherent in, or stemming from the process of judging and court *rulings*? These questions direct our attention to the normative content of mediation theory: what is invoked in mediation if not law or if not justice? How can a process that aims at addressing more than mere and obvious “positions” offer clarity as to what the “more” that it promises encompasses: more humanity, more flexibility, more truth? And who decides this balance, not just in individual cases, but in terms of a possible normative agenda for the overall process of mediation? What is different if the goal of a process is not justice, but settlement, or, as it were, resolution? Who makes these decisions? What ideologies guide both the institutions that dispense and the consumers of these processes? And, most centrally: why do scholars of mediation think about mediation in the terms they do — pragmatist, private, internal, technical, individual, deliberative, with a focus on process?

This chapter considers the existing literature that the field has produced - not to answer these queries, but to understand why there is so much literature that does not even pose them. In other words, if Chapter One answered the question: “What is ADR according to its main schools of thought?”, this chapter asks “Why do these schools of mediation produce their particular kinds

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<sup>119</sup> Note that I am not making a temporal or quantitative argument here— the point of my question isn’t whether adjudication is becoming increasingly rare at the expense of ADR mechanisms but that this substitution happens at all. While there is research that indicates that a great number of cases is settled before it reaches the courtroom, I depart from the assumption that it simply occurs sufficiently to warrant investigation, regardless of whether the usage of mediation, or arbitration, etc. increases in a given year.

of questions and answers?” By examining the existing literature and the broader discourses to which it relates, I argue that the field came to be both market-oriented and ideologically and jurisprudentially pragmatist; this, furthermore, is a striking example of how liberal political thought depoliticizes and neutralizes what would ordinarily be a deeply political activity, i.e. the resolution of conflicts. The resolution of conflicts goes from being judicial, an activity related directly to the functioning of the state via a branch of modern government, to being largely private and concerned primarily with individuals and the specifics of a given dispute rather than overarching, abstract principles. That such dispute settlement is not a more socially contested<sup>120</sup> process speaks to our prevailing political practices and theories. The absence of a sustained debate about fundamental critical and political questions within ADR scholarship highlights the shortcomings of its theory of justice and the enduring strength of philosophical pragmatism.

The critiques summarized in the closing section of the previous chapter have affected the field only temporarily. More importantly, the crucial contributions that mediation has made to notions of justice are articulated in, by and large, a non-normative manner. The chapter proceeds as follows: First, I explore the two main origins of new theory by adapting the framework of economic versus political liberalism suggested by political theorist Russel Hardin.<sup>121</sup> This is the notion that some theories start as an *explanation* of a phenomenon or event while others originate as an *invention* prior to its material realization. I argue that the tension and synergies created by economic versus political forces are illustrative of the way that mediation scholarship operates, at the intersections of practice, research, and the development of new theory and policy. I discuss the various models that ADR has either created or applied to itself to describe its relationship to

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<sup>120</sup> Yamamoto, E. (1996). ADR: Where have the critics gone. *Santa Clara Law Review*.

<sup>121</sup> Hardin (1993) Liberalism: Political and economic. *Social Philosophy and Policy*, 10 (02), 121–144

theory-building, such as the reflective practitioner and the pracademic, and the resulting neutral “toolbox” paradigm. This section thus focuses on the relationship of the mediation to theory in order to draw out the standards it uses to evaluate and recognize knowledge as relevant and useful.

The second section hones in on the enduring legacy of pragmatist philosophy, both in the development of legal theory and dispute resolution more broadly- pragmatism being a central explanatory framework to the pracademic toolbox, though it is rarely openly discussed except in the work of Michal Alberstein, who is the central figure of this section.

Finally, I discuss the lacunae that this manner of self-theorizing has created, with regards to three interconnected points: the distinct theorizations of litigation vs dispute resolution; the unsettled question of procedural versus substantive justice in mediation; and with regards to wider political norms, questions of power and authority in mediation.

## ***2.1 Self-theorizing in mediation scholarship: Invention or Explanation?***

The observation that the ADR literature (and teaching) have a pragmatic, skills-oriented nature would not be surprising to its scholars, nor necessarily to its practitioners.<sup>122</sup> In general, mediation seems to frequently oscillate between calls for self-theorizing and the more comfortable assertion that mediation is “an art, not a science.”<sup>123</sup> It is worth noting here that a

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<sup>122</sup> For a summary of theory-building projects in the 1990s and aughts, under the auspices of Christopher Honeyman et al (for instance, the “Practice to Theory” and the subsequent “Broad Field” projects, see Ackerman, R. M., & Welsh, N. A. (2003). Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction. *Penn St. L. Rev.*

<sup>123</sup> Additionally, there have been calls for more empirical research to understand the facts on the ground better, from a quantitative perspective. See most notably, Hensler, D. R. (2002). Suppose it's not true: challenging mediation ideology. *J. Disp. Resol.*

remarkable number of researchers are currently practitioners or have practiced in the past—gaining respect in the scholarly field still requires possessing some practical experience. Much of mediation literature features stories from the field and/or ethnographic elements, be that to gain credence in one’s audience or as a deliberate methodological choice. For academics working on mediation, it would be exceptional not to identify at least partially as a mediator- this in contrast to other fields of knowledge production, where a purely “theoretical” approach seems both more valid and common. There are, of course, important ethical implications to studying the field on which one’s livelihood (at least in part) depends, from the difficulty of maintaining potentially critical distance to what negotiation courses call “agent-principal tension”: my incentives as a practitioner are to maintain the (potentially lucrative or otherwise fulfilling) practice. As a researcher, however, there should not be limits to possible findings, including the possibility that a practice does more harm than good.

### **2.1.1 Where does Theory come from?**

Before delving further into the relationship of mediation and theory, it is helpful to clarify two senses of “theory.” There is, of course, a growing wealth of theoretical knowledge available to students of ADR: different subfields of psychology, such as decision making, social psychology, organizational behavior, sociolinguistics and communication studies, among others. By theory, however, I mean more specifically jurisprudential, legal and political theory. The question of theory’s relationship to mediation, then, is about a critical assessment of the structural contexts in which mediation occurs, or the norms and standards that are employed in mediation and

implicated in it. This understanding of theory refers both to a critical analysis of the practice of mediation and to the analysis of dispute resolution as a legal, scholarly and political phenomenon.

Does mediation precede theory or does theory produce it? Does theoretical analysis examine a prior, existing situation, or does theory prescribe a yet to be realized scenario? Asking where theory comes from is another way of asking what theory does, including what good it does. To that end, in this section I contextualize ADR in terms of economic and political liberalism in order to locate mediation theory's main concerns and how this context structures its scope of inquiry.

It is helpful to reframe the question about the origins of theory in economic terms: is mediation driven by “supply” or “demand”?<sup>124</sup> To pose this question is to foreground how power operates, even implicitly, in the politics of research: for instance, do we study phenomena that develop “on the ground” by individuals with differing amount of capital, or does one follow a prescribed methodology and/or norm stemming from powerful institutions, be they the legislator, a governing/licensing body, or a powerful ideology?

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<sup>124</sup> See Menkel-Meadow for a characteristic scaling up of the stakes:

Can we change the world, or do world conditions change us and our theories and practices? Can conflict resolution theorists and practitioners who seek nothing less than to change how we conceive of each other and our human differences reorient human beings away from assumptions of scarcity, competition and unproductive conflict towards more diverse, collaborative and problem solving means of human existence? Is it better/easier to create theories and practice of conflict resolution in more troubled times, or is it easier to imagine methods of conflict engagement in times of (relative) peace? To try to answer these important questions I will examine my own take on where the field of conflict resolution came from (in my own experience) and where it might be going.

Menkel-Meadow, C. (2013). The Historical Contingencies of Conflict Resolution. *Intl J. of Con Ict Engage. Resol*, 1, at 33.

We can regard theory as either explaining and describing or as producing and imagining; each refers to a different understanding of mediation's relationship to politics and power. The political philosopher Russell Hardin discusses the chicken-and-egg question for the case of political theory and provides a useful way of framing the bottom-up vs. top-down distinction. Hardin compares the development and origin of *political* and *economic* liberal thought in the writings of Hobbes, Locke and Mill.<sup>125</sup> He argues that whereas political liberalism started as theory, i.e. an ex-ante "invention" that was then realized by application to collective, mass-scale problems, economic liberalism on the other hand "grew": it started occurring somewhat spontaneously, without an agenda, and was analyzed only in retrospect as a post-fact explanation. "Economic liberalism was addressed to piecemeal, typically small-number interactions that mattered directly only piecemeal to a few in each case, rather than collectively to all or very many at once" (122). On the other side, political liberalism, as a project developed to order and re-structure the way states operate, was very much directed at everything at once, a bright idea to light the way forward.

These two, however, are not mutually exclusive. Hardin argues that in both liberalisms the "role of the state and government seems itself to be collective," even a "collective issue." In other words, economic liberalism is not limited to the dyadic relations between actors in the market, but also importantly applies to the distinct relationship of the state to its citizens. It is economic activity—predicated on the inescapability of human collaboration and some degree of

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<sup>125</sup> It is remarkable how familiar the language Harbin uses to summarize Hobbes' theories is to students of negotiation techniques *a la* PON. "This is the core of the problem Hobbes's theory was intended to resolve: dyadic Prisoner's Dilemma interactions in which order and general benefit require that only certain moves be allowed. The allowed moves are those in which both parties gain from an exchange, not those in which one party takes and the other loses." Harbin (1993), at 123

public order in which this can take place— that links the “evolving” theory of the marketplace and the “invention” of the state. There is then, an important connection (which can take the form of friction)<sup>126</sup> between the “piecemeal” economic theory and the grand invention of politics, in the necessity of peacekeeping required in both levels.

If we understand the Law as a set of rules that create and govern the modern liberal state and that, just as importantly, create and regulate economic activities, then it would be an example of an ex-ante invention applied to government at large. In contrast, ADR occurs more spontaneously and without a large or overarching society-wide agenda. ADR functions in a responsive, if not reactive, ex-post manner. These differences between the Law and ADR would suggest an inherent tension. To be clear, I do not mean to suggest a false dichotomy where ADR is only relevant for economic (or in legal terms, civil) questions whereas public, and potentially political matters would be resolved through the Law; this distinction, after all, fails to acknowledge the degree to which politics and economy, or public and private conflicts, are interwoven and determined by each other. Nor do I claim that the law is the realm of invention and ADR merely explains after the fact glitches in dyadic relationships. In fact, what is noteworthy and interesting is the nature of mediation theory as next to the Law and the legal institutionalization of justice, but clearly outside it. The often invoked “shadow of the law”<sup>127</sup> in which mediation *practice* occurs and that structures parties’ behavior does not cast a similarly long shadow on mediation *theory*, which occurs largely free from doctrinal debates. The common image of a continuum of DR techniques is therefore very telling: it refers to techniques

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<sup>126</sup> For Hobbes, for instance, the two freedoms are in direct conflict: the political liberalism that creates for example religious freedom is always at risk of allowing social disorder which is bad primarily because it puts at risk economic liberty, and its primary goal: welfare.

<sup>127</sup> Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *The Yale Law Journal*, 88(5), 950.

connected primarily by the potential for escalation, where the processes exist side-by-side, but separately. They are not, however, separate poles with distinct ideologies. Mediation does not seek to change the ruling assumptions of the legal process. Instead, it largely ignores the wider questions in its literature and focuses its attentions inwards and *on the ground*.

The parallels in the intellectual development to political versus economic liberalism are notable. As is evident in many aspects of mediation theory today, the *logic* of the market and market regulation is still powerful, and impulses to “invent” new orders (especially ones that are not market-oriented, such as transformative or narrative mediation) are less popular and lucrative.<sup>128</sup> Perhaps this is because they seem to start with a “supplier” of services or, worse, norms, whereas the “neutral” tools and technologies mentioned above are branded as demand-driven, answers to “reality”, often obscuring their normative origin and commitments.

### 2.1.2 Mediation as a “Practice in Search of Theory”

The evocative expression “practice in search of a theory” is sometimes used to characterize mediation. Surprisingly, it seems to be often used by practitioners, and is not attributed to any

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<sup>128</sup> Nor do I suggest that ethnographies are somehow “practical” whereas legal philosophy is theoretical. Note though how in a 1981 essay, European sociologists Cain and Kulscar discuss the origin of the “dispute” term in sociology as a fusion of “anthropological studies of law and social control and conflict theory”, i.e. the tradition of legal anthropology versus European philosophy (chiefly Aubert and Eckhoff) and the friction losses as well as strengths such an interdisciplinary methodology produces: “[u]nlike the anthropological tradition, these [philosophical] analyses were not based on systematic fieldwork, but were derived from the tradition of speculative philosophy which in Europe has always been an equal partner with empirical work in the development of sociology.” (386) They are critical of the gains of such an approach, especially because it treats conflicts and disputes as synonymous terms: “Both appropriation and conflation render disputes indubitably universal. The theoretical value of this obliteration of distinctions is, however, doubtful” (at 387). See Cain, M., & Kulscar, K. (1981). Thinking Disputes: An Essay on the Origins of the Dispute Industry. *Law & Society Review*, 375–402)

one source.<sup>129</sup> While especially apt for this context, the phrase is not limited to ADR scholarship- it has been attributed for instance to phenomena like community service,<sup>130</sup> specific legal issues,<sup>131</sup> public participation generally,<sup>132</sup> among others. The debate acknowledging the importance of theorizing for ADR scholarship has been structured largely around either calls to improve existing practices, or attempts to mobilize various bodies of thought for their potential insights to mediation theory.

In general, the prolific work of Carrie Menkel-Meadow presents more than just a call for theorizing.<sup>133</sup> Rather, she calls for and models the realization of theoretically self-aware research. Departing from her training as lawyer and her vantage point as a law professor, the range of topics she discusses- from negotiation techniques to the ethics of mediation practice to questions of international conflict studies - is both an exception that confirms the rule as well as an important source of critical progress for the field.

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<sup>129</sup> The oldest source of the phrase in ADR I have been able to locate has been is Menkel-Meadow, C. (1983). Review: Legal Negotiation: A Study of Strategies in Search of a Theory. *American Bar Foundation Research Journal*, 8(4), 905–937, though Menkel-Meadow is talking about negotiation as a set of “Strategies”, rather than the practice of mediation. Almost fifteen years later, a single page in a professional journal uses the phrase in a manner that implies its general familiarity, namely Boulle, L. (1999). Good theory for good practice for good theory. *ADR Bulletin*. For a general summary, see Wilson, B. (2004). Towards a Theoretical Model of Professional Practice Consultancy. *SSRN Electronic Journal*.

<sup>130</sup> McDonald, D.C. (1989). *Restitution and community service*.). Washington, DC: National Institute of Justice, as quoted in Bazemore, G., & Maloney, D. (1994). Rehabilitating community service toward restorative service sanctions in a balanced justice system. *Fed Probation*.

<sup>131</sup> O’Connell, M. E. (1988). Alimony after no-fault: A practice in search of a theory. *New Eng L Rev*.

<sup>132</sup> Wengert, N. (1976). Citizen participation: practice in search of a theory. *Nat Resources Journal*.

<sup>133</sup> Though she does use the “practice in search of a theory” expression, with special reference to negotiation, in an early review article: Menkel-Meadow (1983). Review: Legal Negotiation: A Study of Strategies in Search of a Theory. *American Bar Foundation Research Journal*, 8(4), 905–937.

Menkel-Meadow has frequently reflected on both her own<sup>134</sup> intellectual development as well as that of the field as a whole,<sup>135</sup> including its increasing complexity.<sup>136</sup> Her contribution to legal debates has centered on the influential idea of shifting the ideal of the successful lawyer from someone who “wins” cases to the skilled negotiator and “problem solver.”<sup>137</sup> Her understanding of “procedural justice,” which departs from Stuart Hampshire’s philosophy of “justice as conflict,”<sup>138</sup> constitutes a core part of the idea that ADR should be theorized as a deliberative practice; using the vocabulary discussed above on political and economic liberalism, this sense of procedural justice is fundamental to seeing mediation as an application of the “invention” of political liberal order.<sup>139</sup>

Not content with the adoption of a set of existing deliberative norms, legal ethicist Katherine Kruse sketches a brief outline for theoretical ADR scholarship, in a 2004 response to Menkel-Meadow’s claim<sup>140</sup> that political science can learn from ADR.<sup>141</sup> Kruse contends that

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<sup>134</sup> (1988). Feminist legal theory, critical legal studies, and legal education or the fem-crits go to law school. *J. Legal Educ.*, 38, 61.; (1996). What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life. *Minn. L. Rev.*, 81, 1413.

<sup>135</sup> For instance: (1996). Introduction: What Will We Do When Adjudication Ends-A Brief Intellectual History of ADR. *Ucla L. Rev.*, 44, 1613. (2000). Mothers and fathers of invention: The intellectual founders of ADR. *Ohio St. J. Disp. Resol.*, 16, 1. (2004). From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *J. Legal Educ.* (2009). Chronicling the Complexification of Negotiation Theory and Practice. *Negotiation Journal*, 25(4), 415–429. (2013). The Historical Contingencies of Conflict Resolution. *Intl J. of Con Ict Engage. Resol*, 1, More recently, she has attempted to gather authors for a “jurisprudence of ADR” in 3 part edited volume: Complex Dispute Resolution Vols 1-3 (Carrie Menkel-Meadow ed., Ashgate Press, 2012) as well as through her involvement in the International Journal of Conflict Engagement and Resolution.

<sup>136</sup> Menkel-Meadow, C. (2009). Chronicling the Complexification of Negotiation Theory and Practice. *Negotiation Journal*, 25(4), 415–429.

<sup>137</sup> Her early piece from 1983 asserts that “problem-solving negotiation”, which is similar to the then just nascent PON model of integrative bargaining, is superior to adversarial negotiating because it is more apt to provide solutions that address “underlying needs” and therefore solve the “real problem”. Menkel-Meadow, C. (1983) Toward another view of legal negotiation: The structure of problem solving. *Ucla L. Rev.*, 31, 754 She expands on these ideas in a lecture from 1999: When Winning Isn’t Everything: The Lawyer as Problem Solver. *Hofstra L. Rev.*, 28, 905.

<sup>138</sup> Hampshire, S. (2000). *Justice is conflict*. Princeton, NJ: Princeton University Press.

<sup>139</sup> I further discuss this notion of procedural justice as an “experience” in Ch.4.

<sup>140</sup> Carrie Menkel-Meadow (2005) The Lawyer’s Role(s) in Deliberative Democracy, 5 *Nevada Law Journal* 347.

<sup>141</sup> Kruse, K. R. (2004). Learning from Practice: What ADR Needs from a Theory of Justice. 5 *Nev. LJ*. 389 While Katherine Kruse has been interested in process variation, her research is chiefly on legal ethics more generally.

prior to illuminating other fields of knowledge, ADR first would need to establish “a theory of justice.” Towards that end, she highlights three major points that need to be theorized, namely: first, a vision of “just harmony” that is informed by Nader’s criticism (discussed in chapter one) and that does not mistake the suppression of conflict for harmony; second, a measure for “authentic participation” that cannot be (easily) misused by strategic manipulation; and third, a theory of “appropriate fit,” or a forum matching method that must be guided by normative theory. Kruse argues that for its “normative needs,” ADR can and should turn to deliberative democracy, as both disciplines focus on process in an effort to “fill the gap that has opened in the wake of the loss of faith in substantive definitions of justice.” While I argue in Chapter 4 at greater length the limitations of applying deliberative theories of justice -highlighting the “experiential” forms of participatory justice such theories privilege at the expense of real access to power—it is worth highlighting here how theorizing in mediation ebbs and flows between the confidence of having -invented? discovered?- a worthwhile process with great applicability and the realization that there are levels of analysis missing.

Kruse’s response to Menkel-Meadow is similarly an application of the “invention” of political liberal order, but with a different point of emphasis. Kruse accepts that substantive perspectives of justice should be bracketed because they are interminable, in favor of the desire to construct justice as a more deliberative and inclusive *process*. This is a hallmark of political liberalism. It is noteworthy that even as Menkel-Meadow and Kruse speak most closely to the questions about theory’s role that animate this dissertation, the distance between theorizing as finding a normative proceduralism versus theorizing as a structural, critical analysis of mediation’s relationship to society and power remains vast.

A variety of liberal ideals also often inform debates within the field about its strengths, its weaknesses, and its future. In a symposium held at the University of Missouri almost two decades ago, John Lande<sup>142</sup> responds to Jeffrey W. Stempel's treatment of eclecticism and the facilitative-evaluative debate<sup>143</sup> in ADR.<sup>144</sup> Stempel had argued that mediators should neither abandon what is distinctive about the mediation setting nor neglect the wealth of tactics and instruments that other mechanisms and fields offer (I discuss Stempel in greater length at the end of this section). In his response, Lande discusses the advances that the debate about styles of mediation has brought to ADR theory. Lande argues that while the internal back-and-forth might be "tiresome," it has brought "benefits" to the field as a whole. These benefits have emerged both by virtue of the substantive points that mediators have made (for Lande, primarily by proponents of facilitative mediation) as well as in the overall benefit that "the debate may cause many mediators to consider and reject simple assumptions, developing a more sophisticated understanding of the process." For Lande, the exchange of ideas about the appropriateness of different methods might trigger a "broader, healthy questioning of taken-for-granted mediation theory more generally" (at 322). He highlights specifically the "assumptions" of confidentiality and neutrality as concepts that are due for a "hard look at the realities" behind the scenes.

Lande's view thus expresses the liberal and deliberative belief that internal debate and exchange leads, at least potentially, both to the "maturation" of the field (332) and to better

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<sup>142</sup> Lande, J. (2000). Toward more sophisticated mediation theory. *J. Disp. Resol.* 321.

<sup>143</sup> It should be noted that transformative mediation discusses its theoretical commitments more explicitly, though not necessarily more often.

<sup>144</sup> Jeffrey W. Stempel (2000) The Inevitability of the Eclectic: Liberating ADR from Ideology, *J. Disp. Resol.* 247, see below for detailed discussion.

research. The two ideals he highlights, confidentiality and neutrality, are central to political liberalism's emphasis on the private and on the apolitical.

However, Lande also fails to acknowledge the general disciplinary development of ADR: substantive points, alertness to risks, and other interventions have –with a handful of notable exceptions- most often come from outside scholars, such as legal anthropologists, while the sophistication of debates inside the field has arguably not led to settling fundamental questions about neutrality<sup>145</sup> or confidentiality, as much as to the sense that their present constitution is in crisis, something to be overcome or moved beyond.<sup>146</sup> There is a lack then, not only of “theory” inside ADR, but also a lack of a plurality of critical perspectives from within it that take the field on its own terms.

Moving towards other diagnoses of ADR reveals a similar pattern, but in which the potentials remain nascent and more abbreviated. Other scholar-practitioners' self-examinations have focused on various aspects of the practice/theory divide. For example, Fox (2009) focuses on social constructivism and relational/dialogic theories in a very brief paper, to indicate the lack of specific engagement with post-modern scholarship.<sup>147</sup> Here, theories are tools to help mediation explain and describe its processes. Similarly, Zariski discusses<sup>148</sup> the lack of “theory dispersion” into practice. He suggests a conceptually narrower behavioral “matrix” of intervention theory

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<sup>145</sup> Mayer, B. S. (2004). *Beyond neutrality: Confronting the crisis in conflict resolution*. San Francisco, CA: Jossey-Bass.

<sup>146</sup> For the subfield of negotiation, see Schneider, A. K. (2013). *Pracademics: Making Negotiation Theory Implemented, Interdisciplinary, and International*. *International Journal of Conflict Engagement and Resolution* 1, 188.

<sup>147</sup> Fox, K. H. (2009). Negotiation as a post-modern process. *Hamline J. Pub. L. & Pol'y*, 31, 367.

<sup>148</sup> Zariski, A. (2010). A Theory Matrix for Mediators. *Negotiation Journal*, 26(2), 203–235. See also a note by the same author in an industry publication, in which he argues for the necessity of an integrated undergraduate degree in mediation to provide mediators with a solid theoretical education of all the questions at play in mediation. Zariski, A. (2009). *Beyond Training: Theory for Mediators*. *workplace section news*.

that would cover the “factors of perception, emotion, cognition, communication, and intervention at the micro, meso, and macro levels of conflict.” The focus here is similarly on explaining and describing, rather than either a critical account of mediation in relation to structures of power or the kind of “invention” with a broad political application. Often, scholars also point to new promising avenues for theoretical cross-pollination. One interesting example is the application of relational dialectics theory (grounded in the work of communications theorist Baxter, who herself draws on Bakhtin) to divorce mediation.<sup>149</sup> Such efforts are helpful diagnostics of the field’s relationship to theory; they also point to the absence of a broader critical perspective on the structural and political economic functions of mediation.

### 2.1.3 Reflective Practitioners and Other Self-Understandings

Mediation scholarship has, however, expended great energies in understanding the role of the mediator. Here, too, however, the mediator’s relationship to broader relations of power and histories of political economic structures remain overlooked. The understanding of theory here is more directly concerned with translating it into practice, and then reflecting on these practices in order to improve them.

In mediation scholarship, there currently exist a number of ways to conceptualize the importance of practical experiences for the construction of bottom-up theories. I explore these in greater detail below. These include:

- Practice in search of theory
- Reflective practitioners, Theory-in-use (Donald Schön)

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<sup>149</sup> Baitar, R., De Mol, J., & Rober, P. (2016). Exploring Helpful Tensions between Divorce Mediators and Clients: A Relational Dialectical Analysis. *Conflict Resolution Quarterly*, 34(1), 7–29.

- Action research method (Educational sciences)
- “Lay theories” vs professional theories (as discussed in transformative mediation literature)

Donald Schön’s model of the reflective practitioner is the traditional if not dominant way for thinking about the mediator’s relationship to theory and to theoretical production. Put forth now over three decades ago, it had -and continues to have- a profound impact on the internal debate in ADR about the respective roles of theory and practice in ADR. A scholar of urban planning, Schön’s insights into organizational behavior and learning were immensely significant in the field of Education, too, where the reflective practitioner (RP) approach continues to be influential. The reflective practitioner approach is also widely cited in ADR literature.<sup>150</sup> The two general ideas are, first, that practitioners can teach researchers a great deal because of their deep experiential expertise (rather than the other way around); and second, that practitioners can generalize or scale up their experiences of their so-called “theories in action” by reflecting on particular experiences. These two ideas have proven relevant to and appealing for mediation. It remains less clear, however, how the experiential knowledge of the expert is transformed into a set of academic “products,” or even into theory. On the one hand, the emphasis on practice and practicability treats theory in a piecemeal fashion, in what I analogized above to the structure of economic liberalism. On the other hand, theory has traditionally meant an aspiration to be as value-free and removed from the realm of norms as possible. As we see below, this view couldn’t be further from the influential understanding of “theorizing” in ADR.

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<sup>150</sup> Paradigmatically, see Kressel, K. (1997). Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm. *Negotiation Journal* 13(2). Schön himself reflected on the application of his research in the legal context, see (1995). Educating the Reflective Legal Practitioner. *Clinical L. Rev.*, 2, 231.

A deep trust in the teaching potential of practical experiences, particularly for directly constructing and correcting theory, characterizes many ADR institutions. For instance, Andrea Kupfer Schneider describes experiences at the Harvard PON and as Roger Fisher's teaching assistant in the following way: "Theories were only as good as they were practical- and this directly came from the top. Roger's own experience was to put theory into practice, derive and edit the theory from practice, and so forth. It was a constant cycle."<sup>151</sup> Likewise, a special section of the *Negotiation Journal* in 2013, dedicated to celebrating Roger Fisher's legacy, fittingly contains a number of articles that discuss the nature of the theory and practice would-be divide and cycle. In this issue, Larry Susskind presents a perspective informed by his experience in the field of Urban and Regional Planning at the MIT, self-identifying as a "pracademic" (referencing his role as an active mediator and founder of the Consensus Building Institute). He describes his method of conducting "action research". Whereas fellow PON member Fisher starts with theories, Susskind's approach departs from practice, "[t]hat means I start with 'problems' in the field and work collaboratively with stakeholders to generate 'solutions' that meet their interests. I then document and analyze these interventions to build prescriptive theory through systematic reflection on my own involvement." Citing Schön, Susskind goes on to describe the unusual nature of such reflective practitioners' writing as a quasi-therapeutic process in which they themselves play a central role:

Pracademics write about their own experience as a means of self-assessment. In addition, they write not just as participant-observers, as many anthropologists and sociologists have for decades, but as characters in their own stories, which can alienate many of their academic colleagues.

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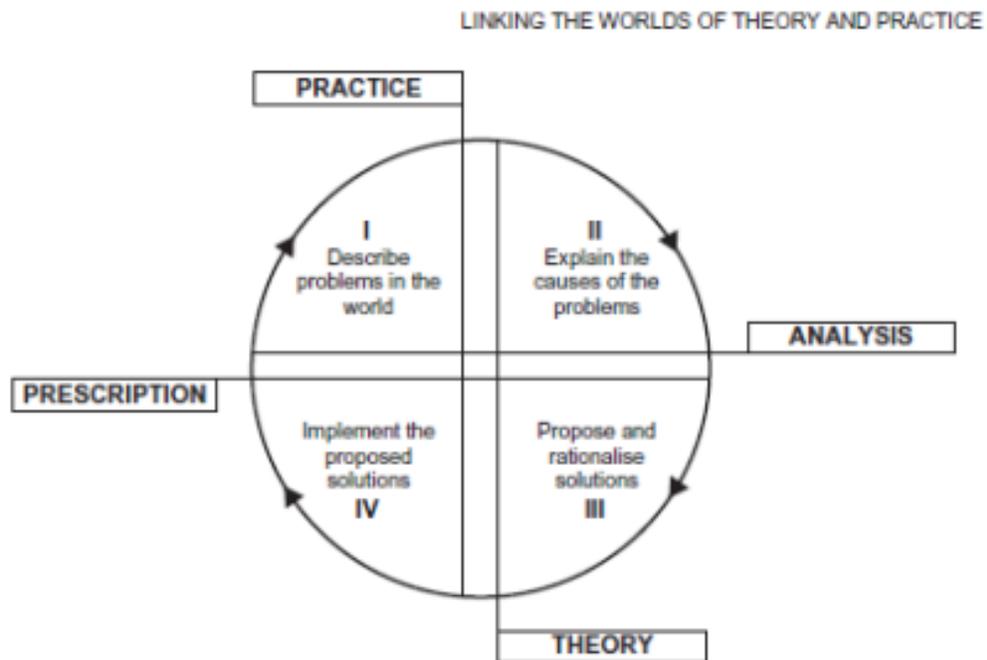
<sup>151</sup> Schneider, A. K. (2013). Pracademics: Making Negotiation Theory Implemented, Interdisciplinary, and International. *International Journal of Conflict Engagement and Resolution* 1(2), 188, at 191.

Susskind acknowledges academia's own political economy: action-centered research and practice agendas tend to lead to less publishable content and might therefore disqualify junior academics from gaining tenure and pursuing academic careers, especially at prestigious universities such as those that compose the PON. Susskind argues that the primary motivator for "pracademics" in ADR is a concern with helping stakeholders. Although he holds that the methodological debate between "starting with practice" and the more "traditional social sciences" "will never be resolved," he asserts the abstractability of his method and its potential to generate "cross contextual insights." In order to illustrate this process, he provides two diagrams

(the second is directly aimed at marketing the pracademic methodology to “less applied, more traditional” university colleagues and administrators). Below is the first diagram:

In this model, a pracademic uses practical experiences and normative positions to establish a distinctive relationship between practice and theory. For Susskind, then, the “leap” from the explanation of an observed real-world problem (steps I and II in his discussion) to theorizing is one of normative prescriptions. Theorizing means “formulating and making a case for (rationalizing) solutions to the problem” (step III). The application of these solutions is then the final step (IV) and central to the pracademic experience. Theory, in other words, is explicitly

**Figure One**  
**The Circle of Engagement**



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Lawrence Susskind, "Confessions of a Pracademic: Searching for a Virtuous Cycle of Theory Building, Teaching, and Action Research," *Negotiation Journal* (April 2013): 225-237, 233.

both normative and instrumental. It is particular to a given situation and intrinsically linked to its

implementation in practice. Susskind acknowledges how different from “traditional” scholarship his model is, particularly steps III and IV (the bottom half of his diagram) because of its normative and “possibly even political” content (233). However, he does not go into detail as to where the “theories” elaborated in step III come from, or the relationship of this potentially political *content* to either pre-existing or aspirational political *structures*. What norms are employed, and how do these norms reflect or depend upon broader relations, histories, and structures of power? How can stakeholders, and indeed, clients of the businesses that pracademics are involved in, know through which theoretical lens their problem will be or should be seen? For Susskind, theory is what you build, not for instance, putting an observed phenomenon or “problem” into contexts of other scholarly writings or ideas. And, just as importantly, theory is directly in service of its real-world application.

In this sense, the critical perspective that Howard Gadlin,<sup>152</sup> himself a practitioner, offers is instructive for highlighting the assumptions that animate the idea of the pracademic and reflective practitioner. Gadlin argues that the debate between theory and practice should not be dissolved or smoothed over because it generates a “creative tension.” This tension, he contends, has been generative for the field. He also warns against the tendency to value theory only in as far as it improves practice. Likewise, he draws attention to the limits of the ability that skilled practitioners possess for self-reflection. These points—the desire to integrate theory and practice, the instrumental valuation of theory, and the emphasis on the capacity for self-reflection—have been fundamental to the economic vision of theory in ADR. Gadlin goes on to caution against “fetishizing” practice:

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<sup>152</sup> Gadlin, H. (2002). Framing new directions for theory from the experience of practitioners. *Negotiation Journal*, 18(4), 327–330.

Practice romanticism takes the insights and creativity of Donald Schön's Reflective Practitioner model and elevates it to an entire worldview. This is the belief that hidden within the minds (and hearts) of practitioners is a substantial body of knowledge, which if elicited, would put to shame the abstract and desiccated formulations of academics and researchers. Practitioners, it is implied, are the ones who really know what conflict is about and how it can be resolved. Academic research and theory is, for the most part, irrelevant to them. Partial proof of this resides, we are told, in the fact that few practitioners make reference to the myriad empirical studies or theoretical formulations generated by academics and their allies. If we can tap the tacit knowledge of the practitioners, our theoretical formulations will be considerably richer and we will move toward a sort of harmonic convergence of theory and practice.

Gadlin alerts readers here to the danger of championing practical "tacit" experience at the expense of traditional research. The absolute faith that knowledge resides in an untapped reservoir mirrors a larger methodological debate alive and well in many social sciences, often along the lines of "quantitative" versus "qualitative" research methods, though the question of application adds a layer of complexity. Wanting to champion forms of knowledge that are applicable to the "real world" crucially elides the role that knowledge-production and the epistemology of various disciplines have in the production of reality. Indeed, we see that which we are expecting to see, what we want to see, what we can perceive in as far as we can conceive of it. Our forms of knowledge, in a word, are performative.

One should be clear then, that, even with Gadlin's caveats, the type of theoretical abstraction that develops from reflecting practitioners is useful mostly for improving practices, for rationalizing one's actions (à la Susskind), for the occasional methodological variation and innovation: i.e. for keeping one's toolbox tidy and functional. These are important to the functioning of the product of "dispute resolution" and have value to consumers and practitioners alike. But recalling the earlier discussion of what theory is, where it comes from, and the functions that it can serve, does such an approach, with its emphasis on translating insight and

reflection into honing a set of practices, have the capacity to generate a more specific self-awareness or critique?

Indeed, what the internal debate about theory did not lead to, and as I have argued, what it has been unable to lead to within the confines of ADR scholarship, becomes more visible when we contrast it with its sister field, that of conflict studies. I briefly turn to conflict studies below, where the general contrast in scope and style brings into sharp relief the role of theory.

#### 2.1.4 A Counterexample: Conflict Studies

ADR as a research field is characterized by a longstanding tradition of interdisciplinarity. There are nonetheless substantial differences in approaches, canons, and self-understandings between ADR as a law-adjacent field and its traditionally more politically and internationally oriented neighbor, conflict studies, which in turn includes peace and conflict resolution studies. The latter features more sustained theoretical scholarship. Paradigmatically, the School for Conflict Analysis and Resolution (S-CAR) at George Mason University has been a hub for theorizing conflict resolution, from the early years of John Burton, widely considered the founder of human needs theory, to anthropologists, and to scholars of international conflict resolution and narrative mediation, among other contributions.<sup>153</sup>

The distinction between conflict and dispute is an interesting if under-explored one, both substantively and disciplinarily. John Burton distinguishes explicitly between disputes and conflicts through a focus on how each of these originate and end. Arguing that disputes involve

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<sup>153</sup> See for example, Scimecca, Avruch, K. (2005). Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic. *Marq. L. Rev.*, 89, 567; Birkhoff, J. E., & Warfield, W. (1996). The development of pedagogy and practicum. *Conflict Resolution Quarterly*, 14(2), 93–110.; Cobb, S. (1993). Empowerment and Mediation: A Narrative Perspective. *Negotiation Journal*, 9(3), 245–259.

conflicting, negotiable interests, Burton holds that these can be “settled” by outside institutions. Conflicts, however, arise out of a shortage or deprivation of basic as well as “ontological” human needs and thus cannot be negotiated. To resolve conflict, these human needs must be met.<sup>154</sup> Crucially, they cannot be met primarily by the parties to the conflict themselves, and even less likely by the third party: conflicts where human needs are unmet often require a *political* intervention. And for the outsider, the negotiator, the task is then not primarily to solve conflict but firstly, to analyze the unmet needs and to help solve the “problems,” rather than the simple, prima-facie dispute. Burton’s prescribed method is explicitly analytical, and it involves a shift in the “unit of analysis” from institutions and their interests to persons. His thinking about conflict resolution includes a fundamental re-examination of normative theoretical assumptions. For instance, Burton<sup>155</sup> goes on to offer a highly instructive reading of major schools of thought in International Relations and political science broadly, namely, that between realism and idealism:

What is clear in retrospect is that what was termed ‘political realism’ was realistic only in the limited sense that it was practice. From early feudalism to the present day practice has been to govern through coercion. There was no theory that justified this political realism. Failures, such as revolutions and wars, could not be explained except by failure to employ sufficient power. There being no theory, there was no explanation of conflicts, and no basis of prediction of future conflicts. Political realism as practice has now been shown to be unrealistic in behavioral theory, and self-defeating in practice. The traditional idealists also lacked a theory. There was a belief system based on a desire for cooperative relationships, but no theory that could explain conflict, still less justify alternative policies. The result has been an alarming void: power politics has failed domestically and internationally, but no alternative has been articulated and applied as policy. This is the bankrupt state of civilization at the end of the twentieth century.

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<sup>154</sup> For instance, Burton, John W. (1993) "Conflict Resolution as a Political Philosophy" In *Conflict Resolution Theory and Practice: Integration and Application*. Ed. Dennis J. D. Sandole and Hugo van der Merwe. Manchester and New York: Manchester University Press, at 56: “The distinction between disputes and conflicts provides us with two conceptual frames: on the one hand, situations that are negotiable, and, on the other, those in which there can be no compromise. These distinctive conceptions imply two very different means of treatment. The first are subject to judicial and arbitrated processes, but the second require analytical problem solving.”

<sup>155</sup> Notice that, perhaps in part due to thinking such as Burton’s, even commercial dispute resolution today does not often use the term dispute settlement anymore, as it has become associated with fast and superficial, arbitrated decision rather than a process that has truly transformed the dispute to a point of resolution. An even more recent change in terminology is the use of “conflict engagement”, to alleviate the normative pressure of resolution, in an acknowledgment that not all conflict can or should be solved away.

Setting aside Burton's substantive points, my aim here is to acknowledge that it is difficult to imagine a scholar of ADR today making such a sweeping assertion that touches on as many historical, ideological and disciplinary institutions at once.<sup>156</sup> It has often fallen to the S-CAR school of thought to introduce more holistic notions of conflict and what they might highlight or indeed elide.<sup>157</sup> Specifically, human needs theory and analytic "problem solving" are examples of concepts that have far-reaching consequences for ADR research in law schools and elsewhere. Menkel-Meadow again offers an exception that confirms the rule, while committed to salvaging mediation theory. She is often heralded as the chief proponent of a "problem solving" approach to mediation (including on her faculty website,<sup>158</sup> though she herself traces the term back to Lon Fuller).<sup>159</sup> Menkel-Meadow makes reference to Burton when she discusses the difference between interests (as opposed to positions, in the *Getting to Yes* sense) and needs. She aligns herself with Burton, though with a more feminist understanding of "human" needs. She writes:

As 'needs' may stand behind or even 'under' interests (often self-proclaimed and still assumed to be mostly economically instrumental), the lawyer can, in interviews and other interactions with the client probe for longer-term needs beyond short-term, case-based 'interests', thereby helping uncover the needs of the client and other affected third parties. This broader, social welfare (if perhaps somewhat maternalistic) approach to determining what actually may be at issue in a dispute is consistent with the approach of many mediators to go beyond the 'framed' dispute to look at what the underlying conflict is really about and 'reframe' it. With a deeper, and perhaps longer, list of 'needs', efficient trades continue (...) but parties and their lawyers can attempt to negotiate for deeper and, ultimately more stable, satisfaction.

These are different possible points of departure for the "problem-solving" approach. For Burton, the emphasis is on a theory that locates the unmet needs to explain and therefore redress the

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<sup>156</sup> For an early analysis of the theorization dynamics in CR, see Hill, B. J. (1982). An Analysis of Conflict Resolution Techniques: From Problem-Solving Workshops to Theory. *Journal of Conflict Resolution*, 26(1), 109–138.

<sup>157</sup> See another example in the use of Foucauldian governmentality by Pavlich, G. (1996). The Power of Community Mediation: Government and Formation of Self-Identity. *Law & Society Review*, 30(4), 707.

<sup>158</sup> <http://www.law.uci.edu/faculty/full-time/menkel-meadow/>

<sup>159</sup> Menkel-Meadow, C. (2003). *Dispute processing and conflict resolution: Theory, practice, and policy*. Aldershot, Hampshire: Ashgate/Dartmouth.

cause of conflicts broadly. For Menkel-Meadow, the emphasis is on identifying the need that informs the conflicting interests or perspectives, thereby producing greater long-term stability in particular disputes. Nevertheless, as I discuss in the next section on pragmatism and law, this approach also serves as an expression of a pervasive philosophical tenet of our times, i.e. pragmatism. As Michael Alberstein puts it, “We’re all pragmatists now”.

The difference in scope between dispute resolution and this snapshot of conflict studies thus also indicates a difference in the style of theory and in the domains that are considered to be under the purview of each. The precise genealogies of the designation of their respective arenas, in which dispute resolution larges houses domestic and private disagreements, and thereby is itself housed in law schools and negotiation programs, while the realm of conflict resolution houses international and “cultural” clashes, all this remains to be studied.<sup>160</sup> This is to say nothing of another sister field that holds significant insights for the practice and theory of ADR, namely collaborative planning. These genealogies have, however, left their mark on research agendas, especially as hybrid and interdisciplinary fields have emerged and the practice continues to expand.

### **2.1.5 Justice, Power, and the Mediator’s Toolbox**

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<sup>160</sup> Some thoughts on the distinction between conflict/dispute can also be found in Warfield, W. (2002). Some Minor Reflections on Conflict Resolution: The State of the Field as a Moving Target. *Negotiation Journal*, 18(4), 381–384; Schoeny, M., & Warfield, W. (2000). Reconnecting systems maintenance with social justice: a critical role for conflict resolution. *Negotiation Journal*, 16(3), 253–268.

Out of the competition of styles and research agendas, then, emerges the current prevalent state of practice, and largely, theory.<sup>161</sup> One finds an “eclectic” utilitarian approach where mediators feel at ease employing and mixing<sup>162</sup> elements of facilitative, evaluative,<sup>23</sup> and less often, narrative or transformative mediation.<sup>163</sup> As a prime example of this, consider Jeffrey W. Stempel,<sup>164</sup> briefly mentioned above, arguing against firm distinctions between styles because they create “false dichotomies.” These dichotomies, he argues, wrongly suggest that mediators have to be firmly in one stylistic camp or another. Instead, mediators should follow their “personal style” and respond to the desires of the parties. For Stempel, and many practicing mediators, a qualified mediator does best by using their experience and judgement to decide which situation and type of dispute calls for a more facilitative or more evaluative style. The role of the law is especially noteworthy in this argument. On the one hand, Stempel indicates that the argument for stylistic purism is due to firstly, an overly formal worldview that assumes “that the world (particularly the legal world) is composed of rigid categories and the corollary view that mediation, as a part of the world, must in some way be classified” when in reality both disputes

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<sup>161</sup> See also Hoffman, D. A. (2008). Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR. *J. Disp. Resol.* For an empirical exploration of the –surprisingly minor- differences in results from using different dispute resolution techniques on 100 divorce cases. Arguing that the tensions between different styles are due to economic and ideological reasons, Hoffman concludes that in light of the overwhelming similarities between styles and the ongoing hybridity, the field at large should aim to develop forward in unison more.

<sup>162</sup> Litig, E. L. R. (2011). We Can Work It Out: Using Cooperative Mediation-A Blend of Collaborative Law and Traditional Mediation-To Resolve Divorce Disputes. *The Review of Litigation*, 30(2), 245. or Marcum, T. M., Stoner, C. R., & Perry, S. J. (2011). Reframing the Mediation Lens: The Call for a Situational Style of Mediation. *S Ill ULJ*.

<sup>163</sup> Wall, J. A., & Dunne, T. C. (2012). Mediation Research: A Current Review. *Negotiation Journal*, 28(2), 217–244 find that mediators actually have “approximately 100 techniques to choose from” (at 226) though many of these are overlapping and hybrid forms. For an overview of the cognitive science research mediation can draw from, see Jones, G. T. (2003). Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution. *Penn St. L. Rev.*, 108.

<sup>164</sup> Stempel, J. W. (1996). Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role. *Fla. St. UL Rev.* Stempel, J. W. (2000). Inevitability of the Eclectic: Liberating ADR from Ideology. *J. Disp. Resol.*, 247.

and mediation as such are much more hybrid beings. On the other hand, he also holds that, secondly, the “ideological” preference for facilitative mediation (at the presumed expense of more evaluative forms) is pushed forward by “non-lawyers, many of whom appear to have a generalized aversion to things legal or litigation like.” Put a little differently, non-lawyers for Stempel approach law in a naively formalistic way *and* they dislike that presumed formality in law, but then they desire formal stringency in mediation styles.<sup>165</sup>

Stylistic uniformity, according to Stempel, is reserved for two scenarios. The first is where the parties expressly demand, for instance, a purely evaluative process. The second is the more dubious scenario where one is ideologically committed to a style; Stempel’s general assumption is that such firm attachments are limited to transformative practitioners, in keeping with their general perception as antiquated and fringe. Nevertheless, this approach corresponds to and, I would argue, grows out of, wider social developments and attitudes towards ideology and presumably strict, purist norms. In a complex, post-modern world it seems simply inadequate to commit to one method and expect it to address all our needs as well as what we understand the parties’ needs to be. As Menkel-Meadow wrote in 2004:<sup>166</sup>

In our postmodern and fractured world, many disputes and conflicts are, in fact, characterized by complicated issues (e.g., resource allocation), multiple-party responsibility (are we past single fault attributions and simplistic causal assumptions in law yet, or do we lag so far behind science?), and generational and other “third-party” impacts (for example, in environmental and family dissolution matters). In my view, we need both new multiparty processes (beyond the outmoded two-sided adversary system) and new substantively creative solutions (beyond the “limited remedial imagination of courts [and other legal institutions]) to find justice in our increasingly diverse postmodern world.

In such an interconnected, interdisciplinary, imperfect post-postmodern world, one in which even the youngest generation has seen at least one large ideological project fail, the suspension of

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<sup>165</sup> Stempel (2000), at 249/50.

<sup>166</sup> Menkel-Meadow, C. (2004) From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *J. Legal Educ.* At 6.

disbelief or basic cynicism necessary to align oneself with any one belief system or method does indeed seem willfully ill-informed. Following Max Weber, if this is a *disenchanted* world, then purity loses out to hybridity, and even erudite ideology loses to a gregarious, modern *worldliness*. The dominant response is to identify evermore problems and create more solutions, ones that are effective, combinable, operationalizable techniques and tools to be strategically employed in order to have “real world” impact.<sup>167</sup> Such a vision is, understandably, both more attractive and legible to practitioners. It also distributes the risk of failure, itself an ever-present possibility in a process as complex and volatile as mediation, along more axes. However, what can get lost in this over-reliance on ideologically “neutral” hybrid techniques are the specifics and contexts of the conflicts at hand, that is, their politics and the questions of power that inflect both the situation and the ways it is reframed as a “problem.”

This would seem to hold true at a more visceral level as well when we consider the anxieties that drive the field: mediation, concerned with being typecast as a “soft” technique, performs its shrewdness, agility and versatility in relation to “complications”. It is almost as though facilitative mediation says, ‘yes, we think about feelings and remedial creativity, and “getting at what it’s really about,”— but at the same time, we are not uncomfortable with the sensitivities of modern, or indeed post-modern, rational humans, nor “touchy feely” in our manners and, most importantly, we accept people as they are and do not require you to change your views of the world for it.’<sup>168</sup>

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<sup>167</sup> Lytle, A. L., Brett, J. M., & Shapiro, D. L. (1999). The strategic use of interests, rights, and power to resolve disputes. *Negotiation Journal* 15, 31.

<sup>168</sup> It is worth pointing out that things in the mediation world are not always so non-ideological: The community mediation movement was explicitly normative and a project of social justice, transformative mediation has similarly explicit ideological commitments. The price both movements (which overlap in significant ways, see Chapter 3) have paid for such heavy normative burdens is the arguable banishing to the outer edges of the mediation world.

In important ways, then, mediation presents itself as both a soft and a hard target. As a result, the image of the mediator's toolbox is emblematic of how real world and ongoing structural injustices can be translated for applied, professional ethics, and how wrestling with injustice can become subsumed into techniques to lessen—or inadvertently obscure—its impact. The fact that different “tools” may have contrary goals, or are mutually exclusive -consider, for example, evaluation and party self-determination- does not weaken the box.<sup>169</sup> It merely expands it, and thereby improves the practice. Dispute resolution, at its most extreme, risks being the proverbial oil in the machineries of power, rather than the sand of resistance.<sup>170</sup> This risk, importantly, does not just exist for those practicing mediation in commercial contexts, but more generally, through the depoliticization of dispute resolution and the absence of an account of power.

As legal anthropologist Annelise Riles points out, normative critiques of mediation lose their punch by being absorbed into the seemingly neutral array of techniques at a practitioner's disposal.<sup>171</sup> For example, critical insights into the obviation of politics, in the sense of getting around unjust local politics via global ADR, are often lauded as an overcoming of petty power politics and indeed as the goal of the process. Riles, writing in response to Laura Nader's (2002)<sup>172</sup> critique of international dispute resolution as a post-imperialistic project, observes that even where “critical academic responses” are successfully heard by the ADR industry, they are transformed into an instrument to improve ADR, rather than to critically assess the practice as a

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<sup>169</sup>Cobb, S., & Rifkin, J. (1991). Practice and Paradox: Deconstructing Neutrality in Mediation. *Law & Social Inquiry*, 16(1), 35–62 write about the distaste for ideological debates, due to the fact that “in mediation, ideology is equivalent to hidden interests or agendas because ideology is understood as that which masks the machinery of domination and coercion-false consciousness.”, at 46.

<sup>170</sup> For a discussion of mediation's apparent apolitical nature, see Silbey, S. S. (2002). The Emperor's New Clothes: Mediation Mythology and Markets. *J. Disp. Resol.* 171.

<sup>171</sup> Riles, A. (2002). User friendly: Informality and expertise. *Law & Social Inquiry*, 27(3), 613.

<sup>172</sup> Nader, L., & Grande, E. (2002). Current illusions and delusions about conflict management—in Africa and elsewhere. *Law & Social Inquiry*, 27(3), 573.

whole. Practitioners and others in the ADR world will simply consider “politics as a factor to be included if ADR is to become more sophisticated in the future”.

ADR absorbs the critiques into the toolbox without much distinction based on normative importance. It adopts them as if they were orphans into a new family with little interest in their former identity: “In translating a critical insight into a programmatic or technical one, the authors demonstrate the power of these technical forms to absorb even the most fundamental challenges to their project as yet another tool in the toolbox, or factor on the checklist.”<sup>173</sup> The normative, theoretical, ideological, systematic charge of, in this case, the anthropological critique of ADR is not contested, but disarmed: no one is necessarily arguing the contrary, but unless they are presented in the existing terms of ADR, they will simply not matter. They are illegible. The toolbox has plenty of space for those tools imagined to counteract, for example, power imbalances; for example, screening parties for prior domestic violence incidents in divorce or custody mediation. And yet, there appears to be little to no space for the hammer of “we should not be doing this” because power might operate in ways that mediation cannot make up for, whether in a given situation or in a set of structures. As Riles writes: “they extend to the academic two choices ‘engage us in the language of the programmatic; give us concrete suggestions for improvement, or speak in the outsider's language of critique’.”<sup>174</sup>

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<sup>173</sup> Riles (2002), at 616.

<sup>174</sup> For a discussion of a similar critique that was level against the Legal Process school, and Lon Fuller specifically (i.e. the elevation of process over substance), see Bone, R. G. (1995). Lon Fuller's Theory Of Adjudication And The False Dichotomy Between Dispute Resolution And Public Law Models Of Litigation. *Boston University Law Review*, 75, 1273.

## 2.2 *The Legacy of Pragmatism in Law and Mediation*

However neutral the toolbox might be presented as being, mediation techniques operate in wider disciplinary and philosophical circles. These circles range from intra-disciplinary developments (such as legal pragmatism), to normative and analytical frameworks (such as Habermasian communicative action) to age-old philosophical debates (such as those surrounding the concepts of *praxis* and *theoria* in Aristotelian ethics).<sup>175</sup> Most importantly, the philosophical tradition of pragmatism has been hugely -if almost invisibly so- influential for the development of the normative framework, especially the “toolbox” ethos, that ADR scholarship and practice relies on. Breaking with the lineage of economic versus political liberal theory discussed above, pragmatism teaches that there is no ideal truth grounded in an external fact, but only ideas that humans develop and can then test in reality. Everything can and will evolve, so there is little concern for permanent normative (or other) principles.

Pragmatism has succeeded at becoming naturalized and diffusing its teachings into a seemingly non-ideological common sense. Critical theory, however, teaches us that even “inquiry” and “perception” are not natural categories. They are socially and historically constructed and shaped by power, and as guiding concepts determine the approach, scope and possible outcomes of knowledge production. Nevertheless, pragmatism is different from classical liberalism in having a more situated, and indeed constructivist notion of the individual. Dewey, for instance, highlights that starting with a liberal “individual” fails to account for the importance of social institutions for the *creation*, and ultimately, evolution of the individual.<sup>176</sup>

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<sup>175</sup> See DeHart, S. M. (1995). The Convergence of Praxis and Theoria in Aristotle. *Journal of the History of Philosophy*, 33(1), 7–27.

<sup>176</sup> Festenstein, Matthew, "Dewey's Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), Edward N. Zalta (ed.)

This section focuses on Michal Alberstein's careful exploration of how pragmatism, legal reasoning and dispute resolution are intrinsically linked in their intellectual histories. Departing from her exploration, recall that this project focuses on the political and normative imaginations of dispute resolution. These imaginations are enabled by dispute resolution's pragmatist basis, and the field's conceptions of power that developed as a result. In line with this excavation, the project seeks to develop a language for the liminality of mediation and for the emotional, informal, and alternative space it occupies.

### 2.2.1 Evolution and Belief: Pragmatism and the Law

A particularly notable exception to the practitioner-centered approach toward the mediation literature is the work of Michal Alberstein. In her books and articles, Alberstein explores notions of normative mediation theory<sup>177</sup> and the pragmatism of ADR and law, the role of trauma,<sup>178</sup> forgiveness and therapeutic elements in mediation as well identity functions inherent in negotiation.<sup>179</sup> In these studies, she asks questions directed both at the implicit normative assumptions and at the intellectual commitments and traditions out of which ADR scholarship arises, such as: "What is the theory which lies behind the idea that there is a method 'to change

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<sup>177</sup> Alberstein, M. (2000). Getting To Where? On Peace Making and Law Teaching at Harvard Law School: (or, Some Private Hope and Public Irony) *Law and Critique*, 1–20.

<sup>178</sup> Sarat, A., Davidovitch, N., & Alberstein, M. (2007). *Trauma and memory: Reading, healing, and making law*. Stanford, Calif: Stanford University Press

<sup>179</sup> (2009). Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations, *The. Cardozo J. Conflict Resol.*, 11, 1, as well as Rothman, J., & Alberstein, M. (2013). Individuals, Groups and Intergroups: Theorizing About the Role of Identity in Conflict and its Creative Engagement. *Ohio St. J. on Disp. Resol.*, 28, 631–841.

the way’ people resolve their disputes? What discourse enables the shift from ‘win-lose’ outcomes to ‘mutual gains’ solutions?’<sup>180</sup>

Most importantly for this dissertation, Alberstein extensively traces the philosophical commitments of American pragmatism, as well as pragmatist jurisprudential theory, in her 2002 book (based on her SJD dissertation, written at Harvard Law School), *Pragmatism and Law: From Philosophy to Dispute Resolution*.<sup>181</sup> She explores thinkers and philosophers such as Ralph Emerson, John Dewey, Oliver Holmes and Charles Darwin, and their legacy in legal realism, as a starting point for ADR. Alberstein holds that pragmatism continues to form an integral part of American self-understanding and the constitution of the “American subject” and she illustrates how it has long been central to American law and society. It is pragmatism that puts the notion of “problem solving” at the front and center of both jurisprudence and legal philosophy- and thereby bridges what for European thinkers would have represented a divide.

Theorizing, in the pragmatist notion, is not thinking as the opposite of doing. Rather, it is thinking deeply about how to best do things –an “account of the way people think,”<sup>182</sup> rather than how Mankind ought to be. The law is a central, and noble, iteration of that worldliness; it is powerfully present in the “[m]ythological foundation of the legal discourse as a substitute for philosophy, which preserves its pathos.”<sup>183</sup> For Dewey, for instance, the purpose of “inquiry” is to solve problems, above all else.

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<sup>180</sup> Alberstein, M. (1999). “Getting to where? On Peace Making and Law Teaching at Harvard Law School: (or, Some Private Hope and Public Irony),” *Law and Critique* 10, 3, 323, at 327.

<sup>181</sup> Alberstein, M. (2002). *Pragmatism and law: From philosophy to dispute resolution*. Aldershot: Ashgate Dartmouth.

<sup>182</sup> Louis Menand (1997) as quoted in Alberstein (2002), at 13.

<sup>183</sup> *Id.*, at 1.

In drawing out the enduring power and varying strands of pragmatism, Alberstein also highlights how pragmatism is contrasted with “inferior” forms of philosophy. She also offers a gendered reading of the differences between “classical, or general, pragmatism as [the] masculine discursive correlate” to the feminine, philosophical discourse of pragmatism (“general, hysteric, external, practical and progressive”).<sup>184</sup> The reverence for practice and practitioners in ADR, Alberstein argues, is connected to the “cultural offsprings” stemming from pragmatism, especially the legacy of Emerson. It is found in “Dewey’s ‘democratic faith in common people’... the scorn for high theory and for intellectuals... and in the contemporary Roger Fisher’s activist tone,”<sup>185</sup> as well as in the origin story of pragmatism as a continuous “pulling together” of ideas across diverse fields and schools of thought; this last idea lives on in ADR’s unconcerned interdisciplinarity. This narrative, Alberstein argues, underplays the fundamental shift and “new beginning” that pragmatism represented in American philosophy, as well as its proximity to a Darwinian approach to science, as opposed to Kantian idealism, which remains paramount in Europe.

Ideologically, pragmatism works in tandem with the American myth of individual (and collective) self-creation. At the time of its emergence, pragmatism was also, however, a marked departure within the United States: scholars at Harvard, specifically, saw their Unitarian religious beliefs falter when confronted with evolutionary thought. How could one continue to be a theologian if the origin of the species was no longer God? Drawing on Kuklick’s account of the early intellectual history of pragmatism in Boston,<sup>186</sup> Alberstein describes how young Charles Pierce and William James answered this challenge by reframing beliefs as a “habit of action”

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<sup>184</sup> *Id.*, at 2.

<sup>185</sup> *Id.*, at 12.

<sup>186</sup> Kuklick, Bruce (1977) *The Rise of American Philosophy*. Cambridge, Massachusetts, 1860-1930 as quoted in Alberstein (2002) at 17.

that are perfectly suited to evolve and change. For instance, just because one no longer believes a specific aspect of a religious teaching — such as the belief that humans were created according to the biblical account- does not mean that one has to abandon *all* religious belief.<sup>187</sup> From the start then, pragmatism was interested in both continuity *and* progress: not a radical overthrowing of previous thought, but a re-examination and evolution that synthesizes between (frequently overstated) poles to arrive at a reasonable “middle-of-the roadism,” as Kucklick calls it.

Alberstein uses a post-structuralist methodology that is inspired by Lacanian psychoanalytic. She develops the term “philosophy” to capture the particular -and pervasive- strand of legal thought that pragmatism has brought forward: experience and “inquiry” becomes philosophy, and from there it imbues “the Law” with just enough pathos and grandeur for the law to become a substitute for philosophy. The pathos and grandeur contribute to the intertwined nature of “grand theory” -itself present in Emerson’s original quest for a uniquely American philosophy - and to its settlement into what Alberstein calls “a low, case-sensitive practice, a [...] ‘little-things’ private existence.”<sup>188</sup>

In keeping with the gender politics of pragmatism, William James himself provides us with an opening for connecting ADR and pragmatism:

You see by this what I meant when I called pragmatism a mediator and reconciler and said, borrowing the word from Papini, that she ‘unstiffens’ our theories. She has in fact no prejudices whatever, no obstructive dogmas, no rigid canons of what shall count as proof. She is completely genial. She will entertain any hypothesis; she will consider any evidence.<sup>189</sup>

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<sup>187</sup> *Id.*, at 18.

<sup>188</sup> *Id.*, at 12.

<sup>189</sup> William James, Lecture II from *What is Pragmatism* (1904), *A New Name for Some Old Ways of Thinking*, in December 1904, from William James, Writings 1902-1920 (retrieved from <https://www.marxists.org/reference/subject/philosophy/works/us/james.htm>) See also Alberstein’s reading of the quote as James’ anchoring of pragmatism in the “middle of the road”, Alberstein (2002) at 20.

Pragmatism is then presented by its proponents as a feminine voice of calm, generosity and friendly peacekeeping. From a psychoanalytic view, however, it would be hard to not read its “unstiffening” as becoming flaccid and potentially castrating. The seeming absence of “obstructive” ego, prejudice, or barriers of any kind allows for unparalleled openness and receptiveness. Here, James seems to be describing an idealized mother figure or, a prostitute who neither judges nor forbids. In either reading—mother or prostitute—the domain is private. The feminine, private flexibility of the domestic pragmatism, based in “real life,” is then pitched against the brass, masculine, external, foreign, outside world of analytical European philosophy, located in the ivory towers of imaginary theory.

I should note here again that in its self-understanding, the PON that Alberstein investigates is concerned not only with “little things.” Rather, as discussed in Chapter 1, members of the PON do very much think that their method can be applied to greater contexts and scales, including to geopolitical conflicts, rather than only disputes.<sup>190</sup> However, they do not need a “grand theory” or single normative narrative to do so. Normative and moral needs are not the focus, they are a positive externality: the most efficient allocation of resources happens to be fair, too. The technique (of integrative bargaining, in this case) then almost replaces theory. It is in this sense that a pragmatist understanding informs this approach to DR as well.

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<sup>190</sup> For an example of the “scaling up” of integrative bargaining theory, see for instance Khalif Z. Shariff (2003). *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*. *Harv. Negot. L. Rev.*, 133, arguing that DSD is the extension of PON principles to larger scale, public institutions. For a critical read of such optimism, see Cohen, A. (2009b). *Dispute Systems Design, Neoliberalism, and the Problem of Scale*. *Harvard Negotiation Law Review*, 14.

### 2.2.2 The Life of the Law versus philosophical engineering

Alberstein draws out the significant difference between Holmes and classical pragmatist philosophers, like Dewey. Holmes is an of-the-world lawyer who nonetheless remains fundamentally detached from the real world, including in his judgments. As she puts it, Holmes's pragmatism is logical, ironic, not good at 'real affairs', professional, theoretically obscure, obsessive, internal".<sup>191</sup> For Alberstein, these differences are "complementary answers to the same call." For her, it is in various counter-intuitive ways that the philosophers and the lawyer presented what were at times more and at other times less "practical," worldly approaches. For instance, Holmesian legal philosophy was extremely specific to his view of the interior "life" of law. This is encapsulated in the famous quote, "The Life of the law has not been logic. It has been experience."<sup>192</sup> Legal reasoning is a thoroughly opaque, experiential process<sup>193</sup> that does not lend itself to abstraction into other fields, though Holmes does use metaphors from other areas. Alberstein explains, "Decision making in law, according to Holmes, is a 'matter of organic happening, of mathematics and scales'".<sup>194</sup> The law incorporates from other areas of knowledge, and has effects of any number on areas of life, but its internal process, or its technique, is kept almost romantically obscure by Holmes. It is only accessible to those who devote themselves to "the Law."

By contrast, Dewey's pragmatist theories were intended to be accessible and applied in any number of contexts, it was a true *method*, an instrument to be used both to devise approaches

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<sup>191</sup> *Id.*, at 55.

<sup>192</sup> Holmes, J. (1880) Langdell Review, Book Notices, *14 AM. L. Rev.* 233, at 234; as quoted in Hawkins, B. (2012). *The Life of the Law: What Holmes Meant.* *Whittier L. Rev.* at 324.

<sup>193</sup> For an analysis of the famous quote, see for instance, Hawkins (2012) who argues that "experience" here is far from a generalizable unit, but rather the intuitive expertise acquired by judges through years of practice.

<sup>194</sup> Alberstein (2002), at 65.

and to evaluate them, ripe with the ethos of engineering and clarity. This understanding of method links together pragmatism as a philosophy, the influence of evolutionary thought, and the centrality of process for liberal political thought. Dewey held that pragmatism is not a “spectator sport,” and that it is not concerned with finding a stable, external truth and abstract knowledge. Instead, pragmatism is an ongoing process of inquiry, which generates timely, and therefore necessarily provisional solutions to the concrete physical or intellectual trigger of the inquiry.

Over the course of this book, Alberstein draws out the continuity between Holmes, Llewelyn and Duncan Kennedy, whom she refers to as “legal prophets,” and the legal developments post WWII, when pragmatism was still influential but evolved into legal realism and the process school. This evolution includes a slow dispersion of pragmatist approaches into a discreet “common sense,” one that is so pervasive that it is hard to argue with.

Using the example of (then) present-day Harvard Law School, Alberstein highlights the manner in which much of the negotiation teaching captures students’ intuitions, including the sense that abstract jurisprudence alone will not make them good, or successful, lawyers. The logic of win-win is presented as a way to circumnavigate ideological divisions and unbridgeable power differences, not by engagement with them, but by means of a technology that makes them secondary. It is presented both as promising and as an appeal to common sense. In the context of what is still considered to be one of the best legal educations an aspiring lawyer can receive—a degree from Harvard Law—the “and-and” of the curricular offerings nonetheless make it clear that “[t]he constructive, optimistic and unified mode of this discourse [of ADR] is contrasted to the diverse ‘torn’ political mode of jurisprudential discourse.”<sup>195</sup> I would add that this instance powerfully illustrates one of the ways in which liberalism is intrinsically linked to the marketing

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<sup>195</sup> Alberstein, M. (2000). Getting To Where? *Law and Critique*, 10: 323–342.

of ADR in the sense of a set of techniques: institutional arrangements each with their own historical baggage, and mutually exclusive methods of dispute resolution, are presented in the manner of personal and business “choices.” They are offerings and options that individual consumer-students are free to make. The promise to students seems to be: opt to expand your toolbox as a lawyer, become a sophisticated consumer and potential creator of doctrine and jurisprudence, take courses which might leave you with more questions than answers- but also, while you are here, do come and learn how to do this other, much simpler, more intuitive method. It is striking here that even if individual students might choose one side over the other, or find the choices irreconcilable, the institution itself does not, on its face, take sides.

### ***2.3 Three lacunae left by mediation scholarship***

The previous sections have pursued two arguments. First, there is, with a handful of exceptions, a sustained trend in the dispute resolution literature that makes scholarship less focused on “invention” and normative theories and more focused on explanatory models of (reflective) practice. Second, if we approach mediation theory from the standpoint of modern American legal theory, we find that mediation follows the contours of an application of pragmatism.

Nonetheless, in what follows, I want to argue that this pragmatist theoretical basis leaves important lacunae in the ability to think about what mediation is and what it should be. This shortcoming can be summarized along three axes: (i.) the disparity between mediation versus litigation theorizations; (ii.) the lack of clarity on questions of substantive versus procedural justice; and (iii.) a “blind spot” concerning power and authority in mediation theory. I will briefly discuss each axis here, drawing out the conceptual implications through lines between them via the example of the on-going debate on the notion of neutrality.<sup>196</sup>

#### **2.3.1 Disparity between mediation and litigation theorizations**

When critiques of mediation, such as the so-called Access to Justice literature, use the Law as a means of contrast, they run the risk of romanticizing the actual workings, and indeed the

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<sup>196</sup> See for instance Forester, J. & Stitzel, D. (1989). Beyond Neutrality. *Negotiation Journal*, 5(3), 251–264 for an early repudiation of the neutrality ideal, albeit while intervening in the public disputes debate. Gibson, K., Thompson, L., & Bazerman, M. H. (1996). Shortcomings of neutrality in mediation: Solutions based on rationality. *Negotiation Journal*, 12(1), 69–80 For a bigger scope, see Mayer, B. S. (2004), arguing that there is a “deep crisis” in ADR due to the field’s failure to “address conflict in a profound or powerful way” and “engage in its purpose seriously”. Mayer might be a curious choice here, seeing as his credentials center on his success as a practitioner, and his books address a wider audience than most scholarly writings. However, his diagnosis of a crisis in conflict resolution merges the theoretical and the practical shortcomings seamlessly and advocates for solutions on both levels, including a critique along the three axes I propose here.

normative basis of the legal system. There are anecdotes of law students being informed that they are in the wrong building when they bring up the concept of justice; the law professor directs them to the philosophy department.

Many lawyers and legal scholars, even those with less cynical outlooks, would agree that legal theory and idealism are far removed from the daily workings and the social construction of the regulatory bodies, the courts, law enforcement agencies, and certainly the legislature. Legal positivism is the mainstream approach. Critical legal studies points out that far from being just, the Law is an instrument that creates and reproduces structures of oppression and that it favors the rich and powerful. To be clear, my argument in this dissertation is *not* to suggest that the Law is morally, politically or democratically superior to mediated agreements. Rather, the starting point is that the levels of research, internal debate, and theorizing that exist within the study of law, and which continue to take place and expand, even if with increasingly interdisciplinary methodologies—have no disciplinary equivalent in ADR. What does that tell us about ADR and where do we go from here?

Rather than recounting the development of legal theories over the course of centuries, my interest is in highlighting the interconnectedness between legal theory and its contemporary context—that is to say, the manner in which the creation and analysis of legal knowledge are shaped by their political context. In the previous chapter, I mentioned the so-called “litigation explosion.” In a series of studies that revolve around this idea, Marc Galanter historicizes the changing research focal points, the varying public standing of lawyers, and the law’s overall place in the social and political order over the course of the twentieth century in the United

States.<sup>197</sup> Galanter argues that the norms around how to settle disputes and conflict, what is the right amount of legal and formal interference in it, who can hand out justice, who deserves it versus who is considered a troublemaker, have waxed and waned over the years.<sup>198</sup> These developments have emerged out of the clash of political movements, public trends and manipulation, and for legal scholarship especially, expectations formed in the past and that were not objectively assessed.

Galanter points out that in the US context, until the mid-sixties, law was seen as a dying profession. This status changed dramatically with the overall extension of rights and the civil rights movement. He describes the result of this expansion as a two-fold contradictory dynamic: on the one hand, a strengthened belief in the power of the law and the importance of public justice, which, on the other hand, was followed by a backlash via the critique that there had become “too-much-law.” The US thus went from romantic conceptualizations of lawyers *a la* “To Kill a Mockingbird” and from the fortification of rights against monied interests via the expansion of public interest law, the access to justice movement, and others—to the fear of becoming a litigious, infighting society. Galanter holds the “litigation explosion” to be largely false if checked against empirical studies that show overall decline of law suits. Instead, it is then employed strategically to put a damper on such extended accountability.

The too-much-law critique operates both on the level of litigation and the level of legislation. At the former level, the critique emerges from the (largely imagined) spectacle of

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<sup>197</sup> Galanter, M. (1983). Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society. 46 *Ucla L. Rev.*; Galanter, M. (1986). The day after the litigation explosion. 46 *Md. L. Rev.*

<sup>198</sup> Galanter, M. (2002). The Turn against Law: The Recoil against Expanding Accountability. 81 *Tex. L. Rev.*

people dragging each other in front of civil courts, driven by personal animus and, on the corporate side, by greedy (and clueless) consumers trying to extort payments from companies for inflated liability and tort claims. At the level of legislation, the critique invokes overactive regulatory bodies. From this perspective, legitimate efforts to extend environmental and consumer rights were not only dubious “Naderisms”<sup>199</sup>—as avenues for political activism—but also dubious avenues for judicial activism, with overactive and interventionist courts. Supreme Court Chief Justice Warren Burger, mentioned in chapter 1, participated in this narrative by advocating for judicial restraint at the 1976 Pound Conference—(not) incidentally the very same occasion that saw Frank Sanders introduce the idea of the Multi-Door-Courthouse.

Galanter argues that throughout, legal scholarship remained fundamentally conservative due to a sort of structural delay. The norms of what is considered an ordinary (and therefore desirable) amount of litigation was not empirically founded, but rather, based on the experiences of the senior lawyers and professors, whose ideas had been shaped by the lull of the 1930s and 1940s. Further, I would add, the structure of legal scholarship was such that an extraordinary amount of research was concerned with the workings of courts, the doctrinal arguments they ought to engage in and jurisprudence to explain their decisions. An extension of rights, and a following uptick in litigation thus falls right into the focal points of legal scholarship at the time.

Galanter also sees the “recoil against enlarged accountability filtered into legal education.”<sup>200</sup> He writes:

The rise of “law and economics” and generous funding by right wing foundations, notably the John M. Olin Foundation, encouraged an academic counterpart to the shift from “not enough justice” to “too much law.” Legal academics became less confident in the ability of legal reform to transform society. Influential torts casebooks tracked the rhetoric of tort reform. But business spokesmen and conservative ideologues were not the only people who were dubious about the expanded reach of the law. A spate of articles by liberal academics decried excessive legalization and litigation.

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<sup>199</sup> Named after legal and political activist Ralph Nader – incidentally the brother of legal anthropologist Laura Nader.

<sup>200</sup> Galanter (2003), at 276.

ADR's emergence in this context of a backlash to the rights movement, however, is then cast as an *invention* that came at the right time only to be usurped by market forces, just as the scholarly debate, from all points of the political spectrum, had served to undermine belief in the court system.<sup>201</sup>

If we accept this history of twentieth-century legal scholarship, it becomes clear that there is no pure legal scholarship safely operating in the Platonic world of ideas to be pitted against the characteristic pragmatism of the worldly ADR literature. However, and this is a central point, attached to the law, both contemporarily as well as historically, is a sustained and truly contentious scholarly debate that is not aimed primarily at describing or developing “tools” for the Courts and legislatures to employ.

This remains also true presently, despite the influx of cognitive sciences into legal scholarship, or perhaps precisely because of it. Internal dissent is formed almost necessarily by virtue of bringing a vast array of bodies of knowledge to bear on legal questions. ADR, of course, has a strong interdisciplinary component as well; so what accounts for the difference? The distinction might simply be structural: whereas the Law School is not the only place that studies law, it provides a center, while ADR is the urban sprawl, encompassing perspectives, methodologies, motivations, biases, and commitments from diametrically opposed viewpoints. What is more, the distinctions do not converge into a single field of study, but, quite often,

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<sup>201</sup> Merry, S. E. (1992). Popular Justice and the Ideology of Social Transformation. *Social & Legal Studies*, 1(2), 161–176. Cain, M., & Kulcsar, K. (1981). Thinking Disputes: An Essay on the Origins of the Dispute Industry. *Law & Society Review*, 375 identify “five presumptions of dispute theorizing. universality, ideological functionalism, settlement by courts, qualitative identity of the parties, and comparability.”, at 376.

remain in parallel silos. There is no real equivalent, then, to the capacious, critical tradition of, for example, the “Law and Society” scholarship tradition. Recall from the previous chapter that Menkel-Meadow, perhaps the most high-profile theorist of mediation discussed in these chapters, acknowledges this as the “unfinished project of ADR jurisprudence.”<sup>202</sup>

The concept of neutrality in mediation confirms this observation. After all, it is not the case that judicial impartiality is a settled debated for legal scholars. Rather, the debate that surrounds judicial impartiality is better theorized and more sophisticated. For instance, jurisprudence exists as a field of study to understand judicial decision-making (even if those decisions may be ultimately attributed to what the judge ate for breakfast) as an intersecting point of legal, doctrinal, social, and political explanations. On the other hand, mediation teachers do not go significantly beyond affirming the (only supposed, according to Bernard Mayer) need for neutrality—in some cases preferring the term “impartiality”—in mediator trainings and the study of mediation. The qualitative difference between these is equivalent to the difference between ethical rules versus legal philosophy.

Judges are perceived as neutral in some sense as well, but along with that neutrality comes the power of office, of social legitimacy. Judges carry with them the considerable weight of the social legitimacy that they convey. In the sense that they represent societal norms, judges are of course not neutral. In fact, they are expected to convey the potential of societal approbation or societal support through the decisions that they render. Mediators, facilitators, and other conflict resolution professionals do not offer that kind of social sanction. To the extent that people need this sanction, neutral conflict resolvers cannot avoid falling short.<sup>203</sup>

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<sup>202</sup>Menkel-Meadow, C. (2000). Mothers and fathers of invention: The intellectual founders of ADR. *Ohio St. J. Disp. Resol.*, 16.

<sup>203</sup> Mayer (2004), at 30.

The argument isn't that the Law achieves or is even always particularly concerned with justice (most lawyers would disagree), but that it is a structural part of the equation, a part, if you will, of the brand. In our political ordering, we turn to the law for justice, for sanction, for an institution to declare what is right and wrong.

The endurance of neutrality as a conceptual given in mediation shows a disconnect between theory and practice: while most scholars are aware of the impossibility of true mediator neutrality, it is still taught at face value in ADR courses.<sup>204</sup>

### **2.3.2 Substantive versus procedural justice**

The question of justice is, quite obviously, as large a theoretical question as there is. Rather than attempt to offer a redefinition or add to the literature on sub-forms of justice, my aim in raising the difference between substantive and procedural justice is to simply point out the ongoing uncertainty within mediation on how to address this question. It is unclear whether mediation can offer substantial justice, or what notion of procedural justice it operates under.

The ruling assumption of mediation theory is that when people are given a chance to participate in the decision-making process, when they are heard and when they feel heard, they encounter a form of recognition that in turn feels like justice. The second assumption is that people value this feeling, independently of the substantive outcome. Deborah Hensler points out the lack of empirical studies of mediation, especially with regard to participant satisfaction. This lack, she suggests, leads to the blind transposition of what we think about trials onto mediation, including

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<sup>204</sup> Astor, H. (2007). Mediator neutrality: making sense of theory and practice. *Social & Legal Studies*, 16(2), 221.

the assumption that people prefer “procedural” over substantive justice—which in turn would supposedly be dealt out through litigation.<sup>205</sup>

The first imprecision in the notion of “procedural” justice in relation to mediation is that it fails to distinguish the importance of procedure, meaning the form and the design of processes and procedures, from the effect of such designed processes. To be clear, I do not mean that mediators must design their work in order to achieve maximum “customer satisfaction,” but rather, that it is important to take seriously the real-world effects of the processes and of how they relate to the real world needs, situatedness, and relations of power in which human beings are embedded. The power of mediation—even if it is only supposed, as Hensler might say—is not primarily in the model and forms of process design, but in their experientiality. The design influences the experiences, but the experience of mediation is the ultimate measure. Mediation closely aligns the possibility of involvement and participation with a form of justice. This is why its theorists have found inspiration in deliberative theory and in its emphasis on procedure to achieve democracy (an argument I explore at more length in Chapter 4). However, as participants, the satisfaction that one is able to glean from participation is not a theoretical question as much as a lived experience. The response that parties have is therefore likely to be influenced more by the emotional, almost physical, experience of addressing a conflict in the context of a mediation.

This emotional component is a significance source of what makes mediation powerful—and what makes it difficult to theorize. An interesting approach that goes beyond mere formalism of proceduralism is the concept of recognition by the political philosopher Axel Honneth. For Honneth, recognition is a three-pronged component in the design of justice. These three prongs

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<sup>205</sup> Hensler, D. R. (2002). Suppose it's not true: challenging mediation ideology. *J. Disp. Resol.* 81.

are the spheres of recognition in love (broadly understood to include affective relations between human beings); social esteem; and standing in the law.<sup>206</sup> For Honneth, avoiding “disrespect” is more important, and perhaps more achievable, than the elimination of inequality. If we are to avoid the experience of disrespect, he suggests, a system of justice must operate on the multiplicity of these spheres. It would thereby mimic or mirror the complexity of human identities, and it would facilitate progress in the overall development of normative orders.

However, even supposing that recognition is understood to include an experiential, identarian component, it might still contain a bias towards a form of social control of procedural justice, where desirable impulses are championed. This becomes clear in the context of neutrality. Even if carefully designed ADR processes achieve procedural justice, and even if that were to lead to substantive justice, nonetheless, potential clients often do not believe that promise, as Bernard Mayer points out. Instead, they desire and indeed require “vindication,” or an acknowledgement of what they perceive as the normative harm done to them and a judgment from the outside that mends this harm and makes one whole. To achieve this, mere participation in a mediated dialogue is not enough. As Mayer writes, “The fantasy of a powerful representative of social norms looking down from the bench and indicating that one party to a dispute is just and righteous and the other shallow and evil may almost always be just that: a fantasy not likely to be realized. But it is at least conceivable.”<sup>207</sup>

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<sup>206</sup> Honneth, A. (2004). Recognition and Justice: Outline of a Plural Theory of Justice. *Acta Sociologica*, 47(4), 351–364.

<sup>207</sup> Mayer, B. (2004), at 27.

Procedural justice, both in the liberal tradition and in the ADR tradition, is more rational, more delayed, more grey, and more of a compromise. It may be good for you, and good for the world, but this is so in the way of medicine: with a bitter taste, with side effects, with the potential for complications. And like medicine, it does not “feel natural.” Vindication, on the other hand, would, representing in this imagination a form of “natural” law because humans are not only creatures that yearn for understanding and dialogue. Treating *needs*—such as what Bernard Mayer identifies as the need for vindication, validation, impact and safety—as less important than *values* such as neutrality, voluntariness, compromise, or collaboration, creates a mismatch between, on the one hand, the full range of needs of the parties in a conflict and the measure of justice arising from them and, on the other hand, a theory of dispute resolution committed to forms of procedural justice that regards those very needs as inferior.

The question of justice in mediation, then, both in regards to how and whether to achieve it, as well as what it would look like, is far from settled. This normative vacuum extends to the question of neutrality. Form and content of justice in mediation are far from settled.

### 2.3.3 Power and authority in mediation theory

The field of dispute resolution has long faced concerns about the question of power, and it has also long had concerns with its lack of prior concern.<sup>208</sup> The primary lens employed in the

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<sup>208</sup> Avruch, K. (2005). Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic. *Marq. L. Rev.*, 89, 567, for a lack of power account from conflict perspective; Also, Nader, L., & Grande, E. (2002). Current illusions and delusions about conflict management—in Africa and elsewhere. *Law & Social Inquiry*, 27(3), 573–591 conclude “If any single generalization has emerged from the anthropological research on disputing processes (Nader and

literature has been one that considers power imbalances, primarily the potential imbalances between parties. This is of course a fundamental question that touches on the heart of questions of theory and practice. If parties have different degrees of power throughout the process, and we continue to designate the mediator as a neutral actor, the outcomes are likely to be skewed heavily to reflect such disparities. There are approaches to address these imbalances,<sup>209</sup> mostly through process design. Generally speaking, however, wider questions of power and authority are thrown into relief more clearly in international settings, surrounding, for instance, questions of “culture”<sup>210</sup> and hegemonic notions of what a good resolution would look like from the (Western) perspective of those who intervene in conflict.

However, power in mediation is not only about differing degrees of social and economic capital that the parties have and the access these afford or forestall. After all, anthropologists teach us to question that very simple assumption. The ways in which participants operate in a setting such as a mediation, how they are able to codeswitch, and how they marshal other forms of pressure or alternatives to the mediation do not always equal their power position on paper. What’s more, though, is that the conception of power in mediation should work to encompass more structural factors than that of differing party capacities, or an understanding of power as a commodity.

Power and authority structure our social institutions in much more subtle—and indeed, overt—ways. The question of power in dispute resolution, in other words, really ought to be the question

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Todd 1978), it is that mediation and negotiation require conditions of relatively equal power.” (At 579) Nader and Grande also quote Auerbach who “...explains the current enthusiasm for delegalization as an effort to deal with the legitimacy dilemma: ‘The law is designed to protect the Haves as well as the Have-nots. The problem is that the ideal of equal justice is incompatible with the social realities of unequal power, so that, as I have said elsewhere, disputing without the force of law is doomed to failure.’” (At 858).

<sup>209</sup> Or Walther, G. (2000). Power imbalances in divorce mediation. *American Journal of Family Law*, 14(2).  
Gewurz, I. G. (2001). (Re)designing mediation to address the nuances of power imbalance. *Conflict Resolution Quarterly*, 19(2), 135–162.

<sup>210</sup> Brigg, M. (2003). Mediation, power, and cultural difference. *Conflict Resolution Quarterly*, 20(3), 287–306.

of the *politics* of dispute resolution. What notions of authority, justice, and decision-making are at stake here? Who decides? What is the norm, and what is the standard? How are we shaped by outside authority, and what can mediation hope to achieve in this landscape? This shift from power as a commodity—one that is either already possessed (power imbalance) or one that is given to all participants (empowerment)—to these questions of power as the structural dynamics of the social institutions and discourses that are activated, elided, or articulated in mediation—is largely unaddressed by the research, perhaps because “politics” is increasingly a distasteful word, invoking exactly that which dispute resolution seeks to resolve: conflict and contestation.

Here, again, the debate around neutrality has relevance. The notion of mediator neutrality serves to obfuscate the power inherent in the mediator role, especially in the problem-solving camp, as she actively shapes the process, and reframes issues in ways that might fundamentally change the course of a mediation.<sup>211</sup>

What is more, developing such a political notion of power in mediation is pressing precisely because mediation actively promises empowerment gains to its users. I will discuss this in detail with regards to the framing of empowerment in transformative mediation, but problem-solving and facilitative mediation styles also use the term, for instance when *Getting to Yes* affirms that there is power to be gained from developing the ability to reframe. By doing so, they open a link between the improved dyadic dynamics in individual mediations to wider social change effects.

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<sup>211</sup> See Cobb, S., & Rifkin, J. (1991). Practice and Paradox: Deconstructing Neutrality in Mediation. *Law & Social Inquiry*, 16(1), 35–62. Zamir, R. (2010). Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic, *Pepp. Disp. Resol. Law Journal*.

There is ample reason to be skeptical of such “empowerment” optimism, as Sarah Cobb argues.<sup>212</sup>

Somewhat less frequently, the question of the power that a mediator wields is taken up in the literature.<sup>213</sup> Here, again, however, we can see how a lack of theorizing impacts the terms of the discussion around neutrality. What are the broader goals for mediating? When should a mediator take more or less charge of the goings-on in the room—be it to bring about agreement, to support a “weaker” party, or to advance a social, legal, political norm, be that justice or any other principle?

The theory which I seek to excavate from underneath the pragmatist consensus, then, is political more than legal. As the political theorist Wendy Brown argues, those terms have become discursively conflated in liberal political thought; at the same time, *practice*<sup>214</sup> becomes about legalism, thus evading the political debate one would expect it to elicit. The point is therefore not so much to critique mediation, as such critiques have been presented elsewhere at great length,<sup>215</sup> but to understand why fundamental questions can seemingly only be formulated in the

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<sup>212</sup> Cobb, S. (1993). Empowerment and Mediation: A Narrative Perspective. *Negotiation Journal*, 9(3), 245. For a more recent critique along a similar methodology, see Zamir, R. (2011). Can Mediation Enable the Empowerment of Disadvantaged Groups-A Narrative Analysis of Consensus-Building in Israel. *Harv. Negot. L. Rev.* 16, 193, arguing:

The breaking down of the personal narrative into a list of pragmatic topics lessened the chance for a dialogue, since it filtered out from the agenda symbolic values, such as history, culture, morality, and collective identity-values constituting an inherent part of the face and voice of the "other." This process was a by-product of conducting the mediation according to a problem-solving model, a model of rational decision-making based on pragmatic cost-effective reasoning. As Espeland has argued, such a model is incapable of attributing importance to symbolic values that are incommensurable with economic value or empirical justification. Those values will generally be perceived as a form of inferior, irrelevant logic. (at 45)

<sup>213</sup> Gerami, A. (2009). Bridging the theory-and-practice gap: Mediator power in practice. *Conflict Resolution Quarterly*, 26(4), 433.

<sup>214</sup> In Brown’s case, the practice of tolerance, see Brown, Wendy (2009).

<sup>215</sup> I present them with some detail in the introductory chapter to this dissertation.

“outsider’s language of critique”.<sup>216</sup> The critiques laid out in the previous chapter, as I have indicated, impact the field only temporarily. They do not seem to reach the center. Mediation has made important contributions to notions of justice, by highlighting that formal justice processes can fall short of the underlying needs of parties. These contributions are articulated in a, by and large, non-normative manner. In other words: mediation, driven by its pragmatism, argues that it “works.” It does not say sufficiently how it *thinks*, neither of itself nor of the justice system and its ideals. It shies away both from engaging its critics as well as from leveling an explicit critique of adjudication and its politics, the powerful institutions of the justice system or even the ideals of justice inherent in them.

There is reason to be hopeful that ADR might sustain a more critically inclined internal debate that goes beyond questioning the specifics. This would mean that there will be, quite simply, more professors of mediation, as compared to the still characteristic clinical focus. Programs in Dispute Resolution continue to increase and grow, and we can expect a further maturing of the research. However, there is probably equally as much reason for caution. The pragmatist methodology, as this chapter has argued, brings with it the exclusion of questions of politics, and a sustained effort at critical internal scholarship.<sup>217</sup>

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<sup>216</sup> See Riles, A. (2002).

<sup>217</sup> Here, again, collaborative planning proves the counterexample, to confirm ADR’s general private mindedness vs a public theory of “critical pragmatism” in collaborative planning: Forester, J. (2013). On the theory and practice of critical pragmatism: Deliberative practice and creative negotiations. *Planning Theory*, 12(1), 5–22.

### 3. Choice, Voice, and *Promise*

In his landmark jurisprudential article on mediation from 1971, Lon Fuller writes: "[O]f mediation one is tempted to say that it is all process and no structure."<sup>218</sup> This is a tempting description. However, it fails to consider the ways in which process *is* structure.<sup>219</sup> Not only are we what we repeatedly do, but processes themselves are powerful normative techniques that contain more than the sum of their parts and thereby structure the encounters in which they are deployed. Similarly, one might look at mediation and conclude that it has “no theory” because it does not produce much broad, general, abstract, or critical scholarship beyond its own methodology. However, as Chapter 2 shows, ADR does indeed use a very specific, pragmatist theory, albeit the literature heavily leans toward the improvement of clinical practice. What, then, is missing? Why does the field inspire so much academic critique and yet relatively little scholarly response from within?

I have argued above that centrally, mediation theory *and* practice do not have a satisfactory account of power—both the forms of power at play in society at large that mediation simultaneously reenacts and masks, as well as structures of unequal power relations among parties involved in mediation. In other words, power is not yet accounted for internally—that is, in the way it operates within the mediation process and between the people linked in direct social

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<sup>218</sup> Fuller, L. L. (1970). Mediation--Its Forms and Functions. *S. Cal. L. Rev.*, 44, at 308.

<sup>219</sup> As the legal anthropologist Sally Engle Merry writes with regards to the structuring force of legal processes:

“One aspect of the power of law is its ability to establish a dominant way of construing events and to silence others, thus channeling and determining the outcome of legal proceedings. Legal processes can be seen as performances in which problems are named and solutions determined. These performances include conversations in which the terms of the argument are established and penalties specified. The ability to structure this talk and to determine the relevant discourse within which an issue is framed—in other words, in which the reigning account of events is established—is an important facet of the power exercised by law.” See Merry, S. E. (1990). Discourses of Mediation and the Power of Naming. *Yale JL & Human.*, 2, at 2.

relations—nor externally, or in the ways that external power relations shape the social context in which the original conflicts occurred. As such, the solutions that it reaches lack a clear criterion for evaluation. Conventionally, one might say that this criterion or standard is justice. And yet, for a concept that seems so proximate and relevant, it remains so aspirational that it seems out of reach; and yet, in its absence, injustices litter our world and they are not nearly as hard to identify. Naming these injustices, their origins and their consequences, in a systematic and theoretically sophisticated way is an unfinished project for ADR.

It should be noted again here that I am not the first to make this observation about the ambiguities of justice in relation to mediation. Rather, my point is that in internal debates, the problem and the key point of contention has actually revolved around the understanding of power, even if articulated in different terms, as discussed in chapter 2. And as I argue there, however, the responses thus far have focused mostly on the first two aspects of power, or imbalances between parties and the idea of power residing in specific techniques,<sup>220</sup> and not sufficiently examined the role of social power relations more broadly as they structure the entire mediation process: the role and self-understanding of mediators and their standing vis-à-vis the parties; the structural and institutional landscape in which mediations take place; the ideals toward which parties and mediators strive; and importantly, the forces of power inherent in the human experience of mediation.

In this chapter, then, I examine how one school of mediation addresses these questions, to highlight how the emphasis on individual choice and empowerment ultimately elides the

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<sup>220</sup> For an excellent discussion of ways to assess and address power imbalances within a mediation session, see Gewurz, I. G. (2001) (Re)designing mediation to address the nuances of power imbalance. *Conflict Resolution Quarterly*, 19(2), 135.

structures of power. This school, Transformative Mediation, is distinct in that it identifies with social and ideological reform and it is committed to a sense of empowerment that goes well beyond one's ability to expand the pie. Below, I examine how TM deals with questions of power, both internal and external to the mediation process.<sup>221</sup>

As discussed in Chapter 1, Transformative Mediation is a style of mediation founded on the work of Joseph Folger and Robert Baruch Bush. Across their work, ranging from their book *The Promise of Mediation* as well as a series of articles, to their interventions in the field via trainings, the ISCT, and participation in the academic discipline, their framework revolves around advocating for an approach to mediation and conflict intervention that seeks to go beyond the mere settlement of disputes. Folger and Bush see moments of conflicts as opportunities to improve the interactions of parties with each other, as well as for allowing each party individually to experience both greater self-efficacy and an increased empathy with others. The terms they propose for these complimentary processes are "empowerment" and "recognition", with the goal of integrating them into "compassionate strength"—that is, a simultaneous awareness of one's own as well other people's needs and perspectives. To enable such changes, or “shifts” in TM’s language, it is central to treat mediations not as an exercise in problem-solving where the mediator brings about a mutually acceptable settlement to solve the “crisis.” Instead, a mediation is designed as a situation in which the parties are supported in making shifts from “moments of weakness and self-absorption” (this being Folger and Bush’s assessment of people’s instinctive reactions to being conflict), to greater clarity and connection. Having

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<sup>221</sup> For a more current discussion of TM’s commitment to social justice, arguing that party self-determination is crucial to achieve more just mediation outcomes, see Bush, R., & Folger, J. P. (2012). Mediation and social justice: Risks and opportunities. *Ohio St. J. on Disp. Resol.* See also Folger, J. (2008) Harmony and transformative mediation practice: Sustaining ideological differences in purpose and practice. *NDL Rev*, 84, 823 (discussing the ideological and practical differences between the “harmony” and the transformative mediation frameworks).

positive experiences of recognition and empowerment through conflict will, according to the authors, allow for “spill-over effects”<sup>222</sup> into other arenas of personal and social life and thereby lead to an overall change in the way in which people relate to each other. Here, it is clear that TM’s understanding of empowerment, recognition, compassion, and strength refuse to limit the significance of mediation to either the (rational) interests or even (unarticulated) needs of the parties, and rather, is concerned with the ways in which parties both in the mediation *and* in society at large can relate to one another and better understand themselves as affective and moral beings.

Mediation techniques employed in TM center on communication strategies that serve this vision of conflict as an opportunity for moral growth. The mediator’s role is limited to *supporting* the parties. It is they who retain control of- and responsibility for- the process throughout; this is referred to as party self-determination. In practice, this means that mediators follow the conversation closely and use “mirroring,” or repeating statements by the parties, as close to verbatim as possible. The mediator’s task is to also summarize what was said at different points in the mediation, taking special care to lay out clearly the topics in the conflict and where there are agreements and disagreements without smoothing over points of contention. To highlight party choice and avoid even subtle coercion by one party or by the mediators themselves, they will periodically use “check-ins,” where they remind parties of their options; such options can take the form of taking a break before continuing the session, caucusing with the mediator, or checking in with an outside source (such as a lawyer) if necessary, among others. In contrast to facilitative and evaluative styles of mediation, transformative mediators do not ask direct questions. They are unlikely to initiate caucuses to get background information.

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<sup>222</sup> Bush, R. B. & Folger, J. P. (1994), at 88.

They do not make suggestions for solutions to the dispute. Empowerment is *self*-empowerment that is *supported* by the mediator, not the attainment of greater power through solutions or options, be they efficient or creative, that are *provided* by the mediator.

It is instructive here to contrast the TM understanding of *empowerment* both with the PON rhetoric of power and its trope, “There is power in...” and with Menkel-Meadow’s understanding of underlying needs. Recall from Chapter 1 that for PON, the aim is for the parties to work toward a win-win solution by thinking about “power” less as a zero-sum confrontation and more as a bargaining model in which power actual resides in specific techniques of framing and reframing. This is indicated in the *Getting To Yes* discourse that there is power *in* the mastering of various techniques. Each party, and indeed the mediator, has or exercises power when they are able to successfully deploy these techniques, in an attempt to persuade the other party. Power here is a commodity held by parties based on their tactics: it resides in the instruments of rhetoric and reframing that they wield.

Meanwhile, in TM and the *Promise of Mediation*, the claim is not that power resides in or can be gained by the use of specific techniques. Empowerment is directly about the affective and psychic condition of each party to exercise self-direction; it describes the transformed situation of a party, not its growing ability to persuade. Empowerment is attained through the overall experience, not key moves that enlarge the pie. It is less about the settlement and agreement than about each party having the self-direction and self-empowerment of illuminating its own condition, options, and situation to itself and of understanding the other party. Furthermore, only the parties can empower themselves by virtue of the process and their experience of balancing self and other, strength and compassion. The mediator supports the parties’ empowerment, but it is neither she nor the shrewd use of a bargaining technique that empowers them; “power” as such

does not reside in techniques that she or they can employ. Put simply, empowerment is in the parties, not in the techniques and resolution.

Likewise, recall from Chapter 2 that Menkel-Meadow's understanding of mediation places a premium on the ability to identify the underlying needs that are hidden in the adversarial structure of litigation, and, indeed, that can be masked by an exclusive focus on winning and on interests. For Menkel-Meadow, power resides in the process. Mediation is best when the long-term needs and the interests that they produce are addressed. The focus on each party's unarticulated and perhaps unrecognized needs requires a crafty process -or better yet, a variety of processes- and an equally astute mediator. Although there is little by way of a theorization of or direct appeal to power, this understanding of mediation rests on the mediator's ability to turn the conversation away from limited interests to something bigger: the parties' needs and the public interest. If empowerment for TM belongs to and is exercised by the parties, it is, for Menkel-Meadow, in the processes and in the mediator who can overcome zero-sum games and a narrow sense of interests. And if empowerment for TM is intimately tied, as we will see below, to "self-transcendence" or the ability to think and experience outside the limits of one's own interests and needs, it is for Menkel-Meadow more limited to what might be called "interest-transcendence," so as to gain a better understanding of one's needs and find a creative remedy.

Whereas Menkel-Meadow calls for a process that pays attention to the public interest, in *The Promise of Mediation*, Folger and Bush explicitly connect their method with even wider political, social and ideological goals. In turn, they connect these goals to their underlying and "coherent view of human nature and society, the Relational worldview."<sup>223</sup> Relational ideas revolve around the integration of dualities: self and other should relate to each other in ways that

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<sup>223</sup> Bush, R. B. & Folger, J. P. (1994)

allow for both to flourish. This is an “and/and” of compassion for the other and strength for the self. Folger and Bush present this as a body of thought that needs to be enacted in transformational behavior. In this way, they themselves integrate the duality of thought and action, discursively performing in a sense this “integration of dualities.” For them, “The ultimate value is transformation [...] to act with compassionate strength.”<sup>224</sup> In order to grasp how this ideal of transformation toward compassionate strength plays out on the ground, and the senses of power that inflect it and those that it elides, it is important to first lay out the structure of the ethnography that informs the final part of this chapter’s analysis.

The ethnographic component of this chapter’s analysis of TM employs a participant-observant approach. I participated in three different trainings and became a volunteer mediator for the Ithaca Dispute Resolution Center and, through this, a New York State certified mediator.<sup>225</sup> While there are some Community Centers that use transformative mediation,<sup>226</sup> the vast majority uses a facilitative style.<sup>227</sup> Ithaca itself is a historic center of TM. It has close ties with Joseph Folger, who visited the Center as well as the Cornell ILR school during the time of my field study. In turn, long-time members of the Ithaca Center have direct links to the Institute for the Study of Conflict Transformation (ISCT), a think tank concerned with the study and promotion of TM in the United States and globally. Incidentally, these members were the ones carrying out

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<sup>224</sup> *Id.*, at 242.

<sup>225</sup> Note that NYS tasks local mediation centers with the certification process of mediators. The certification process is different in other states, such as Virginia, where the state court system administers trainings for certification.

<sup>226</sup> The ISCT website lists five affiliate community dispute resolution centers in the United States, as of Spring 2019. <http://www.transformativemediation.org/affiliates/>

<sup>227</sup> See a special issue of the *Dispute Resolution Magazine* discussing the state of community mediation (without reference to TM): Amsler, T. (2012). Community Dispute Resolution: Assessing Its Importance and Addressing Its Challenges. *ABA Dispute Resolution Magazine*.

the trainings I participated in, one, a fellow at the ISCT as well as on its Board of Directors—and another staff member and lead trainer who is also a ISCT fellow.<sup>228</sup> These connections between the Ithaca Dispute Resolution Center, its institutional surroundings, deep networks, and location, make the case study especially poignant as an exemplary representation of TM in theory and action today.

The thematic analysis I present in this chapter heavily focuses on the foundational literature of TM and on the main training that volunteer mediators have to complete, rather than on in-session observations. This focus reflects that my concern here is primarily with the framing of TM to its newest practitioners, and it is here that we understand its self-conception at work. Furthermore, focusing on training provides a view into how TM, as a discursive and practical field, fashions, molds, or seeks to make its mediator. It is certainly true that the mediation session is the most applied form of mediation practice. However, it is a frequently studied setting,<sup>229</sup> and less pertinent to the questions of this dissertation about the theorization and framing of power and mediation. A focus on in-session observations can make reference to which questions and techniques appear and which questions and techniques do not in a particular setting, or to what parts of a framework do or do not manifest on the ground, and the discourses and techniques that any given mediator may use to supplement the framework. All this, however, only indirectly confronts the framework, inevitability limited by the peculiarities or specifics of each given session and its personalities. Meanwhile, the training offers a more direct view into the overall

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<sup>228</sup> See <http://www.transformativemediation.org/about/board-and-fellows/>

<sup>229</sup> There are many interesting ethnographies of mediations, a famous example would be Sally Engle Merry's work on community mediation centers. See Merry, S. E. (1990). *The Discourses of Mediation and the Power of Naming*. *Yale JL & Human.*, 2, 1. Merry, S. E. (1992). Culture, power, and the discourse of law. *NYL Sch. L. Rev.*, 37, 209.

framework of mediation, its articulation, and its self-theorization. In other words, rather than accounting for the structural dynamics and peculiarities, anomalies, or normality of a session, my aim is on how transformative mediation thinks about how these ought to be understood and approached by the mediator.

The contribution I am interested in making is thus not an analysis of “actual practice” and how it measures against the “theory of TM.” From my experience, such results vary widely according to the individual mediators, how closely they internalized non-directive mediation, and the dynamics of the specific conflict. Indeed, it is the common training, or the communal exposure to the Center’s self-image, standards and approach to TM, that allows us to understand the specificity and drawing power of TM as an ideology. How are mediators taught to think about what they do?

Using an inductive observational technique, I identified a number of recurring themes for analysis and then coded them according to the theoretical concepts I propose in this thesis: power and depoliticization; procedural justice and process belief; and Weber’s three levels of authority, namely, legal, traditional, and charismatic authority. While there is substantial overlap between these themes, I examine them in turn for sake of clarity.

This chapter proceeds in three main parts. First, I discuss the underlying relational framework from which TM departs. Here, I approach the foundational TM literature as part of the case study and offer a close reading of its understanding of relational thinking and its political theory. Second, I offer a description of the set up of the ethnographic component of this case study.

Finally, I present an analysis of the major theoretical lessons and takeaways that should be gleaned from these observations.

### ***3.1 Foundational TM literature and its intellectual origins***

How does TM conceive of its normative background? With whom do its members see themselves as being in conversation? The website of the Institute for the Study of Conflict Transformation, (ISCT, the institutional home of the TM movement)<sup>230</sup> provides an initial indication of what literatures are influential; some of these make an appearance in the scholarly writings analyzed below, while others form more of a general intellectual climate. Specifically, the ISCT website lists authors who undertake a critique of liberal political thought. These critics do not depart from, for example, a Marxist or critical studies perspective, but rather from the proposal of a relational worldview. The website contains a column titled “Learn” that publicizes various training opportunities, a blog written by a ISCT member, as well as a “Resources” section with a reading list. In the subsection “About ideologies and worldviews,” the Institute mentions, for example, Robert Bellah’s popular *Habits of the Heart*, a book concerned with what the author regards as the excessive culture of American individualism; the book’s goal is then to describe communal cultural traditions that can balance individualism with more “connected” ways to live. Bellah is concerned with establishing “a political discourse that could discuss substantive justice and not merely procedural rules.”<sup>231</sup> Towards that end, the book draws attention to, and seeks to remedy, the need to raise the level of public political discourse so that

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<sup>230</sup> See list “Here’s what we are reading at ISCT”, available from <http://www.transformativemediation.org/resources/>

<sup>231</sup> Bellah, Robert N. (1985). *Habits of the heart: individualism and commitment in American life*. Berkeley: University of California Press, at 287.

the fundamental problems are addressed rather than obscured. Meanwhile, taking aim at the same target from a different angle, Billig et al<sup>232</sup> highlight the dilemmatic aspects of social thinking: contrary themes that compete and generate complex thought. In that way, the rhetorical skills of argument are closely linked to skills of thinking (dilemmatically), visible for instance in the dilemmas brought forth by liberalism's ideology.

Bellah also appears in the website's section on the "Relational Worldview," together with -inter alia- Jane Mansfield<sup>233</sup> and more recent work that criticizes neo-liberalism broadly and seeks to advocate for a relational paradigm as a counterpoint to it.<sup>234</sup> Other authors from the relational section, such as Sandel and Gilligan<sup>235</sup>, are mentioned explicitly in TM scholarship discussed below. Suffice it to say here that an ideological commitment to create a more communal and equitable society are clearly central to the development of TM and its self-understanding.

In the following sections, I first discuss the central tenets of relational thinking. Where do they come from and how do they shape TM? I then turn to TM's resulting political theory and its reception in the wider field, including critiques of its (lack of) solidity.

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<sup>232</sup> Billig, M., Condor, S., Edwards, D., Gane, M., Middleton, D. and Radley, A.R. (1988) *Ideological Dilemmas: A Social Psychology of Everyday Thinking*. Sage.

<sup>233</sup> Mansbridge, J.J. (1983) *Beyond Adversary Democracy*. University of Chicago Press. Mansbridge, J.J., editor. (1990) *Beyond Self-Interest*. University of Chicago Press.

<sup>234</sup> Specifically, the list mentions several articles from an education background by B. Solarz and E. Lange, such as (2014) "Transformative Learning in a Relational Epistemology: Re-narrating a Moral Self in a Neoliberal Context." In Andritsakou, D., & West, L., (Eds.). (2014). *What's the point of Transformative Learning?* Proceedings of the 1st Conference of the European Society for Research on Adult Education.

<sup>235</sup> Gilligan, C. (1982). *In a different voice: Psychological theory and women's development*. Cambridge: Harvard University

### 3.1.1 Relational thinking: the foundations of the TM framework

Folger and Bush make reference to Carol Gilligan’s theory of the moral development of relational beings.<sup>236</sup> In order to understand Gilligan’s feminist approach to moral development theory, one needs to first examine the work of her interlocutor, psychologist Lawrence Kohlberg.<sup>237</sup> Kohlberg, the founder of moral development theory, was also a proponent of a liberal universalism. He is used by Habermas<sup>238</sup> in order to provide an example of the basic universalization necessary for deliberative philosophy and discourse ethics. Kohlberg’s “principled morality,” for Habermas, presents a way out of “relativistic objections”<sup>239</sup>—that is, that different cultures might develop different moral norms, or more generally, that different social arrangements produce different social norms. Kohlberg achieves such universal knowledge by positing that while the *content* of moral norms may differ according to contexts, there are *universal forms* of moral development that every child, adolescent, and later adult acquires. Any “remaining structural differences between moralities” are then just indicators that a particular moral norm has not yet fully developed. A potential pitfall for Kohlberg’s narrative is that it can serve to cement the existing social order; the particular, socially constructed values upheld by those with power are framed as the highest form of moral development, something that others can only aspire to.

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<sup>236</sup> They refer to her as a “moral thinker” at different points in *The Promise of Mediation*, and summarize her work as stressing “the equal importance of both individuality and connectedness in human consciousness and the resulting capacity for integrating strength of self with concern for other.” Bush & Folger (1994), at 255.

<sup>237</sup> Kohlberg, L. (1981). *Essays on moral development: The psychology of moral development* (Vol. 2). San Francisco: harper & row.

<sup>238</sup> Habermas, J. (1990) *Moral Consciousness and Communicative Action*. MIT Press. P. 116-40.

<sup>239</sup> *Id.*, at 117.

It is precisely to this hierarchical tendency that Gilligan<sup>240</sup> responds when she presents her research on the framing of relationships in the study of women's lives. The idea that female lives are about connection and empathy, whereas the more advanced male identity is about separation and individuation, goes back to classical Freudian ideas about child development, in which the female child is thought to be "weaker" because of her less developed superego (due in turn to the supposed deprivation that girls experience in the absence of "clear-cut Oedipal resolution"), and as a consequence, a different inherent ethical sense that is based on emotion, rather than (male) reason. This difference is not only stipulated, however, in moral development theory; it also clearly ranked.

Gilligan argued against Kohlberg, especially his assertions that when women reason, they do so at an intermediate level of moral development. She highlights that while relationships are indeed central to women's well-being, this does not exclude relationships from women's critical and moral scrutiny. On the contrary, it allows them to develop a morality of care, where strength includes one's ability to care for others.<sup>241</sup>

Gilligan's assessment of women's ideas about morality is predicated on difference. It influences how TM frames the ability of individuals to make choices. We have different avenues

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<sup>240</sup> On Gilligan and healing: see Daicoff, S. S. (2005). *Law as a Healing Profession: The Comprehensive Law Movement*. n 20 "The ethic of care typically emphasizes interpersonal concerns and is believed to be characteristic of women. Unsatisfied with the appropriateness of Lawrence Kohlberg's theory of moral development to women, Gilligan and others performed research that found that women more often make decisions out of an "ethic of care" while men more often decide on the basis of a "rights" orientation. See also Carol Gilligan (1987), *Moral Orientation And Moral Development* in E. F. Kittay & D. T. Meyers (Eds.), *Women And Moral Theory* New Jersey: Rowman & Littlefield; Judith White & Chris Manolis, Individual Differences in Ethical Reasoning Among Law Students, *25 Soc. Behav. & Personality* 19, 33 (1997) (briefly describing the history of the debate between Kohlberg and Gilligan).

<sup>241</sup> White, J., & Manolis, C. (1997). Individual Differences In Ethical Reasoning Among Law Students. *Social Behavior and Personality: an International Journal*, 25(1), 19–47. at 33.

before us and must make good choices to become increasingly better human beings, where “better” means not only more (male-associated) rational and rights-oriented, deliberate actors, but also more concerned with what Gilligan calls the central questions of “responsibility and care” that women invoke when making moral decisions.<sup>242</sup> Relational thinking is then not a weakness. It is, in fact, the very goal for development.<sup>243</sup>

Although Gilligan’s analysis focuses on patriarchal structures and their hegemonic power, these ideas are divorced from her broader political point in their application in TM. For Bush and Folger, community and relation is the goal, but other than in the adoption of a feminist authors’ ideas, they do not draw a connection to feminism as a political agenda.

The details of TM’s normative commitments are sketched out more clearly elsewhere. In an article published prior to *The Promise of Mediation*, Bush imagines a conversation in which a judge consults with a law clerk, a court administrator, a law professor, and a practicing mediator.

<sup>244</sup> In the article, Bush mentions not only Carol Gilligan, but also several other moral philosophers, such as Michael Sandel and his communitarian critique of liberalism, Alisdair

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<sup>242</sup> Gilligan, C. (1982), at 105.

<sup>243</sup> In the context of the psychological research that TM invokes, see J. R. Seul (1999). How Transformative is Transformative Mediation: A Constructive-Developmental Assessment. *Ohio St. J. on Disp. Resol.* Seul proposes a reading of development psychology theory in contrast to the moral development literature. In development psychology, three stages of adult development (interpersonal, institutional, inter-individual) are presented -in a matter of fact manner, without discussing whether these stages are desirable or how normative they are implicitly. This would show that TM’s assumption that everyone can achieve recognition and empowerment is built on a static understanding of human personalities. Seul questions the TM model of everyone as equally capable of achieving “compassionate strength” and argues instead that a person’s developmental stage limits their ability to make “choices” and the usefulness of the universalist categories of recognition and empowerment. Seul argues further that non-directive problem solving mediation can be equally supportive of personal growth. Positing that the inter-individual stage is the “highest” stage, achieved only by “approximately 11 percent of the population” and clearly the end goal, developmental psychology seeks to reduce the hierarchical bent of human development but ends up at a similar place: “inter-individual” competencies are very comparable to TM’s compassionate strength: an acceptance of moral complexity, relativism, self and other and knowledge of a similarly separated inside.

<sup>244</sup> Bush, R. A. B. (1989). Mediation and adjudication, dispute resolution and ideology: An imaginary conversation. *J. Contemp. Legal Issues*, 3, 1, at 15.

MacIntyre and his attempt to overcome the rational/relativist divide, as well as for the Law, Ian Macneill's relational contract theory. He argues that together, they represent an emerging relational ideology.<sup>245</sup> Despite not engaging with the works of these authors in any detail here, Bush directly connects his ideological commitments to calls for communitarian social reform, and he constructs an opposition between liberalism and relational thinking. Bush argues that mediators effectively voice these relational "values of self-determination and self-transcendence." If they are followed, communitarian social relations and mediation would create persons with extraordinary amounts of altruism. Bush quotes Macneill: "The foundation of community lies in the principle of sacrifice to others," and "The core of the community vision is the elevation ... of duty, reciprocity and belonging to a position of prime importance in all of human existence."<sup>246</sup> Importantly, such changes would be all-encompassing, at least in Bush's imagined conversation:

Therefore, adopting the mediator's approach also means changing the basis of the rules of law that courts use. In other words, if we change our choice of dispute resolution processes to conform to a different, relational vision of society, we also have to change our theory of law to conform to that vision of society. Otherwise, we would have a system at ideological war with itself, fostering relational values in mediation and individualist values in adjudication. In fact, interestingly enough, such changes in legal theory are already emerging. Alternative theories of law based upon a relational or communitarian theory of society are currently being written and talked about.<sup>247</sup>

The ideas of relationality hinge on the belief in the inherent capacity of human beings to evolve from one, presumably less enlightened, state to another, one that allows for greater self-

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<sup>245</sup> *Id* at 17: "The debate is explicit in fields such as political, moral and legal philosophy as reflected in the recent literature. However, the connection to the dispute resolution debate is not hard to see. I want to clarify that connection by identifying voices from those fields with the voices from our conversation about mediation and adjudication [...] philosophers like Rawls, Dworkin, Nozick, and those who write in this general tradition (although from quite divergent viewpoints), whom we could call rights-based liberals or individualists. The voice of the mediator, [...] is the voice of others like Carol Gilligan, Michael Sandel, Alisdair MacIntyre, Ian Macneill, who present what we could call a communitarian or relational vision of society."

<sup>246</sup> *Id.*, at 15.

<sup>247</sup> *Id.*, at 18.

realization and greater connection to others. In the context of TM theory, this capacity to evolve has been interpreted as the capacity to “shift” out of moments of weakness and self-absorption into empowerment and recognition. This, in turn, is why the party’s self-determination is so central. TM takes this capacity as a starting point. It affirms that as humans, we have the innate desire to live in connection and, as such, the competence to achieve a better quality of conflict interactions, especially so if we are supported in moments of crisis—that is, conflict.<sup>248</sup> This is the educational component of TM, or the “public value” it contributes:

Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And that itself is the public value that mediation promotes. In other words, going through mediation [can be] a direct education . . . as to self-determination on the one hand and consideration for others on the other. . . . The experience of the mediation process . . . serves the public value of civic education in self-determination and respect for others. . . . In our contemporary society, citizens increasingly suffer from learned dependency—whether on experts, on institutions . . . or otherwise —and from mutual alienation and mistrust, especially along lines of race, gender and class. The resulting civic weakness and division threaten the very fabric of our society. Personal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value—and this is precisely what the process of [mediation] provides. This [strengthening of civility] is the public benefit . . . critical to discussions of the public value of mediation, by comparison to the formal legal process or other ADR processes.<sup>249</sup>

Bush concedes that such educational processes will be prolonged and incremental. Even so, he insists that they have a clear direction: “they are less direct and slower ways of achieving the ultimate goal of self-transcendence: they force people to behave as if they have concern for others, so that they will ultimately come to a point where they genuinely have concern for others more than or as much as for themselves.”<sup>250</sup>

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<sup>248</sup> One should be careful to distinguish this concept of human capacity to the counter-cultural movement present in the 1960s US referred to as human potential movement (HPM) that advocated *inter alia* the use of meditation (not mediation!) for self-improvement . For a discussion of the latter, see Stone, D. (1978). The human potential movement. *Society*, 15(4), 66-68.

<sup>249</sup> Bush, R., & Folger, J. P. (2012). Mediation and social justice: Risks and opportunities. *Ohio St. J. on Disp. Resol.* at 36. For an early discussion of the “growth and experience” TM provides, see Bush, R. A. B. (1989). Mediation and adjudication, dispute resolution and ideology: An imaginary conversation. *J. Contemp. Legal Issues*, 3, 2.

<sup>250</sup> Bush (1985), at 16/7.

A community is (eventually) educated into relationality.

### 3.1.2 TM's political theory: a "critique of the liberal state"?

Political scientist Neal Milner excavates the implied understanding of the state that the relational model operates under.<sup>251</sup> He argues that TM is directly opposed to liberalism:

[The Promise of Mediation] is ultimately is a critique of the liberal state, which limits the moral capacities of its citizens by focusing on individualism. The liberal state sees society as a collection of individuals, each operating quite autonomously. The problem-solving approach to mediation, an outgrowth of the liberal state, focuses on individual needs *much as the market does*. For Bush and Folger, the transformative approach to mediation is linked to a relational rather than an individualist worldview. The relational worldview begins with the idea that the highest achievement of human conduct "integrates strength of self and compassion toward others" (p. 242). The self and the other are inseparable, and the capacity to transform requires that people develop both the self-oriented skills (empowerment) and skills regarding the treatment of the other (recognition). (At 747, emphasis added)

What Milner invokes here is a surprisingly abstract and general unit of analysis given the overall practice focus in *The Promise of Mediation*.<sup>252</sup> As he writes, *The Promise of Mediation* is "ultimately a book of political theory"<sup>253</sup> and, indeed, Folger himself has stated that<sup>254</sup> "there is no theory of mediation, there only is a theory of conflict." But what ideology is invoked by TM and its reading of human capacity? If the relational model's unit of change is individual people in disputes becoming empowered and, ultimately, better humans and citizens, is it truly a movement against the liberal state and its focus on individualism? (After all, this focus on self-

<sup>251</sup> Milner, N. (1996). Mediation and Political Theory: A Critique of Bush and Folger. *Law & Social Inquiry*, 21(3), 737.

<sup>252</sup> Gaynier, L.P. (2005). Transformative mediation: In search of a theory of practice. *Conflict Resolution Quarterly*, 22(3), 397–408 critiques Folger and Bush for lacking a coherent theoretical body of thought and argues for the application of Gestalt-based theory to fortify the theoretical standing of TM.

<sup>253</sup> Milner, N. (1996), at 470.

<sup>254</sup> In remarks given at a workshop for the Cornell ILR school, Fall 2014.

improvement might sit more comfortably with neo-liberal iterations of liberal thought than one might realize at first. I return to this point in the conclusion.)

Other authors have analyzed the political and moral commitments of TM in practice. For example, Gunning<sup>255</sup> does so with regards to community mediation and transformative ideology. He concludes that although he finds himself “very attracted to transformative mediation with its focus on self-determination and responsiveness to others,” he is also troubled by the absence of mediator responsibility for just outcomes, which TM argues is the only possible consequence of party self-determination. Gunning points out that for many, such impartiality in the face of structural injustice is hard to stomach. “I am far less comfortable watching men bully women or majority group members using their greater social capital over minority group members to get agreements that are unjust, than transformative mediation proponents are.”

This is a strong form of the critique of impartiality, but it nonetheless draws attention to the controversy between how TM and its critics approach power, justice, and the politics of mediating.

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<sup>255</sup> Gunning, I. R. (2004). Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations. *No. 2 Cardozo J. Conflict Resol.*, 5, 87.

### 3.2 *Training description*

In what follows, I offer a more detailed description of the institutional structure of the Ithaca Community Dispute Resolution Center and recount the experience of participating in a basic transformative mediator training that it convened to train future volunteer mediators. The Ithaca Dispute Resolution Center was founded in 1983, following efforts by the New York State Court system to encourage community dispute resolution centers. An explicit goal of the founders was to offer a way for settling disputes that is accessible to individuals with limited economic means. This goal remains central to this day; most services that the CDRC offers are free for parties. Cornell University's Center for Religion, Ethics and Social Policy (CRESP) and the Unified Court System provided the initial funding for one staff position, plus 12 volunteer mediators. The Center has since expanded. As of 2018, it employed nine staff members and more than 30 volunteer mediators offered services in three counties (Chemung, Schuyler and Tompkins). In 2002, the Center transitioned to exclusively use TM.<sup>256</sup> In 2011, the NYS Court system cut its funding by 63%, which led to a decrease in staff positions and a greater need to rely on volunteer mediators.<sup>257</sup>

The Center offers a variety of services and programs, along three tracks: (i) mediation, which relies heavily on volunteer participation and generally uses pairs of co-mediators; (ii) group facilitation; and (iii) trainings, which are typically held by the mediators on staff.

In the mediation services, the bulk of cases are parenting plan cases. These are mostly court-referred, meaning that parents or caregivers have had some level of family court

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<sup>256</sup> Retrieved from <http://www.cdrc.org/transformative-mediation.html>

<sup>257</sup> Retrieved from <http://www.cdrc.org/cdrc-history.html>

involvement in their separation, divorce, or custody agreements. They are sent to the CDRC by the court. These referrals mandate that parties must make contact with the Center, not that they have to reach a mediated agreement or even actively participate in a session. There is also a program that involves the Ithaca and Elmira Small Claims Court. During the time of my fieldwork, a CDRC volunteer would be present one day per week to offer mediation to Court claimants (and defendants) before, and potentially instead of, their Court case, either on the spot in the courthouse or in a session to be scheduled at the Center. Other programs focus on elder issues, agricultural conflicts, and general conflicts between members of the community. There also exists a program directed at families in conflict outside the parameters of custody arrangement.<sup>258</sup>

The Center has developed specific policies for child abuse and domestic violence, whether it is documented or suspected. These policies include a screening process, which is also a requirement of the NYS Court system.<sup>259</sup> Given the focus of work involving former partners and families, these processes are crucial to ensuring that certain baseline parameters are met before parties are expected or encouraged to engage with each other in a party-centered process.

Importantly, the intake process at the CDRC is structured in such a way that there is almost no specific information available to the mediators prior to the session. The mediators are informed of the general category of dispute (such as custody, small claims, community dispute, etc.) and of the names of the parties, which is crucial in a small community such as Ithaca where many mediators and parties might know each other and must therefore both be asked in advance if there are any possible conflicts of interest.

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<sup>258</sup> Retrieved from <http://www.cdrc.org/types-of-mediation.html>

<sup>259</sup> CDRC Volunteer Handbook 2015, copy on file with author.

At the end of each session, participants receive evaluation sheets with questions regarding their satisfaction with the session and the mediators, among other questions. These evaluation sheets are then deposited in a closed box. Mediators typically debrief with their co-mediators, and they can request to consult with staff members if they wish to further process or review a mediation. They are not made privy to the evaluations, and are not in turn personally evaluated by the results.

The training in which I participated was held in a conference room at the Cornell Industry and Labor Relations School.<sup>260</sup> There were approximately 30 participants, around half of whom participated only for part of the time for general training in conflict management. The other half participated in the entire training with the goal of becoming volunteer mediators. Most participants came from wider Ithaca area, some from other parts of the Central New York region. Approximately half were doing only part of the training as an introduction into mediation; these participants were primarily professionals from a Human Resources background. The training schedule was intensive, taking place from Wednesday through Saturday from 8:30AM to 5:30PM each day. The training was led by a CDRC staff member and the Director of Training and Facilitation, and a number of “training partners,” or current volunteer mediators from the CDRC. The full 30 hour training serves as the basis for future volunteer mediators at CDRC. These volunteer mediators also expected to complete additional training courses (for example, a training specialized for parenting plan, as in custody mediation), as well as a further

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<sup>260</sup> This location is indicative of an increasing cooperation between the two institutions which were previously less aligned, due to the Ithaca CDRC commitment to TM, whereas the Scheinman Institute on Conflict Resolution located at the ILR school offers training and scholarship on mediation and other ADR techniques in the employment and labor context, focusing on problem-solving and bargaining approaches. See CDRC Annual Report 2016-17, at 4.

apprenticeship program where trainees are paired with an experienced mediator (in my case, a professional mediator from Ithaca community). The apprentice receives feedback on a taped simulation, as well as observation on several mediations. The entire training process took me approximately 5 months; as a full-time graduate student, I was (one of) the first in my training cohort to complete it, as it is fairly time intensive for individuals with other professional commitments. The coordination of the apprenticeship process was undertaken by CDRC administrative staff, matching volunteers according to experience level.

Training sessions followed an internal teaching manual<sup>261</sup> and featured frequent group discussions, exercises, and role-playing. The role plays were both of the interactive kind, designed as opportunities for the participants to practice skills, and “fish bowl” style, that is, a simulation between trainers and active volunteer mediators to highlight a specific dynamic or problem.

The teaching manual is a document of almost one hundred pages. It is a collection of (sometimes unsourced) materials, texts, and diagrams. The first page notes that some materials were developed and are copyrighted by the Institute for the Study of Conflict Transformation, the institutional home of TM in the United States. The first third covers the background of mediation, the CDRC, and TM. The rest, pages 43-94, is practice-oriented and outlines core activities and mediator interventions. The topics covered in the background materials include:

- Conflict:
  - The experience of conflict

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<sup>261</sup> Community Dispute Resolution Center. *Diminishing the Cost of Conflict: Basic Training in Transformative Mediation*. Training Manual. Ithaca: CDRC (2014) Henceforth “Manual”. Copy available upon request with author.

- Styles of conflict
- Conflict “as opportunity”
- Changing conflict interaction diagrams
- Mediation, TM:
  - “The bigger picture”
  - Core values and principles
  - Premises of transformative theory
  - “Shifts of opportunity”
  - The mediator’s orientation, role, goals and principles

The first day emphasized an introduction to the Center and its mission, mediation in general, and TM as a value system. The manual lists six “core values” of TM: “Self-Determination, Quality of Process, Confidential, Safe, Impartial, Voluntary.” These values were discussed extensively and referred to throughout the training. They also were posted on the walls throughout the four days.

The main conceptual point was the framing of “conflict as opportunity.” This framing introduced the very specific language surrounding "shifts" out of a negative conflict cycle, in which the parties feel "weak" and "self-absorbed," to a positive and constructive conflict interaction, in which they feel "strong" and become "responsive" to other people again. Such alterations are achieved through "shifts" in the parties’ interaction that occur with the help of mediators. The “empowerment” shift was described as a "virtuous cycle" away from weakness to a sense of "I can do this" and openness to the other party; it also takes place through the

"recognition" shift, which allows for empathy with the other side, or an experience of "I'm beginning to see where you're coming from." The manual highlights that these dynamics occur *between* the people in a conflict as well as *within* each person. The process of shifting is, then, both internal and interactive. This process establishes that, for the trainers, the parameters of success in a mediation go beyond quantifiable settlements. It encourages the trainees to focus their efforts on the process itself.

The trainers emphasized that the role of the mediator is to support these shifts and to create opportunities for them to occur. They presented this role as the fundamental difference between TM and other theories of mediating that are more if not exclusively focused on achieving resolution or helping with the substance of the dispute. The language used here is closely linked to the terms of the *Promise of Mediation*. Although the technical term of "party self-determination" was rarely used—except prominently in the heading of one of the core values—it was instead the TM terms “empowerment and recognition” that featured most centrally. Similarly, while the idea of mediation as a means of “addressing what is under the surface” was mentioned on the first day, the classical integrative bargaining terminology of “positions versus interests” only made a passing appearance in the afternoon of the last day, thereby firmly establishing the training on the idiomatic grounds set forth by TM literature.

The training then further explored the transformative framing of conflict and mediation. It introduced the relational worldview, or, as the manual puts it, "a few relational 'premises' to think about":<sup>262</sup> “a person’s view of what conflict is all about rests on deeper, underlying premises or

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<sup>262</sup> Manual, at 23.

beliefs about the social world generally, including the nature of human beings and their social processes/institutions.” In this way, transformative conflict theory is presented as “part of a larger, relational, worldview that is emerging in modern society.” In the confines of the training, the variety of other constituent parts of this view are not named. The core point that trainers stressed is that, from a relational standpoint, human beings are inherently social and centrally motivated by a desire to experience connection and a “moral impulse to act with both strength and compassion.” This desire can be fulfilled because of two important capacities that humans have: the capacity for "self-determined choice" and the capacity for "responsiveness to others, even when confronted with adverse circumstances.” This view of human desire and capacities generates the view of conflict as a “crisis in human interaction that tends to generate destructive interaction.” Here, the goal of “conflict intervention” is a “change in the quality of the conflict interaction... regardless of the specific substantive outcome.”<sup>263</sup>

Alongside this emphasis on basic theory, or the thinking and conceptual architecture that motivates transformative mediation, the training also comprised many group exercises and role plays designed to practice the actual mediation skills. These exercises also attempted to help the trainees experience these skills from the perspective of would-be parties. For instance, trainees were given an opportunity to experience reflective listening themselves. In groups of two, participants engaged in a 20-minute exercise where they shared a conflict that was on their minds with a partner; the partner was instructed to listen in a reflective manner, that is, by mirroring what the other person says and summarizing what they understand to be the main points, but without offering advice, opinions, or asking direct questions. The stated purpose was, on the one

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<sup>263</sup> Manual, at 26/7.

hand, for the mirrored party to experience being deeply listened to, rather than directed, questioned, or counseled, and, on the other hand, for the listening party to observe their “directive impulses” and to practice being present and reflective with another person without offering direct help. Often, trainees shared deeply personal experiences, even though in most cases they had not known each other prior to the training.

Such exercises were repeated throughout, and usually debriefed with the full group. Many participants reflected on the difficulty of not jumping in with advice or evaluations. On the other side, many found it comforting to be on the receiving end of reflective listening. A theme articulated in the idiom of “sitting with” emerged, meaning the goal of letting parties *sit with* insights and emotions that come up in the session, including discomfort, pain, confusion, difficulty, and complexity, and to accept the presence of these insights and emotions rather than rush towards would-be solutions and resolution.

Although the idea of “sitting with hard things” is not entirely congruous with the TM concept of shifting to empowerment and recognition, they are connected. This “sitting with” is more than an increased sense of rhetorical clarity. Rather, it is an integral part of the dynamic of shifting out of the roles of being a victim and a consumer of solutions toward a clear sense of self as an actor and partner in a human relationship with agency, limited as it may be. However, it is also the basis of party accountability for TM. Because transformative mediators do not embellish the situation, and because they do not rush towards solutions that they would present to parties, parties have a more realistic sense of their options. Trainees were instructed to use moments of impasse for a technique called “checking in,” as described above. To check in with parties, in this context, means to suspend the on-going conversation and the reflecting or summarizing

interventions, and, instead directly to ask the parties how they are feeling, where they think the conversation should go next, whether they want a break—be it to potentially confer with outside counsel or to gather their thoughts—or whether they would like a chance to speak with the mediators one-on-one in separate meetings, a technique traditional mediation calls a “caucus.” The training taught participants to use check-ins as a technique to highlight “decision points” for the parties, but to follow the parties’ lead on whether or not they were willing to make any decisions, be these elements of resolution or the decision to explore a given topic further. This gentle and subtle highlighting is another means of supporting a party-directed process, but in addition, it is the key procedural instantiation of party responsibility. The manual reminds trainees that asking open questions (as opposed to directive or substantive questions) is supposed to help further reflection by the party, and not to “satisfy the curiosity of the mediator. A mediator is not invested in the questions s/he asks. If a speaker chooses not the answer a question, the mediator follows the speaker wherever he/she goes.”<sup>264</sup> The process of transformative mediation is neither about the questions at stake nor about the mediators themselves. It is, rather, about supporting the parties’ decisions and improving their interactions.

### ***3.3 Choices and voices: relational philosophy in practice***

In interpreting the structure of this training and apprenticeship, my analysis draws out a number of recurring themes. These themes are crucial elements for constructing a critical theoretic account of mediation in its relationship to theory, practice, and structural forms of power. Two of these themes are, first, the issues of power/depoliticization, and second, the theme of process

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<sup>264</sup> Manual, at 76.

belief. These two have direct connections to the lacunae identified at the end of Chapter 2 and to the wider question of the politics of dispute resolution. I discuss each in turn below, in 3.3.1 and 3.3.2. In section 3.3.3., I suggest a different reading of the question of power in TM by categorizing its elements along Max Weber's three levels of authority, namely legal, traditional and charismatic.<sup>265</sup> This reading serves to simultaneously complicate and provide analytic clarity to the intersecting layers of social, legal, political and moral power and their performances, invocations and elisions in TM.<sup>266</sup> While I have introduced Barnett and Duval's taxonomy of power to argue that Weber's notion of power analyzes only coercive power relations, his notion of authority here is helpful to highlight that even where processes are structured by coercive power, the legitimization of such power involves a variety of other dynamics.

Transformative Mediation is openly normative and is an explicit social reform proposal. One might therefore expect it to make use of a more explicit political imaginary that addresses questions of power and justice.<sup>267</sup> Indeed, Bush and Folger not only are explicit about wanting to change society and opposing liberalist individualism. They also reject being integrated into

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<sup>265</sup> Weber developed these ideas in several writings. They were first published posthumously in 1922. I'm working with the fifth edition, published in 1972: *Wirtschaft und Gesellschaft*. Grundriß der verstehenden Soziologie. Studienausg., 5th rev. Edition by Winckelmann, Tübingen: Mohr. A good English edition is Weber, Max (1964). *The Theory of Social and Economic Organization*. New York: Free Press.

<sup>266</sup> For the purposes of this initial analysis, I will keep Weber's notions of *Macht* (power) versus *Herrschaft* (authority/ domination) limited to the formula that power plus legitimacy equals authority. Non-binding processes such as mediation clearly don't function by sheer power, i.e. the likelihood that people will obey orders. They rely on a degree of purchase and acceptance (in Weber's model, legitimacy) that means people will follow an order -or, as it were, an agreement, or a process proposed by an institution- because they find it reasonable and legitimate. I discuss these conceptual questions in greater detail in Chapter 4.

<sup>267</sup> Some observers find hope in TM theory to address structural inequalities in the US's flawed democracy, see Aiwazian, A. (2013). *Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy*. *Scholar*, 11, 1.

existing mediation institutions, precisely because of the different ideology they advocate.<sup>268</sup> They refuse to become included as one more instrument or technique in the great “neutral” toolbox.

However, in my case study and fieldwork, I did not find that these broadly formulated values—rooted in the belief in human capacity to balance self and other into a moral “compassionate strength”—translated into a more self-aware understanding of questions of power. In part, this is because TM retains a strong emphasis on *individual* choices, which is inherent in the dual notion of party self-direction and mediator non-directiveness. The emphasis on individual choice comes at the expense of the inequalities that may structure these choices. Pointedly, when Joe Folger was pressed on questions regarding the justness of mediating between people with vastly different social capital during a training for the Ithaca CDRC and Cornell ILR School, he simply responded that “we all live in systems of inequality.”<sup>269</sup> Such a response dilutes the specificities of inequality and deflects attention away from how they can inform, inflect, or impede the very array of individual choices as well as the configuration of self-direction open to differently and unequally situated persons. The response is, importantly, consistent with TM’s points of emphasis on empowerment.

Moreover, TM, as it was practiced in my case study, also shares a liberal belief in “the process” as self-correcting and powerful on its own account. The political dimensions of conflicts—some of which I mention below—are not made explicit, but referred back to the parties, who are to be supported equally by “ambi-partial” mediators. TM’s argument, in theory, is that power relations cannot be addressed by problem solving mediation, but that TM allows for

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<sup>268</sup> See also Folger, J. P., & Bush, R. A. B. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Conflict Resolution Quarterly*, 13(4), 263–278. See also Bush & Folger (1994), at 108.

<sup>269</sup> In remarks given at a workshop for the Cornell ILR school, Fall 2014.

incremental social change by enabling those who come in contact with it to be both more *empowered* in their own claims and more considerate of others—or, in the language of TM "shifting out of weakness and self-absorption." It is indeed the case, based on my fieldwork, that TM runs less risk of "pacifying" conflicts by pressuring parties into mediator-initiated settlements.

In practice, however, both the socio-political context of specific CDRCs (in the Ithaca case, the defunding by the New York State and the resulting shift to using almost exclusively volunteer mediators with varying degrees of buy-in to TM values) as well as the methodology of non-directiveness can unwittingly create conditions for power abuses and injustice. Mediators are not trained to recognize, let alone address these situations. Instead, the training affirms that as mediators, one cannot know, nor must they inquire into, the larger context of a dispute beyond information that the parties offer in the session. A CDRC trainer called it "stepping into the river of someone's life": we do not know what came before or what will happen after, and should never attempt to "solve problems" for the parties, and, instead, mediators should merely support them to the extent that they request. Remaining doubts should be referred to the staff at the CDRC. The ideological reform, thus, seems to proceed at a remove, from the riverbank, and in discrete forms of growth and gradual experience. The pace of ideological reform, as an effect of these experiences, is determined, perhaps blindly, by the individual parties.

### **3.3.1 Theme of power and depoliticization**

The training sessions focused on familiarizing participants with the central techniques of TM practice and included ample role-playing. However, the main training started with an

introduction of TM values, concepts, and the technical language and terms that TM developed. Here, the theme of empowerment through mediator supported “shifts” out of what the trainers (following Folger and Bush) call “moments of weakness and self-absorption” into “strength and responsiveness” was developed. These shifts are the central focus of mediation, and the criterion by which mediators are taught to evaluate the success of a session. The emphasis, from the beginning, was thus taken away from settlement and resolution, and placed on the internal norms of the process. Broader outside norms do not play an active role in this system, as became evident in several instances, for instance when participants were asked to reflect on how they and others express anger, to illustrate the feelings of “weakness and self-absorption” that TM ascribes to people in conflict. There was no substantive discussion in the training materials of how social and cultural norms surrounding gender, class, and race directly impact what is and is not a socially acceptable expression of anger, and more to the point, how contemporary structures pathologize expressions of anger by women, people of color, and the working class as irrational hysteria, threatening rage, or uneducated crassness. The contemporary formations of power surrounding *who* expresses *what*, in other words, are treated as external to the process. At the same time, the premium placed on communication elided whether we can be sure that a party is safely able to adequately convey their feelings about a situation, to such an extent that that mediators can trust that they have used “their voice” and are making “their choices.” The individuation of voice and choice risks being at the expense of structural dynamics and norms.

The mediation techniques that were taught were also fundamentally non-directive: mediators are trained to “mirror” the parties by repeating what is said and occasionally summarizing what has been said in a way that highlights, but does not evaluate, the existing areas of agreement and disagreement. The argument for this form of mirroring, staying as close

as possible to the word choice and affect of the party, is again that in conflict, people become weak and self-absorbed and often lose the ability to hear *both* themselves and the other party with any degree of clarity.

Throughout this discussion, the notion of party self-determination was clearly paramount. It was again presented as a central tenet of internal TM ideology, but without connecting it to any external socio-political questions. The mediation room becomes an insular and limited experience of “stepping into the river of someone’s life” without either access to information beyond what parties share freely (after all, TM discourages the use of direct questions by mediators, seen as too intrusive) or mediator expertise beyond that which is taught in the trainings.

The participants’ remarks and questions about the roles that race or gender play in how people (are allowed to) express such emotions as anger were not discussed. In fact, when an element of racial tension emerged in a role play, where an African-American participant referred to “keepin’ things real”, the trainer re-frames the implied conflict, i.e. as a “hot button word” without mentioning the other dynamics. The cultural backgrounds implicated in the mediation, of both the mediators and the parties, are similarly acknowledged as a factor in mediation, but not one that receives particular attention. In one exchange, a trainee mentioned her (Asian) cultural background as leading to her avoiding a “clash” and open conflict with others, and due to which she wouldn't stand up for herself and become “empowered” during a session. She said: “This may not be good for me if I feel domineered. [TM] wouldn’t work for me personally.” The lead trainer did not engage the substance of her comment, but did acknowledge the problem of power in mediation: “Well, so before we pull the plug on you... we can’t level the playing field. You can only check in with staff [at the CDRC, if you feel like a party is at an unfair advantage such

that they might not be in a position to benefit from mediation]... but you can't always call out" the power dynamics at play in the room.

At a later time in the training, the same participant brought up her "lingering doubts regarding power" and wondered aloud whether the institutional mechanisms, such as the Center's pre-screening of parties for domestic violence incidents, are enough to address institutional racism and sexism. A different trainer answered that "one time that mediation isn't appropriate is when one party isn't comfortable." The determination of that, however, remains with the parties. Barring obvious red flags such as documented past abuse occurrences between the parties, each party is then tasked with determining whether a mediation is a good option for them. The belief in human capacity encompasses not just people's capacity for growth and moral development but also that they themselves are the "experts of their life" at present. "Because we all live in unequal systems," the trainer continued, we each develop strategies for dealing with this." In other words, TM limits itself to being an intervention in an imperfect system; it is an intervention that enables individuals to find as much expression as they can, but without assigning a role for addressing any injustices beyond the mediation experience. The trainer asked the participants what they would do if they "know what's going on," in this case when they realize there is discrimination occurring but the parties choose not to bring it up. "Systemic oppression isn't a new question," the trainer offered and invited answer from the group, which remained silent. The other trainer mentioned caucuses as a possible avenue.<sup>270</sup> This would be an opportunity for the mediator to be more direct: "Bring up the possibility of racism, etc. but never take the choice [of pursuing it] away from parties." Introducing racism into the conversation in

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<sup>270</sup> The CDRC strongly encourages mediators that when a caucus is requested, to always meet with both parties.

this way, however, is actually a departure from TM's emphasis on process and values; it does supplement the role of the TM mediator from supporter to one who even if inadvertently influences a party and actively suggests a more structural awareness that can be at odds with that party's own self-understandings. Trainees were reminded that they are never seeing either the whole person or the whole picture behind a situation.

Participants also asked about the idea of "supporting" parties. The training presented this idea as the superior alternative to more active mediator roles. On the one hand, mediators are encouraged to "resist the urge to help." On the other hand, a trainee wondered how parties can still "fully own" the process, if mediators are supposed to support them in it. The lead trainer's response was to think of support without influence as "a commitment, intent and focus point." Some time in the training was devoted to discussing biases, personal values, and the participants' personal response to conflict so that they can "monitor" their own "directive impulses." A directive impulse might be a response to the level of emotion or tone with which a party expresses themselves. Directing them would include tone-policing, or someone taking offense with the manner in which something is expressed rather than its substance. Tone-policing is often criticized by persons and groups concerned with social justice, especially in contexts where someone with greater economic, social, or racial privilege limits another person's expression, for instance by claiming it is too loud, aggressive, or emotional. Participants were encouraged to put aside their potential discomfort with expressions of emotion; it was not, however, referred to as tone-policing, a term which increasingly forms part of the contemporary landscape of progressive social justice advocacy, perhaps suggesting that the conversation's focus on a

broader set of phenomena signals a gap between TM and contemporary social justice discourses that focus on the intersections between social habits and structures of class, gender, and race.<sup>271</sup>

The ways in which social power and privilege may structure one's reactions to and ability to perceive forms of discrimination also remained at the margins of the training. The frequently employed TM phrase that a dispute or its resolution "is not about you" (i.e. the mediator), suggests an image of objectivity. Rather than a mediator's insights or corrective impulses, the training assured participants, transformative mediation is about "trusting" the party's self-determination as well as the power of the process. Indeed, that a mediator might be troubled when observing glaring injustice, not on their own behalf, but on that of the clients, as Gunning also mentions,<sup>272</sup> meets the assertion that these structures and imbalances cannot be altered in the context of mediation, though they can, presumably, be acknowledged.

Even though the mediator re-presents and does not smooth over points of disagreement or conflict, structural and productive forms of power are at the margins of TM training. In these ways, mediators risk that they are neither short-circuiting structures of power nor even acknowledging them and finding ways to work within them, but eliding these structures and even depoliticizing dynamics of power. The trust that the mediator is to place in the parties can also work, inadvertently, as trust in the overall systems that TM is critical of but that provide one party or another with its perspective. If the way to move beyond these asymmetrical or incongruous perspectives is for one party to understand and recognize the other party's experience, which only that other party can express, then the burden to explain oneself continues

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<sup>271</sup> For instance, Campbell, E. (2018, August 28) Educators Must Mind Tone-Policing. *School Library Journal* Retrieved from <https://www.slj.com/?detailStory=educators-mist-mind-tone-policing>

<sup>272</sup> Gunning (2004), at 90.

to be placed unevenly on women, people of color, and those from lower classes, to explain to those who enjoy gender, racial, and class privileges. Indeed, by framing conflict as an opportunity for moral growth on an individual level without a way to directly confront or address the dynamics of power, TM risks turning conflicts into an individual problem, requiring people to make better choices, rather than, for example, the protection of the Law or members of their community or more direct forms of social change.

### **3.3.2 Theme of process belief**

As mentioned above, TM conceptualizes mediator neutrality in a distinctive way. The assumption seems to be that because mediators are not invested in a specific outcome, they will not hasten agreement or otherwise influence the process to achieve a specific outcome. Party self-determination in this vein is assured through a specific process that requires mediators to shed their “directive impulses” and focus their attention on what the parties are saying in the moment, rather than analyzing or contextualizing the dispute or attempting to assure balance in contributions from the different parties. Several terms were used to describe this process, from “micro focus” to “following like a beagle” (referring to that dog breed’s tendency to keep their nose close to the trail of a scent). The trainers also highlighted the formal simplicity of the techniques—mirroring and summarizing, plus occasional “check ins” in which the mediators pose direct questions to the parties, trying to ascertain if they are feeling comfortable with the process, whether they need a break or a caucus, etc.—as an advantage. At the same time, there was a desire to highlight the specificity of the skills: mediation was described as an “invisible expertise” that “flies under the radar” because the focus is on intangible process successes such

as shifts from a passive attitude to the dispute to an active, empowered stance with greater clarity.

This instruction was to stay with the parties as closely as possible, and the concept of “ambi-partiality” was introduced in that context, namely as a manner of equally supporting whichever party one is “following” and mirroring at the moment, which is typically the one that is speaking. Mediators were encouraged to resist the urge to structure the conversation such that both sides get comparable time to speak, or that they always speak one after another. Training participants’ questions about the detail of these techniques, which many seemed to find counter-intuitive, were met with affirmations of process belief. If one were to incorrectly mirror something, or if a point that a party makes gets lost in the back and forth, mediators are assured that “the process is very forgiving” and that if something is important to the dispute, it will re-emerge later.

Non-directiveness is similarly both a goal and a method. A participant asked what to do if mediators can see that an agreement reached is unlikely to function or last for the parties. The trainer replied that such an assessment is not part of the process; the response mixed process belief with a version of human capacity belief: “they [the parties] have to go back to their life [...] they’ll figure out that their choices are crappy.”

The training manual calls the goal of mediation “a change in the quality of the conflict interaction itself, from destructive to constructive, negative to positive, regardless of the specific substantive outcome.” However, the important question remains of whether this can realistically be the only goal on the institutional front: how can the CDRC, and TM more generally, demonstrate its successes if the unit is an immeasurable “shift”? A telling exchange took place

towards the end of the training when participants asked about statistics for settled disputes and party satisfaction, which are measured in evaluation sheets handed out to the parties at the end of each session. The training was taught by a staff member and mediator at the CDRC who was in the process of becoming a certified mediation trainer. A member of the NYS Court System who worked in the general mediation program was present throughout to observe the training and grant certification. This person had been largely silent throughout the training, but became a part of the classroom conversation at the point where participants raised questions about the ability to measure the success of a mediation for the outside, non-transformative, institutions. She assured participants—and the CDRC staff who were also present—repeatedly that while the Court System collects statistics on user satisfaction and other metrics, it does not link its financial support for a center to the amount of disputes “solved.” There does not appear to be, then, a financial advantage to more facilitative methods at use in other centers, but nonetheless- the specificity of the methods and process of dispute resolution at work in TM has created a distinctly countercultural niche.

### **3.3.3 Authorizing mediation**

To be clear, I do not want to suggest here that TM is “worse” at protecting weaker parties than other mediation styles. On the contrary, I think the argument that not compelling a settlement protects parties’ interests is made with sincerity and that it has merit. As discussed in Chapter One, more directive forms of mediation have convincingly been criticized for bringing about agreement at the potential expense of a party that has more limited alternatives or is more

susceptible to the pressure of agreeing. Leaving the responsibility for an agreement with parties goes a long way to avoiding such pacifying tendencies.

The critique I do make is that ultimately, TM's reliance on the concept of individual choice and its belief in the power of the process clashes considerably with its relational ethos. Further, it means that TM does not have good answers to the lacunae I identified above from the analysis of more general ADR literature, namely, the questions of theoretical sophistication vis-à-vis litigation-based models of dispute resolution, the lack of clarity regarding what form of justice is being sought, and finally, an absence of critical thinking about questions of political and social power writ large.

Given TM's self-professed commitment to social and political change, and to framing disputes as opportunities for individual and collective moral growth towards an ultimately more just and more balanced society, and away from the individualistic approach that political liberalism enshrines, the question of power would be most urgent to address.

As a way of developing a fuller understanding of power for TM, I propose a tri-fold way to analyze the peculiar dynamics created by following a non-directive model with regards to power and authority. Adapting Max Weber's three spheres of authority—legal, traditional and charismatic—to the context of my case study, I argue that a set of tonally and qualitatively dramatically differing spheres interact to form a complex concert of overt and covert, soft and hard power. It is these conflicting and seemingly divergent spheres that can help us to understand both the power and the weakness of transformative mediation, that is, its appeal, its potential, and its shortcomings. To be sure, my goal here is not developing a checklist along three spheres, nor is it to make policy/reform suggestions. Rather, it is to take seriously the potential of non-

directive mediation on an analytical plane. One of the reasons, to my mind, that TM leads a fairly insular life on the “spectrum” of approaches is its self-description using its own standards, expressed in language that is alienating in its jargon-like quality. It lacks both specificity and engagement with the shared language of ADR, the Law and conflict studies more widely.

If we take authority, following Weber, to be power plus legitimacy, or a degree of voluntariness or acceptance on the part of the participants, the interesting thing about transformative mediation is that it operates on both formal and informal levels. It appeals to and engages with different registers of social, political and psychological power.

On the legal/formal level, I observed the interaction between the importance of the “shadow of the law” and the court system (present via the large number of court-referred custody agreement cases, as well as the small claims court cases) and the self-understanding of the CDRC as offering a service entirely distinct and largely separate from the legal system. In a telling moment on the last day of the training, the lack of attention to the legal ramifications of mediation became visible. Training participants—some of whom were practicing attorneys or law professors—asked about the legal status and enforceability of mediated agreements, to which the trainers, including leading members of the CDRC, had no answer. The formal, legal level plays a fundamental role in the operations of the Center then: local courts are the main providers of cases, and the NYS court system functions both as the certifying body and the main source of funding. At the same time, TM rejects the parameters of legal analysis from its innermost operation, i.e. the mediation session.

On the “traditional” level, training manuals connect the frequently referenced idea of balancing between self and other with a century-long, historical tradition of mediation as a way of internal community life. Mediation is framed as a traditional “way of honoring individual rights while at the same time preserving community cohesion.”<sup>273</sup> Throughout, the “intuitive” nature of practicing and learning TM is contrasted with more formal, counter-intuitive methods of dispute resolution. Trainees are encouraged to think of themselves not as “experts” but as “peacemakers” for their communities. The negation of technical expertise is in part a response, again, to a community mediation tradition of working primarily with volunteers from the community, rather than full-time professional mediators—though many volunteers have high levels of expertise in adjacent professional backgrounds. It is, however, also an affirmation of the specificity of TM as a skill. The volunteer trainees included several therapists, attorneys, social workers, HR professionals, academics, among others. These backgrounds were treated mostly as “baggage”—trainers reminded trainees not to “talk like lawyers,” not to analyze, but rather to listen intently and “support shifts” by making use of the techniques of TM, techniques that are straightforward but not necessarily easy: *mirroring* while listening (“so what I hear you say is...”); *summarizing* what was said so far while not glossing over disagreements; *checking in* with parties about their comfort level, whether they want breaks, etc. This expertise in the TM process is linked, through the idea of “traditional” peacemaking, to a different form of communal life, in which a harmonious relational model has been replaced by (post-)modern forms of individualized specialization. These skills enable the recovery of a more peaceful, though historically ambiguous, tradition.

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<sup>273</sup> Manual, at 14.

The “charismatic” level is a particularly rich, albeit complex, unit of analysis for this case. I, once more, take some liberty with the term and understand it to encompass qualities that, to some extent, resist classification within conventional legal vocabulary.

With regards to mediator charisma, the training encourages participants to view TM as both a deeply personal experience for the mediator and simultaneously as a “break” from their personal thoughts, expertise, and ideas. Trainees were encouraged to develop a “mediator persona” and to see the process of becoming community mediators as a wide-ranging endeavor that touches on their personalities: TM becomes a “way of life,” and “what you do is what you become.” Thus both the techniques of TM as well as the relational mindset are presented as necessitating a personal, internal, commitment. In turn, this commitment then becomes visible to the wider community as volunteers are instructed to “walk the talk” and “become an ambassador for transformative mediation.” In seeming contrast to this, the training frequently also reminded trainees to ignore their own reactions and reservations, biases, knowledge and opinions. “This process is not about you” was a frequent refrain throughout the training and a regular answer to a variety of trainees’ concerns, as mentioned above.

This is where the charismatic and the depoliticizing dynamics of TM intersect: formal judgment is suspended in favor of “ambi-partial” support, and the responsibility of the mediator limited to supporting the parties. The transformative mediator is then an internal “persona,” but one that supersedes other professional, personal or ethical identities for the duration of the session. Leaving aside to what extent such a suspension is cognitively possible given everything we know about implicit biases,<sup>274</sup> it is normatively interesting as it invokes a form of self-, even

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<sup>274</sup> For instance, Bingham Amsler, L. B., Atvgis, A., & Jackman, M. S. (2017). Dispute System Design and Bias in Dispute Resolution. *SMU Law Rev.*, 1.

ego-less service. Here, TM is on par with its problem-solving siblings: the process becomes the method becomes the idea.

Beyond the question of the mediator's charisma, power and authority are also invoked by the centrality of the emotional experience in the relational mediation model. The force of the human experience of being in conflict, and how the model centers emotion and subjective experience to develop methods that allow room for them, is different from other forms of mediation; while these other forms acknowledge that emotions play a role in disputes, they try to limit their influence on the decision-making. For TM, it is the experience of shifting out of one emotional state (weakness and self-absorption) into another (clarity and responsiveness) that is most central and beneficial.

Future volunteer mediators were taught to resist the urge to cover up moments of impasse, difficulty, or emotional heaviness. The ability for parties to make their own choices requires a level of candor that can, at times, be best expressed by mirroring what a party has said and letting that statement stand without any suggestion of how to move onward, how to solve the conflict, or how the parties should feel or act.

Creating such a space in a mediation session is both difficult and it offers a fairly unique, counter-intuitive experience for participants and parties. The expertise into which the volunteers were being trained, then, is a subtle process skill that likely runs counter to the ways expertise is perceived in the rest of their professional lives. It is "traditional," in the sense that it is remarkably simple and yet contrary to modern forms of problem-solving. On a formal institutional level, it is also unusual for a service provider to offer a service that openly embraces not always providing solutions, but instead focuses on party choices.

This isn't to say the Ithaca CDRC does not "solve cases"; many mediations do indeed end in agreements.<sup>275</sup> But, it is noteworthy that annual reports for the Center<sup>276</sup> do not list "resolved" conflicts, but rather just "mediated cases." The criterion for success is thus primarily qualitative, rather than quantitative. However, measuring the quality of mediations based on empowerment and recognition shifts is a difficult task, and more so given the model's refusal to actively engage with outside factors.

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<sup>275</sup> There aren't many studies of the respective settlement rates for each mediation style; the largest scale case of TM being employed outside of Community Centers is the US Postal Service internal Redress system, and research indicates high rates of satisfaction by users, and roughly the same rate of resolution as facilitative programs. Laura Bingham Amsler has done a number of interesting longitudinal studies of this case, the most recent results were published in 2012. See Bingham Amsler (2012) Transformative Mediation at the United States Postal Service. *Negotiation and Conflict Management*, 5(4), 354–366. This article also discusses earlier data, such as the satisfaction and resolution rates mentioned.

<sup>276</sup> Available under <http://www.cdrc.org/cdrc-annual-reports.html>

## 4. Invisible Power: Reading Mediation through Political Theory

In Chapter 3, I argued that despite a normative commitment to relational values of self-transcendence, transformative mediation shows a focus on individual choice and process belief in its methodology. This chapter unpacks the political baggage of these concepts and further investigates how the absence of a method for addressing questions of power is both a symptom of and a contributor to a depoliticization, not only of TM practices, but also problem-solving mediation styles. The critique of mediation, laid out in Chapters 2 and 3, has significant elements that reflect a broader critique of liberalism and liberal political thought; this is fitting given the reliance on liberal political thoughts and norms throughout mediation theory. From approaches that are committed to mutual gains, to those that theorize justice and process, to relational thinking about participation and the importance of speech, contemporary formations of mediation draw on a liberal understanding of deliberation, conflict, and the subject; a critique of liberal values and institutions in relation to power is, in this sense, directly relevant for theorizing the question of power in mediation.

The limits and broader implication of this critique are also important to highlight: within our present system of liberal governance and disputing, “alternatives” are immensely hard to conceive of. This is in part because these are very hard problems indeed: how do you introduce standards of justice that acknowledge, e.g. structural power arrangements, let alone productive and discursive forms of power, into the mediation room, where there is no audience, no public oversight beyond the mediator’s moral compass? In this chapter, I suggest that, most importantly, it is also difficult to do this because acknowledging the absence of power from the discussion around mediation touches on the non-negotiables, so to speak, of our political order. To the extent that our procedures, and the forms and institutions into which they have evolved,

are the primary incarnation of our political *ideals*, there can be no fundamental change to one without a serious challenge to the other. Liberal political thought is enacted in the social life of citizens in liberal states, and if we can posit that liberalism regards power primarily in terms of its limitation, rather than for instance, making its operations visible or democratizing its agents, so do its institutions. No piecemeal reform of such a political system can truly address this underlying dynamic—not even ADR, with its interest in underlying dynamics. Or, to put it more provocatively, with Adorno: there is no right life in the wrong one.<sup>277</sup>

I start by exploring the parallels between liberalism, deliberative democracy, and thinking about mediation, briefly tracing Rawlsian theories of consensus and the role of politics, procedure, and rational argument that they envision. Then I introduce deliberative democracy (DD) as the application of liberal thought into pluralist societies and present the body of ADR literature that engages deliberative theory explicitly. I discuss the particular notion of procedural justice that has developed in mediation theory as a result of this engagement, which I refer to as experiential justice. Section 4.2. presents critiques of deliberative democracy and liberalism more generally, both the more well-known critiques of DD as well as more radical commentary on liberalism. It is these latter accounts of liberalism that, I contend, bear insights for the field of ADR that it has not yet taken on. These insights are chiefly about the idea of liberalism’s depoliticization, an idea I borrow from Wendy Brown, and about the themes of violence and pacification in liberalism. These readings about the politics of liberal structures are helpful for sharpening the understanding of public/private distinctions and the roles of emotion, rationality, and politics and the limits of contestation. I explore these ideas in 4.3. by applying them to

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<sup>277</sup> Adorno, T. W. (2005). *Minima moralia: Reflections on a damaged life*. Verso, at 39, translated there as “Wrong life cannot be lived rightly.”.

mediation. In section 4.4. I conclude by attempting to synthesize the insights from the critiques of liberalism with the value of mediation as a way of addressing conflict where it happens, in the world. As such, I propose Weberian *worldliness* as a way of acknowledging productive power.

A persistent problem in political liberalism is that it requires its subjects to be of a particular kind: law-abiding, rational, and both willing and able to separate their public life from their private inner beliefs. In liberalism, no matter how ungenerous, self-absorbed, or dangerous individuals are, the law and the right procedures can restrain or even train their worse tendencies and prevent their abuses of each other. In similar fashion, the right laws and institutions can ward against the concentration of power and against the state's different parts from either abusing each other or citizens. One important role of the state, norms and the law is then to ensure that people act in the correct—legal—way, as well as to punish those who do not. The law suggests equality: it promises that power shall be applied equally and neutrally from the state onto its subjects, and it also promises equality between willing subjects. This power of the law becomes dispersed through various methods, practices, and technologies, including extra-state mediation techniques. There is no mediation without the liberal state, both for mediation's theories of conflict, understandings of the subject, and their functioning alongside or in the shadow of law.

What is more, recent decades have seen states lose much of their institutional and administrative power to market forces, privileging neoliberal power structures. If in liberal thought, conflict is a problem to be solved through law and procedure, in neoliberalism conflicts become a problem to be commodified, made internal to the competition between different providers of resolution—a battle of the processes, even more integrated and discreet. The erosion of central state power for the benefit of the market-place logic, and the response to that loss via

the promotion of individual self-improvement fits with the development of ADR, both its contemporary growth as an industry and its disciplinary development towards a product oscillating between a pragmatically savvy but normatively neutral “supplement” and a procedurally just alternative to the existing system.

Meanwhile, across the range of ADR approaches, conflicts are seen as problems that require more or less creative techniques, framings, and re-framings, be it to reach a solution or for the moral improvement of the subject. The structural conditions that produce or variously inflect a conflict with particular logics and histories are outside its purview. Political theorist Wendy Brown argues that in the neoliberal state, via Foucauldian processes of “responsibilization,” the state and market actors end up “forcing the subject to become a responsible self-investor and self-provider.”<sup>278</sup> As citizens stop turning to the state to provide services—including that of justice—ADR makes sense as both a tool as well as a provider of expertise and dispersed power. The logic of this structure is hard to escape even where TM advocates for communal (but not harmonious) models of living; it is, of course, significantly more so in those forms of ADR that accept the market logic more wholeheartedly (where parties, or “clients,” might conclude that they are not being dominated in arbitration simply because they are paying for what is often billed as “private justice.”) And, if for those with less power, the law is often primarily an instrument of punishment rather than a source of rights and protection, the privatization of justice and its reliance on market logics continues to be inflected by these power asymmetries and structures. There is then no ideal model of justice in practice; rather, there are parallels between the law and ADR and the forces of standardization that operate in both—parallels and forces with which the field of ADR needs to grapple.

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<sup>278</sup> Brown, W. (2015) *Undoing the Demos: Neoliberalism’s stealth revolution*. MIT Press, at 84.

#### 4.1 *From liberal theory to deliberate action*

If ADR is, as I have suggested, indebted to and enmeshed in—if not an extension of—liberal thought, this is also so in its understanding of how parties should engage with each other and with the conflict. Rather than a detailed analysis of liberal political thought,<sup>279</sup> then, I am interested in the ways both liberalism and deliberative democracy structure the legal, social and political imaginary to such an extent that they become hegemonic, or “reasonable” common sense.<sup>280</sup> Interestingly, the linkage between these concepts is one of the central preoccupations of this dissertation: the nature of “practice”. The ubiquitous nature of liberalism in ordinary institutions and ways of thinking, and indeed the discursive construction of liberalism as only having alternatives in either authoritarianism or Marxism,<sup>281</sup> contributes to our framing of conflict, consensus, debate, as well as what the goals towards which a dispute resolution system can and should strive, both substantively and experimentally. To this end, and given their impact (sometimes explicitly, as we saw in Chapter 2) on how scholars of and significant strands in ADR have sought to understand this practice, I focus on John Rawls’ theory of procedural justice and contemporary deliberative democracy thinkers.

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<sup>279</sup> Liberalism as political thought, as I understand it here, i.e. as a body of political thinking that includes certain forms of political practice (including, but not limited to deliberative democracy) should be sharply distinguished from “liberal” political agendas, vaguely congruous to the term “progressive” in the US context. For an interesting discussion regarding the law as a “liberal” instrument of achieving better results for disadvantaged groups, and how this tendency is under increasing attack not from “conservatives” in the classic sense, but those who invoke legal pragmatism, see Simon, W. H. (2004). Solving problems vs. claiming rights: The pragmatist challenge to legal liberalism. *Wm. & Mary L. Rev.*

<sup>280</sup> Gramsci, Antonio (1992), Buttigieg, Joseph A, ed., *Prison notebooks*, New York City: Columbia University Press

<sup>281</sup> Fukuyama, F. (1992). *The end of history and the last man*. New York: Free Press

A good place to hone in on liberalism's permeating quality is the importance of the different connotations of *consensus* and *conflict* in its political theory. Consensus, on the one hand, is presented as the platonic ideal identity of a functioning society, as well as its aspirational goal. Consensus then marks the overcoming of struggle and disagreement, which are seen as a negative occurrence. On the other hand, pluralist political thinkers evaluate de-centralized, diverse societies with no single power center as more desirable, further developed and healthier. The consensus in pluralistic states is to "agree to disagree," and to design institutions that can manage the conflicting demands of different interests effectively and peacefully. These pluralistic institutions are central to political liberalism. With this dual view, one can conceptualize the law as either an institution based on conflict or indeed on consensus.

Liberalism is, fundamentally, a theory of democracy, understood to require consensus, in a pluralistic society ripe with endemic conflicts. It provides an answer to the question that liberal thought finds most central: How do citizens organize living together in a way that allows for stability and security on the one hand, and participation, fairness, and social peace on the other? Conflict, for liberal thinkers, is a given, whether it emerges because of human nature and conflicting self-interest or because of imperfect political orders and social inequalities—but it is important to control it via institutions. Rawls, in his notion of "justice as fairness" sketches a social contract that asks a relatively low common buy-in from its citizens.<sup>282</sup> Rather than aiming to legislate private and interior "moral truth," the law should content itself with the exterior forms of consensus. Citizens can disagree vehemently (though not violently) on what is "good," as long as they affirm—for any number of different and even conflicting reasons that correspond

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<sup>282</sup> Rawls, J. (1985). Justice as Fairness: Political not Metaphysical. *Philosophy & Public Affairs*, 14(3), 223.

to their individual world view, ranging from religious to moral to tactical reasons—basic, liberal political values:

In justice as fairness, social unity is understood by starting with the conception of society as a system of cooperation between free and equal persons. Social unity and the allegiance of citizens to their common institutions are not founded on their all affirming the same conception of the good, but on their publicly accepting a political conception of justice to regulate the basic structure of society. (At 249)

It is then easy to see why liberalism is so focused on procedures: if the assumption is that substantive political goals and norms can and will change over time, what we can influence is merely the manner, methods, or means in which a pluralistic society negotiates its members' differing interests and inherent conflicts. What's more: the state cannot and should not regulate the hearts and minds of its subjects; liberalism presents this as a distasteful tradition from the times before it secured religious freedom and freedom of conscience. This means that caring for democracy is less about advocating specific policy agendas and substantial rights and more about conditions, communication, access to information, and freedom of expression. The ideal of "justice" is thus bound to change, but people's universal rights, and their capacity to participate in the negotiation of what it means to them, should not. "Political," in this case, is at an institutional, not an ideological level.

Elsewhere, Rawls calls this the "possibility of stable social unity secured by an overlapping consensus on a reasonable political conception of justice,"<sup>283</sup> an evolution of Hobbesian consensus by mere self-interest. In what may sound like unfounded optimism for a reader in 2019, he notes that "three centuries of democratic thought and developing constitutional practice" allows us to "presume not only some public understanding of, but also

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<sup>283</sup> Rawls, J. (1987). The Idea Of An Overlapping Consensus. *Oxford Journal of Legal Studies*, 7(1), 1, at 2.

some allegiance to, democratic ideals and values as realized in existing political institutions,” so that the “political justice” consensus in a pluralist society rests on more than a mere mutual pact of non-aggression between warring sects. Importantly, they assume a communal identity along the lines of equal and free citizenship; this is presented on the one hand as progress towards rationality, away from historical group identities such as religious groups, but on the other hand it also relegates any transcendence to the sidelines and away from what constitutes politics: “fundamental intuitive ideas are not taken for religious, philosophical or metaphysical ideas.”<sup>284</sup> Such ideas, for Rawls, are variable and changeable whereas pluralism, or the fact of diversity of ideas and opinions, will remain. There is, then, a clear acknowledgement that everyone does not want the same things—but this conflict, liberalism assures us, can be solved by well-designed institutions and procedures, the guardians of this political justice, without much interest in the content of the conflicting views or experiences.

Rawls’ *Theory of Justice* hinges on a specific notion of rationality that further attempts to center social life away from interior, personal, controversial, subjective, or otherwise transcendent markers, and closer to economistic notions of social contract.<sup>285</sup> In other words: to be a good citizen means to accept that society should care for its weakest members, not because

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<sup>284</sup> *Id.*, at 8.

<sup>285</sup> For instance, he argues that

“[o]ne feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested. This does not mean that the parties are egoists, that is, individuals with only certain kinds of interests, say in wealth, prestige, and domination. But they are conceived as not taking an interest in one another’s interests. They are to presume that even their spiritual aims may be opposed, in the way that the aims of those of different religions may be opposed. Moreover, the concept of rationality must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends. I shall modify this concept to some extent, as explained later (§25), but one must try to avoid introducing into it any controversial ethical elements. The initial situation must be characterized by stipulations that are widely accepted.”

Rawls, J. (1999). *A Theory of Justice*, Revised Edition. Harvard University Press, at 12.

Jesus said so but also not purely because one's naked self-interested rationality warns that extreme wealth inequality might lead to instability and violence. Rather, the concern is for justice—but justice that is directly linked to institutional balance in a democracy. Rawls' methodology for reaching consensus is that of analytical philosophy: for example, a baseline level of support for those members in society who depend on such help is reasonable, according to a thought experiment called “the veil of ignorance,” itself essentially an adaptation of the Kantian categorical imperative, where everyone would reasonably be in favor of some level of support if they did not know what hand they would be dealt in a hypothetical society. He further proposes the framework of “justice as fairness,” that is, a political norm achievable in everyday institutions, rather than an aspirational, unachievable ideal.<sup>286</sup>

Briefly, the idea is that in a constitutional democracy the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines. Thus, to formulate such a conception, we apply the principle of toleration to philosophy itself: the public conception of justice is to be political, not metaphysical. Hence the title. (At 223)

#### 4.1.1 Applying liberal thought: deliberation

Deliberative democracy is liberal theory put into practice: it develops the methods and processes through which a pluralistic society interacts and its citizens participate, namely via deliberation, debate, and discussions, rather than mere voting. As a scholarly field, its contemporary prominence is paramount: deliberative democracy is arguably the most influential framework today of normative political theory. While its many contributors might disagree on different points, the focus on communication and discourse is widely shared. It holds that deliberation makes not only for better decisions but also an increased sense of community. On

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<sup>286</sup> Rawls, J. (1985).

the continental side, Jürgen Habermas, as the major proponent of deliberation as the process by which the best argument emerges due to the “forceless force of the stronger argument,” departs, like Rawls, from an assumption of universal values shared by participants in deliberation. His theories of “communicative action” and “communicative rationality” spell out how to achieve a “rule-governed and stable network of interaction.”<sup>287</sup> Habermas’ universality principle is akin to the Rawlsian method of “reflective equilibrium,” or the process of mutual adjustments in deliberation until participants find overlapping consensus. One such consensus is the universal sense of justice—an underlying principle on which all are able to agree. In Chapter 3, we saw traces of Habermas’ understanding of universal moral consciousness as it relates to moral development theory by Kohlberg in TM.

Amy Gutmann and Dennis Thompson, major proponents of the US-American deliberative democracy literature, focus on two strands of arguments for deliberation. These are that on the instrumental level, deliberation leads to better decisions, and on an expressive level, it allows citizens’ participation in a way that respects their autonomy. The fairness inherent in creating participatory deliberative institutions would mean that citizens can have input into policies and laws, and they would feel that those have been reached in a fair manner even if they “lose” a particular round of deliberation. The concept of reciprocity, so central to anthropological thought, is both a “regulatory” and a moral principle of justice, according to Gutmann and Thompson, because citizens “owe one another a justification for the mutual binding laws (...) they collectively enact.”<sup>288</sup> Here, Gutmann and Thompson depart from pure proceduralism; they

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<sup>287</sup> Habermas, J. (1990).

<sup>288</sup> Gutmann, A., & Thompson, D. F. (2004). *Why deliberative democracy?* Princeton University Press, at 99.

argue that such justifications need to make reference to substantive values, that is, beyond bargaining and mere process. In that sense, they argue, deliberation is more than a mere formal set of procedures, though the content of the substantive values, of course, is also subject to, with the exception of so-called “principles of preclusion,” deliberation and discussion.<sup>289</sup>

#### 4.1.2 Deliberative democracy and ADR in the literature

The connection between these bodies of thought is the concept of application, and, to an extent, practice. If deliberative democracy is the method for applying, creating, improving and sustaining liberal political order, ADR and consensus-building would appear to be the even more applied methodology for deliberative theory in the (inevitable) case of disputes. As mentioned above, deliberative democracy is central to ADR theory, it provides the next-higher level of theoretical abstraction, the inverse to application, so to speak.

At first glance, however, there is an apparent tension: if one of the advantages of ADR is a more creative, holistic, or integrative manner of approaching the needs of human beings in disputes, a philosophy of rational deliberation seems like a contradictory basis: it can squeeze out these very elements. In what follows, I review a few examples of ADR scholarship discussing deliberative democracy.

A prominent example of incorporating deliberative democracy into ADR is Carrie Menkel-Meadow’s work. She extensively discusses the roles of lawyers in a system of justice marked by fragmentation and diversity.<sup>290</sup> Menkel-Meadow’s discussions are heavily informed

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<sup>289</sup> Gutmann, A., & Thompson, D. (2002). Deliberative Democracy Beyond Process. *Journal of Political Philosophy*, 10(2), 153.

<sup>290</sup> Menkel-Meadow, C. (2005). The Lawyer’s Role (s) in Deliberative Democracy. *Nevada Law Review*

by her views of conflict theory<sup>291</sup> and she argues in favor of integrating methods that go beyond the binary, oppositional logic of adversarialism. For her, this is connected to a philosophical sense that in the aftermath of (the failure of) “grand-theories,” the only agreement we can have *a priori* as a society is the process by which we settle disagreements; she makes reference to Stuart Hampshire’s dictum that “Justice is Conflict.”<sup>292</sup> The turn to conflict theory allows Menkel-Meadow to go beyond merely dyadic notions of seemingly private disputes, and to highlight the ways in which there are more than two parties, more than two possible outcomes, and more than the strictly private to most conflicts. She links the variety in viewpoints in “post-modern” pluralism to the need for institutional and remedial “creativity” and indeed “process pluralism.”<sup>293</sup>

Here as in liberal theory, the question of proceduralism versus substantive consensus arises. Menkel-Meadow concludes that while universal substantive values might be unattainable, working toward the creation of just procedures is possible and fundamental to achieving justice. At the most general level, then, the question of conflict is, as in liberalism, folded into a question of procedure.

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<sup>291</sup> Several articles in this vein share a similar sense of audience and develop these ideas extensively: Menkel-Meadow, C. (2001). Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice. *Fordham L. Rev.*, 70, 1761, where she holds, at 1768: “Thus, for me, first principles about the pursuit of justice suggest that there are both substantive and procedural dimensions to justice and that “legal justice” may not be capacious enough to include all that I would consider just.”

Also, see Menkel-Meadow, C. (1996). Trouble with the Adversary System in a Postmodern, Multicultural World. *Wm. & Mary L. Rev.*, 38, 5.

Menkel-Meadow, C. (2004). From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *J. Legal Educ.*

<sup>292</sup> Hampshire, S (2000) *Justice is Conflict*. Princeton University Press.

<sup>293</sup> Menkel-Meadow, C. (2004), at 8.

A second example of mediation scholarship that more explicitly engages liberal political philosophy is Joseph Stulberg's work.<sup>294</sup> In a 2005 article, he reflects on both the difficulty and importance of developing standards of justice for mediation. He does so by using the same method of "reflective equilibrium" as Rawls and others, and he applies it to questions of social justice and power in mediation. Positing a number of givens, he identifies possible critiques and then argues for building conditions and constraints into the process that would minimize the criticism. His response highlights the centrality of procedure, but in a way that is much more in line with "toolbox" thinking and standardization.

Stulberg describes mediation as an example of "justice from below" (as opposed to norms and laws imposed "from above"). This is because, for him, mediation relies on mutual acceptability, and it is because the scope of harms<sup>295</sup> that mediation addresses is larger than those that laws can recognize and sanction. He then tests, using the reflective equilibrium approach, whether mediation meets the criteria for a "pure procedural justice" method in a Rawlsian sense.<sup>296</sup> The possible infractions of procedural justice he identifies are as follows: 1. obvious coercion; 2. impacts on "basic interest that most human beings believe should not be" compromised (giving the example of sex slavery); 3. terms that violate "positive law"; 4. terms that violate Human Rights or human dignity; 5. lack of information when parties are settling; 6. terms that violate fundamental values shared by larger community.<sup>297</sup> These can be addressed

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<sup>294</sup> Stulberg, J. B. (2005). Mediation and Justice: What Standards Govern. *Cardozo Journal of Conflict Resolution*, 6, 213. See also Stulberg (1998). Fairness and Mediation. 13 *Ohio St. J. on Disp. Resol.*

<sup>295</sup> Here, Stulberg references mediation scholars Hyman & Lela P. Love (2002) *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 *Clinical L. Rev.* 157.

<sup>296</sup> This liberal political theory is confirmed, for instance in a list of "Recommended further Reading" of a mediation skills book where Stulberg lists three books under the rubric of "Books on Political Theory and Values", namely Nozick's "Anarchy, State and Utopia", Mill's "On Liberty" and Rawls' "Political Liberalism". See also Stulberg, Joseph B., and Lela Porter Love. (2009). *The middle voice: mediating conflict successfully*. Durham, N.C.: Carolina Academic Press, at 152.

<sup>297</sup> Stulberg (2005), at 221-227.

through six corresponding “principles,” namely: voluntariness, inalienability of interests, publicity of outcomes, dignity and respect, informed decision-making, and toleration of conflicting fundamental values.<sup>298</sup> He then translates the principles into practical prescriptions (or what he calls the “cash value” of the “abstract” principles)<sup>299</sup> for process improvement “via process design or mediator ethics.” Stulberg concludes that when and if these prescriptions are incorporated, mediation becomes a process of pure procedural justice from below. It becomes one where parties can solve their disputes without reference to any outside (or from “above”) norms.

Stulberg’s analysis is an example of the “toolbox” worldview described in Chapter 2: critiques—such as the question of procedural versus distributive justice, or the importance and impossibility of perfect neutrality—are “tested” for their normative validity and directly transformed into policy and implementation prescriptions. The political content of the principles is not contested. For instance, who decides where the line between “toleration of conflicting fundamental values” and “terms that violate fundamental values shared by the larger community”? The criticism becomes incorporated into the method, because the method used for testing the critique is the same method used for justifying the activity in the first place, in this case, mediation.

In perhaps the most extensive example of explicitly engaging Deliberative Democratic theory, Aragaki<sup>300</sup> draws a line between DD and ADR modes of thinking, in order to indicate that although both rely on a kind of proceduralism, there is a significant difference between their

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<sup>298</sup> Stulberg (2005), at 227/8.

<sup>299</sup> Stulberg (2005), at 242.

<sup>300</sup> Aragaki, H. N. (2009). Deliberative Democracy as Dispute Resolution: Conflict, Interests, and Reasons. *Ohio State Journal on Dispute Resolution*, 24(3), 406.

political ambitions. He critically discusses the mutual interest of what he terms “Interest-Based Dispute Resolution” (IBDR, those methods that emphasize interests beyond positions, so excluding arbitration and litigation) and deliberative democracy theorists. He cautions against the “tremendous optimism” over the presumed parallel between these fields, which can threaten to ignore the significant differences in “orientation to conflict” (a phrase he borrows from Folger and Bush) and “that should give us pause and make us consider the foundational questions more seriously.”<sup>301</sup> Notably, then, for Aragaki, the normative questions are intimately linked to disciplinary and methodological questions around the theory/practice paradigm. Addressing DD theorists directly, he writes that one of his aims is to correct

what I take to be the perception of IBDR as a practice-oriented field that has comparatively little to contribute to a theoretical debate about what conflict resolution in the public sphere should look like. My secondary purpose, then, is to suggest that IBDR does in fact have a coherent normative agenda, one that is capable of engaging deliberative theory on its own turf. (413)

In a creative extension of the foundational literature behind transformative mediation—namely Carol Gilligan’s moral development theory along gender norms—Aragaki argues that DD is apt for solving disputes that are (male connotated) “conceptual”, rather than (female connotated) “relational” in nature or, indeed, framing. That is, where a mediator sees a conflict on a number of emotional, human-relational axes, the emphasis for DD is on conceptual conflicts and the “logic, truth and evidence of an argument.”<sup>302</sup> Presenting the IBDR literature for conflict and human needs, he outlines why such a rational orientation is unlikely to work in practice to solve intractable conflicts, namely because such an approach fails to engage the underlying human needs and interests.

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<sup>301</sup> Aragaki (2009), at 410.

<sup>302</sup> Gutmann (2007) *The Lure and Dangers of Extremist Rhetoric*, 136 *DAEDALUS* 7072, as quoted in Aragaki (2009), at 422.

Aragaki suggests that those differences in orientation might not be bridgeable:

“deliberation may be more about judging what is right for the common good—what we should want—rather than figuring out what we can all want.” There is then a necessity to direct one’s gaze away from one’s needs and accept the importance and normative supremacy, by virtue of their rationality, of communal interests: since “deliberation is essentially an evaluative process in which some interests are rejected as unreasonable, it suggests the coercive and exclusionary character of reason-giving discourse.”<sup>303</sup> The types of “reasons” people are made to give in deliberation are only counted as rational and “good faith” if they are “reciprocal,” that is, accessible and understandable to the other party, regardless of whether they might disagree; this creates a structure that explicitly excludes communicating deeply held personal beliefs, and other underlying interests. Aragaki concludes by suggesting that, rather than focusing on deliberative practices, IBDR turn towards the *modus vivendi* strand of liberal political thought.<sup>304</sup> This is because the “political ambitions” of IBDR go beyond the structuring of disagreement into reasonable deliberation and instead they “involve finding ways of working together to negotiate provisional, revisable, and authentic interest-based accommodations that are superior to the available alternatives and, in this way, help ‘make the world a better place.’”<sup>305</sup>

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<sup>303</sup> *Id.*, at 445.

<sup>304</sup> Aragaki summarizes the *modus vivendi* literature as arguing that “Politics is not a matter of adjudicating between competing rights and liberties through moral argument. Rather, it is better described as negotiating temporary peace, by addressing unmet interests until new conflicts inevitably re-emerge and necessitate further renegotiation. *Id.*, at 477 and references John Gray as the prime example of the *modus vivendi* school see Gray, J. (2004). *Two faces of liberalism*. Cambridge: Polity Press.

<sup>305</sup> In an interesting response to Aragaki, Peter Muhlberger argues that ADR and DD have more in common than Aragaki allows, namely liberal democracies’ (false) assumption that “people come to the political or social arena with fixed and known preferences” Muhlberger argues that Aragaki understates the role of emotions and identity in communicative action theory broadly and that ADR has yet to fulfill its “transformative potential” and can do so precisely by employing the rational turn offered by DD. See Muhlberger, P. (2011). A Deliberative Look at Alternative Dispute Resolution and the Rule of Law *J. Disp. Resol.*, 145.

### 4.1.3 Reason, emotion and procedural justice as experience in ADR

ADR operates at the emotional and intellectual intersection between a more humane process and formality of protections, between what we designate as private and public.<sup>306</sup> Many mediations are indeed the liminal space where those designations are drawn and redrawn. Are mediators aware of this and prepared for it? Can they veritably accompany such processes? Public justice, private fairness, expectations, human “needs” and public “interests” are mingled in ways that our analytical and institutional lenses have a hard time disentangling. While the term “justice” might elicit many different reactions and while it can suffer from a real ontological problem of under-determination, *injustice* is often much easier to define and recognize. Inequality, inequity, discrimination are all things that the law, and indeed all forms of dispute resolution, should aim to limit.

ADR scholars have sought to develop notions of procedural justice specific to mediation and other DR processes.<sup>307</sup> Menkel-Meadow suggests procedural justice must be thought together alongside the diversity of options, or procedural pluralism, and while keeping in mind the wider

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<sup>306</sup> For a discussion on deliberative/discursive constitutional theory and parallels to ADR, see Cohen, A. J., & Alberstein, M. (2011). Progressive Constitutionalism and Alternative Movements in Law. *Ohio St. LJ*, 72, 1083.

<sup>307</sup> An example of a concern for ensuring just procedures on a formal level is the extensive work of Nancy Welsh focusing on court-connected mediation programs and their design, seeking to extend the same standard of procedural rights one would extend to formal legal proceedings. See Nancy A. Welsh (2002) Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, *J. Disp. Resol.* 179; Welsh (2001) The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, *6 Harv. Negot. L. Rev.* 1, 78 suggesting steps that should be taken to ensure that mediation enhances rather than diminishes self-determination, a component asserted by procedural justice studies to be imperative to the perception of a fair process; Welsh, (2001) Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, *79 Wash. U. L.Q.* 787, arguing that court-connected third-party processes "should and must be judged against the standard of procedural justice" (at 860).

public reverberations of seemingly private dispute settlements.<sup>308</sup> She argues that these questions can be most fruitfully studied using a sociological approach committed to the specificity of context and by taking seriously Lon Fuller’s warning that each method develops its own morality.<sup>309</sup> Highlighting the role of emotions in mediation, she proposes a specific notion of procedural justice as developed by social psychologists,<sup>310</sup> namely that “participants in dispute resolution processes have a strong desire for ‘procedural fairness’ that may be more robust than their satisfaction or concerns about actual outcomes.”<sup>311</sup> Notwithstanding Menkel-Meadows methodological carefulness, she concludes that the development of just procedures in ADR is possible and that our “very survival depends on it.”<sup>312</sup> Elsewhere she puts it even more succinctly: “process is the human bridge between peace and justice.”<sup>313</sup>

What is central for the way in which DD has been folded into ADR theory is how a subjective, emotional, or what I have been calling experiential, sense of fairness in the process can come to replace an emphasis on fairness in the outcome or a critical awareness of the discourses and structures of power present in mediation, in its practices, and in the disputes it confronts. Legal anthropologist Elisabeth Mertz<sup>314</sup> warns that “‘procedural’ justice and increased ‘voice’ are used as a ruse [...] diverting citizen's attention from their lack of actual control over

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<sup>308</sup> Menkel-Meadow, C. (2004). From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *J. Legal Educ.*, at 10.

<sup>309</sup> *Id.*, at 25. Note that this focus on specific context in the assessment of a conflict is shared with legal pragmatism.

<sup>310</sup> E. Allen Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York, 1988); John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, 1975) as quoted in Menkel-Meadow (2004) at 13.

<sup>311</sup> *Id.*, at 13.

<sup>312</sup> *Id.*, at 29.

<sup>313</sup> Menkel-Meadow, C. (2006). Peace and Justice: Notes on the Evolution and Purposes of Legal Processes. *Georgetown Law Journal*, 94, at 580.

<sup>314</sup> Mertz, E. (1988). Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices. In C. L. Briggs (Ed.), *Disorderly Discourse* (Vol. 30), at 138.

political outcomes.” A subjective feeling of participation emerges, rather than genuine power to shape events.

Important work has detailed the inner workings of the concept of rationality, whether instrumental or engaged, on a philosophical level and with regards to how it impacts dispute resolution.<sup>315</sup> Such work is central for complicating and elaborating our understanding of inner/outer, public/private, and female/male-connotated dynamics. Here, and extending this analysis, I wish to highlight the sheer discursive force of the rational, common sensical, and technical methodology that DD describes. Its power is especially striking if we consider that this reasonable manner of reaching agreements hinges so heavily on the emotional “sense” of being involved, heard, and respected.<sup>316</sup> Fairness, and justice even, becomes a reality for the citizen-participant via the *experience* of participation in deliberation. This is not unlike the affective pull of having one’s “day in court,” with its theatrics and the stagings of proceduralism.<sup>317</sup> Psychological factors of vulnerability, experiences of victimhood, trauma, and agency, among others, are all at play in this sense of participation. They bring to the fore the connection between mediation and therapy. A number of scholars have highlighted what is sometimes called “the therapeutic state” and questioned whether an emotional notion of dispute resolution reflects and recreates it.<sup>318</sup> This is a fruitful avenue for thinking about the roles and guises that power can

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<sup>315</sup> Forester, J. (1993). *Critical theory, public policy, and planning practice: Toward a critical pragmatism*. Albany, NY: State University of New York Press.

<sup>316</sup> For general discussions on the role of emotion in philosophy, see Nussbaum, M. (2001) *Upheavals of Thought*. Cambridge University Press. For an exploration of Nussbaum and Matthew Newcomb, see Fleckenstein, K. S. (2007). Once Again with Feeling: Empathy in Deliberative Discourse. *Jac*, 27(3/4), 701.

<sup>317</sup> Allen, Jessie, (2007) *A Theory of Adjudication: Law as Magic* New York University Public Law and Legal Theory Working Papers. Paper 54; Conley, J. M., & O’Barr, W. M. (1999). *Rules versus relationships: The ethnography of legal discourse*. University of Chicago Press.

<sup>318</sup> See for instance: Humphrey, M. (2005). Reconciliation and the Therapeutic State. *Journal of Intercultural Studies*, 26(3), 203; Mirchandani, R. (2008). Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State. *Law & Social Inquiry*, 33(4), 853.

assume, and the subjectivities and affects that can bind them all together. I would add that power and the therapeutic nonetheless exceed and are not monopolized by the state; it may not play this role in most situations. Indeed, independently of this, it is possible to identify the affective, experiential benefit that participants of DR achieve, or hope to achieve. Rather than healing, parties often expect a level of participation in an accessible but still external and neutral institution. As citizens of representative democracies, we are accustomed to third parties regulating and intervening in the conflicts of our life. In bringing these elements together, dispute resolution institutions become a mix of regulatory, caretaking and community event.

There is a striking way in which ADR's supplemental position, as an "alternative to" rather than "instead of" or a project of legal, social, political reform is in line with broader social developments around self-improvement. By means of illustration, consider the conceptualization around and growing popularity of "mindfulness", a light form of meditation loosely based on Buddhist practices. I was reminded of mindfulness during my training as a transformative mediator, especially by the language surrounding supporting the parties through "being present with them", employing a "micro-focus" on each party, and the frequent reminder not to judge situations as they appear to be in the session. The techniques of TM oftentimes parallel the training of one's mind to be focused, clear and non-judgmental in mindfulness practice. While TM has not taken an explicit position towards mindfulness, some ADR scholars have, most notably Leonard Riskin, the author of the influential mediation styles grids,<sup>319</sup> who has published

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<sup>319</sup> Riskin, L. L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harv. Negot. L. Rev.*; Riskin, L. L. (2003). Retiring and replacing the grid of mediator orientations. *Alternatives to the High Cost of Litigation*, 21(4), 69; Riskin, L. L. (2005). Replacing the mediator orientation grids, again: Proposing a "new new grid system." *Alternatives to the High Cost of Litigation*, 23(8), 127.

on teaching mindfulness and awareness in mediation.<sup>320</sup> This brings to mind criticisms of mindfulness as an appropriation and commodification of a culturally and theological concept (via the work of Jon Kabat-Zinn, who popularized meditation in the Western context).<sup>321</sup> To separate a philosophically grounded practice -mediation- of its theoretical and cultural context in order to allow easy, non-ideological use of what is then a *technique* is one thing,<sup>322</sup> the way mindfulness approaches are used, for instance in public health programs or employer-sponsored workshops, to increase the productivity of subjects in capitalistic, neoliberal societies via an ethos of self-improvement, is a different, deeply ironic one.<sup>323</sup>

Participation in process *design* also feels like control for parties—and to some extent, it is.<sup>324</sup> But, the parties only exercise partial control over the controlling processes: they might be judging themselves and each other, but they are not free from third party intervention.<sup>325</sup> Thus,

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<sup>320</sup> Riskin, L. L. (2004). Mindfulness: Foundational training for dispute resolution. *J. Legal Educ.* Riskin, L. (2010). Further beyond reason: mindfulness, emotions, and the core concerns in negotiation. *NEV. LJ.*; Riskin, L. L. (2011). Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium. *J. Legal Educ.* 61.

<sup>321</sup> Kabat-Zinn, J. (2004). *Wherever you go, there you are*. London: Piatkus.

<sup>322</sup> Erik Braun (2013) *The Birth of Insight: Meditation, Modern Buddhism, and the Burmese Monk Ledi Sayadaw*. University of Chicago Press, chronicles the doctrinal situatedness of mindfulness, and its historical contingency from its origin of “pure insight” meditation to the Burmese monk, who transformed mediation to a slimmed down practice accessible to laypeople.

<sup>323</sup> Arthington, P. (2016). Mindfulness: A critical perspective. *Community Psychology in Global Perspective*, 2(1), 87-104. Hardering, F. & Wagner, Greta (2018) “Vom überforderten zum achtsamen Selbst? Zum Wandel von Subjektivität in der digitalen Arbeitswelt”, in: Thomas Fuchs, Lucas Iwer and Stefano Micali (eds.), *Das überforderte Subjekt. Zeitdiagnosen einer beschleunigten Gesellschaft*. Berlin: Suhrkamp. Walsh, Z. (2016). A meta-critique of mindfulness critiques: from McMindfulness to critical mindfulness. In *Handbook of mindfulness* (pp. 153-166). Springer, Cham.

<sup>324</sup> Sternlight, J. R. (2002). ADR is here: Preliminary reflections on where it fits in a system of justice. *Nev. LJ*, 3, at 297: citing research that “perceptions of procedural justice are more influential than perceptions of distributive justice, with respect to how disputants will assess the fairness and legitimacy of the entire system”; J. H. (2015). Beyond fairness: The place of moral foundations theory in mediation and negotiation. *Nevada Law Journal*, 15 discusses the use MFT in mediation to go beyond a mere “sense” of fairness.

<sup>325</sup> See Zamir, R. (2010). A procedural justice article in which an Israeli mediator discusses neutrality vs party control desires.

the question of neutrality remains central to the traditional notion of procedural justice via well-designed institutions. However, given contemporary understandings of post-constructivist and performative theorizations, positivist notions of neutrality seem naive; the literature has largely laid to rest this ideal, even as an ideal.<sup>326</sup> We know from physics that one cannot measure or evaluate something without altering its behavior; and in social theory, our categories exert influence in the world and on the subjects they describe. A “neutral” person in the room changes the dynamics of the dispute. Both the suggestion that there is a neutral person, and whatever the neutral person says, change the dispute, even before it becomes “institutionalized.” Furthermore, as research into biases has made clear, there is no such thing as a neutral: it is always positional, situated, and marked—even by the conspicuous absence of qualifiers. Quite simply, in ADR, neutrality can never be perfectly realized. The reaction has been to set it either as an aspiration or to make changes in process design, or in the case of transformative to accept that the mediator’s presence is never neutral and instead to work toward an aspiration that starts with this acknowledgement by replacing the imagined distance, equalization, and impartiality that mimics the law with presence, support, and “ambi-partiality” that centers the emotional and empathetic.<sup>327</sup>

I’ve explored some of the political philosophy commonly associated with and employed by mediation theory above. These strands of political philosophy, however, do not offer satisfying commentary on the two main kinds of external (and sometimes internal) critique that ADR has

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<sup>326</sup> See the summary of neutrality debates in Ch. 2.3.

<sup>327</sup> For further critiques of TM neutrality: Kuttner, R. (2006). Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation. *Negotiation Journal*, 22(3), 331–349 and Gaynier, L.P. (2005). Transformative mediation: In search of a theory of practice. *Conflict Resolution Quarterly*, 22(3), 397.

faced: namely, the lack of a comprehensive and structural understanding of power in ADR and the tendency to pacify. These critiques of mediation lead us directly into the criticisms that liberalism and deliberative democracy have faced. In the next section, I begin by briefly summarizing the more well-known counter-arguments among these, chiefly centering on DD's shortcoming in reaching its democratic promise. There is, however, a more radical critique to be made: namely that for a body of thought centered on freedom, liberalism does a remarkable job of producing other forms of un-freedom and obstructing it for a large number of social groups, both domestically and internationally (as well as its facilitatory role in colonialism as an experience that connects these two spheres).<sup>328</sup>

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<sup>328</sup> A number of projects in political science have more recently explored the ways liberalism has structured the definitions of citizenship, participation, economy and international relations. In the US context, an obvious riddle is how the founding of the country was an achievement of liberal thought and institutions, while being both co-existent with and predicated on the express unfreedom of enslaved people, including those owned by the founding fathers. See for example Rana, A. (2014). *The two faces of American freedom*. Cambridge: Harvard University Press.

## ***4.2 Depoliticization and pacification: two critiques of liberalism***

Liberal democracy, from its conception in the Enlightenment, has always been presented as a defense against enemies: enemies at the top, especially despotic rulers and aristocratic nobility; but also in the midst of society: civil conflicts and wars because of ethnic or religious difference, people attacking and oppressing each other with impunity, and the rule of the many or the masses unchecked. On a positive level, liberal democracy guarantees basic civil liberties through the rule of law and a concept of human dignity that enshrines basic rights for all citizens. The fears that liberal democracy responds to are both historical and enduring; our current political moment, ripe with institutional erosion, public division, and myriad internal conflicts, certainly brings them to the fore.

In liberalism's self-narration, the twentieth century has seen a spread of liberal democracies worldwide, and arguably, the extension of liberal institutions and values within existing liberal states.<sup>329</sup> It has seen, too, an enormous amount of bloodshed and the breakdown of states, basic humanity, liberal values and institutions. Renewed commitment to liberalism was then in part a response to the excesses of power hunger, nationalism and racial hatred that culminated in WWII and the Holocaust. Only fair, liberal institutions and processes can provide some hope to protect us from these.<sup>330</sup>

This narrative presents liberalism both as the vehicle through which freedom and self-rule can be realized and as the response to private, domestic, and global injustices. In a world that Max Weber calls "disenchanted" due both to the dominance of instrumental and legal rationality over other forms of authority and to the belief in the ability to explain and perhaps solve all

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<sup>329</sup> Fukuyama, F. (1992). *The end of history and the last man*. New York: Free Press

<sup>330</sup> Popper, K. R. (1971). *The open society and its enemies*. Princeton University Press.

problems, liberalism offers itself as an explanation for and solution to conflict. And yet, contrast this narrative with, for instance, the polemical analysis offered by Carl Schmitt (who, like Habermas, was also a student of Weber). The apparent virtues of liberalism, especially surrounding its emphasis on deliberation, were where Schmitt located its depoliticizations.<sup>331</sup> Schmitt was critical of portraying liberal legislators, such as parliaments, as pluralistic, discursive spheres striving for consensus by discussions: for Schmitt, this imagery merely masks the concealed interests that they bring into the backrooms, the way that discussion is a mask for conflicts, the real underlying power struggles for influence and votes, and the weakening of the state from within that these conflicts cause. If, for Carl Schmitt, political liberalism's view of parliamentary politics is encapsulated as representatives in an artificial machinery who turn matters of public concern into topics of endless discussion in which private interests masquerade as reason, all this for him is about liberalism's ruses and elisions: what has, does, and always will matter is power.

Importantly, while Schmitt's critique of deliberation—or the semblance of deliberation—might be extended to other deliberationist institutions including in mediation, a number of features of ADR scholars complicate the picture. PON's emphasis on win-win outcomes and creating value would be, for Schmitt, symptomatic of a liberal denial of conflict, especially existential conflict about irreconcilable positions, but they would likely agree in their assessment of power as a commodity (even if Schmitt would regard the claim that power resides in techniques as an evasion that mistakes the instrument for its use). Whereas, for Schmitt, liberalism subjects questions of public interest to private opinion, Menkel-Meadow's analysis

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<sup>331</sup> Schmitt, C. (2008). *The concept of the political*. Chicago, Ill: Univ. of Chicago Press.

attempts to reverse or inverse this problem: private disputes, she reminds readers and practitioners, have a direct bearing on the public interest. Similarly, whereas Schmitt finds that liberalism emphasizes both individualism and “moral pathos” over democracy as the people and as a “political ideal,” TM’s approach is critical of atomized individualization but seeks to bridge it with a structure of self-directed moral improvement and education that might reverberate across society and derives its own political agenda out of a moral pathos. Across the differences, the questions of deliberation’s depoliticizing and pacifying effect remain.

More recently, deliberative democracy has been criticized on a number of different accounts, both in terms of DD falling short of its democratic promise, as well as a general common critique of Habermas that would label deliberative democracy a kind of “consensus machine” geared at making the unpalatable seem agreeable.<sup>332</sup> Defenders of Habermas argue that disagreement is still possible in deliberative democracy, and indeed in Rawlsian liberalism—but it is unclear what happens with that disagreement, or how one would disagree with fundamental values without becoming cast as an amoral, antisocial being unable to live in society. There are also, of course, decades of internal disagreement within these literatures, such as Habermas’ critique of Rawls’ “thin” notion of overlapping consensus.<sup>333</sup>

In an influential article published in 1997, Lynn Sanders focuses her critique on the anti-democratic and conservative effect that DD theories have, especially with regards to how

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<sup>332</sup> For a summary of that critique, and a subsequent defense from it, see White, S. K., & Farr, E. R. (2012). “No-Saying” in Habermas. *Political Theory*, 40(1), 32–57.

<sup>333</sup> Krasnoff, L. (1998). Consensus, stability, and normativity in Rawls’s political liberalism. *The Journal of Philosophy*, 95(6), 269-292; Habermas, J., Cronin, C., & De, G. P. (2005). *The inclusion of the other: Studies in political theory*. Cambridge: Polity Press. starts from the opposite point, i.e. that critiques of DD are a theory that doesn’t stand the test of practice.

deliberate contexts tend to recreate social hierarchies and generate their own exclusions. Two decades ago as today, DD was a pervasive paradigm; Sanders begins by referring to how “irrational” it might seem to criticize deliberation given its pervasiveness. She casts DD as an elite project, and by extension an anti-democratic one, by exploring the ways in which it does not appeal to “ordinary citizens.” Her critique goes beyond questioning rationality to also exploring the manner in which conservatism is aided by deliberative “connotations” of “reserve, cautiousness, quietude, community, selflessness, and universalism (...) [to] undermine deliberation’s democratic claims.”<sup>334</sup> Ultimately, she argues that in a political context as rife with inequality as the US, it is unrealistic to assume that all citizens are able to participate in deliberation equally and with comparable success; on the contrary, those who are already systematically disregarded in society will be disadvantaged if not disregarded in deliberation. Using the example of jury deliberations, she argues that factors of gender, race, and class make rational and autonomous deliberation amongst “peers” highly unlikely. Instead, she proposes “testimony,” a concept that is rooted in Black political thought and centers the sharing of individual experiences in an egalitarian structure, as a more promising avenue for democratic practices.<sup>335</sup>

Equally influential as Sander’s landmark piece is Iris Marion Young’s somewhat more ambivalent critique of deliberation as internally flawed based on a “concept of democratic discussion [restricted] narrowly to critical argument [which] tends to silence or devalue some people or groups.” She contends that DD casts difference (in culture, social, racial, gender groups, but also on an individual level) as something to be overcome rather than respected, and

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<sup>334</sup> Sanders, L. M. (1997). Against Deliberation. *Political Theory*, 25(3), 347–376, at 348.

<sup>335</sup> *Id.*, at 371/2.

that deliberation theories function as a forceful centralizer of standardized forms of communication, to the peril of all other forms of communication that different cultural groups, for example, might favor, such as storytelling.<sup>336</sup> While the *theory* of deliberation is paramount in political theory and political philosophy, the practice and reality of power politics, or what Iris Marion Young calls “interest-based politics” (not to be confused with Aragaki’s Interest-Based Dispute Resolution) seems at least as prevalent as an analytic lens, if not increasingly more influential than deliberative democracy.<sup>337</sup>

Aragaki’s fundamental criticism in applying deliberative democracy theory to mediation—as discussed above—is that in its focus on rationality at the expense of underlying interests and human needs, DD cannot effectively solve conflicts. The focus on the rational does not, he explains, cover what most conflicts are really about. While I agree with this observation, and the other critiques mentioned above, I find that they do not explain the most confounding quality: how discussions about what is at stake in the *politics of* dispute resolution are largely unimportant to the field at large and remain normatively neutral, limited to critical outsiders, or - in the case of TM- still cannot escape liberal notions of choice and process.

In order to get a better view from outside the (tool-)box, I propose taking a closer look at mediation from the vantage points offered by Wendy Brown’s account of depoliticization and literatures that explore the pacification and violence in liberalism. In what follows then, I want to explore these two topics, as well as their linkage through questions of power and their demand that one pay attention to an essential aspect of conflict, namely the underlying collective and

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<sup>336</sup> Young, I. M. (1996). Communication and the Other: Beyond Deliberative Democracy. In S. Benhabib (Ed.), *Democracy and Difference* (pp 120–133).

<sup>337</sup> Kadlec, A. (2008). Critical Pragmatism and Deliberative Democracy. *Theoria*, 55(117), 54–80.

individual identities. Brown highlights the ways that certain practices and institutions—in her case, “toleration”—naturalize conflicts between specific kinds of groups (“religions” and “cultures”) by regulating or managing it, rather than, for example, healing, resolving, or otherwise confronting its central grammar.

Her analysis raises important questions for the effect of “dispute resolution” not on a specific dispute, but on which disputes count, the boxes into which they are placed, the potential for their naturalization, and the effect of individuating various issues to parties rather than as parts of a broader set of political questions about inequality, marginalization, and structures of power. In that sense, Brown’s critique addresses structural and productive facets of power—something that the more institutionally-minded readings of the access-to-justice school discussed in chapter 2, did not. Her perspective is steeped in post-structural methodologies and can take a critique of mediation as a faulty and unfair institution to the internal, political and productive mechanisms that operate to obscure patterns of domination and historic injustice—namely by breaking apart conflicts into units of individual “disputing”, occurring in a political and historical vacuum.

Similarly, critics of liberal pacification have something to say, I think, to the possibility that mediation pacifies both by isolating a conflict from its broader sets of social and political conflicts—be they local, national, or global—and treating it as a problem to be solved through interests, needs, or public interest; or by refusing or being unable to situate it in this manner in the name of other values such as party self-direction. To introduce both sets of critiques, which ultimately revolved on the situatedness and identity of mediation, parties, and mediators, it might suffice to begin asking: who are the people who come into the room, and who are they outside this room? And who are the people who mediate?

### 4.2.1 Power, depoliticization and public/private boundaries

In *Regulating Aversion*, Wendy Brown explores the processes of depoliticization in liberal democracies that are used to regulate the coexistence of certain forms of difference. Tracking the genealogy of “tolerance” as a concept central to liberalism and indicative of the “governmentality”<sup>338</sup> that liberal orders privilege, she explains that tolerance is an exemplar of the “depoliticization [that] involves construing inequality, subordination, marginalization, and social conflict, which all require political analysis and political solutions, as personal and individual, on the one hand, or as natural, religious, or cultural on the other.”<sup>339</sup> Brown finds that this dynamic takes several forms, prominent among which is the conflation and subordination of political questions of power and domination into law and questions of legality.<sup>340</sup> Sites of political contestation thus become instead legal debates, regulatory techniques, and questions of rights. Brown also notes the general absence of specific, historical contextualization of current events in liberal discourses, allowing events to become divorced from the very forces behind “social relations and political conflict.”<sup>341</sup> The particular histories of how people live—and if and how they are in conflict with others, how these fights have continued or changed, and whether these histories feature injustice, potentially historical injustices—are swallowed up into circular rationalities<sup>342</sup> of the diffused, neutral, and normal order of liberalism.

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<sup>338</sup> A term developed by Michel Foucault denoting, roughly, the integration of techniques and attitudes that align with the interests of the “government” into the rationality of the governed subject, thus defusing power into a number of dynamics that become internalized and invisible, rather than necessitating overt force. See Foucault, M. (2011). *The government of self and others: Lectures at the Collège de France, 1982-1983*. New York: Picado

<sup>339</sup> See Brown (2009), at 30.

<sup>340</sup> *Id.*, at 13.

<sup>341</sup> *Id.*, at 15.

<sup>342</sup> *Id.* at 80.

Brown explores how liberalism has structured life into private and public spheres, and the space “designated as cultural, social, economic, and private is considered natural or personal (in any event, independent of power and political life)”. It is a space devoid of state responsibility and even communal responsibility, but not of their influence. She writes, “Liberalism’s excessive freighting of the individual subject with self-making, agency, and a relentless responsibility for itself also contributes to the personalization of politically contoured conflicts and inequalities.”<sup>343</sup> At its extreme, we are looking at an abdication of public, communal responsibility for the lives of others, because their concerns are labelled private.

Brown explores the tension between rationality, individuation, and identities, including those based on religion and ethnicity, in the liberal subject. For her, the underlying Kantian logic of the maturity of the autonomous liberal subject hinges on individuation, which in turn consists of rationality and “will,” or the ability to make choices. Collective identities are then regarded as such choices, or as “optional relationships”:

Most importantly, if, for liberals, collective identities represent the dangerousness of the group, then liberalism stands for that which has found a solution to this dangerousness without abolishing collective identity altogether. Liberalism prides itself on having discovered how to reduce the hungers and aggressive tendencies of collective identity while permitting individuals private enjoyment of such identity. This solution involves a set of interrelated juridical and ideological moves in which religion and culture are privatized and the cultural and religious dimensions of liberalism itself are disavowed. Culture and religion are private and privately enjoyed, ideologically depoliticized, much as the family is; and, like the family, they are situated as “background” to *homo politicus* and *homo oeconomicus*. Culture, family, and religion are all formulated as “havens in a heartless world” rather than as sites of power, politics, subject production, and norms. In this way, far from being conceived as that which constitutes the subject, culture becomes something that, in Avishai Margalit and Moshe Halbertal’s phrase, one may “have a right to.” (At 169)

It is this motion of isolating potentially contentious, and yet deeply relevant, topics to the private sphere that by extension allows the liberal state, and our present arrangement of political

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<sup>343</sup> *Id.*, at 17.

institutions generally, to be perceived as culturally and normatively neutral and, over time, as every day, common sense and logical. On the flip side, the designation of human and collective identity as an “emotional” and intimate<sup>344</sup> serves to isolate such questions from the oversight of political institutions, the law and, indeed, critical inquiry generally.

#### 4.2.2 Violence, Pacification and the state’s boundaries

If we can find the root of ADR’s silence on questions of power in its liberal and deliberative philosophic background via Brown’s theory of depoliticization, it stands to reason that the related critique of ADR as pacification shares a normative root. In what follows, I make use of a radical reading of pacification as the “process of rendering violence invisible” in liberal theory and practice; this is the reading that pacification is central to the liberal “world order,” instantiated in liberal capitalism and the colonial<sup>345</sup> projects of liberal states.

Violence occupies a curious position in our political imaginary. It marks the termination of rational civilized discourse, a breakdown of peace, order, safety and the rule of law, and simultaneously, it is a fairly common occurrence, both domestically and in the violence around the globe, both between individuals and violence doled out by state actors. Violence is associated with strong emotions: fear, shame, anger, and trauma. As such, it is not surprising that, following the logic of depoliticization, violence is not discussed broadly in law and ADR; instead it is embargoed to the state, which is supposed to have a monopoly on it.

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<sup>344</sup> As an immigrant to the United States, I had to learn that religion and politics are considered impolite to bring up with strangers, and sometimes even with family members.

<sup>345</sup> Baron *et al* (2019).

Baron et al introduce the link between violence and pacification by reinterpreting the ancient Roman understanding of *pax* as not just the opposite of war and violence but also as “the forceful creation and maintenance of a political order: pacification.”<sup>346</sup> The end of wartime violence creates a vacuum that necessitates an equally strong political project, and its defense requires energies comparable to the force of violence. Peace and violence are then not antonyms, but complementary forces. Using International Relations scholarship as their basis, Baron et al argue that liberal orders work to make violence invisible.

We are used to identifying violence as a physical occurrence of harm, war, or visible brutality. Their absence connotes safety and peace. Where violence is less overt, increasingly, scholars have identified indirect violence: “Indirect violence refers to the aggregate actions of social groups and institutions that cause violence on other social groups,” or harm that is dispersed slowly, sometimes unintentionally or without a deliberate aggressor, but with an overall effect of violence on some people.<sup>347</sup> Structural poverty and the way in which global inequality causes it would be an example of such indirect violence. Indirect violence operates with a largely structural and institutional, not the more personal coercion of direct violence.

However, for Baron et al, this typology does not address the “inconspicuous, intersubjective” forms of violence that they term pacification. To describe this third type of violence, they use an approach taken from phenomenology. Violence, they argue, does not only operate directly and indirectly. It also structures the world (or, with Heidegger, the worldhood)<sup>348</sup> in fundamental ways. This argument is abstract and requires us to accept an expanded notion of perception that includes the barely-visible. For instance: The threat of violence is still a form of

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<sup>346</sup> *Id.*, at 2.

<sup>347</sup> *Id.* at 3.

<sup>348</sup> *Id.*, at 5.

violence, and its possibility shapes, for instance, the way cities or neighborhoods are built. A surveillance camera invokes violence, not for those who rely on state actors watchful eye to guarantee safety and “law enforcement” but for instance for those who have come to reasonably fear any interaction with security forces. This fear has a force that changes the world in a violent manner- not in the same way physical violence does, of course, but still meaningful. Violence need not manifest in the physical world to shape the physical world, just as it does not need to be invoked explicitly in order to shape the political world. Reading the three types of violence in conjunction with Barnett and Duval’s typology of power—discussed in the Introduction of this dissertation—Barron et al describe pacification as a

type of phenomenological violence [which] includes threats, coercion, intimidation and surveillance to restructure and sustain social and political relations. When this type of violence operates effectively, it appears as though there is no violence; the violence is in the structuring of the prevailing order. While such an outcome may appear peaceful (in the sense of an absence of direct and even indirect violence), it is, at best, a negative peace that operates through a violent and coercive reordering of society. (At 25)

Unobservable violence also functions to shape the forms of protest against oppression that are available: acts of “violent political resistance”<sup>349</sup> such as riots have declined since the 1970s, while, for instance, grave economic inequality (and popular discontent about it) have rapidly increased in the same time span and continue to harm large parts of the population. The spread of non-militant, non-violent forms of protest is then another hallmark of pacification,<sup>350</sup> as direct forms of violence, even where they are used to protest or defend oneself from violent

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<sup>349</sup> Barron et al mention rioting, guerrilla warfare and assassinations, others might think of the radical-left terrorist groups such as the *Rote Armee Fraktion*, etc.

<sup>350</sup> While the authors don’t explicitly reference Martin Luther King Jr’s theory of non-violence for the civil rights movement, this would reasonably be an example of such liberal pacification, albeit a very specific one.

oppression, become politically unacceptable. In that way, they argue, the absence of violence does not indicate more harmonious societies, but rather, more pacified ones.

In this erasure of violence one may see, again, an instance of the tendency of liberal political orders to delineate the external, public, rational, civilized from the internal, private, emotional, barbaric, unacceptable, and Other. However, Baron et al take their argument one step further by asserting that rather than liberalism bringing about the end of direct violence, it has simply shipped this violence overseas. They highlight the historical link between colonialism, imperialism and political economy and liberal political thought, for instance in the work of John Stuart Mill, who

conceptualized and deployed liberalism as a domination strategy. Mill argued that it is appropriate to impose despotism or slavery on “savages” who incline to “fighting and rapine,” but the government should use force as little as possible: “What they require is not a government of force, but one of guidance. Being, however, in too low a state to yield to the guidance of any but those to whom they look up as the possessors of force, the sort of government fittest for them is one [that] possesses force, but seldom uses it. (At 8)

Pacification as “guidance” is preferable to and more effective than direct violence, but the threat of direct violence is still necessary to maintain the stability needed for liberal order. It is this disappearing act of violence, its integration into various forms of life that seem harmonious, that makes liberal states appear peaceful and neutral. The pacification of societies that are rife with suffering, both in the “West” and in its peripheries, makes the structural and productive force of this unobservable violence invisible.

### ***4.3 Pacification and Proceduralism: parallels***

To what extent do these critiques of liberalism mirror the critiques I have offered throughout this dissertation, specifically those regarding mediation scholarship's lack of internal theoretical and normative contestation and its inattention to power? I argue that dispute resolution, both as a practice, an institution and as a baseline normative goal (namely that conflicts should be resolved, rather than ignored or settled by force, etc.), is both representative of and constituted by liberal processes.

#### **4.3.1 Depoliticization and the absence of power from mediation theory**

There is a clear parallel between liberal proceduralism and the centrality of process in mediation, in the desire to steer and to a certain extent control the explosive power of conflict in society.

Neither dispute resolution techniques *nor* theory focus on the substance of the cases, a specific understanding of what it means to be in a dispute, or any larger, potentially historical, context instances of disputing might be related to. Conflict, in its full range of meanings, is compartmentalized and institutionalized into “dispute.” Like tolerance, it becomes disconnected from its original contexts in favor of a common-sensical, “natural” essence. Dispute resolution as a technology, then, is arguably an instance of depoliticization in Brown's sense:<sup>351</sup> it has the

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<sup>351</sup> Brown (2009), at 17: “other sources of discursive depoliticization (...) include long-standing tendencies in liberalism itself and in the peculiarly American ethos of individualism. They include the diffusion of market rationality across the political and social spheres precipitated by the ascendancy of neoliberalism. And they include the more recent phenomenon that Mahmood Mamdani has named the “culturalization of politics.”

hallmarks of erasure that rational (including market-rational) discourses of disputing entail, specifically the erasure of power, of historic boundedness and of social relations that may be at work in a conflict.

Brown's arguments about the conflation of the legal and the political seem to operate in tandem with Michal Alberstein's exploration of how pragmatist philosophy infused legal reasoning with its philosophical elevation of the legal method, namely by promoting the concept of "inquiry" to a philosophical activity. Philosophy in this pragmatist sense is not the place for grand theories, but for flexible, capacious, and undogmatic ways of thinking. Law is an application of this method, and as such, it can come to take philosophy's place, what Alberstein calls *philawsophy*. The system of theorizing justice becomes circular and, importantly, focused on experience.

The discursive situatedness of mediation in a liminal space between public and private boundaries is another striking parallel to Brown's analysis. Mediator-scholars, for one, know about the power of "emotion," self-hood and identity, and on the other hand, the need to "integrate" it into conversations, if often implicitly. But when these mediators, specifically those who operate in law school contexts, turn to scholarship, they find few socially and scholarly acceptable ways to talk about those aspects of conflict or to integrate them into the analysis of dispute resolution. Beyond the instrumentalism of the psychological insights that the PON has popularized, the powerful experiential component of mediation is difficult to analyze. Where it is attempted, the use of deliberative ideology, with a focus on process and procedural justice as a *feeling* at the expense of substance, renders such endeavors susceptible to vagueness and "culturalization."

The wider discursive supremacy of rationality structures the limits of going into what is deemed “private” affairs, or “culture.” The analysis of “interests” involves identifying the underlying motives, but it does little more than enumerate them; a party might insist on a certain settlement dollar amount to save face, because they want to feel respected, or because they are angry—or they might be amenable to resolution because they feel scared, traumatized, or simply exhausted and want to move on. This undifferentiated notion of “emotional,” underlying needs ends up treating what might be systemic issues as personal ones. Discrimination, for instance, obviously impacts the person who experiences it, but in isolating it from its history and the questions of power, it is treated as an individual injury more than an injustice.

Importantly, it is precisely this designation of private identity and public reason and the subsequent isolation of the “private” that makes mediation an “alternative.” While there are parts of ADR that make market-based efficiency arguments, most approaches, including PON, insist on their integrative quality: this is ADR’s unique ability to go beyond legal categories, to deal with the “messy” parts that make disputes hard to resolve in the seemingly rational legal world. The reverse can also be true: if “emotions” or collective identities were a cause for public concern and justice, they would be addressed in court.<sup>352</sup> If mediation addressed power explicitly and critically, it would risk undermining its niche and market corner, its specific quality and added value. It is the ability to speak to “internal” concerns without questioning the external factors that makes ADR a useful technology for liberal states.

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<sup>352</sup> From the experiences of, for instance, minority groups of insisting on their rights in interactions with law enforcement, one is inclined to be less than hopeful.

Even in the context of approaches that have ideological commitments to wider social change like TM, resolution is achieved with reference to internal process norms; extending Brown's argument, this is a self-referential notion of justice that disengages from political and substantive justice.

I should note here that Brown distinguishes private, individual practices of tolerance from the political discourse surrounding tolerance. The argument she puts forwards is that it is not tolerance itself that is problematic; practicing acceptance and open-mindedness in one's daily life, as a kind of personal ethic, can surely be a positive behavior. Rather, it is that we should critically investigate the calls for tolerance in the public sphere and as a political discourse.<sup>353</sup> Who is addressed, who is excluded, what is obscured, and what is invoked here? Similarly, it would indeed be irresponsible to suggest that people who experience conflict in their lives should reject moving towards resolution—and not only because it requires significant amounts of personal, social and economic capital to maintain a dispute unresolved. But the immediate public linking of conflicts to their orderly, institutional resolution, without regard for what is being argued over, including through informal institutional mechanisms, belies a fear of difference and discord in social relations. It tells those who feel wronged, and those who have wronged,<sup>354</sup> to move on and to make it go away.<sup>355</sup> It serves to make injustices into technical system errors that require only the right kind of tool to be repaired.

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<sup>353</sup> Brown, W. (2009), at 13.

<sup>354</sup> Of course, in many disputes, both or multiple parties might have the sense that they have both responsibility and "victimhood" in the situation.

<sup>355</sup> This would be the application of Brown's counter-method: asking why we think we need rational methods of deliberation in order to manage/resolve disputes so urgently today -see Brown (2009), at 87: "instead of asking why we need tolerance so badly today, we might more productively ask, What produces the conviction that we need it badly, what kind of tolerance is being called for, who or what is doing the calling, who is called on to enact it, what is tolerance being invoked to achieve, what kind of subjects and objects is it producing, and what ramifications does it have beyond its surface aim of conflict resolution?"

Accepting the hypothesis that mediative processes can be part of a governmentality in which power is dispersed away from a forceful center through a myriad of internalized controlling processes would mean that mediation facilitates such a depoliticization. This would be present both in problem-solving styles of mediation and via the enduring ethos of personal responsibility, self-improvement, in Transformative Mediation.

### 4.3.2 Violence and pacification in mediation

Much like power, violence is another word that ADR does not use very often. And similarly, its absence from the discussion<sup>356</sup> also defines ADR and the discourses surrounding it. It is kept at bay by the iconographic force of invocations of the “spectrum of dispute resolution,” which precludes violence from the range of the imaginable and banishes it to the realm of other mechanisms and instruments, be they formal or informal.<sup>357</sup> Baron et al criticize the dyadic distinction between physical and structural violence and propose a framework for understanding not only direct and indirect, but also “non-observable” violence—the threat of violence, and the defense from it, the barbed wire on one’s fence—defines society’s “lived, material and psychic forms.”<sup>358</sup> It is this violence, the way it cannot be observed even though it has real consequences, and the quiet manners of expression that offer the range of acceptable and often-institutionalized responses, that they call pacification.

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Such questions allow us to consider how tolerance discourse itself frames and organizes the conflicts it is summoned to solve.”

<sup>356</sup> For an, albeit marginal, counterexample, see Cobb, S. (1997). The Domestication of Violence in Mediation. *Law & Soc’y Rev.*, 31, 397 discussing the ways mediation can “domesticate” experiences of domestic violence by using a Foucauldian and narrative analysis.

<sup>357</sup> As discussed in the introduction to this dissertation.

<sup>358</sup> Baron *et al* (2019), at 4.

Similarly, the critique of dispute resolution as “harmony ideology” and pacification holds that mediation, with its ethos of private settlements, renders invisible instances of suffering, political contestation, and structurally violent oppression. Mediation, with the possible exception of transformative mediation, would then be a technology oriented and committed to the structural obfuscation of violent social processes, not their analysis or amplification. It is not peace that ADR is after, the argument would go; it is pacification in the sense of rendering invisible the constitutive force of violence in our world, while creating a substitute for shared political power via the *experience* of participation.

The question of whether mediation is pacification in that sense—as making invisible those forms of violence that re-entrench the “prevailing order”—is hard to answer *grosso modo*. Mediation is pacification of the liberal *legal* order, or at least one part of it. Importantly, it is not a body of political thought, but a practice; yet it equally functions to make power, violence, inequality invisible in its operations.<sup>359</sup> Violence is then a force that makes boundaries both more visible and more fragile: there is a desire to keep it contained, monopolized in the liberal state, but also as a corrective and a threat, so as to motivate resolution: by making it a contained rarity, an aberration (at least for those with greater social power), its threat wields great strength. To be clear: this is not to trivialize the experience of violence, but to highlight how methods of nonviolence and pacification together function to sanitize our states from violence, while exporting it to other parts of the world or to the margins of our communities.

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<sup>359</sup> Schehr, R. C., & Milovanovic, D. (1999) Conflict mediation and the postmodern: Chaos, catastrophe, and psychoanalytic semiotics. *Social Justice*, 26 (1), 208 discusses conflict mediation as hierarchical and ordering mechanisms.

It is not that ADR should be mediating cases that *have* violence, but that mediation should take into account those forms of violence that are invisible and yet structure the contexts in which “non-violent” disputes occur.

#### ***4.4 From Mediating Power to the Power in Mediation***

What are we to make of these parallels? How can ADR learn to engage with the political and pacification in a sustained manner, beyond merely translating them into tools that leave the whole unquestioned, as Annelise Riles has put it?<sup>360</sup> In this final section, I begin by laying out the case for mediation as it currently stands, its enormous heterogeneity notwithstanding. I then indicate that the critiques of depoliticization and pacification nonetheless come together in their re-presentation of mediation as an *unworldly* endeavor, one that denies or refuses to account for the political structures of power. Finally, I return to Weber to draw out one of his other concepts, *worldliness*, and how it presents a different future and possibility for mediation, one that requires, first and foremost, the mediator’s worldliness without being technical and pragmatist: not simply in the world or of the world, but *looking at* the world to lay bare the structures of power that constitute the mediator, the parties, the unrepresented parties, and indeed, the world.

Mediation allows for better, more efficient, more creative, and more integrative ways of solving disputes. It allows people to take part in these processes more actively than adjudication does. It takes people’s underlying needs into account and, through the experience of mediation, they are able to feel ownership over the conflicts in their life. Its literature is shaped by a

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<sup>360</sup> Riles, A. (2002)

pragmatist ethos of inquiry and experience, an ethos that has left its traces on mediation by way of legal realism. It turns to deliberative democratic thought to develop standards of accountability and an understanding of its role in democracy. It has taken note of concerns raised by critics from outside, and responded by increasing protections for vulnerable parties, by improving the training of mediators, and by continuing a lively internal discussion about its practices and purpose. As a practice, mediation integrates inner and outer concerns in ways that are both practical and methodologically sophisticated, not by siding with substantive norms but by guaranteeing the availability of impartial, varied, and accessible venues for addressing disputes.

On the other hand, the critiques offered above are devastating to this self-description. Adapting the critiques of liberalism that political and international relations theorists such as Brown and Baron et al have offered to the context of ADR would suggest that mediation, by virtue of its own virtues and the structures in which it is embedded but which it neglects, not only undermines the accountability provided by the public court system, but that it extends governmentality by systematically obscuring the political stakes of conflict. It limits critical explorations of various forms of power behind conflicts to the privatized, therapeutic settling of instances of dispute. The systemic and productive violence inherent in and necessary for the functioning of the liberal state, for instance, the suffering created by enduring forms of inequality—be they white supremacy, or economic disparities—is obscured by defining this violence away. Mediation would be another technique of pacification in that sense: the obfuscation of unobservable violence by ensuring a seemingly peaceful functioning of society. This pull towards individuation and proceduralism would be present, albeit to a lesser extent, in

Transformative Mediation and conflict theory, due to the overwhelming discursive force of liberal rationality and the common sense ethos developed by pragmatism.

On a disciplinary level, mediation is an example of how liberal political thought, in its focus on forms and processes that break systemic questions into individuated forms of self-improvement, in an attempt to “keep the peace” in a political order that is predicated on the production and subsequent exclusion of the Other.

ADR’s primary fault would be in its relationship to the world, or that it is, *unworldly*: interested in parties’ interests, needs, moral improvement, and even the public interest in an instrumental way, but not in the structures that bring these interests, needs, morals, and public interests into being and marginalize, occlude, or terminate others. The scope that ADR gives itself would be a refusal of seeing the world in which it is situated, even where this is in the name of the self-direction that others should be afforded.

The point of writing this thesis is ultimately not to merely rehearse the critiques of mediation practice and theory, though I do believe them to be important and pertinent. Instead, it is these critiques that bring into sharp relief the question of how we can hope to address the conflicts in our society without pacifying them. These critiques, and the ones I adapted in this chapter, require a project that is a form of anti-integration, so to speak.

However, it is also important to highlight the limits of these critiques. Let me start, then, by pointing out the limits of the applicability of the depoliticization critique. The object of Brown’s critique, ultimately, is the law as she argues that the conflation of law and politics obfuscates power. Extending this part of her argument to mediation so as to say that mediation, including

TM, fails to secure justice because it does not account for the reality of power and politics would in turn fail to recognize that mediation is a critique (albeit one that is often left implicit) of the legal process. Taking power seriously cannot mean that we ignore the fact that legal processes have failed their users many times over, and more so the less powerful ones. Menkel-Meadow points to a “baseline” problem, in which people overestimate the degree of justice available, especially to disempowered groups, through litigation.<sup>361</sup> An alternative, one that engages people beyond the exclusionary formality of the court process and beyond the corruption of private legal processes (consider the devastating experiences many have of using, for instance, the Title IX process to report experiences of harassment or sexual violence) is sorely needed. Such an alternative would need to balance between the remedial creativity of non-legal processes and the need for some form of fair standards. It would need to overcome a simplistic notion of neutrality—itself a holdover from the grammar of the law—and a naive belief in process, and proceduralism, the power to persuade, or the parties themselves.

People who experience conflict have many needs and many interests. TM is right to remind mediators that they should not assume to know what they are. We should, rather be mindful of the impact of procedural choices, not because they are all we can hope to address, but because their impact is so great. Here we can learn from the process design developed in non-dyadic, multi-party DR forms, such as collaborative planning. It is not enough to hold a public meeting for citizens to engage each other, and for the mediator to be uninvested in the substantive decisions. The availability of childcare, translation services, forums that community members feel comfortable attending, etc., define the range of accessibility, and by it, what can be

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<sup>361</sup> Menkel-Meadow, C. (1994). Ethics and the Settlements of Mass Torts: When the Rules Meet the Road. *Cornell Law Review*.

discussed and by whom. Process design, in this way, can also be harnessed in order to illuminate rather than obscure or deflect structures of power. Who gets to sit where, speak when, how the sessions structured, what forms of expression are encouraged and curtailed, are all real forms of justice. These are procedural questions but not only that; they should not be considered independently of their substantive content and contexts.

Forms and forums of dispute resolution respond also to a human desire to have access to institutions and experience communion in them. If we think of the state's historic evolution from might to power to the law to fragmentation of power, governmentality and participatory methods (and mediation as one of them), it does not mean we have to stop questioning the more subtle operations of power in these diffused nodes, but that we can use the more counter-current insights of mediation theory, such as the increased ability to hear differences, to sit with them, in the organizing of communities. After all, a number of political crises in our state institutions reinforces the realization that relying on the state to be a provider of care requires firstly increasing amounts of structural privilege and secondly, a more trustworthy state than those we currently have.

Secondly, the structuralist critiques dismiss the many ways people perform power in their interactions. Here, anthropologists might remind us that a person's outward rank on the social ladder should not be used to pathologize them as *powerless*. Such a flat understanding of power as being directly equal to a person's class status misunderstands the complex dynamics individuals engage in in social contexts- for example, the way that a person that can show

discriminatory conduct against themselves holds power over the discriminator by pursuing an EEOC complaint, litigation, publicizing the events, etc. Being fluent in various sociolects allows for more abilities to codeswitch. “Remedial” creativity might be equivalent to the numerous ways of resilience in many parts of our society that are structurally disadvantaged. But simply labeling these other options as “BATNAs” ignores the politics inherent in each possible avenue and in how intersecting systems of power, access or oppression construct and constrict each of them. It is impossible, for instance, to fully understand the question of justice in mediated processes without addressing the experience of injustice many citizens of color accrue in the formal justice system.

Whatever the result of all these valid critiques is, it shouldn't be the shrinking of aspirations, to ever smaller terrains for possible action, the lowering of standards to the bare bones of procedure, a rejection of transcendence and growth. Where Brown's account describes the abdication of state and communal responsibility from a number of crucial arenas by labeling them private, mediation holds in it the potential for insisting on a burden- and responsibility sharing of these, seemingly private areas, of being an Other's keeper.

### *Weltzugewandtheit*

In the final part of this chapter, by way of suggesting a path forward for the kind of outlook that might offer a view into the structures of power and the situatedness of mediation as a whole, without obscuring or downplaying the non-structural features, I return to one of Max Weber's concepts. I previously indicated the analytical potential that Weberian thought holds for understanding ADR, specifically in Chapter 3 when analyzing the dynamics of authority at play

in the CDRC. Weber on occasion comes up in the conflict studies literature,<sup>362</sup> and Carrie Menkel-Meadow herself refers to Weber's theory of charisma in her review *The Promise of Mediation* to ask whether the charismatic power upon which a model of mediation may be premised can be taught or institutionalized.<sup>363</sup> I think that Weber's framework for authority, as drawing on the levels of formality and law, tradition, and charisma, allows us to take seriously the force of internal and difficult-to-quantify dynamics in mediation. This, in turn allows us to develop a rubric for the power inherent in the experiential appeal, or if you will, the enchantment of mediation. Weber stipulates charisma and tradition not as irrational factors but rather, as forces that systems of government are built upon and that skillful leaders make use of—historically and in the abstract.<sup>364</sup>

A future project might be to apply Weber's notion of *Weltzugewandtheit* to come to bear on the disciplinary question of pragmatism versus politicization. Max Weber traces the degrees of being in and of the world to the influence of different religious belief systems. The German term *Weltzugewandtheit* originates from religious philosophy and denotes a gregarious worldliness as opposed to cloistered contemplation. While there is no perfect translation, I am drawn to the word for its almost kinetic quality: facing, turned to ("*zugewandt*") the world, one holds oneself in a position that is not in the thick of things, not primarily in nor of the world, so to speak, but directly *looking at it*. This almost Bourdieuvian physicality of a gregarious *habitus*

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<sup>362</sup> Scimecca, J. A. (1993). Theory and alternative dispute resolution: A contradiction in terms? In *Conflict Resolution theory and practice*. Manchester University Press argues that dispute theorists should turn to Weber generally. Forester (1993), at 70 ff discusses Weber's complex stance on rationality -and their influence on Habermasian communicative action.

<sup>363</sup> Menkel-Meadow, C. (1995) The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices. *Negotiation Journal* 11:3 at 222.

<sup>364</sup> Compare this also with Habermas' notion of traditional societies in which the *Lebenswelt* and System are not separated yet, and in which colonialization of the *Lebenswelt* has not yet occurred: an integrated, non-transcendental, social sphere. Habermas, J. (1990) at 138 ff.

structures what is perceived, and it potentially overcomes the theory/practice divide. Its historic emergence, as Weber tells it, is deeply linked to humans reaching for a spiritual beyond.

Weber argues that despite the rise of the modern state and the ensuing curtailment of the reach of religion from all social domains, religious outlooks nonetheless heavily influence both the socioeconomic sphere (most famously so in the *Protestant Ethic and the 'Spirit' of Capitalism*,<sup>365</sup> itself a rebuttal of Marxist dialectical materialism) as well as the relations of members of a religion to the state in general, to the law and dispute resolution mechanisms. In many strands of Christianity and Judaism, i.e. *weltzugewandte* religions, professions are chosen out of what Weber calls an ethos of "active asceticism" in which the individual sees their role within the world as a tool of God's will; as opposed to a contemplative asceticism, where the individual is a "vessel" for God, the goal is intellectual and "mystic" deliverance and people should spend their life as far removed from worldly things as possible. For Weber, the modern state, bureaucracy and overall "rationalization" do, of course, limit the structuring force of mass religiosity in favor of more specific "ethics," that is, a "value rational belief of people in norms for human behavior"<sup>366</sup> that can be either morally or aesthetically good. And while the norms that these ethics express are often enforced by religious "guarantees," they might also be increasingly rational "conventions," enforced by the sanctions of the states' legal institutions and police. So, what we see in these world-facing religions is that their values might inform social norms, but it is political organization and the codification of laws that rationalizes religious beliefs into commodious ethics that have worldly consequences. The force of belief systems then

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<sup>365</sup> Weber, M. (2001). *The Protestant ethic and the spirit of capitalism*. London: Routledge.

<sup>366</sup> Theorie der Stufen und Richtungen religiöser Weltaflehnung. Zwischenbetrachtung (1920) as published in Weber, M., & Käsler, D. (2002). *Schriften 1894-1922*. Stuttgart: Kröner, at 688. (Translations by the author.)

strengthens what Duvall and Barnett would call *productive* power: relations between socially, geographically and temporarily distant people, linked by diffuse beliefs and their different iterations and genealogies.<sup>367</sup>

An ethos of *Weltzugewandtheit* can therefore encompass rational *and* spiritual modes of thinking, and be an expression of the multi layered manner in which people negotiate their private and public convictions. Not as containers, but as tools- tools that have purpose and pursue values, not the neutral ones of (neo-)liberalism.

Importantly, for Weber the value of “fraternal love,” central to so-called salvation religions (I.e. those that promise their believers redemption after death) is not in competition with economic development of capitalistic markets, however both redemption and fraternal love can be in sharp contrast with the modern state as a holder of identity and meaning. Here, Weber focusses on the experience of conflict and violence in a way that is highly relevant for our thinking on dispute resolution as both a public and a private exercise. In the religious worldview, the individual human being is treated as the object of love and redemption, while for the rational state, the concern is with the functioning of institutions, bureaucracy, the application and enforcement of rules according to ethics that can be abstracted from, i.e. are so rational that one can apply them across the board and without regard for individuals. In a rational state, our idea of law and the justice the legal system may dispense is thus focused on standards, not exceptions, not humanity, not particularity or private, individual solutions and cases.

As Weber points out, even the desire to change or reform a rule or law has to be incorporated into the rational machine of bureaucracy. Additionally, the monopoly of violence,

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<sup>367</sup> Duvall and Barnett (2005), at 55.

the chief characteristic of a state, means that the ethics as they have become laws might ultimately be enforced through physical force, which is in direct conflict with Christian pacifism. Of course, ever the positivist, Weber adds that whether such violence is ultimately successful is not a reflection of the quality of the ethics but of the power conditions on the ground.<sup>368</sup>

Now, what makes the modern state so successful is that paradoxically, in addition to being rational, it can mobilize pathos and community in a manner that rivals religious experiences. Weber uses the example of war to argue that states can do what previously only ideas of other-worldly deliverance could do: make our deaths (banal and common as they may be) *mean* something. It is this multiplicity of appeals and their interaction that should inform how we understand the relationship of mediation to authority and power, so that it does not fall too deeply into the proceduralism of rational/legal authority nor the caprice of charisma. For the purposes of a research and practice methodology that is facing the world, it is important to remember that what we are ultimately talking about in ADR are the experiences of human beings, and that the way humans make sense of their experiences is on both internal, emotional, spiritual levels as well as institutional, intellectual and legal ones.

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<sup>368</sup> Weber (2002), at 622.

## Conclusion

This dissertation has been aimed at excavating the politics of alternative dispute resolution, especially mediation, as well as its theory of -procedural- justice. The previous chapters put these, as I have argued, deeply liberal imaginaries in dialogue with longstanding critiques of the field. As a whole, the project highlights the paradoxical commitments of a field that is nominally aimed at integrating interests and positions, as well as overt and interior motives, and yet, which nonetheless exhibits great reluctance to integrate its own stated and unstated allegiances, or to undertake a rigorous self-examination.

I began with an introductory description of three major scholarly approaches in the ADR field, namely: the Project on Negotiation (PON), which first popularized principled negotiation; a deliberative approach to mediation, epitomized by Carrie Menkel-Meadow; and the Transformative Mediation movement, focusing on the work of Baruch Bush and Joseph Folger. These three differ greatly in goals, approach, methodology, normative commitments and theoretical sophistication. These differences, in turn, offer a vantage point from which to better see the width of a very complex, often disconnected field. Nonetheless, common themes emerge. Notable among these is the notion of “problem-solving” shared between PON and Menkel-Meadow. There is also the shared idea that mediation is able to address more than the symptoms of a dispute; all three schools argue that mediation can help reach deeper agreements because “underlying” interests and/or needs are explored, and thus make the world better. Chapter 1 also presented a summary of the main critiques leveled at ADR over the past decade, which cast mediation as a technique of “harmony ideology” (Laura Nader) or have made post-structuralist

and access-to-justice arguments that mediation serves to diffuse social conflicts in order to keep them out of courts and off the public record and extend social control (Abel, Harrington). The section asks why such critiques have been leveled and developed mainly by those outside the field of ADR and what that tells us about the field's relationship to theory.

To better explore this question, Chapter 2 then discussed the relation of practice and theory in ADR scholarship. What types of theories and methodologies has mediation developed to contextualize its own findings? Here, again, I first describe the approaches offered by ADR scholars themselves, especially the notions of theory-in-use and the use of the reflective practitioner model (Donald Schön). I then turned to the work of Michal Alberstein, who excavates the legacy of legal and philosophical pragmatism beneath the practical ethos, and the shared notion of experience, of ADR. Chapter 2 closes by arguing that these pragmatist theories notwithstanding, ADR has struggled to develop theoretically satisfying answers in three key areas. I used the on-going debate about neutrality in mediation as an illustration for each of these areas.

First, ADR's internal debates are, while sustained and varied, not comparable in sophistication or scope to the theorizations of legal processes and institutions. Second, ADR struggles to address the question of justice, both in its substantive and procedural variants. Third, ADR does not have a satisfying account of power or authority when it comes to mediation. These arenas suggest why the field's contributions are largely made in a politically and normatively neutral manner, as a set of process techniques and technologies without ideological attachments, tools to be employed and combined in accordance with what a mediator determines a given conflict requires, but never in conflict to the liberal legal and political order.

Chapter 3 probed an approach that is an outlier in the field of mediation, transformative mediation, for its underlying political commitments. I first analyzed the relational worldview that TM proponents invoke for its normative background, and find that part of TM's disciplinary isolation is indeed due to its stated rejection of liberal individualism. TM instead invokes an ethic of care (drawing on Carol Gilligan)<sup>369</sup> and relationality (adapting Sandel, MacIntyre, Macneill). It proposes a party-directed method that focuses on "empowerment and recognition". Given my interest in how this underlying theory—or what TM calls its worldview—informs its conception of practice, I focus on the moment that bridges the two, namely the training of new transformative mediators. I describe my experience as a participant-observer, training to be a volunteer mediator at the Ithaca Community Dispute Resolution Center—itsself a hub of transformative mediation practice. Two themes emerged from the fieldwork, namely: a framing of "empowerment" that negates political aspects of power, and an overall belief in process. I argued that these dynamics belie TM's promise to overcome the normative neutrality of the field of mediation and instead are implicated in liberal conceptions of selfhood and power.

Chapter 4 drew out how process, inquiry, and experientiality have to be understood in relation to power. The liminal nature of mediation marks it as an arena where self and other, internal and external, substantive and procedural, individual and collective interests intersect and where their operations of power are most visible. I turned to political theory to make these implied connections explicit. First, I described the existing connection between liberal political theory and mediation. This connection appeared in two forms: with analytic philosophical understandings of procedural justice and consensus over basic values (Rawls), which separate

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<sup>369</sup> Gilligan, Carol (1982).

justice from its substantive content, and with continental philosophy's approach to deliberation and deliberative democracy (Habermas), which similarly treats fundamental conflicts as a problem to be overcome through the right procedures. I then explored ADR scholars' engagement with liberal and deliberative theories. After having reviewed critiques of deliberation, I turned to applications of both styles of theorizing in ADR in order to highlight how they maintain liberalism's emphasis on procedural rationality and can inadvertently preserve its exclusions. I then turned to critiques of liberalism as a structure, specifically in the ideas that it depoliticizes (Brown) and pacifies (Baron et al), and drew out a number of parallels between these critiques and ADR. Finally, I proposed returning to Weber, in order to excavate his notion of *worldliness* as an ethic of growth that can reorient ADR to look at rather than turn away from politics and violence.

This project has important limitations that point to fruitful avenues for future research for ADR. Most centrally, I do not engage conflict theory or other adjacent fields, such as collaborative and participatory planning, except in passing. These fields, perhaps less encumbered by the market logic of the institutionalization of dispute resolution, have long engaged in explicitly political and theoretically informed debates.<sup>370</sup> The role of the public, due to the public arena in which these other fields are practiced, is explicitly addressed. I have accepted the disciplinary dividing function of the Law (and the Law School), though its influence might be in the process of

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<sup>370</sup> John Forester developed the notion of "critical pragmatism" as a methodology that engages insights from critical theory, deliberation, public policy and conflict studies. Forester (1980) Critical theory and planning practice. *Journal of the American Planning Association* 46(3); (1993) Critical Theory, Public Policy and Planning Practice. SUNY Press; (2009) *Dealing with Differences: Dramas of Mediating Public Disputes*. Oxford: Oxford University Press; Forester, J. (2012). From Good Intentions to A Critical Pragmatism (pp. 1–24). In *Oxford Handbook of Urban Planning*. Oxford University Press.

eroding.<sup>371</sup> There are similarly important and instructive types of dispute resolution, chiefly narrative mediation and other facilitative techniques, that I have not discussed here.

Throughout the process of writing this dissertation, I have kept a running list of alternative theories of alternative dispute resolution that remain to be written. The potential avenues are manifold. Mediation could be investigated as a Marxist mediation process—understanding mediation to be a locus of reconciliation of opposing social forces. Using a cultural and media studies approach, mediation could be taken as a *medium* for communicating within a shared culture. ADR might also be approached as a case study in the field of Science and Technology Study, investigating what is gained and lost in interdisciplinary fields, how they relate to each other, and who sets the agenda. Mediation holds, both in TM’s interest in moral growth and self-improvement, and some scholarship addressing the role of mindfulness in mediation (Riskin) a link to study the adaptation – or appropriation- of Eastern theological traditions into commodified technologies.

Putting these possibilities aside, this dissertation has more directly touched on a number of promising avenues for future research. The most obvious is a project that applies the insights from the critiques of liberalism explored in Chapter 4. What would it mean to politicize mediation? I have hinted at some theoretical avenues at the end of Chapter 4, but more concrete ways of expressing such a way of holding oneself towards the world (to borrow and butcher Weber’s term) come to mind. Mediators should be trained to think about power in both concrete

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<sup>371</sup> In the editorial to a new journal intervening at the intersection of conflict and dispute resolution, Alberstein, M.; Rothman, J. (2013). Taking stock of the field: Past, present and future. an introduction. *International Journal of Conflict Engagement and Resolution* 1(1), 3 discuss the politics and limitations of the naming and re-naming of subfields.

and abstract ways, and to be wary, not just of obvious imbalances in coercive power between parties, but also the influence other forms of power exercise on all of us, before the mediation and in the mediation. Investigating how different parties and situations are particularly susceptible to coercive, structural, institutional, or productive forms of power should be supported as an urgent and important task. At the same time, such efforts should take care not to pathologize parties with outward social disadvantage. Mediation should take seriously what we know about the impossibility of neutrality and investigate both an ethical project for mediation *as well as* process design solutions informed by this realization. Very generally speaking, mediating in awareness of underlying power struggles and violence, harm, and systemic oppression cannot be expected to be a simple or easy “process.” It should be a thoroughly complex, uncomfortable endeavor for mediators, especially for those of us who enjoy the privileges of structures of power by virtue of our identity markers. Mediation needs to develop ways to move away from smoothing over differences—and here, the TM contribution of party-direction holds value, if it were to be critically assessed so as to move beyond the politics of responsabilization, moral improvement, and the deflection of systemic forms of violence and pacification. The scholarly guides for such an approach to practice would be another worthwhile research agenda. For its part, this dissertation proposes the idea of worldliness and the ethic that it requires as a counterweight to the depoliticizing forces at play.

From the standpoint of legal theory, both Alberstein and Menkel-Meadow have suggested the unfinished (and perhaps uninitiated) project of a “jurisprudence of mediation” that might inquire into the types of results and effects that given styles of mediation and contexts produce. In this

vein, it would be important to extend the methods and questions of of legal theory, especially those of critical legal studies, to the study of ADR.

## REFERENCES

- Abel, R. (ed.) (1982) *The Politics of Informal Justice, Vol. 1: The American Experience* Academic Press
- Ackerman, R. M., & Welsh, N. A. (2003). Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction. *Penn St. L. Rev.*
- Aiwazian, A. (2013). Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy. *Scholar, 11*, 1.
- Alberstein (2009). Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations *Cardozo J. Conflict Resol., 11*, 1.
- Alberstein, M. (2000). Getting To Where? On Peace Making and Law Teaching at Harvard Law School: (or, Some Private Hope and Public Irony) *Law and Critique*, 1.
- Alberstein, M. (2002). *Pragmatism and law: From philosophy to dispute resolution*. Aldershot: Ashgate Dartmouth.
- Alberstein, M.; Rothman, J. (2013). Taking stock of the field: Past, present and future. an introduction. *International Journal of Conflict Engagement and Resolution 1(1)*, 3.
- Allen, Jessie (2007). A Theory of Adjudication: Law as Magic. *New York University Public Law and Legal Theory Working Papers*. Paper 54;
- Amsler, Laura Bingham (2012) Transformative Mediation at the United States Postal Service. *Negotiation and Conflict Management Research 5(4)*, 354.
- Amsler, T. (2012). Community Dispute Resolution: Assessing Its Importance and Addressing Its Challenges:. *ABA Dispute Resolution Magazine*.

- Aragaki, H. N. (2009). Deliberative Democracy as Dispute Resolution: Conflict, Interests, and Reasons. *Ohio State Journal on Dispute Resolution*, 24(3), 406.
- Astor, H. (2007). Mediator neutrality: making sense of theory and practice. *Social & Legal Studies*, 16(2), 221.
- Atkinson, P., Coffey, A., & Delamont, S. (Eds.) (2014). *Handbook of ethnography*. Los Angeles: SAGE.
- Avruch, K. (2005). Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic. *Marq. L. Rev.*, 89, 567.
- Baitar, R., De Mol, J., & Rober, P. (2016). Exploring Helpful Tensions between Divorce Mediators and Clients: A Relational Dialectical Analysis. *Conflict Resolution Quarterly*, 34(1), 7–29.
- Barnett, M., & Duvall, R. (2005). Power in International Politics. *International Organization*, 59(1), 39
- Baron, I. Z., Havercroft, J., Kamola, I., & Komen, J. (2019). Liberal Pacification and the Phenomenology of Violence. *International Studies Quarterly*, 1–14.
- Bellah, Robert N. (1985). *Habits of the heart: individualism and commitment in American life*. Berkeley: University of California Press.
- Billig, M., Condor, S., Edwards, D., Gane, M., Middleton, D. and Radley, A.R. (1988) *Ideological Dilemmas: A Social Psychology of Everyday Thinking*. Sage.
- Birkhoff, J. E., & Warfield, W. (1996). The development of pedagogy and practicum. *Conflict Resolution Quarterly*, 14(2), 93

- Bone, R. G. (1995). Lon Fuller's Theory Of Adjudication And The False Dichotomy Between Dispute Resolution And Public Law Models Of Litigation. *Boston University Law Review*, 75, 1273.
- Brigg, M. (2003). Mediation, power, and cultural difference. *Conflict Resolution Quarterly*, 20(3), 287.
- Brown, W. (2009). *Regulating Aversion*. Princeton University Press
- Brown, W. (2015) *Undoing the Demos: Neoliberalism's stealth revolution*. MIT Press
- Burton, John W. (1993) "Conflict Resolution as a Political Philosophy" In *Conflict Resolution Theory and Practice: Integration and Application*. Ed. Dennis J. D. Sandole and Hugo van der Merwe. Manchester and New York: Manchester University Press.
- Bush, R. A. B. (1989). Mediation and adjudication, dispute resolution and ideology: An imaginary conversation. *J. Contemp. Legal Issues*, 3, 2.
- Bush, R. B. & Folger, J. P. (1994) *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. Jossey-Bass.
- Bush, R., & Folger, J. P. (2012). Mediation and social justice: Risks and opportunities. *Ohio St. J. on Disp. Resol.*
- Cain, M., & Kulcsar, K. (1981). Thinking Disputes: An Essay on the Origins of the Dispute Industry. *Law & Society Review*, 375.
- Clifford & Marcus (Eds.) (1986) *Writing Culture: The Politics and Poetics of Ethnography*. University of California Press
- Cobb, S. (1993). Empowerment and Mediation: A Narrative Perspective. *Negotiation Journal*, 9(3), 245.
- Cobb, S. (1997). Domestication of Violence in Mediation. *Law & Soc'y Rev.*, 31, 397

- Cobb, S., & Rifkin, J. (1991). Practice and Paradox: Deconstructing Neutrality in Mediation. *Law & Social Inquiry*, 16(1), 35.
- Coglianesi, C. (1997). Assessing consensus: The promise and performance of negotiated rulemaking. *Duke Law Journal*, 1255.
- Cohen, A. (2009a) Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values. *78 Fordham L. Rev.* 1143.
- Cohen, A. (2009b). Dispute Systems Design, Neoliberalism, and the Problem of Scale. *Harvard Negotiation Law Review*, 14.
- Cohen, A. & Alberstein, M. (2011). Progressive Constitutionalism and Alternative Movements in Law. *Ohio St. LJ*, 72, 1083.
- Conley, J. M., & O'Barr, W. M. (1999). *Rules versus relationships: The ethnography of legal discourse*. University of Chicago Press.
- Daicoff, S. S. (2005). Law as a Healing Profession: The Comprehensive Law Movement. *6 Pepp. Disp. Resol. L.J.* 1.
- DeHart, S. M. (1995). The Convergence of Praxis and Theoria in Aristotle. *Journal of the History of Philosophy*, 33(1), 7–27.
- Dezalay, Y., & Garth, B. (1996). Fussing about the forum: Categories and definitions as stakes in a professional competition. *21 Law & Soc. Inquiry* 285
- Dore, L. K. (2006). Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution. *81 Chi.-Kent L. Rev.* 463
- E. Allan Lind & Tom R. Tyler, (1988) *The Social Psychology of Procedural Justice*. New York: Springer.

- Erik Braun (2013) *The Birth of Insight: Meditation, Modern Buddhism, and the Burmese Monk Ledi Sayadaw*. University of Chicago Press
- Fiss, Owen (1984) Against settlement, *93 Yale Law Journal* 1073
- Fleckenstein, K. S. (2007). Once Again with Feeling: Empathy in Deliberative Discourse. *Jac*, 27(3/4).
- Folger, J. (2008) Harmony and transformative mediation practice: Sustaining ideological differences in purpose and practice. *NDL Rev*, 84, 823
- Folger, J. P., & Bush, R. A. B. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Conflict Resolution Quarterly*, 13(4), 263
- Forester, J. (1993). *Critical theory, public policy, and planning practice: Toward a critical pragmatism*. Albany, NY: State University of New York Press.
- Forester, J. (2009) *Dealing with Differences: Dramas of Mediating Public Disputes*. Oxford: Oxford University Press
- Forester, J. (2012). From Good Intentions to A Critical Pragmatism (pp. 1–24). In *Oxford Handbook of Urban Planning*. Oxford University Press.
- Forester, J. (2013). On the theory and practice of critical pragmatism: Deliberative practice and creative negotiations. *Planning Theory*, 12(1), 5
- Forester, J. & Stitzel, D. (1989). Beyond Neutrality. *Negotiation Journal*, 5(3), 251
- Forester, John (1980) Critical theory and planning practice. *Journal of the American Planning Association* 46(3);
- Foucault, M. (2011). *The government of self and others: Lectures at the Collège de France, 1982-1983*. New York: Picador.

- Fox, K. H. (2006). In Search of a Canon: Three Texts on Dispute Resolution. *Negotiation Journal*, 22(2).
- Fox, K. H. (2009). Negotiation as a post-modern process. *Hamline J. Pub. L. & Pol'y* 31, 367.
- Frank Sander (1976), *Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* in 70 F.R.D. 79, 111
- Freeman, J., & Langbein, L. I. (2000). Regulatory negotiation and the legitimacy benefit. *NYU Env'tl. LJ*, 9, 60.
- Fukuyama, F. (1992). *The end of history and the last man*. New York: Free Press
- Fuller, L. L. (1970). Mediation--Its Forms and Functions. *S. Cal. L. Rev.*, 44.
- Gadlin, H. (2002). Framing new directions for theory from the experience of practitioners. *Negotiation Journal*, 18(4), 327
- Galanter (1998) Faces of mistrust: the image of lawyers in public opinion, jokes and political discourse. *66 U. Cin. L. Rev.* 805
- Galanter & Cahill (1994) "Most cases settle": Judicial Promotion and Regulation of Settlements. *46 Stan. L. Rev.* 1339
- Galanter, M. (1983). Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society. *46 Ucla L. Rev.*
- Galanter, M. (1987) The day after the litigation explosion. *46 Md. L. Rev.* 3
- Galanter, M. (1994) News from Nowhere: The debased debate on civil justice. *71 Denver University Law Review*, 77.

- Galanter, M. (2003) The Turn Against Law: The Recoil Against Expanding Accountability. *81 Tex. L. Rev.* 285.
- Galanter, M. (2004) The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts. 1 *Journal of Empirical Legal Studies* 459.
- Gaynier, L.P. (2005). Transformative mediation: In search of a theory of practice. *Conflict Resolution Quarterly*, 22(3), 397.
- Gerami, A. (2009). Bridging the theory-and-practice gap: Mediator power in practice. *Conflict Resolution Quarterly*, 26(4), 433.
- Gewurz, I. G. (2001). (Re)designing mediation to address the nuances of power imbalance. *Conflict Resolution Quarterly*, 19(2)
- Gibson, K., Thompson, L., & Bazerman, M. H. (1996). Shortcomings of neutrality in mediation: Solutions based on rationality. *Negotiation Journal*, 12(1)
- Gilligan, Carol. Moral Orientation And Moral Development in E. F. Kittay & D. T. Meyers (Eds.), *Women And Moral Theory* (New Jersey: Rowman & Littlefield, 1987);
- Gilligan, C. (1982). *In a different voice: Psychological theory and women's development*. Cambridge: Harvard University
- Goldberg, Stephen B., Eric D. Green, and Frank E. A. Sander. (1985) *Dispute resolution*. Boston: Little, Brown
- Gramsci, Antonio (1992), Buttigieg, Joseph A, ed., *Prison notebooks*, New York City: Columbia University Press
- Gray, J. (2004). *Two faces of liberalism*. Cambridge: Polity Press.
- Grillo, T. (1991). The mediation alternative: Process dangers for women. *The Yale Law Journal*, 1545.

- Gunning, I. R. (2004). Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations. No. 2 *Cardozo J. Conflict Resol.*, 5.
- Gutmann (2007) The Lure and Dangers of Extremist Rhetoric, 136 *Daedalus* 7072
- Gutmann, A., & Thompson, D. (2002). Deliberative Democracy Beyond Process. *Journal of Political Philosophy*, 10(2), 153.
- Gutmann, A., & Thompson, D. F. (2004). *Why deliberative democracy?* Princeton University Press
- Habermas, J. (1990) *Moral Consciousness and Communicative Action*. MIT Press.
- Habermas, J., Cronin, C., & De, G. P. (2005). *The inclusion of the other: Studies in political theory*. Cambridge: Polity Press.
- Hampshire, S. (2000) *Justice is Conflict*. Princeton University Press.
- Hardin (1993) Liberalism: Political and economic. *Social Philosophy and Policy*, 10 (02), 121.
- Harrington, C. B. (1982). Delegalization Reform Movements: A Historical Analysis. In Abel, R. (ed) *The Politics of Informal Justice: The American experience*. New York: Academic Press
- Hawkins, B. (2012). The Life of the Law: What Holmes Meant. 33 *Whittier L. Rev*, 323
- Hedeem, T. (2011). Remodeling the Multi-Door Courthouse to Fit the Forum to the Folks: How Screening and Preparation Will Enhance ADR. *Marq. L. Rev.*, 95, 941.
- Hensler (2002) Suppose It's Not True: Challenging Mediation Ideology. *J. Disp. Resol.*

- Hernandez-Crespo, M. (2012). From Noise to Music: The Potential of the Multi-Door Courthouse Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America. *J. Disp. Resol.* 335
- Hill, B. J. (1982). An Analysis of Conflict Resolution Techniques: From Problem-Solving Workshops to Theory. *Journal of Conflict Resolution*, 26(1).
- Hoffman, D. A. (2008). Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR. *J. Disp. Resol.* 11
- Honneth, A. (2004). Recognition and Justice: Outline of a Plural Theory of Justice. *Acta Sociologica*, 47(4)
- Humphrey, M. (2005). Reconciliation and the Therapeutic State. *Journal of Intercultural Studies*, 26(3)
- Hyman & Lela P. Love (2002) If Portia Were a Mediator: An Inquiry into Justice in Mediation, 9 *Clinical L. Rev.* 157.
- Hyman, J. (2015). Beyond fairness: The place of moral foundations theory in mediation and negotiation. *Nevada Law Journal*, 15.
- Innes, J. E. (2004). Consensus Building: Clarifications for the Critics. *Planning Theory*, 3(1), 5.
- Jeffrey W. Stempel (2000) The Inevitability of the Eclectic: Liberating ADR from Ideology, *J. Disp. Resol.* 247
- Jones, Todd (2004) Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution. 108 *Penn St. L. Rev*
- Kadlec, A. (2008). Critical Pragmatism and Deliberative Democracy. *Theoria*, 55(117), 54.

- Khalif Z. Shariff (2003). Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization. *Harv. Negot. L. Rev.*, 133,
- Kohlberg, L. (1981). *Essays on moral development: The psychology of moral development* (Vol. 2). San Francisco: harper & row.
- Kovach, K. K., & Love, L. P. (1998). Mapping Mediation: The Risks of Riskin's Grid. *Harv. Negot. L. Rev.*, 3, 71.
- Krasnoff, L. (1998). Consensus, stability, and normativity in Rawls's political liberalism. *The Journal of Philosophy*, 95(6)
- Kressel, K. (1997). Practice-relevant research in mediation: Toward a reflective research paradigm. *Negotiation Journal*, 13(2)
- Kruse, K. R. (2004). Learning from Practice: What ADR Needs from a Theory of Justice. *5 Nev. LJ*. 389
- Kucklick, Bruce (1977) *The Rise of American Philosophy. Cambridge, Massachusetts, 1860-1930*. Yale University Press
- Kuttner, R. (2006). Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation. *Negotiation Journal*, 22(3), 331
- Lande, J. (2000). Toward more sophisticated mediation theory. *J. Disp. Resol.* 321
- Lieberman, J. K., & Henry, J. F. (1986). Lessons from the Alternative Dispute Resolution Movement. *The University of Chicago Law Review*, 53(2)
- Litig, E. L. R. (2011). We Can Work It Out: Using Cooperative Mediation-A Blend of Collaborative Law and Traditional Mediation-To Resolve Divorce Disputes. *The Review of Litigation*, 30(2), 245.
- Love, L. P. (2000). Images of Justice. *Pepp. Disp. Resol. LJ*, 1(1).

- Love, L., & Waldman, E. (2016). The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation. *Ohio St. J. on Disp. Resol.*, 31.
- Love, L.P. (1996) Evaluative Mediation is an Oxymoron, *14 Alternatives To The High Cost Of Litig.* 31.
- Lytle, A. L., Brett, J. M., & Shapiro, D. L. (1999). The strategic use of interests, rights, and power to resolve disputes. *Negotiation Journal* 15.
- Mansbridge, J.J. (1983) *Beyond Adversary Democracy*. University of Chicago Press
- Mansbridge, J.J., (editor). (1990) *Beyond Self-Interest*. University of Chicago Press.
- Marcum, T. M., Stoner, C. R., & Perry, S. J. (2011). Reframing the Mediation Lens: The Call for a Situational Style of Mediation. *S Ill ULJ* 36.
- Mauss, Marcel (2002) [1925]. *The Gift: The form and reason of exchange in archaic societies*. London: Routledge.
- Mayer, B. S. (2004). *Beyond neutrality: Confronting the crisis in conflict resolution*. San Francisco, CA: Jossey-Bass.
- Menkel Meadow, C. (1988). Feminist legal theory, critical legal studies, and legal education or the fem-crits go to law school. *J. Legal Educ.*, 38, 61
- Menkel-Meadow, C. (2015). Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes. In: *The Handbook of Conflict Resolution*. Chapter 50. Eds. Peter T. Coleman, Morton Deutsch, and Eric C. Marcus. Wiley
- Menkel-Meadow, C. (1983), Toward another view of legal negotiation: The structure of problem solving. *Ucla L. Rev.*, 31, 754

- Menkel-Meadow, C. (1983). Review: Legal Negotiation: A Study of Strategies in Search of a Theory. *American Bar Foundation Research Journal*, 8(4), 905
- Menkel-Meadow, C. (1985) For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, *Ucla L. Rev.* 485, 500.
- Menkel-Meadow, C. (1991). Pursuing Settlement in an Adversary Culture: a Tale of Innovation Co-opted or the Law of ADR. *Fla. St. UL Rev.*, 19, 1.
- Menkel-Meadow, C. (1994). Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases). *Geo LJ*, 83, 2663.
- Menkel-Meadow, C. (1995) The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices. *Negotiation Journal* 11:3
- Menkel-Meadow, C. (1996). Introduction: What Will We Do When Adjudication Ends-A Brief Intellectual History of ADR. *Ucla L. Rev.*, 44, 1613
- Menkel-Meadow, C. (1996). Trouble with the Adversary System in a Postmodern, Multicultural World. *Wm. & Mary L. Rev.*, 38, 5
- Menkel-Meadow, C. (1996). What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life. *Minn. L. Rev.*, 81, 1413
- Menkel-Meadow, C. (1999): When Winning Isn't Everything: The Lawyer as Problem Solver. *Hofstra L. Rev.*, 28, 905.
- Menkel-Meadow, C. (2000). Mothers and fathers of invention: The intellectual founders of ADR. *Ohio St. J. Disp. Resol.*, 16.
- Menkel-Meadow, C. (2001). Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice. *Fordham L. Rev.*, 70, 1761.

- Menkel-Meadow, C. (2002). When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering. *Wash. UJL & Pol'y*, 10, 37.
- Menkel-Meadow, C. (2003). Correspondences and contradictions in international and domestic conflict resolution: Lessons from general theory and varied contexts. *J. Disp. Resol.* 2, 319.
- Menkel-Meadow, C. (2003). *Dispute processing and conflict resolution: Theory, practice, and policy*. Aldershot, Hampshire: Ashgate/Dartmouth.
- Menkel-Meadow, C. (2004). From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *J. Legal Educ.* 54
- Menkel-Meadow, C. (2005). The Lawyer's Role (s) in Deliberative Democracy. *Nevada Law Review* 5, 347
- Menkel-Meadow, C. (2006). Peace and Justice: Notes on the Evolution and Purposes of Legal Processes. *Georgetown Law Journal*, 94
- Menkel-Meadow, C. (2009). Chronicling the Complexification of Negotiation Theory and Practice. *Negotiation Journal*, 25(4)
- Menkel-Meadow, C. (2012). (ed) Foundations of Dispute Resolution: Vol. I of Complex Dispute Resolution. Ashgate
- Menkel-Meadow, C. (2012). Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving. *Unbound*, 8
- Menkel-Meadow, C. (2013). The Historical Contingencies of Conflict Resolution. *Intl J. of Conflct Engage. Resol.* 1, 32

- Menkel-Meadow, C. (2014). Cultural Variations in Restorative/Transitional Justice: Process Pluralism, Not One Size Fits All. *UC Irvine School of Law Research Paper*.
- Menkel-Meadow, C., & Nutenko, I. (2009). The Next Generation: Creating New Peace Processes in the Middle East. *Negotiation Journal*, 25(4), 569
- Merry, S. E. (1990). Discourses of Mediation and the Power of Naming. *Yale Journal of Law & the Humanities* 2, 1
- Merry, S. E. (1992). Culture, power, and the discourse of law. *NYL Sch. L. Rev.*, 37, 209
- Merry, S. E. (1992). Popular Justice and the Ideology of Social Transformation. *Social & Legal Studies*, 1(2), 161
- Mertz, E. (1988). Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices. In C. L. Briggs (Ed.), *Disorderly Discourse* (Vol. 30)
- Milner, N. (1996). Mediation and Political Theory: A Critique of Bush and Folger. *Law & Social Inquiry*, 21(3), 737
- Mirchandani, R. (2008). Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State. *Law & Social Inquiry*, 33(4), 853
- Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *The Yale Law Journal*, 88(5), 950.
- Mnookin, Robert H., Scott R. Peppet, Andrew S. Tulumello. (2000) *Beyond winning: negotiating to create value in deals and disputes*. Cambridge, Mass: Belknap.
- Moffitt (2009) Three Things To Be Against ("Settlement" Not Included), 78 *Fordham L. Rev.* 1203

- Moore, S. F. (1987). Dividing The Pot Of Gold: Social and Symbolic Elements in an Instrumental Negotiation. *Social Analysis: the International Journal of Social and Cultural Practice*, (22), 118
- Muhlberger, P. (2011). A Deliberative Look at Alternative Dispute Resolution and the Rule of Law, *J. Disp. Resol.* 145.
- Nader, L. (1990) *Harmony ideology: justice and control in a Zapotec mountain village*. Stanford University Press.
- Nader, L., & Grande, E. (2002). Current illusions and delusions about conflict management—in Africa and elsewhere. *Law & Social Inquiry*, 27(3), 573
- Nader, Laura (2002) *The Life of the Law. Anthropological Projects*. University of California Press.
- Nelken, M. L., Schneider, A. K., & Mahaud, J. (2010). If I'd Wanted to Teach About Feelings, I Wouldn't Have Become a Law Professor. *Marquette University Law School Legal Studies Research Paper Series Research Paper No. 10*
- Noce, Della, D. J. (1999). Seeing Theory in Practice: An Analysis of Empathy in Mediation. *Negotiation Journal*, 15(3), 271–301.
- Noce, Della, D. J. (2003). From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model. *Ohio St. J. on Disp. Resol* 19
- Nolan (1998) *The Therapeutic State: Justifying Government at Century's End*. New York: New York University Press.
- Nussbaum, M. (2001) *Upheavals of Thought*. Cambridge University Press
- Patton, Bruce; Ury, William and Fisher, Roger. (2011) *Getting to Yes: negotiating agreement without giving in*. Third Edition. New York: Penguin Books.

- Paul, G. D., & Borton, I. M. (2014). Exploring Communities of Facilitators: Orientations toward Restorative Justice. *Conflict Resolution Quarterly*, 31(2), 189
- Pavlich, G. (1996). The Power of Community Mediation: Government and Formation of Self-Identity. *Law & Society Review*, 30(4), 707
- Popper, K. R. (1971). *The open society and its enemies*. Princeton University Press.
- Raiffa, Howard. 1982. *The art and science of negotiation*. Cambridge, Mass: Belknap Press
- Rana, A. (2014). *The two faces of American freedom*. Cambridge: Harvard University Press.
- Rawls, J. (1985). Justice as Fairness: Political not Metaphysical. *Philosophy & Public Affairs*, 14(3), 223
- Rawls, J. (1987). The Idea Of An Overlapping Consensus. *Oxford Journal of Legal Studies*, 7(1)
- Rawls, J. (1999). *A Theory of Justice*, Revised Edition. Harvard University Press.
- Resnik (1986) Failing Faith: Adjudicatory Procedure in Decline, 53 *U. Cm. L. Rev.*, 494.
- Resnik (1995) Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication. 10 *Ohio St. J. on Disp. Resol*, 211
- Resnik (2015). The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR. *Nevada Law Journal*, 15, 1631
- Reuben, R. C. (1999). Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice. *Ucla L. Rev.* 47, 949
- Rhode, D. (2004) Access to Justice. New York: Oxford University Press; Rhode (2001) Access to Justice, 69 *Fordham L. Rev.*, 1785

- Riles, A. (2002). User friendly: Informality and expertise. *Law & Social Inquiry*, 27(3)
- Riskin, L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harv. Negot. L. Rev.* 1, 7
- Riskin, L. (2003). Decision-making in mediation: The new old grid and the new new grid system. *Notre Dame Law Review* 79, 1
- Riskin, L. (2004). Mindfulness: Foundational training for dispute resolution. *J. Legal Educ.* 54
- Riskin, L. (2005). Replacing the mediator orientation grids, again: Proposing a “new new grid system.” *Alternatives to the High Cost of Litigation*, 23(8), 127
- Riskin, L. (2010). Further beyond reason: mindfulness, emotions, and the core concerns in negotiation. *Nev L.J.* 10
- Rothman, J., & Alberstein, M. (2013). Individuals, Groups and Intergroups: Theorizing About the Role of Identity in Conflict and its Creative Engagement. *Ohio St. J. on Disp. Resol.*, 28, 631
- Sander, Frank (1979) Varieties of Dispute Processing, in Leo Levin & Russell R. Wheeler (Eds.), *The Pound Conference: Perspectives On Justice In The Future* 65.
- Sanders, L. M. (1997). Against Deliberation. *Political Theory*, 25(3), 347–376, at 348.
- Sarat, A., Davidovitch, N., & Alberstein, M. (2007). *Trauma and memory: Reading, healing, and making law*. Stanford, Calif: Stanford University Press
- Schehr, R. C., & Milovanovic, D. (1999) Conflict mediation and the postmodern: Chaos, catastrophe, and psychoanalytic semiotics. *Social Justice*, 26 (1), 208
- Schelling, T. C. (1958). The Strategy of Conflict Prospectus for a Reorientation of Game Theory. *The Journal of Conflict Resolution*, 2(3), 203

- Schmitt, C. (2008). *The concept of the political*. University of Chicago Press.
- Schneider, A. K. (2013). Beyond Theory: Roger Fisher's Lessons on Work and Life. *Negotiation Journal*, 29(2), 171–177
- Schneider, A. K. (2013). Pracademics: Making Negotiation Theory Implemented, Interdisciplinary, and International. *International Journal of Conflict Engagement and ...*, 1(2), 188
- Schneider, A. K., & Honeyman, C. (2006). *The negotiator's fieldbook*. American Bar Association.
- Schön, D. (1995). Educating the Reflective Legal Practitioner. *Clinical L. Rev.*, 2, 231
- Schoeny, M., & Warfield, W. (2000). Reconnecting systems maintenance with social justice: a critical role for conflict resolution. *Negotiation Journal*, 16(3), 253
- Scimecca, J & Avruch, K. (2005). Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic. *Marq. L. Rev.*, 89, 567
- Scimecca, J. A. (1993). Theory and alternative dispute resolution: A contradiction in terms? In: Sandole, D. J., & Van der Merwe, H. (Eds.) *Conflict resolution theory and practice: Integration and application*. Manchester University Press
- Seul, J.R. (1999). How Transformative is Transformative Mediation: A Constructive-Developmental Assessment. *Ohio St. J. on Disp. Resol.* 15
- Sherman, E. F. (1997). Good Faith Participation in Mediation: Aspirational, Not Mandatory. *Disp. Resol. Mag.*, 4, 14.

- Shestowsky (2008) Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little. *23 Ohio St. J. on Disp. Resol.* 549.
- Silbey, S. S. (2002). The Emperor's New Clothes: Mediation Mythology and Markets. *J. Disp. Resol.*, 1
- Simon, W. H. (2004). Solving problems vs. claiming rights: The pragmatist challenge to legal liberalism. *Wm. & Mary L. Rev.* 46, 127
- Sousa Santos, B. (2002). *Toward a New Legal Common Sense: law, globalization, and emancipation*. Cambridge University Press.
- Stempel, J. W. (1996). Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role. *Fla. St. UL Rev.* 24, 949
- Stempel, J. W. (1996). Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood. *Ohio St. J. on Disp. Resol.*, 11, 297
- Stempel, J. W. (2000). The Inevitability of the Eclectic: Liberating ADR from Ideology. *J. Disp. Resol.*, 247
- Sternlight, J. R. (2002). ADR is here: Preliminary reflections on where it fits in a system of justice. *Nev. LJ*, 3, 289
- Sternlight, J. R. (2006). Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad. *DePaul L. Rev.*, 56, 569.
- Sternlight, J. R., & Jensen, E. J. (2004). Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse? *Law and Contemporary Problems*, 67(1/2), 75

- Sternlight, J. R., & Resnik, J. (2004). Competing and Complementary Rule Systems: Civil Procedure and ADR. *Notre Dame L. Rev.* 80, 481
- Stulberg (1998). Fairness and Mediation. *13 Ohio St. J. on Disp. Resol.*
- Stulberg, J. B. (1997). Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock”. *Fla. L. Rev.*, 24
- Stulberg, J. B. (2005). Mediation and Justice: What Standards Govern. *Cardozo Journal of Conflict Resolution*, 6, 213
- Stulberg, J. B. (2011). Must a Mediator Be Neutral-You'd Better Believe It. *Marq. L. Rev.*, 95.
- Stulberg, Joseph B., and Lela Porter Love. (2009). *The middle voice: mediating conflict successfully*. Durham, N.C.: Carolina Academic Press
- Ury, W., Brett, J. M., & Goldberg, S. B. (1993). *Getting disputes resolved: Designing systems to cut the costs of conflict*. Cambridge, Mass: Program on Negotiation at Harvard Law School.
- Wall, J. A., & Dunne, T. C. (2012). Mediation Research: A Current Review. *Negotiation Journal*, 28(2), 217–244
- Walther, G. (2000). Power imbalances in divorce mediation. *American Journal of Family Law*, 14(2).
- Ware, S. (2013). Is Adjudication a Public Good?: “Overcrowded Courts” and the Private-Sector Alternative of Arbitration. *Cardozo Journal of Conflict Resolution*, 14.
- Warfield, W. (2002). Some Minor Reflections on Conflict Resolution: The State of the Field as a Moving Target. *Negotiation Journal*, 18(4), 381
- Weber, M. (2001). *The Protestant ethic and the spirit of capitalism*. London: Routledge.

- Weber, Max (1978). *Economy and society: An outline of interpretive sociology*. Berkeley: University of California Press.
- Weber, Max (1920) *Theorie der Stufen und Richtungen religiöser Weltablehnung*. Zwischenbetrachtung as published in Weber, M., & Käsler, D. (2002). *Schriften 1894-1922*. Stuttgart: Kröner.
- Welsh, Nancy (2001) Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, *79 Wash. U. L.Q.* 787, 860
- Welsh, Nancy (2001) The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, *6 Harv. Negot. L. Rev.* 1, 78
- Welsh, Nancy (2002) Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, *J. Disp. Resol.* 179
- White, J., & Manolis, C. (1997). Individual Differences In Ethical Reasoning Among Law Students. *Social Behavior and Personality: an International Journal*, 25(1), 19
- White, S. K., & Farr, E. R. (2012). “No-Saying” in Habermas. *Political Theory*, 40(1), 32
- William James (1904), Lecture II from What is Pragmatism A New Name for Some Old Ways of Thinking, in December 1904, from William James, *Writings 1902-1920*.
- Wilson, B. (2004). Towards a Theoretical Model of Professional Practice Consultancy. *SSRN Electronic Journal*.
- Wolfe, J. S. (2000). Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate) Dispute Resolution. *Tulsa LJ* 36, 785.
- Yamamoto, E. (1996). ADR: Where have the critics gone. *Santa Clara Law Review* 36, 1055

- Young, I. M. (1996). *Communication and the Other: Beyond Deliberative Democracy*. In: S. Benhabib (Ed.), *Democracy and Difference* (pp 120–133). Princeton University Press
- Zamir, R. (2010). Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic. *Pepp. Disp. Resol. LJ. 11*, 467
- Zamir, R. (2011). Can Mediation Enable the Empowerment of Disadvantaged Groups-A Narrative Analysis of Consensus-Building in Israel. *Harv. Negot. L. Rev. 16*, 193
- Zariski, A. (2010). A Theory Matrix for Mediators. *Negotiation Journal, 26(2)*, 203–235.
- Zehr, H. (2002) *The Little Book of Restorative Justice*. Intercourse, PA: Good Books.