

## ARTICLES

### JUDICIAL CONFLICT RESOLUTION (JCR): A NEW JURISPRUDENCE FOR AN EMERGING JUDICIAL PRACTICE

*Michal Alberstein\**

#### ABSTRACT

*In the past few decades, the role of judges has changed dramatically, yet its nature has remained largely unexplored. To date, most cases settle or reach plea-bargaining, and the greater part of judges' time is spent on managing cases and encouraging parties to reach consensual solutions. Adjudication based on formal rules is a rare phenomenon which judges mostly avoid. This Article argues that the various Conflict Resolution methods, which are used outside the courtroom, as alternatives to adjudication, could have a strong and positive influence, both theoretical and practical, on judicial activities inside the courts. Theoretically, the Article develops a conflict resolution jurisprudence, which prioritizes consent over coercion as a leading value for the administration of justice. Descriptively, the Article conceptualizes judicial activity in promoting settlement and plea bargaining as Judicial Conflict Resolution ("JCR") and examines it along the lines of common methods of conflict resolution—negotiation, mediation, arbitration, dialogue facilitation, problem solving, restorative justice and dispute design. The JCR Perspective suggests that judges are often parties to the negotiation as to whether to adjudicate the legal conflict, third parties in an effort to mediate it, arbitrators as to guiding rules of compromise, as well as facilitators of dialogue, problem solvers and dispute designers. The hybridity of their conflict resolution work is related both to the variety of processes that judges use and to the fact that they are performed in the shadow of authority.*

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\* Associate Professor, Faculty of Law, Bar-Ilan University. Head of Conflict Management, Resolution and Negotiation Program, Bar-Ilan University.

## TABLE OF CONTENTS

INTRODUCTION.....	880
I. AN UNDER-THEORIZED FORM OF JUDICIAL ACTIVITY: SETTLEMENT .....	883
II. JUDICIAL CONFLICT RESOLUTION (JCR) FROM A JURISPRUDENTIAL PERSPECTIVE.....	886
A. <i>The Role of Law: From Coercion to Problem             Solving</i> .....	886
B. <i>A Conflict Resolution Perspective of Law: Six             Organizing Principles</i> .....	887
C. <i>The Link between the Fields of Law, Conflict             Resolution and ADR</i> .....	892
III. JCR AS A NEW PARADIGM FOR CONCEPTUALIZING (AND ASSESSING) JUDICIAL ACTIVITY.....	895
IV. VARIETIES OF JCR .....	898
A. <i>Judicial Negotiation</i> .....	898
B. <i>Judicial Arbitration</i> .....	899
C. <i>Judicial Mediation</i> .....	900
D. <i>Judicial Problem Solving</i> .....	901
E. <i>Judicial Dialogue Facilitation</i> .....	903
F. <i>Judicial Restorative Justice</i> .....	903
G. <i>Judicial Dispute Design</i> .....	904
V. FUTURE DIRECTIONS OF RESEARCH .....	905

## INTRODUCTION

In the past few decades, the role of judges has changed dramatically, yet its new nature has not brought about a corresponding shift in legal thought, and has remained largely unexplored. To date, most cases settle or reach plea-bargaining.<sup>1</sup> The greater part of judges' time is spent on managing cases and on encouraging parties to reach consensual solutions.

How do judges manage the large portion of cases that settle? What are the new horizons that this judicial function may present in the future if comprehensively examined and understood? The hypothesis underlying this Article is that the various Conflict Resolution methods, which are used outside the courtroom, as alterna-

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<sup>1</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

tives to adjudication, could have a strong and positive influence on both the study and practice of judicial activity. Such activities may be conceptualized along the lines of generic modes of conflict resolution—negotiation, mediation, arbitration, dialogue facilitation, problem solving, restorative justice and dispute design. This Article suggests that judges are often parties to the negotiation as to whether to adjudicate the legal conflict, third parties in an effort to mediate it, arbitrators as to guiding rules of compromise, and facilitators of dialogue, problem solvers and dispute designers.<sup>2</sup>

Conflict resolution in the courtroom is a hybrid: a combination of judicial authority and consensual processes. Consensual processes occur in the shadow of authority and in tension with it. In addition, conflict resolution in the courtroom varies according to the legal process and crosses the boundaries between criminal and civil conflicts. It can be evaluated, studied and improved through criteria, which go beyond the prevalent search for efficiency in court administration.

While new developments in the role of judges have received some attention, they have not been examined comprehensively. To date, approaches that emphasize problem solving or therapeutic judging focus on experimental activities such as the establishment of specialized Problem Solving Courts<sup>3</sup> or improvements of marginal activities.<sup>4</sup> In contrast, this research examines judicial conflict resolution (“JCR”) as a mainstream judicial activity.<sup>5</sup>

Another hypothesis underlying this research is that a conflict resolution perspective has a strong jurisprudential standing, which has not yet been explored in legal theory. The function of law as resolving conflicts in society has been usually considered a by-product of its authoritative role in determining rights and assigning them. The conflict resolution function of law is marginalized within such a perspective. In contrast to that view, in various re-

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<sup>2</sup> Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083 (2011).

<sup>3</sup> BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003); JOANN L. MILLER & DONALD C. JOHNSON, *PROBLEM SOLVING COURTS: A MEASURE OF JUSTICE* (2009); PAUL HIGGINS & MITCHELL B. MACKINEM, *PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* (2009).

<sup>4</sup> DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); Sharyn Roach Anleu & Kathy Mack, *Judicial Authority and Emotion Work*, 11 JUD. REV.: SELECTED CONF. PAPERS: J. OF THE JUD. COMM'N OF NEW SOUTH WALES 329 (2013).

<sup>5</sup> For a discussion of the need to shift the focus from legal dispute resolution to a conflict resolution perspective, see Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7 (2004).

search fields today there is the growing understanding that the existing institutions of law mostly fail to achieve compliance through command and control regimes, both in civil and criminal contexts, and that more complex and nuanced responses to crime, violence and conflicts are required in order to promote society.<sup>6</sup> Such responses should be founded on a conflict resolution perspective and may help shape new comprehensive roles for judges while they perform their mainstream activities.

This Article will examine and develop the following arguments:

*First*, the pursuit of settlement in the courtroom is understudied and its clarification may help to improve and regulate a mainstream judicial activity.

*Second*, there is a conflict resolution jurisprudence containing six organizing reconstructive narratives that have a far-reaching influence on the perception of the judicial role.

*Third*, recent developments of judges' roles such as problem solving judges, therapeutic judges and multitasking judges fail to capture comprehensively the judicial role and are marginalized conceptually as experimental. Instead, the notion of JCR reframes judges' activity as conflict resolution in its nature.

*Fourth*, Alternative Dispute Resolution ("ADR") methods and conflict resolution studies are highly relevant for the understanding of judicial activities related to settlement and plea-bargaining. It is invaluable for articulating the reality of judges' work and promotes coherence. In addition, it can provide a perspective that may in time increase effectiveness of the judicial process. Judges perform various JCR activities, implicitly and consciously, beginning by being themselves negotiators over the requirement to decide, arbitrators, who combine consent with law, mediators, dialogue facilitators, restorative justice practitioners, problem solvers and dispute designers.

*Fifth*, JCR should be examined empirically, developed theoretically, and improved prescriptively.

This research calls for merging deep theoretical inquiry into the law's function in conflict resolution with a bottom-up study of judicial activities on the ground and in practice. It transcends the focus on efficiency, which currently prevails in assessing judges' ac-

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<sup>6</sup> JOHN W. BURTON, *VIOLENCE EXPLAINED: THE SOURCES OF CONFLICT, VIOLENCE AND CRIME AND THEIR PREVENTION* (1997); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

tivities and improves accountability and access to justice through the introduction of coherence into a mainstream activity within the administration of justice.

The following sections will deal with the arguments above, beginning in Section I with an overview of the current perception of judicial settlement, which is narrow and limited. Next in Section II, moving to the jurisprudential debate and presenting the conflict resolution notion of law and in Section III providing a new paradigm for judicial activity, including a preliminary map of JCR forms and their appearance in law, theory and practice. Finally Section IV proposes future research goals and long-term projects.

#### I. AN UNDOCUMENTED AND UNDER-THEORIZED FORM OF JUDICIAL ACTIVITY: SETTLEMENT

Legal writing in the last decades has repeatedly confirmed the data that most cases settle, a phenomenon that has also been called “the vanishing trial.”<sup>7</sup> This is true for criminal trials as well, where plea bargains are the most common outcome.<sup>8</sup> This reality raises interest in the role of judges in promoting settlements. Some legal conflicts are initially channeled to alternative dispute mechanisms such as mediation. Yet, most cases settle during the course of the court proceedings.

In contrast, the classic perception of a judge is of a neutral third party authorized by the state, who gives decisions based on legal rights, and determines factual disagreement between the parties based on evidence law and procedural constraints.<sup>9</sup> When a judge adjudicates a dispute she is supposed to balance legal and factual arguments that are presented by the parties, and after considering them on a scale of reason, to apply the right principle which determines who is right. When she writes her decision, her reasoning should use the existing legal norms, presenting the facts in a neutral mode, balancing the existing evidence and legal argument, providing a precise formal applicable determination of facts and law. In reality, this classic perception, which is challenged

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<sup>7</sup> Galanter, *supra* note 1; Langbein, *supra* note 1.

<sup>8</sup> The reference to “settlement” hereinafter will include plea-bargaining as well, unless otherwise mentioned. Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective*, 12 INT’L CRIM. JUST. REV. 22 (2002); Susan R. Klein et al. *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015).

<sup>9</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

from various perspectives, remains today only marginal for understanding the real activities of judges.

In terms of the reasoned decision making of judges, critique of formalism and of the various claims for formality in law have been growing in the last century.<sup>10</sup> When judges perform their designated activity of deciding cases according to law they tend to deviate, sometimes in systematic and sometimes measurable modes from basic tenants of formalism.<sup>11</sup>

However, in most legal cases judges do not write reasoned legal decisions altogether since legal conflicts do not reach this stage and settle beforehand. The reality of “the managerial judge,”<sup>12</sup> whose main task is to manage legal dockets and to reduce the costs of full adjudication, has been reflected and analyzed both in the criminal and civil spheres.<sup>13</sup>

How does judicial activity promote settlements? What does the notion of compromise mean when pursued by judges? In negotiation studies, the strategy of compromise is considered limited and incoherent. In contrast to the neater strategies in which relation to self and other are well defined—competition in which only self-interest is pursued, accommodation in which only the other is rewarded, avoidance in which none is satisfied and problem solving in which both collaborate—the compromise is a mixed strategy that is hard to decipher.<sup>14</sup> The parties are perceived as being able to reduce a purely competitive strategy in favor of a mild tendency to approach the other side and to produce distributive solutions. It seems like a process of bargaining is the common procedure to

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<sup>10</sup> WILLIAM W. FISHER ET AL., *AMERICAN LEGAL REALISM* (1993).

<sup>11</sup> Michal Alberstein, *Measuring Legal Formalism: Reading Hard Cases with Soft Frames*, 57 *STUD. L. POL. & SOC'Y* 2003 (2012); see also Michal Alberstein and Bryna Bogoch, *Formalizing Formalism: An Empirical Study of the Rhetoric of Formalism in Israeli Supreme Court Opinions Over Time (2012–2015)* (unpublished Individual Research Grant 1397/12 from the Israel Science Foundation).

<sup>12</sup> Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982).

<sup>13</sup> Neal Kumar Katyal, *Judges as Advicegivers*, 50 *STAN. L. REV.* 1709 (1998); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 *JUDICATURE* 257 (1986); James A. Wall & Dale E. Rude, *The Judge as a Mediator*, 76 *J. APPLIED PSYCHOL.* 54 (1991); RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013); RICHARD A. POSNER, *HOW JUDGES THINK* (2009); LAWRENCE S. WRIGHTSMAN, *JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT?* (1999); *JUDICIAL DISCRETION IN EUROPEAN PERSPECTIVE* (Ola Wiklund ed., 2003); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 *OHIO ST. J. ON DISP. RESOL.* 271 (2011); Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 *PEPP. DISP. RESOL. L.J.* 351 (2006).

<sup>14</sup> KENNETH W. THOMAS, *THOMAS-KILMANN CONFLICT MODE INSTRUMENT* (1974).

reach a settlement but how does such bargaining look like when a judge is involved?

While these activities of judges have received some attention,<sup>15</sup> they have not been examined comprehensively. In other words, judicial practice in the majority of court cases is for the most part undocumented and unexplored. More importantly, these developments have not been accompanied by changes in the rules and practices that govern the nomination, training, promotion and evaluation of judicial practices.<sup>16</sup> Lawyers and judges are still trained to master legal doctrine rather than to deal with the activities they will perform in the majority of cases.<sup>17</sup> This is regrettable, since once our attention shifts to focus on the pursuance of settlement as a mainstream judicial activity, more relevant frames for conceptualizing such activities emerge.

When considering the pursuit of settlement, the basic generic mechanisms of conflict resolution may be relevant not only for understanding what judges do but also for increasing their effectiveness in resolving conflicts. In other words, alternative dispute mechanisms that are usually used outside the courtroom may influence or have the potential to influence judicial activities inside the court. These mechanisms have not been sufficiently examined in respect to judicial activity since the prevailing view is that judges' main work is either adjudicative or managerial. In addition, the ADR movement is relatively new, and the nature of the relationship between the two systems—litigation and ADR—has not yet been delved into.

The actual activities of judges in promoting settlements and resolution of criminal conflicts by using their discretion have been studied in recent years mostly in Canada and Australia and some modes of such activities has been named Judicial Dispute Resolution (“JDR”).<sup>18</sup> New manuals for judges, implementing ideas of

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<sup>15</sup> ROBERT D. COOTER, *BARGAINING IN THE SHADOW OF THE LAW: A TESTABLE MODEL OF STRATEGIC BEHAVIOR* (1982). See also *supra* note 13.

<sup>16</sup> AMERICAN BAR ASSOCIATION, *BLACKLETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE* (2005), available at [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf) (last visited Mar. 7, 2015); I. V. Anderson, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 *MO. L. REV.* (2011); Stephen J. Choi & Mitu Gulati, *Choosing the Next Supreme Court Justice*, 78 *S. CAL. L. REV.* 23 (2004); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 *DUKE L.J.* 1313 (2008); Richard A. Posner, *Judicial Behavior and Performance an Economic Approach*, 32 *FLA. ST. U. L. REV.* 1259 (2004).

<sup>17</sup> The changes in lawyers' roles have been discussed by Galanter, *supra* note 1.

<sup>18</sup> TANIA SOURDIN & ARCHIE ZARISKI, *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION* (2013).

procedural justice, and basic psychological notions such as empathy or behavioral contract, have been introduced to the legal profession. Following such developments some judges have defined themselves as “therapeutic” or “problem solving” judges.<sup>19</sup> In particular, the alternative movement Therapeutic Jurisprudence has emphasized the role of judges in promoting the well being of the legal actors before them.<sup>20</sup>

In other words, new judicial roles are beginning to emerge. However, no coherent understanding of these emerging activities and experimentations exists today within the current legal literature, and most of it focuses on prescriptions and plain descriptions or evaluations of satisfaction in reference to the actual activities that take place in the courtroom. Much of the current literature is dedicated to activities done in institutionalized alternatives such as Problem Solving Courts. Almost no significant academic writing and research exist on judicial conflict resolution as mainstream activities. The existing innovations are still considered experimental and marginal in reference to mainstream judicial activities.

## II. JUDICIAL CONFLICT RESOLUTION (JCR) FROM A JURISPRUDENTIAL PERSPECTIVE

### A. *The Role of Law: From Coercion to Problem Solving*

From a jurisprudential perspective, the function of law as resolving conflicts in society has usually been considered a by-product of its authoritative role of determining rights and assigning them. The law claims authority,<sup>21</sup> regulates behavior and provides normative schemes to promote social good. In most of its institutional manifestations, the law operates through a system of formal rules established by the state, encompassing criminal and civil affairs. The definition of law and its role in society varies across continents countries and legal communities. Some legal philosophers have been emphasizing the coercive function of law, and its role as controlling society and managing it.<sup>22</sup> Others have referred to the law as a system of hierarchical norms, examined through validity

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<sup>19</sup> MICHAEL KING, SOLUTION FOCUSED JUDGING BENCH BOOK (2009), available at <http://www.ajja.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf> (last visited Mar. 7, 2015).

<sup>20</sup> WINICK & WEXLER, *supra* note 3.

<sup>21</sup> JOSEPH RAZ, THE AUTHORITY OF LAW (1979).

<sup>22</sup> JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).



and genealogically connected to a basic norm.<sup>23</sup> Some legal realist definitions searched for the actual implications of law in as decided in concrete cases by judges,<sup>24</sup> and hermeneutic perspectives portrayed law as operating through violence of interpretive narratives that aspire to bridge an ideal concept to a troubled reality.<sup>25</sup> According to all definitions of law, one its main functions is to control and to produce compliance. The reference to sanctions as important for the definition of legal norms<sup>26</sup> and the intense expansion of regulation and legalization of each branch of our daily lives reflect the fact that the need for coercion though legal intervention is an important aspect of current society.

And yet, in various research fields today there is the growing understanding that the existing institutions of law mostly fail to achieve compliance through command and control regimes, both in civil and criminal contexts, and that more complex and nuanced responses to crime, violence and conflicts are required in order to promote society.<sup>27</sup> These responses rely on consent and problem solving and pave the way for the understanding of the main function of law as conflict resolution and the role of judges as conflict resolution experts.<sup>28</sup> This new role of persuasion is therefore not only a necessity, enforced by case-load and efficiency concerns, but also a reflection of a significant theoretical transformation of the understanding of the role of law in society.

### B. *A Conflict Resolution Perspective of Law: Six Organizing Principles*

The new theoretical understanding in the field of conflict resolution, and the changing perception of the role of law provide together a theoretical foundation for a conflict resolution perspective of law. The tension between authority and conflict resolution in

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<sup>23</sup> HANS Kelsen, *Pure Theory of Law* (1934).

<sup>24</sup> OLIVER WENDELL HOLMES, *The Common Law* (1881); K.N. LLEWELLYN, *Common Law Tradition Deciding Appeals* (1960).

<sup>25</sup> Robert M. Cover, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW* 101 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995).

<sup>26</sup> Kelsen, *supra* note 23.

<sup>27</sup> BURTON, *supra* note 6; John Dryzek & Valerie Braithwaite, *On the Prospects for Democratic Deliberation: Values Analysis Applied to Australian Politics*, 21 *POL. PSYCHOL.* 241 (2000).

<sup>28</sup> William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 *WM. & MARY L. REV.* 127 (2004); Amy J. Cohen & Michal Albershtein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 *OHIO ST. L.J.* 1083 (2011).

law is inherent for the understanding of the roles of judges in resolving conflicts in society and calls for a different understanding and management which will be developed within this research.

The conflict resolution perspective of law that this Article assumes entails six principles, which represents recurring narratives of reconstruction as they appear in various model of conflict resolution.<sup>29</sup>

### 1. Process Emphasis

In philosophy, the idea of process as overcoming substantive arguments is a familiar solution to old metaphysical problems. Within the American philosophy of pragmatism this tendency is mostly celebrated when instead of determining between dichotomies such as mind and body, experience and reason, or being and not being there is a constant shift toward “becoming” and a use of a process which is supposed to embrace paradoxes by containing oppositional logics of the previous discourse within the new regime.<sup>30</sup> In jurisprudence, an emphasis on process has been introduced by various schools, such as The Legal Realism,<sup>31</sup> The Legal Process,<sup>32</sup> and by legal philosophers such as Dworkin,<sup>33</sup> and Fiss.<sup>34</sup> The process emphasis in law is usually focused on escaping the application of legal rules through reference to the principles and policies behind them, and applying them in a functional mode.<sup>35</sup> From a conflict resolution perspective, the process emphasis is the idea that the legal conflict is only a superficial presentation of positions, while the real movers of the conflict are the private the interests and needs of the parties.<sup>36</sup> The combination of the process emphasis in law with that of conflict resolution will require that private

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<sup>29</sup> For an elaborate presentation and overview of these principle and the way they appear in various conflict resolution movements see Michal Alberstein, *The Law of Alternatives: Conflict Resolution as The Art of Reconstruction*, 67 *STUD. L., POL. & SOC'Y* (forthcoming 2015).

<sup>30</sup> *PRAGMATISM: A READER* (Louis Menand ed., 1997); *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW AND CULTURE* (Morris Dickstein ed., 1998); MATTHEW FESTENSTEIN, *PRAGMATISM AND POLITICAL THEORY: FROM DEWEY TO RORTY* (1997).

<sup>31</sup> FISHER ET AL., *supra* note 10.

<sup>32</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1st ed. 1994).

<sup>33</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

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

<sup>35</sup> Gary Peller, *Neutral Principles in the Fifties*, 21 *U. MICH. J.L. REFORM* 561 (1988).

<sup>36</sup> RONALD FISHER & WILLIAM URY, *GETTING TO YES: HOW TO NEGOTIATE AGREEMENTS WITHOUT GIVING IN* (1981).

interests and needs of parties will be analyzed in the shadow of “public” principles and policies as defined by law.

## 2. Constructive Future-Oriented Intervention

A conflict resolution perspective espouses a constructivist and optimistic consciousness with an orientation toward the future. In legal theory, it often includes overcoming critique through development of a constructivist approach. Such an approach can be demonstrated by Dworkin’s idea of presenting legal texts in the best way possible<sup>37</sup> and has a hermeneutic aspect. In a conflict resolution version of this principle, legal conflicts can be resolved constructively without referring to the legal rules behind them as the optimal criteria for their resolution. The choice to reject the more pessimistic, descriptive perspective on the conflict resolution field is an ideological preference not justified by objective criteria or by pure reason. This gesture can be characterized as almost a Nietzschean mode in which after realizing that there is no God, no metaphysical truth, no external criteria to rely upon, the immediate choice is not necessarily nihilism and despair but instead a pure will to extract the constructive picture of reality.<sup>38</sup> A judge which espouses a constructivist consciousness assumes that resolving the conflict amicably and helping the parties to try various modes of processing is always better than imposing a formal legal solution on them.

## 3. Deconstruction and Hybridization

Legal conflicts are typically presented in a binary adversarial way, depicting the conflict as a win-lose situation in which one party’s claim opposes the other’s and reflects and all-or-nothing argument. The idea of deconstruction and hybridization as transforming conflicts begins with judges’ efforts to differentiate between legal claims, to narrow controversies and to balance arguments. In the new emerging field of new governance it is also a theoretical perspective about the right ways to promote social change through law, and to combine social forces in a mode of negotiation joint action.<sup>39</sup> This philosophy continues in conflict resolution work when other issues that are not necessarily apparent on

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<sup>37</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985).

<sup>38</sup> FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* (Walter Kaufmann trans., Vintage 1966) (1911).

<sup>39</sup> Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503 (2008).

the briefs of the parties should be considered in order to deal with the conflict. Conflicts have emotional, economical, medical and criminological aspects that need to be addressed and may affect the conflict intervention mode which is needed in order to process them constructively. A conflict resolution perspective aspires to address and manage such complexity. Facilitators of alternatives encourage disputants to deconstruct an “all-or-nothing” or “win-lose” legal framework into a multiple array of smaller more manageable problems, interests, choices, preferences, and desires.<sup>40</sup> These problems, in turn, become partly resolvable through hybridization—that is, a creative strategy for practical bargaining and compromise in which parties agree to make incremental and piecemeal trades across multiple divergent interests and desires.<sup>41</sup> Judges can use this principle as a mode of intervention when doing their work of JCR.

#### 4. A Search for a Hidden Layer

The search for policies and principles underneath legal rules is part of the jurisprudential effort to overcome the critique of formalism.<sup>42</sup> When rules are considered indeterminate, they can still be managed through balancing the principles and policies on which they are founded. The conflict resolution perception of law is an anti-foundational perception of conflict, which calls for avoiding

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<sup>40</sup> Robert Axelrod’s game theory work on the Prisoner’s Dilemma provides the basis for a famous deconstruction of this sort. He assumes a recurring, rather than one-shot, Prisoner’s Dilemma, which enables each player to engage in a series of discrete, small responses to her opponent’s choices. Axelrod then proceeds to show how particular kinds of responses can develop rational incentives for collaboration over the course of the longer game. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984). Drawing on Axelrod, theorists of alternatives likewise describe the act of negotiating conflict not as a one-shot deal but rather as a series of choices or stages where parties can make small decisions to enable a growing sense of trust and collaboration. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 160 (1986) (using Axelrod’s research to propose dividing the negotiation “process into a number of small steps”). See also Roger Fisher, *Fractionating Conflict*, 93 *DAEDALUS* 920, 921 (1964) (similarly proposing a number of practical advantages for conflict resolution when major conflicts are treated as “a number of small ones”).

<sup>41</sup> For a few examples, see FISHER & URY, *supra* note 36, at 73–79 (describing how to use shared and differing interests to “invent options for mutual gain”); DAVID A. LAX & JAMES K. SEBENIUS, *supra* note 40, at 88–116 (offering lessons in “trading on difference”); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 12–15, 28–43 (2000) (offering lessons in how to identify the multiple issues comprising a problem and to leverage differing issues into value creating trades).

<sup>42</sup> See Peller, *supra* note 35; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *VA. L. REV.* 279 (1973); Kent Roach, *What’s New and Old About the Legal Process?*, 47 *UNIV. TORONTO L.J.* 363 (1995).

the surface of antagonistic claims through the focus on an underlying layer of the conflict. The hidden layer has been central to any conflict resolution intervention and whether it was defined as economic interests, emotional subtext or biological needs, the message of each school of conflict resolution was that working with the underlying phase is much more productive and constructive than staying with the surface level of conflict. This underlying level can be needs, interests, emotions, relationship, entitlements' narratives,<sup>43</sup> ideologies or identity perceptions.<sup>44</sup>

### 5. Perception of Self in Relationship

A conflict resolution perspective entails a reconstructed perception of the human subject and strives to enrich and transform the common individualistic consciousness through the emphasis on the relational aspect of conflict interactions. Such ideas are emphasized in approaches such as law and literature<sup>45</sup> and cultural feminism.<sup>46</sup> These approaches are usually focused on reading legal texts and finding elements of care and relationship. In conflict resolution the acknowledgement of emotions and relationship in the conflict as a significant element in human dispute is an innovation that aims to produce a new conflict self, which is less individualistic, less separated and more caring and empathetic. The judge is supposed to exercise "relationality" with the parties in the courtroom, in order to promote trust, encourage compliance, and transform the conflict.

### 6. Community Work and Bottom-Up Development

The usual perception of law is of a top-down institution that imposes legal rules in order to enforce and reach compliance. In contrast to such an image, new approaches such as new governance or popular constitutionalism have developed in the recent years emphasize bottom-up development and call for less authoritative and formal modes of control. A conflict resolution perspective assumes that learning from interdisciplinary collaboration and "not knowing" yet what exact rule should be applied in a certain conflict, is part of the right process to achieve a solution to concrete

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<sup>43</sup> JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000); SARA COBB, *SPEAKING OF VIOLENCE* (2013).

<sup>44</sup> JAY ROTHMAN, *FROM IDENTITY-BASED CONFLICT TO IDENTITY-BASED COOPERATION* (2012).

<sup>45</sup> MARTHA NUSSBAUM, *POETIC JUSTICE* (1995).

<sup>46</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

conflicts. A conflict resolution perspective espouses a “grass roots” emphasis of working from the bottom up without knowing yet the complete plan or the preferred outcome that should be achieved. A judge who follows this principle will listen carefully and remain curious regarding ways to process the conflict before her. She will let the parties choose optimal ways to deal with it.

### *C. The Link Between the Fields of Law, Conflict Resolution and ADR*

As mentioned in Section I, the relationship between judicial activities and ADR has not yet been delved into, due in part to the fact that the ADR movement is relatively new and is considered alternative to adjudication and practical. The relationship between conflict resolution and judicial activities has not been explored since adjudication is considered the prominent judicial activity. Thus, using these lenses to understand mainstream judicial activity is not second nature to many. This section will elaborate on the links among these fields.

The study of conflicts and their constructive engagement has been developing and growing in the past decades, dealing both with personal, interpersonal, group, intergroup, national and international levels of conflicts.<sup>47</sup> This field expresses itself in responses to legal disputes,<sup>48</sup> trauma, criminal offences,<sup>49</sup> and means of fostering effective problem solving,<sup>50</sup> relational transformation,<sup>51</sup> community building, dispute system design, dialogue facilitation,

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<sup>47</sup> THE HANDBOOK OF DISPUTE RESOLUTION (Michael L. Moffitt & Robert C. Bordone eds., 2012); THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch et al. eds., 2011); ROGER FISHER, WILLIAM L. URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2011); JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICT IN NATIONS, ORGANIZATIONS, AND COMMUNITIES (1997); MARC GOPIN, BETWEEN EDEN AND ARMAGEDDON: THE FUTURE OF WORLD RELIGIONS, VIOLENCE, AND PEACEMAKING (2000).

<sup>48</sup> STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK EA SANDER, DISPUTE RESOLUTION (1985).

<sup>49</sup> WINICK & WEXLER, *supra* note 3, at 37; DAVID WEXLER, REHABILITATIVE LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (2008).

<sup>50</sup> WINICK & WEXLER, *supra* note 3; Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements*, 39 ISRAEL L. REV. 301 (2006); JOANN L. MILLER & DONALD C. JOHNSON, PROBLEM SOLVING COURTS: A MEASURE OF JUSTICE (2009); PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? (Paul C. Higgins & Mitchell B. Mackinem eds., 2009).

<sup>51</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2004).

reconciliation and transitional justice. While in the first decades of the development of the field much progress has been achieved through the development of practical models of conflict engagement, and through the emergence of academic and training programs, more emphasis on theory building and deep theoretical reflections has been growing in the past decade.

The intersection between law and conflict resolution has been mostly through the development of the ADR movement during the 1970s in the United States,<sup>52</sup> and the introduction of alternative processes such as mediation and arbitration has been mainly celebrated as reducing costs and as relieving legal dockets in a litigious society.<sup>53</sup> The efficiency impetus was the first significant link between the fields of law and the wider field of conflict resolution. ADR professionals were concerned with reaching solutions quickly, and as they were integrated into the legal system, used top-down approaches, similar to those used in the courtroom (applying pressure on the sides to reach an agreement).<sup>54</sup> With time, and mainly outside the legal system, ADR mechanisms began to branch out to emphasize concerns other than efficiency, such as: (1) improving—and even transforming—relationships; (2) empowering sides to find ways to solve conflicts; and (3) providing a therapeutic component to address the deep needs of the sides. New theoretical frameworks were developed supporting these new emphases. These new branches of ADR reside alongside the traditional form of ADR, which emphasizes efficiency. They have parallel developments in the field of conflict resolution.<sup>55</sup>

This development of the theory of ADR somewhat coincides with the development of the theory of the role of law, as described earlier: from coercive to problem-solving, from top-down approaches to consensual processes. Yet the theory of ADR has made more strident paces in this direction. The theory of law today, though it has changed, is today quite similar to the theory of

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<sup>52</sup> Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7 (2004).

<sup>53</sup> Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

<sup>54</sup> Nancy A. Welsh, *The Thinning Version of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001).

<sup>55</sup> See ROTHMAN, *supra* note 44. Rothman's ARIA model does not take the short route to conflict resolution, focusing on the future, but delves into the past to uncover the deep concerns of the parties.

ADR in the 1970s: consensual processes reached primarily by exerting authority (of the mediator/arbitrator). The fact that the theory of ADR has evolved to include transformative and empowerment emphases may provide a trajectory for what we may expect or hope for in the judicial realm. The conflict resolution field with its own “second generation” models, which deal with identities and relational perspectives, may supplement this sequence.

This transformation is already happening mostly on the margins: since the 1990s, innovations have been developing in the criminal justice system and have included problem solving courts, restorative justice projects and therapeutic jurisprudence. These new models for criminal processing have been offered to supplement or substitute adversarial proceedings and were mostly focused practical innovations with no theory building, while claiming to reduce cost and recidivism. Some scholars have named this phenomenon “non-adversarial justice.”<sup>56</sup>

Considering the spread of alternative to adjudication during recent years,<sup>57</sup> it is reasonable to assume that both on the criminal and civil level of legal conflicts we are witnessing a procedural transformation that requires deep theoretical and empirical study. The perspective of such study should also change to an ADR perspective that refers to legal conflicts as entailing psychological needs, sociological aspects, relationship, identities, long terms interests and requiring future oriented collaborations, comprehensive problem solving and active rehabilitation. Addressing the complexity of legal conflicts is an important task for the judge.<sup>58</sup> Such complexity increases when criminal conflicts are at stake, and many times an original conflict between a victim and offender, or an addiction problem based on health and mental conditions, is supplemented by a conflict between the state and the defendant over the charge according to a legal criminal norm.

Legal theory of conflict resolution, combined with an updated theory of conflict resolution and ADR are the most comprehensive and coherent paradigm to understand judicial activities in the shadow of settlement.

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<sup>56</sup> See KING, *supra* note 19.

<sup>57</sup> See, e.g., Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984); Welsh, *supra* note 54.

<sup>58</sup> For a detailed description of a variety of ADR procedures addressing such complexity, see Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).



### III. JCR AS A NEW PARADIGM FOR CONCEPTUALIZING (AND ASSESSING) JUDICIAL ACTIVITY

Following the insufficiency of the concept of settlement to capture judicial activities in most cases as described above, and the innovation embedded in a jurisprudential conflict resolution perspective, this section will seek a new paradigm for conceptualizing judicial activity in the shadow of settlement.

Understanding the activities of judges in relation to legal conflicts apparently requires knowledge in psychology, sociology, management, social work, criminology, and brain science and cultural studies. Judges manifest inter-personal skills, and their interaction with parties can be studied from a psychological perspective. Analysis of patterns of activity requires familiarity with insights from management; assessment of their ability to help rehabilitate victims and attackers in the criminal requires knowledge of criminology; their speech in the courtroom and their managerial decisions can be analyzed from a hermeneutical perspective and from a cultural perspective as well. Judges operate, whether they admit it explicitly or not, and even when denying it, as therapists, anthropologists, criminologists and managers although they have not been trained in such professions.<sup>59</sup> However, the basic training of judges is legal and they are usually evaluated according to their written reasoned opinions.<sup>60</sup> Naturally, their functioning according to the other professions is not optimal. This Article claims that the most comprehensive discipline, which incorporates knowledge in psychology, management, sociology, and so forth, while focusing on a pragmatic constructive intervention in a case, is conflict resolution. ADR is a parallel perspective for such a paradigm. Conflicts should be the unit of analysis for understanding judicial activities and the resolution or constructive engagement of them should become a practical goal of judicial activity, which corresponds with the theoretical importance if this goal.

The notion of conflict is broader than that of “dispute” and will be central here since it includes arguments over non-negotiable

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<sup>59</sup> Wall & Rude, *supra* note 13; Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. MIAMI L. REV. 46 (2004).

<sup>60</sup> For a critical review of methods for evaluating judges, see Choi, Gulati & Posner, *supra* note 16; Posner, *supra* note 16; Ryan C. Black & Ryan J. Owens, *Elevation Adaptation: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*, 7th ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES PAPER (2012); AMERICAN BAR ASSOCIATION, *supra* note 16.

human needs, identities, relational perspectives, concerns about self-esteem and reputation, third parties interests, long term consequences and other intangible elements which are crucial for the constructive processing of the legal case.<sup>61</sup> Unlike disputes, which focus on bargaining over material interests on which there are background norms, conflicts are about complex intersections of needs and other significant underlying elements, which are not given for distribution and many times grow with consumption. This research assumes that legal conflicts are always complex, multi-dimensional, polycentric,<sup>62</sup> linked to various cultural, economic and social aspects, and having relational dimensions. The choice to treat a legal conflict as complex and polycentric is considered interpretive in this Article. The multi-dimensional aspects of conflicts may not be addressed in any case, but such a framing is always possible.

Following the analysis above, and in order to overcome the insufficiency of the notion of settlement to capture the phenomenon of judicial activity, the next session provides a preliminary mapping of existing judicial practice, criminal and civil, while referring to the basic forms of ADR and conflict resolution. It begins with negotiation as a relatively mild intervention of judges in the conflicts while preserving an external position to the conflict. It continues with judges as arbitrators, which combine consent with authority, judges as mediators, and finally problem solvers, dialogue facilitators, restoring justice and designing systems.

A preliminary map of current judicial conflict resolution activity in reference a common sequence of legal cases<sup>63</sup> is suggested here:

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<sup>61</sup> On the difference between conflicts and disputes, see JOHN BURTON, *VIOLENCE EXPLAINED* (1997). A generalization would be that *disputes* that are confined to interpretations of documents, and disputes over material interests in respect of which there are consensus property norms, fall within a traditional legal framework. *Conflicts*, which involve non-negotiable human needs, must be subject to conflict resolution processes. These would include many cases of crime and violence. This Article assumes that each legal dispute can be viewed as more complex than it is and perceived as a conflict.

<sup>62</sup> The notion of polycentrism is introduced by Lon Fuller, borrowed from Polanyi. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978). Fuller defines polycentric situation as including situations often entailing “many affected parties and a somewhat fluid state of affairs. Indeed, the last characteristic follows from the simple fact that the more interacting centers there are, the more the likelihood that one of them will be affected by a change in circumstances, and, if the situation is polycentric, this change will communicate itself after a complex pattern to other centers.” *Id.* at 397.

<sup>63</sup> The stages of the trial are taken from Keren Weinshal-Margel, available at <http://elyon1.court.gov.il/heb/Research%20Division/dbeng.htm> (last visited Mar. 7, 2015).

	Sentencing Decisions in Criminal Cases	Sentencing Hearings in Criminal Cases	Decisions re. the Resolution/Disposition of the case	Main Hearings (trial)	Decisions re. Separate Motions (anytime during the proceedings)	Pretrial(s) Settlement Conferences
Judicial Negotiation	+	++	+	+	+	+++
Judicial Arbitration	+	+	+++		+	+
Judicial Mediation		+			+	+++
Judicial Restorative Justice		++				+
Judicial Facilitation of Dialogue and Transformation		++				+++
Judicial Problem Solving	++	++	++	++	++	++
Judicial Dispute Design		++			+	+++

As the table here suggests, most of the JCR activities are performed during the pretrial, and some of them are conducted in criminal cases when sentencing is at stake. Nevertheless, judicial negotiation over the question whether to decide the case continues along the phases of the trial, and problem solving which is today mostly conducted in special institutional settings is also conducted throughout the progression of the trial. The following analysis will present JCR as it unfolds in reality in reference to the basic forms of conflict resolution. It will also discuss the connection of each activity to the jurisprudential principles of conflict resolution, and the possible reframing and regulation of such activities to reflect these principles. The actual implementation of the conflict resolution perspective may require a more nuanced study of various kinds of legal conflicts, and constructions of specific legal procedures and judicial training to engage constructively in these brands of conflicts.

## IV. VARIETIES OF JCR

A. *Judicial Negotiation*

Negotiation is communication for the purpose of persuasion, and is the broad context of any conflict resolution activity.<sup>64</sup> In terms of judicial conflict resolution, negotiation takes place between the judge and the parties on the question of adjudication: the preference of the judge is often settlement while that of the parties is often adjudication. This dynamic is partly regulated through procedural law. The designated stage of “pretrial:” the unique role of “settlement judge”<sup>65</sup> or—in the criminal context—the first hearings, are all formal means to empower judges in such negotiations. Previous research has examined negotiation between parties to the conflict, and has conceptualized plea-bargaining as a negotiation between the parties and their lawyers.<sup>66</sup> In contrast, this research focuses on the negotiation that takes place between the judge and the parties. This negotiation takes place mainly in the first stages of the trial, before the actual hearings, and before the evidence are gathered, but in fact it may be relevant during other stages of the legal process.

Other incidents may involve negotiation over the approval of an agreement between the parties, following mediation or private bargaining. The dynamic related to this kind of negotiation crosses criminal and civil divides, and occurs both informally, in gatherings in judges’ chambers, and formally, through the opportunities offered by procedural law.

In terms of the conflict resolution perspective of the judge, judicial negotiation is usually not focused on transforming or resolving conflicts, but has a competitive quality and an adversarial approach, i.e., the judge is herself a party within a negotiation

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<sup>64</sup> ROY J. LEWICKI ET AL., *NEGOTIATION: READINGS, EXERCISES AND CASES* (2010).

<sup>65</sup> ELIZABETH PLAPINGER AND DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS*, [http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/\\$File/adrsrbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/$File/adrsrbk.pdf) (last visited Mar. 7, 2015); Susan FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57 (1993); Peter Robinson, *Opening Pandora’s Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques*, 27 OHIO ST. J. ON DISP. RESOL. 53 (2012); Peter H. Schuck, *The Role of The Judge in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

<sup>66</sup> Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010); David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200 (2011); Rebecca Hollander-Blumoff, *Getting to Guilty: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997).

about how to resolve the conflict. The prediction of the actual narrow decision in the dispute informs the judge during those interactions and no interest is usually expressed in addressing the broad interests or emotions underlying the case. Framing judges' activities in this context as more process oriented and constructive, empowering the parties to conduct their own negotiations; having judges focus on their own and other parties underlying interests for concluding the case; fractioning the conflict to a legal dispute which may be resolved and to other aspects which parties still have to deal with; addressing emotions and relationship; and working bottom up. All of these conflict resolution activities may improve judicial negotiation and JCR in general.

### B. *Judicial Arbitration*

Arbitration differs from adjudication since the terms and structure of the process are determined and shaped by the parties, and the outcome is usually confidential and not given to appeal. Judges function like arbitrators when they promote agreements between the parties that narrow the conflict scope and bound their judicial decision making authority. There are also some legal regimes in which, based on the parties' prior consent, presiding judges are authorized to terminate a conflict by rendering a final decision based on "compromise considerations."<sup>67</sup> In some places, an arbitration decision based on parties' consent is defined as "binding Judicial Dispute Resolution (JDR)."<sup>68</sup> Judges who decide according to such agreements between the parties many times do not have to provide reasoned elaboration for their decisions. They can decide, with parties' explicit endorsement, based on predictions, on high-low constraints provided by the parties, social justice considerations, indeterminacy of rules and facts, and even based on parties' interests or on impediments to conflict resolution. The combination of parties' consent with judicial authority makes this mode of judicial conflict resolution very interesting and popular.

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<sup>67</sup> J. E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964); J. E. Coons, *Compromise as Precise Justice*, 68 CALIF. L. REV. 250 (1980); Joseph Jaconelli, *Solomonic Justice and Common Law*, 12 OXF. J. LEG STUD. 480 (1992); M. Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CALIF. L. REV. 231 (2001).

<sup>68</sup> See SOURDIN & ZARISKI, *supra* note 18.

This mode of decision-making can expand the scope of discretion for judges in creative ways.

Judicial arbitration decisions combine the authoritative decision of the judge with the detailed consent of the parties to narrow it down or to change its scope.<sup>69</sup> Current research on arbitration focuses on private practice, and does not deal with the intersection of authority with parties' consent inside the courtroom. Such combinations may entail hybrid processes such as med-arb (a process in which the same neutral begins with mediation and if it does not work continues to arbitration), final offer arbitration (both in criminal and civil settings),<sup>70</sup> arb-med (a process in which a written decision in an arbitration between the parties is given and concealed in an envelope and mediation is conducted by the same neutral), and even arbitration based on interests or on overcoming existing barriers to conflict resolution may be offered by judges.

In terms of the jurisprudence of conflict resolution, judicial arbitration places a strong emphasis on process, in an effort to weave the unique procedure, combined with the measured criteria, which fits the concrete conflict at stake. It encourages creativity and consent of the parties to some extent, in reference to some aspects of the conflict management and deconstructs the big conflict into manageable questions for decision. It is a hybrid process that combines authority with consent. It places less emphasis on relationship development but does have a bottom-up aspect of letting the parties choose their own track of decision making.

### C. *Judicial Mediation*

Mediation is negotiation carried out with the assistance of a third party, which has no power to impose an outcome on disputing parties. It is common to differentiate between mediation that is based on a facilitative approach in search of underlying interests or needs and directive mediation that is based on positions and legal rights.<sup>71</sup> While the former addresses the conflict and its complexity by aspiring to find a broad creative solution through informed con-

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<sup>69</sup> David B. Wexler & Michael D. Jones, *Employing the 'Last Best Offer' Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation*, 6 PHOENIX L. REV. 843 (2013).

<sup>70</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 106, 157 (2012).

<sup>71</sup> Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Kimberlee Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

sent, the latter focuses on issues of rights and legal predictions and is directive in its nature. Judges use mainly the latter, narrow style of mediation due to their authority and lack of training in facilitative forms of mediation.<sup>72</sup>

Although judge's authoritative role usually interrupts with their mediation practice, judges in recent years usually go through mediation training and perceive their role as helping parties to resolve conflicts not only in a narrow legal sense.<sup>73</sup> The more successful and substantive judicial mediation are usually done with settlement judges, who are not assigned to decide the case on the merits.<sup>74</sup> Such practices may include meeting in the judges' chambers, separate meetings with parties, and nourishing a collaborative atmosphere as usually common in mediation rooms.

In terms of the jurisprudence of conflict resolution, judicial mediation takes into account the conflict in its entirety, aspiring to address emotions, relationship, interests and themes, while focusing on process and constructive development. It is hard to imagine a pure mediation process when judicial work is involved due to judges' authority, but elements of mediation can be practiced successfully when the right conditions and regulation are available.

#### D. *Judicial Restorative Justice*

Restorative Justice is an approach that focuses on the needs of victims and offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. It is a process in which all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm.<sup>75</sup> It is considered oppositional to retributive justice,<sup>76</sup> which is the common perception within the criminal justice process. Still, elements of restorative justice may be incorporated into the criminal justice system, and a more pluralistic notion of criminal procedure can be

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<sup>72</sup> See Wissler, *supra* note 13; Otis & Reiter, *supra* note 13; Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned for them for Trial*, 2006 J. DISP. RESOL. 335 (2006).

<sup>73</sup> EUROPEAN ASSOCIATION OF JUDGES FOR MEDIATION, <http://www.gemme.eu/en> (last visited Mar. 7, 2015).

<sup>74</sup> COOTER, *supra* note 15.

<sup>75</sup> JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002).

<sup>76</sup> HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990).

imagined.<sup>77</sup> Judges deal with situations of wrongs that require healing and transformation on a daily basis, mostly in criminal cases, but sometimes in civil cases as well. Indeed, the needs of victims in criminal conflicts have been addressed in many legal regimes in the last decade, but no holistic approach as to the transformation of such wrongs has been developed for such conflicts. Restorative practices such as encouraging apology, circle conferencing regarding punishment and creative solutions may be promoted in both criminal and civil conflicts. Such practices are usually common in the sentencing stage in criminal cases, may be part of the pretrial, and may even be relevant during the trial itself. In New Zealand restorative justice is institutionalized in some criminal courts proceedings, and circles are used to determine punishment collaboratively.<sup>78</sup> A proposal by Bibas combines adjudication with restorative justice by offering circles of juries, victims, offenders and their supporters, which gather in order to determine a punishment after hearing the all the stakeholders.<sup>79</sup> Such developments are still marginal within criminal law practice.

Restorative Justice is today practiced in civil cases as well, such as medical malpractice,<sup>80</sup> education,<sup>81</sup> and as a means to prevent violence. In terms of the jurisprudence of conflict resolution, judicial restorative justice works on the constructive processing of a traumatic event, while emphasizing process and expressing emotions. It addresses parties' needs and works bottom-up, while separating the relational work from other aspects of the legal conflict.

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<sup>77</sup> Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313 (2013).

<sup>78</sup> Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, *LEWIS & CLARK L. REV.* (forthcoming 2015).

<sup>79</sup> BIBAS, *supra* note 70, at 157 (“The idea would be to sever the useful procedures from the substantive anti-punishment philosophy. Restorative procedures could empower the parties to express themselves and heal in the course of having local lay juries gauge and impose deserved punishment. Restoration need not be at odds with retribution, but could complement it.”).

<sup>80</sup> Christopher B. McNeil, *Applying the Restorative Justice Model to Medical Malpractice*, 2 *RESTORATIVE DIRECTIONS* 12 (2007), available at <http://works.bepress.com/cbmcneil/2> (last visited Mar. 7, 2015).

<sup>81</sup> Lisa Cameron & Margaret Thorsborne, *Restorative Justice and School Discipline: Mutually Exclusive?*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 180 (Heather Strang & John Braithwaite eds., 2001); David R. Karp and Beau Breslin, *Restorative Justice in School Communities*, 33 *YOUTH & SOC'Y* 249 (2001).



### E. *Judicial Facilitation of Dialogue and Transformation*

Activities of conflict resolution many times do not focus on achieving a concrete result. Facilitators assume that the process itself has therapeutic value for the transformation of conflicts.<sup>82</sup> Facilitation of dialogue fosters “authentic” relations and encourages deliberation, revelation, reflection and relational healing between parties who are usually considered locked in identity conflict. One such an example can be the public hearing in class action in some legal regimes,<sup>83</sup> and out of court facilitation of dialogue among identity groups following a class action has been successfully experimented in the past,<sup>84</sup> but more inquiry needs to be made in order to understand the role of judges in facilitating dialogue among social identities inside the courtroom.

Although the open, transformative nature of dialogue seems to contradict the pragmatic tendency of the courts, judges employ it when a case reaches an impasse or communication has broken down.<sup>85</sup> In addition, when writing a decision, a judge may choose to verbally empower one side, regardless of the verdict.

In terms of the jurisprudence of conflict resolution, dialogue facilitation aims at relationship and identities and does not refer to interests and to efficient management. It is an open-ended activity, which focuses on procedure, and it works to develop constructive engagement.

### F. *Judicial Problem Solving*

Behind many legal conflicts, and especially criminal ones, lie social, economic, and sometimes medical issues and other conditions that make them much more complex than the legal case. The legal question is usually whether the defendant is guilty or not guilty or whether she wins or loses. Although many studies have been done on plea bargaining from a legal, economic and even a

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<sup>82</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2004).

<sup>83</sup> See, e.g., Justin Hansford, *Cause Judging*, 27 *GEO. J. LEGAL ETHICS* 1 (2014); John C. Duncan Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 *COLUM. J. ENVTL. L.* 171 (1999).

<sup>84</sup> Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 *OHIO ST. J. ON DISP. RESOL.* 105 (2006).

<sup>85</sup> This finding is based on judges' comments during a talk that I gave about judicial conflict resolution on March 2, 2014.

negotiation perspective, and some offers to regulate such mainstream activity have been raised,<sup>86</sup> no analysis of the judges' processing and its relation to the underlying conflicts and social problems behind the crime has been made so far. Understanding the role of judges in processing plea bargains as a problem solving activity, and not only as approving competitive bargaining between the parties, will provide a new perspective to deal with the phenomenon of crime and avoid recidivism. Such processing requires interdisciplinary collaborations and infiltration of knowledge from social sciences into judicial activity. It may also involve the victim, in cases there is one, and can address factors that are relevant for empowerment and growth. Although in recent decades special problem solving tribunals have developed in order to address specific problems such as addiction, violence or mental health disorders,<sup>87</sup> sufficient inquiry has not been made into problem solving as a mainstream judicial activity.

The jurisprudence of conflict resolution posits problem-solving activity of judges as supplementing the judicial work of balancing public interests with ad hoc intervention in a concrete case. The public interest to resolve a social problem as it reflects for individuals with their personal complexities. It provides a measured justice, hybrid and with concrete nuances. The focus on rehabilitation and long term interventions is a constructive framework to address chronic social problems in an innovative community-oriented way.

### G. *Judicial Dispute Design*

A basic function of judges in dealing with legal conflict is choosing the right process while considering the various incentives and conditions within the legal system, as well as the nature of the conflict and the interests of the parties. Existing literature of Dispute System Design ("DSD"), which is a branch of ADR,<sup>88</sup> deals mostly with systems outside the courts, and assumes a contingency scale that is open and does not include adjudication. Nevertheless, the research supposes propose that the choices judges make in de-

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<sup>86</sup> Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011); Maria J. Glover, *The Federal Rules of Civil Settlement*, 87 NYU L. REV. 1713 (2012).

<sup>87</sup> CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/> (last visited Mar. 7, 2015).

<sup>88</sup> WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1993).

termining their mode of intervention be studied and inquiries be made into the unique systems which judges implicitly develop in various conflicts and legal encounters, including the hybrids they construct.

Judges as dispute designers reflect the need of them to be primarily conflict resolution experts when they process legal disputes. Fitting the forum to the fuss ideally will be done through examining the relevant attributes of the case, while combining the right principles to construct the right method. Such a process of choice should repeat within any judicial intervention.

## V. FUTURE DIRECTIONS OF RESEARCH

According to the arguments developed in this Article, most of the judicial conflict resolution activities of judges are unregulated and mostly unconscious. The legal framework of the conflict is usually marginal to the actual negotiation that goes on in the courtroom. Judges are negotiators, arbitrators, mediators, and also perform more advanced forms of conflict resolution such as dialogue facilitation and restorative justice. In some institutional settings they do currently perform problem solving explicitly and consciously, but even this activity is under-theorized.

Many times judges who perform conflict resolution activities manage to constructively transform the legal conflicts brought before them, and contribute to their positive resolution. Some other times their activities may be unqualified and in contradiction with their authoritative role. Increased awareness of judges' judicial conflict resolution activities may improve judges' performance and contribute to conflict resolution in society. Continuing to explore and promote this role entails the combination of the following research goals.

*Theoretically*, to further develop a conflict resolution jurisprudence, which prioritizes consent over coercion as a leading value in the administration of law. It brings into law a "conflict" perspective, which assumes that legal rules are means for problem solving and social transformation of conflicts, and not instruments for command and control. It brings into the conflict resolution field a complex notion of authority-induced consent that has not been developed so far.

Specific theoretical objectives: (1) To create a closer link between the theoretical discussions of law, conflict resolution re-

search, and innovative practices recently developed on the ground—both in and out of court; (2) To map civil and criminal procedural law according to a conflict resolution scheme; (3) To cross the boundaries between criminal and civil law through adopting a “conflict” perception; (4) To develop a deep perception of access to justice and accountability which are conflict resolution oriented; and (5) To explore the regulative question of how to promote judicial conflict resolution activity.

*Empirically*, to explore the phenomenon of settlement (including plea bargaining) and the scope of its relation to judges’ activities; to examine the activity of judges when they are not writing full legal decisions; to inquire as to the extent in which such activities can be framed as conflict resolution interventions; and explore which forms of conflict resolution, if at all, are relevant for their understanding. Research will examine the activities of judges as the coordinators of conflicts, and will inquire about the effect of judges’ interventions on conflict dynamics.

Specific empirical objectives: (1) To understand the phenomenon of settlement quantitatively and its relation to variables such as judges’ activities; (2) To study judicial activity in promoting settlement through interviews with judges, lawyers and parties in three countries with different legal systems; (3) To study conflict resolution interventions of judges through observations of court proceedings; and (4) To study the effect of judicial conflict resolution activities on parties’ conflict narratives in civil legal conflicts.

*Prescriptively*, to generate recommendations for changing legal rules, codes of ethics, rules of conduct and policy framings, based on gaps articulated during the empirical stages of the research. Research will also promote a participatory endeavor to build training programs for judges that implement the new perspective of the judicial role. It will disseminate the research findings in an effort to enrich legal culture both in theory and practice.

Specific prescriptive objectives: (1) Raising judges’ awareness as to their conflict resolution role and designing with them collaboratively a workshop tailored to their needs; (2) Recommendations as to legal education and judges’ training; (3) Offering new ethical rules and amendments for criminal as well as civil procedural law based on research findings. This will follow deliberation on the tension between spontaneous judicial conflict resolution activity and regulation and the right balance between them; (4) Developing a structured complex measure to evaluate judges’ activities in promoting settlement and will constructing a method to profile

their conflict resolution activities. The measure will combine considerations of justice with principles of conflict resolution; best practices studied on the ground with interdisciplinary knowledge on conflicts; economical and efficiency considerations with emphasis on accountability and due process;<sup>89</sup> and (5) Dissemination of research findings through conference presentations and publication.

To conclude, this Article begins to develop a new perception of judicial activities and presents it theoretically and conceptually. The Article suggests that a main role of judges, and certainly in trial courts, is to resolve conflicts. Such a role requires special training, and it transcends the current pursuit of settlement in the shadow of the prediction of the judicial decision.

Study of this judicial role will result in more effective and transformative conflict resolution. Adjudication as resolving conflicts may be possible under this perspective, but it will become marginal in reference to other conflict resolution processes. Promoting a conflict resolution jurisprudence combined with judicial conflict resolution elaborated practice may be the next required revolution after the ADR phase. Transforming the adversarial model and changing legal culture may follow this sequence.

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<sup>89</sup> David C. Brody, *Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008).

