

# ADR AND COLLECTIVE TRAUMA: CONSTRUCTING THE FORUM FOR THE TRAUMATIC FUSS

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This paper explores the notion of collective trauma and discusses the implications of its theoretical underpinnings in two Alternative Dispute Resolution (ADR) practices. First, it offers the use of the Narrative Mediation model to construct a method to deal with collective trauma, as it affects individuals. Narrative Mediation is presented as the most comprehensive and transformative tool to address collective trauma. Second, an ADR approach to collective trauma is offered in cases where no mediation is possible. The concept of “fitting the forum to the fuss,”<sup>1</sup> which is a fundamental organizing mechanism in the ADR field, is applied in this stage, combined with the principles of Therapeutic Jurisprudence (TJ), a movement that addresses the therapeutic aspects of law. The integrated formula is used to devise the proper ADR mechanisms for the treatment of traumatic collective events. The claim is that acknowledging the therapeutic needs and collective significance of such events through process choice, supported by legal regulation, can help to overcome the trauma, or at least to minimize its anti-therapeutic effects. The collective trauma of 9/11 and the subsequent Victim Compensation Fund, which operated as a healing mechanism, will both be presented as a case study arguing for a forum choice that combines functional analysis with therapeutic elements.

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<sup>1</sup> FRANK E. A. SANDER & STEPHAN B. GOLDBERG, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 46, 46-68 (1994).

## I. INTRODUCTION

Ideals of restorative justice and alternative mechanisms of dispute resolution that have emerged and developed in recent decades offer new legal methods and public mechanisms that can be applied in the treatment of traumatic events. These processes focus on direct encounters between perpetrators and victims and claim to work as substitutes or complements to the traditional administration of justice through the more formal mechanisms of trial and punishment. Alternative mechanisms offer a nuanced and responsive way to address traumatic events and, in cases of collective trauma, may become the primary legal means to process the claims arising from it.

The importance of Alternative Dispute Resolution (ADR) for helping disaster victims and communities in need has relevance within the notion of trauma, especially in the ways in which traumatic events affect collectivities and shatter social consciousness.<sup>2</sup> In this paper, I will explore the notion of collective trauma and discuss the implications of its theoretical underpinnings in two ADR practices. First, I will offer the use of the Narrative Mediation<sup>3</sup> model to construct a method to deal with collective trauma as it affects individuals. Narrative Mediation will be presented as the most comprehensive and transformative tool to address collective trauma. Second, I will offer an ADR approach to collective trauma in cases where no mediation is possible. In order to do that, I will use the concept of “fitting the forum to the fuss,”<sup>4</sup> which is a fundamental organizing mechanism in the ADR field, using the principles of Therapeutic Jurisprudence<sup>5</sup> (TJ), a movement that addresses the therapeutic aspects of law. The integrated formula will

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<sup>2</sup> For elaborations on the notion of collective trauma and for discussions of it in context, see *TRAUMA AND MEMORY: READING, HEALING AND MAKING LAW*, (Austin Sarat, Nadav Davidovitch & Michal Alberstein eds., Stanford University Press 2008) [hereinafter *TRAUMA AND MEMORY*].

<sup>3</sup> JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (Jossey Bass Publishers 2000).

<sup>4</sup> SANDER & GOLDBERG, *supra* note 1, at 46–48.

<sup>5</sup> For an overview of the history, literature and activities of “therapeutic jurisprudence,” see International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/> (last visited Feb. 22, 2007). See also *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (David B. Wexler, ed. 1990); *LAW IS A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (Bruce J. Winick & David B. Wexler eds., 1996); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000); *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003).

be used to devise the proper ADR mechanisms for the treatment of traumatic collective events.<sup>6</sup> The claim will be that acknowledging the therapeutic needs and collective significance of such events through process choice, supported by legal regulation, can help to overcome the trauma, or at least minimize its anti-therapeutic effects. The collective trauma of 9/11 and the Victim Compensation Fund operating as a healing mechanism will both be presented as a case study for a forum choice that combines functional analysis with therapeutic elements. The argument below can be divided into a number of claims which will inform its consecutive parts:

*First* (Part II), collective trauma can be understood from a social constructionist perspective. According to this worldview, human consciousness is constructed by language, and in order to understand how trauma affects people, we have to analyze the way it affects human perception of reality.

*Second* (Part III), from a social constructionist perspective, there is a tension between the internal and the external view of trauma, where the internal viewer experiences trauma as a riddle and a gap, and the external viewer can describe it as a social phenomenon that has causal links, explanations and political dimensions. There is a healing potential in moving from the internal to the external point of view. Victims who externalize events by understanding their own location within the social conditions that helped to construct the experience of shock can gain more control and empowerment. This comprehension of the larger social condition entails demystification. This externalization process is essential for deconstruction of the traumatic event.

*Third* (Part IV), Narrative Mediation, a mediation method based on a social constructionist perception, is an ideal response to events of collective trauma. Its transformative potential derives from its critical and deconstructive mode. In an ideal situation, it involves encounters between victims and offenders and works by helping the participants to realize the social conditions that enabled the traumatic experience to occur. Transitioning from the “dominant discourse,”<sup>7</sup> which produces trauma and victimhood, to

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<sup>6</sup> For an implementation of TJ principles in cases of collective trauma that require asylum lawyering, see Tehila Sagi, *Even Heroes Need to Talk: Psycholegal Soft Points in the Field of Asylum Lawyering* (Bepress Legal Series, Paper No. 1014, 2006).

<sup>7</sup> WINSLADE & MONK, *supra* note 3, at 58. This notion is taken from the process of narrative mediation, described as the “dominating discourses position of both the mediator and the participants within a series of taken-for-granted assumptions about an issue with which they have to contend.” *Id.*

the “alternative discourse,”<sup>8</sup> which provides control and empowerment, can be achieved by understanding the social conditions of trauma and moving from the internal to the external perspective.

*Fourth* (Part V), in cases where no direct encounter between victims and offenders is possible and/or the social conditions for a transformative dialogue are still not ripe, applying other alternatives to conventional mechanisms is required in order to address the situation of collective trauma. The concept of “[f]itting the forum to the fuss,” combined with principles of TJ, can help to devise a proper process to deal with traumatic events that cannot be mediated.

The section that follows (Part VI) uses the collective trauma of 9/11 as a case study to apply the ADR approach suggested in this paper. The Victim Compensation Fund, established to process the grievances of the survivors, is examined according to the formula above, which combines Therapeutic Jurisprudence with pragmatic concerns. The last section (Part VII) discusses the broader significance of adopting a therapeutic approach to dealing with collective trauma.

## II. SOCIAL CONSTRUCTIONISM AND TRAUMA

Providing a definition of trauma from a discursive perspective is based on a worldview of “social constructionism,” which assumes language as constituting reality. According to this view, people’s consciousness is constructed by language, and in order to understand how trauma operates upon them, we have to analyze the way it affects their perception of reality. A social constructionist worldview entails several features,<sup>9</sup> of which I would like to emphasize three:

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<sup>8</sup> *Id.* at 61:

As these dominant discourses are exerting their influence, alternative ways of speaking or thinking are also finding expression in some communities of interest. These alternative discourses may be expressed in small pockets of resistance, and parties to a dispute will at least be aware of them. Wherever there is injustice or oppression there will be protest.

<sup>9</sup> An example of outlines with such features can be taken from WINSLADE & MONK, *supra* note 3, at 37–41 (discussing the following features: antiessentialism, antirealism, language as a precondition for thought, and language as a form of social action). See also VIVIEN BURR, AN INTRODUCTION TO SOCIAL CONSTRUCTIONISM (Routledge 2001) (1995) (the work from which Winslade & Monk draw these features).

*Discourse:* A social constructionist worldview maintains that language is a precondition of thought and that conceptually it precedes reality. People conceptualize their life experiences through language games<sup>10</sup> and texts that determine the boundaries of their consciousness. “To imagine a language means to imagine a form of life.”<sup>11</sup> Traumatic events reflect a hole or gap in a person’s conceptualization system or form of life. Victims of trauma do not have suitable language games to contain their suffering, and their healing process requires regaining the lost discourse which the trauma entails. The notion of discourse<sup>12</sup> is closely related to narrative and storytelling,<sup>13</sup> since it is through these mechanisms that people interpret their experiences.

*Anti-realism:* According to a social constructionist worldview, there is no pure “objective reality,” and facts are always considered as viewed from some perspective. Perspectives are relative to particular cultural or social versions of reality.<sup>14</sup> An event experienced as traumatic for one individual may not be experienced as such by another, and even in the case of collective trauma, its operation on individuals is always diverse. Trauma is never a matter of pure facts; it is rather a social construct that reflects diverse processing through distinct narratives and texts.

*Identity:* The experience of the self under a social constructionist worldview is connected to multiplicity and diversity. The self is constituted by the myths, traditions, beliefs, assumptions, and values of one’s particular culture, all developed within discourse.<sup>15</sup> Trauma always shatters identities in ways that threaten the sense of selfhood and security. Since our cultural background defines our identity, understanding this background and deconstructing some

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<sup>10</sup> The notion of “language game” is taken from LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3rd ed. 1958). “We can also think of the whole process of using words . . . as one of those games by means of which children learn their native language. I will call these games “language games” and will sometimes speak of a primitive language as language game.” *Id.* at 50.

<sup>11</sup> *Id.* at 80.

<sup>12</sup> For a definition of the notion of discourse, see WINSLADE & MONK, *supra* note 3, at 42 (“[D]iscourse is both the process of talk and interaction between people, and the products of that interaction. Talk tends to happen in recursive patterns within particular locales, and we can therefore speak about these patterns as particular discourses.”).

<sup>13</sup> For the importance of storytelling and narrative in mediation, see Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the ‘Storytelling’ Metaphor*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES* 48 (Joseph P. Folger & Tricia S. Jones eds., Sage Publications 1994).

<sup>14</sup> See WINSLADE & MONK, *supra* note 3, at 38.

<sup>15</sup> *Id.* at 44–45.

of its assumptions may be an important stage in overcoming trauma. The inability to find the proper language and the cognitive gap that characterizes the traumatic event may result in a loss of the experience of a person, and of the self. Exposing the elasticity and cultural arbitrariness of some of our identity perceptions may help victims of trauma to switch to another subjective position and recover from the trauma experienced by the previous identity.

### III. INDIVIDUAL AND COLLECTIVE TRAUMA

In everyday language, trauma is mainly used in individual and medical terms. Beginning in the 19th century, the concept of *psychological* trauma replaced the original meaning of the word, which referred to wounds or physical injuries.<sup>16</sup> Trauma studies began as a riddle for psychiatrists and doctors, and trauma was first identified and examined only in specific populations, such as persons injured in railway accidents, women, and soldiers.<sup>17</sup> Only after the Vietnam War was Post-Traumatic Stress Disorder (PTSD) identified as a distinct medical entity. In 1980, the American Psychiatric Association added PTSD to the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-III) nosologic classification scheme. Viewing trauma as an external etiological event has become a way to imagine the human condition. Nevertheless, individuals haunted by traumatic memories and who manifest post-traumatic syndromes reveal something about our construction of reality, and transferring these personal experiences to collective understandings may help us to develop new perspectives on contemporary phenomena.

Most research on trauma has focused on individual psychology and been dominated by a clinical perspective. Recent studies even reduce trauma to its *biological* dimension. Some have tried to find a pill to treat it — a “magic bullet” solution, typical of many areas

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<sup>16</sup> See MedTerms Medical Dictionary, <http://www.medterms.com/> (last visited Jan. 10, 2006). Until today, in conventional medical language outside psychiatry, “trauma” represents “a serious or critical bodily injury, wound, or shock.” This definition is often associated with trauma medicine practiced in emergency rooms and represents a popular view of the term. “Trauma” is the Greek word for “a wound” but also for “damage or defeat.” On the history of trauma as a concept, see generally RUTH LEYS, *TRAUMA: A GENEALOGY* (Univ. of Chicago Press 2000).

<sup>17</sup> See ALLAN YOUNG, *THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER* (Princeton Univ. Press 1997).

of medical thought.<sup>18</sup> Yet in recent decades, other directions of trauma research have emerged, guided by more interpretive methodologies. Some of these consider tensions between *individual* and *collective* trauma.

A central question when dealing with collective aspects of trauma is whether traumatic events operate in the same way in communities as they do in individuals. Kai Erikson's work on disasters suggests that "sometimes the tissues of community can be damaged in much the same way as the tissues of mind and body," and that the term *trauma* can thus "serve as a broad social concept as well as a more narrowly clinical one."<sup>19</sup> Events such as the 9/11 attack or Hurricane Katrina may traumatize groups on a national or even on a global scale. Due to mass media and the internet, the influence of such events can exceed those directly affected, and reach remote viewers who may become victims of trauma without actually being present at the event.<sup>20</sup> However, as Saunders and Aghaie have shown, the application of clinical categories to social constructs may have its own problematic aspects: "Can the category of PTSD be applied to societies or nations? Are communities 'split' in the same way that an individual mind is? Or is this merely a convenient — or misleading — metaphor?"<sup>21</sup> In response, some scholars insist on distinguishing between trauma as it affects the individual and trauma as a broader cultural process.<sup>22</sup> These theories of cultural trauma posit memory as "usually mediated through newspapers, radio, or television," such that it "always involves selective construction and representation," and inevitably "engages a 'meaning' struggle."<sup>23</sup> The cultural construction of trauma, it is argued, begins with a claim to "some fundamental injury that is then transmitted through influential cultural agents such as the mass

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<sup>18</sup> See Marilyn Marchione, *Scientists Work on 'Trauma Pill'*, ASSOCIATED PRESS, Jan. 14, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2006/01/14/national/a100404S51-DTL> (last visited Dec. 3, 2008).

<sup>19</sup> KAI ERIKSON, *A NEW SPECIES OF TROUBLE: EXPLORATIONS IN DISASTER, TRAUMA, AND COMMUNITY* 228, 230 (Norton 1994).

<sup>20</sup> On the emergence of the category of "PTSD of the virtual kind" as part of the 9/11 aftermath, see Allan Young, *PTSD of the Virtual Kind — Trauma and Resilience in Post 9/11 America*, in *TRAUMA AND MEMORY*, *supra* note 2.

<sup>21</sup> See Rebecca Saunders & Kamran Aghaie, *Introduction: Mourning and Memory*, in *COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST* 16–17 (2005).

<sup>22</sup> See, e.g., RON EYERMAN, *SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY* (Cambridge Univ. Press 2002).

<sup>23</sup> *Id.* at 2–3; see also JEFFREY C. ALEXANDER, RON EYERMAN, BERNHARD GIESEN, NEIL J. SMELSER, & PIOTR SZTOMPKA, *CULTURAL TRAUMA AND COLLECTIVE IDENTITY* (Univ. of Cal. Press 2004).

media and religious, aesthetic, legal, scientific, and state institutions, which define the nature of the trauma and the victim, establish the relation of the trauma to those who experience it only indirectly, and assign responsibility.”<sup>24</sup>

The 9/11 collective trauma for example, according to this view, cannot be understood without reference to its transmission and treatment through public agents, such as mass media, legal and religious institutions, and other means of communication. This perception of collective trauma as culturally constructed, then, is a very different model than one that treats societies more or less as individuals and provides a more nuanced notion of collective trauma. Understanding the trauma of the individual, according to this view, always requires an inquiry into the cultural narratives and ideologies that inform her.

The study of collective trauma is influenced by a rich tradition that can be traced back to the second half of the twentieth century, and is still very influential. It begins with a critique of liberalism and its over-emphasis on individualism. While the initial focus of trauma studies was on the experience and symptoms of the individual, interest in the cultural background that produces the experience was always influenced by trauma studies. The hysterical women analyzed by Freud and Charcot<sup>25</sup> were part of a patriarchal Victorian culture which enabled their trauma and informed its contents. The same is true of the railway workers and their injuries. The development of trauma studies is marked by historical milestones, such as World War I, World War II, the Vietnam War, September 11th and so forth, which produced substantial shifts in the understanding of trauma. The focus on the symptoms and treatment of the individual has gradually been supplemented by an interest in the cultural aspects of trauma, and reference to “cultural trauma,”<sup>26</sup> “collective trauma”<sup>27</sup> and “social suffering”<sup>28</sup> has become more common during the last decade.

Emphasis on social construction, and the use of cultural narratives as means to explain the self, produced a shift in trauma analysis by tying it to broad social structures and moving away from the

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<sup>24</sup> *Id.* at 21.

<sup>25</sup> SIGMUND FREUD, *On the Psychological Mechanism of Hysterical Phenomena*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, Vol. III, 25–39 (1893).

<sup>26</sup> ALEXANDER ET AL., *supra* note 23, at 1.

<sup>27</sup> See TRAUMA AND MEMORY, *supra* note 2, at 3.

<sup>28</sup> *Id.* at 168.

individual as the primary unit of inquiry.<sup>29</sup> Instead, collective identity became the unit of analysis: a group that shares ethnicity, nationality, gender or religion is now considered the primary unit that experiences trauma. The focus on collective trauma is, in this context, an important step within the critique of liberalism, but deeper theoretical analysis takes this critique a step further by returning to the interaction of identities and narratives.

Summarizing the intellectual development discussed above, the notion of identity in trauma embeds at least three phases of liberal thinking. First, there is the classic idea of autonomy and identity as a secret of the self, which can be invaded or exposed through traumatic events. Second, it carries with it the collectivist notion of identity as constructed by culture and society, explained by narratives and texts that shape the horizons of perceptions and influence entire societies. Under this notion of identity, trauma is indeed explained by a rift in the collective texture upon which all individuals depend. Third, the “multicultural identity” perspective, as developed in late 20th century,<sup>30</sup> introduces the notion of multiple identities and assumes that individuals are not fully autonomous, but rather carry the unique stamp of cultural interaction that conditions them. In this view, individuals have possibilities of agency, even if limited, because of the interplay between their identities and their awareness of their constructed locations. It can be also claimed that every trauma is collective in the sense of being conditioned by cultural narratives and texts that enable the experience of trauma to emerge.

To conclude, collective trauma is presented as a traumatic event that is transmitted through various social institutions, influences group identities and shakes their perception of reality. It operates on the group as a unit, but mainly, and in a more nuanced sense, on the individual members of the group with their multiple identities and diverse cultural locations.

#### IV. RECONSTRUCTING TRAUMA IN DISCOURSE

In the previous sections, understanding collective trauma followed the discussion of trauma from a social constructionist perspective. The idea of reconstructing trauma in discourse takes the

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<sup>29</sup> ALEXANDER ET AL., *supra* note 23, at 1–30.

<sup>30</sup> See, CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (New York: Basic Books 1973)

discussion to the next stage by suggesting how to work with these theoretical assumptions. As internal phenomena that occur in the mind, traumatic events exist between epistemology and ontology, as reflections of the social constructions under which they arise. Their existence is, in a sense, only in the eye of the beholder, as a disruption of the regular flow of perception. Indeed, one symptom of PTSD is its origin in personal perception, which can only be verified or reported by the individual who experienced the particular trauma.<sup>31</sup> In a cycle of infinite repetition, traumas impose themselves on their victims as a sort of destiny from which escape is never possible.<sup>32</sup> These events produce a gap in victims' perceptions of reality, which are carried as a heavy, secret burden that needs to be unloaded.

Viewed from another angle, traumatic events can be described from the 'outside' as natural consequences of specific contextual interactions, characterized by specific cultural and social conditions. Traumatic events are often ascribed to human actions and to violence. Even when natural events, such as severe hurricanes, result in harm, the experience of trauma usually involves some human factor that can be identified as being responsible for the harm. A social constructionist perception will always emphasize the cultural and ideological aspects of any trauma and will try to politicize the traumatic event, which is usually interpreted in individualistic terms, by exposing its social factor.

The tension between the singular, horrifying internal experience of trauma and the external explanatory cultural account of it has an interesting appearance: the external viewer who provides social explanations for the traumatic event does not usually experience trauma from the internal point of view, or is able to describe the event from the external point of view only through a split with her experiencing self. This outsider does not perceive the gap that constitutes the trauma, because the consequences were pre-existing, normalized within the social and cultural conditions which provided the subtext for the emerging "trauma." A number of examples can be given to illustrate a collective trauma approach:

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<sup>31</sup> For an overview of the development of the notion of trauma, see YOUNG, *supra* note 17.

<sup>32</sup> See also CATHY CARUTH, *UNCLAIMED EXPERIENCES: TRAUMA, NARRATIVE, AND HISTORY* 11 (The John Hopkins Univ. Press 1996) ("In its most general definition, trauma describes an overwhelming experience of sudden or catastrophic events in which the response to the event occurs in the often delayed, uncontrolled repetitive reappearance of hallucinations and other intrusive phenomena.").

*Traumatic experience of rape:* During the second half of the twentieth century, new approaches to “the woman’s question”<sup>33</sup> have emerged, challenging old regimes of subordination and abuse. Feminist writers have emphasized the suppressed voice of women in the public sphere,<sup>34</sup> which is mostly controlled by men, and have offered various ways to overcome patriarchy through education, legislation and institutional reforms.<sup>35</sup> Some of the feminist writers have emphasized women’s sexuality as suppressed and controlled. Among these, the most famous account of women subordination in legal culture is offered by Katherine MacKinnon. MacKinnon describes American society as “rape culture,”<sup>36</sup> and explains how women’s sexuality is repressed and regulated by the existing legal regime.<sup>37</sup> Sex crimes are not mere violence, according to MacKinnon, and should be understood as political acts of subordination. The traumatic experience of rape, according to MacKinnon, is thus much broader than the single violent event, and is part of a culture in which the rape of women was, at least not long ago, normalized and regulated.<sup>38</sup> Following this approach, it can be argued that in order to overcome a traumatic rape experience, the victim should be empowered not only in terms of the psychology of the individual, but also in terms of the group feminine identity which is an integral component within the rape experience. Raising consciousness for women is, in that sense, a way to transform the suppressive regime which enabled the rape.

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<sup>33</sup> See SHOSHANA FELMAN, *WHAT DOES A WOMAN WANT?: READING AND SEXUAL DIFFERENCE* (1993) (noting that the expression “the woman’s question” is taken from Sigmund Freud who asked this famous question in a letter to Marie Bonaparte).

<sup>34</sup> For an exploration of a range of legal feminist approaches, see *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rossan Kennedy eds., 1991).

<sup>35</sup> See *id.* Legal feminist approaches are usually divided into three waves. The first is the liberal wave, which focuses on achieving more legal and formal rights for women and advancing their status in society. The second is “relational feminism,” which celebrates feminine “ethics of care” and the unique voice of women. The third is “radical feminism,” which was inspired by Marxist critique and exposes the subordination of women in law and society.

<sup>36</sup> Catharine A. MacKinnon, *Sexuality, Pornography, and Method*, 99 *ETHICS* 2, 311, 1989.

<sup>37</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* 171–83 (1983).

<sup>38</sup> See, e.g., MacKinnon’s description of the legal categories which defines rape. *Id.* at 175:

The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is depends upon who she is relative to a man who wants her, not what she says or does . . . . The paradigm categories are the virginal daughter and other young girls, with whom all sex is proscribed, and the whore-like wives and prostitutes, with whom no sex is proscribed. Daughters may not consent; wives and prostitutes are assumed to, and cannot but.

*Terrorism:* Interest in terrorism as a cultural phenomenon has increased since 9/11 and is considered one of the prominent problems facing developed countries in the twenty-first century. The response to the attack on the World Trade Center provides another example of the tension between external and internal accounts of trauma. An interesting account of the ideological background for terror in our era is offered by philosopher Slavojek who explores the ideological and cultural conditions which enabled the 9/11 trauma to emerge.<sup>39</sup> In his analysis, Slavojek describes the spectacularly horrifying collapse of the Twin Towers as the “real” which was prepared by, fantasized about, and encouraged by the West itself, based on deep social and cultural preconditions. According to his view, the deep economic rift between the digitalized First World and the Third World “desert of the real”<sup>40</sup> nourished and enabled the attack. Slavojek’s analysis offers an external account that provides explanations for the attack and portrays it as having been overdue. The more familiar and prevalent response to the 9/11 trauma came, of course, from the internal perspective of horrified individuals on a collective scale, experiencing a virtual trauma.<sup>41</sup> These individuals were not able to give the events of 9/11 any meaning or logic except to portray them as malicious acts of terror, performed by individuals. Addressing the trauma in its complexity by acknowledging its collective sense might begin, at least for the broader community, if not for the victims, by reflecting on the material and cultural conditions that enabled it, according to Slavojek. Education and social justice, rather than war, could become a primary response to trauma following such realization.

*Political Assassinations:* Clearly, political assassinations have political motives, though they are often depicted as unique cases driven by individuals who are considered insane or severely disturbed. An example can be drawn from the case of the assassination of Israeli Prime Minister Yitzhak Rabin. The split in the responses to the assassination reflects the tension between the internals, who perceive the trauma in individualistic terms, and the externals, who point to its collective explanatory dimension. Rep-

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<sup>39</sup> SLAVOJIEK, WELCOME TO THE DESERT OF THE REAL!: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES (Veiso 2002).

<sup>40</sup> *Id.* at 33.

<sup>41</sup> For a discussion of the 9/11 event as creating a unique form of trauma, “trauma of the virtual kind,” see ALLEN YOUNG, *supra* note 17. For a discussion of the 9/11 event as a “national trauma,” see JOEL B. EISEN, *The Trajectory of “Normal” after 9/11: Trauma, Recovery and Post-Traumatic Societal Adaptation*, 14 FORDHAM ENVTL. L. REV. 499 (2003).

representatives of the right wing, for the most part, expressed the internal point of view, pointing to the maliciousness and marginality of the murderer, Yigal Amir, depicting him as the “rotten apple” of the community. Representatives of the left, including the Prime Minister’s family, pointed to the many inflammatory political speeches before the assassination, and to the settlers and their leaders as enabling the traumatic event. The internals see malicious individuals driven by evil moral forces, and the external cultural experts view social and cultural conditions as leading to the act of assassination.<sup>42</sup>

*Racial Discrimination:* A person can be traumatized by being excluded from a group due to color or race. What may seem on the surface as a fair criterion, such as “separate but equal,” may turn into an offensive discriminatory policy which deprives black children of motivation and reinforces their feelings of inferiority.<sup>43</sup> Even an IQ test, which measures intellectual skills on an individual scale, can be discriminatory when it fails to acknowledge cultural differences among ethnicities and racial groups. Overcoming the trauma which institutional racism produces requires exposing the racial bias, declaring the symbolic new regime, and transforming the public sphere in a way that will prevent the trauma from arising again. Desegregating schools or reformulating exams in ways that encompass multiple cultures may address the collective aspect of the trauma and may enable avoidance of trauma in the future. The significant progress made in the last century in the area of racial discrimination can serve as a model for addressing other types of collective trauma.

As the above examples demonstrate, traumatic events often reflect structural violence;<sup>44</sup> therefore, politicizing their occurrence may help to deconstruct and transform the horrifying experiences they create. Patriarchy sometimes results in child abuse, and overcoming the trauma of abuse may require challenging and reconsti-

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<sup>42</sup> See Ariela Azulai, *The Ghost of Igal Amir*, 17 THEORY AND CRITIQUE 15 (2000).

<sup>43</sup> See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>44</sup> Anthropologists describe “structural violence” in terms of both “chronic, historically-entrenched political-economic oppression and social inequality” and mechanisms by which “social forces ranging from poverty to racism become embodied as individual experience.” Structural violence renders individuals and communities vulnerable, in multiple and compounding ways, to discrimination, racism, poverty, disease, and injury as well as more direct assaults on personhood, dignity, and physical integrity. Phillip Bourgois, *The Power of Violence in War and Peace: Post-Cold War Lessons from El Salvador*, in 2 ETHNOLOGY 5, 8 (2001); Philippe Farmer, *On Suffering and Structural Violence: A View From Below*, in SOCIAL SUFFERING (Kleinman ed., Univ. of Cal. Press 1997).

tuting the family regime.<sup>45</sup> Child neglect and poor socio-economic conditions may result in crime, and understanding this may help to promote restorative justice processes between victims and offenders.<sup>46</sup> Colonialism, which is the extension of a nation's sovereignty over territory beyond its borders through domination, ends in local violent resistance and withdrawal. Imbalance in the global economy can result in rebellion and terrorism.<sup>47</sup>

A conclusion which can be drawn from this discussion is that sociological and historical accounts can explain traumatic events as being derived from a sequence of events that have causal links. According to this approach, trauma is described as *always* collective, i.e., always explained by reference to external social forces and to ideological frameworks. Because consciousness is politicized, each trauma has a public dimension that explains its effect on the individual. Part of dealing with trauma is addressing this social dimension.

Responses to trauma in its collective dimension should, according to the description above, encourage a shift from the internal to the external point of view. From the perspective of the external viewer, the causes of trauma may be responsive to treatment through manageable pragmatic mechanisms. Education, consciousness raising and restructuring are examples of tools that may transform the conditions that enabled trauma. Part of the experience of trauma, according to this collective view, reflects a lack of complete understanding of the underlying subtexts and insufficient preparation of individuals for the approaching materialization. The individual experiences a loss, shock, and an inability to find meaning in the new reality produced by the event. The victim's reality is shaken by the occurrence of a surprising event that seems fundamentally incomprehensible and disorienting.<sup>48</sup> Response to the fears should provide reasons and explanations by exposing the ideological and cultural background of the event. Politicizing these can help to transform and reconstruct the internal horrifying expe-

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<sup>45</sup> For a discussion of such a process in the film *Feston*, see TRAUMA AND MEMORY, *supra* note 2, at 263.

<sup>46</sup> See *id.* For a discussion of the film *Son* see Alberstein, in TRAUMA & MEMORY, *supra* note 2, at 263.

<sup>47</sup> See the discussion of Slavojek, above, *supra* notes 39, 40 and accompanying text.

<sup>48</sup> See CARUTH, *supra* note 32, at 22:

The trauma of the accident, its very unconsciousness, is borne by an act of departure. It is a departure that, in the full force of its historicity, remains at the same time in some sense absolutely opaque, both to the one who leaves and also to the theoretician, linked to the sufferer in his attempt to bring the experience to light.

rience. The destabilization created by such “trauma-work” can both produce changes in the underlying conditions and transform the subjective experience of trauma.<sup>49</sup> In this paper, the tool of Narrative Mediation is offered as a means for creating such destabilization.

## V. MEDIATING TRAUMATIC EVENTS THROUGH NARRATIVE MEDIATION

The Alternative Dispute Resolution (ADR) movement in the U.S. emerged during the late 1970s, became institutionalized, and has spread throughout the country, transforming the judicial system to include various mechanisms and alternatives to adjudication as part of its routine services.<sup>50</sup> A prominent mechanism within the range of alternatives offered by ADR proponents is the mediation process, which is an intervention by a third party who facilitates an agreement between the parties to the dispute.<sup>51</sup> Mediation is not merely an alternative, or a private process within this framework, but is instead a discourse that carries legal meaning and can be used to enforce and implement the Rule of Law,<sup>52</sup> encompassing its highest values. Mediation represents the extreme “alternative” to adjudication, and thus can be used as a paradigm of dispute resolution in law.<sup>53</sup> In terms of the interdependence, which underlies

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<sup>49</sup> An implicit claim assumed throughout this discourse is that individualization through politicizing of the self is a valid method of addressing collective trauma, and that this reframed modern liberal ideal allows for a valid incorporation of social, cultural, and post-modern critique regarding the liberal subject. When the individual trauma is perceived through the lens of applicable narratives and texts, this inner horrifying experience is taken not as a private incomprehensible feeling, but as an objective reality which can be explained, deconstructed, and understood. Though this personal pain is inaccessible, the texts and narratives that surround it can be explored and reconstructed. In this way, the traumatic situation can be transformed as well.

<sup>50</sup> For an overview of the development of the ADR movement, see STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (3d ed. 1999).

<sup>51</sup> For various definitions of mediation, see MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 266–67 (Aspen Publishers 2005).

<sup>52</sup> “The Rule of Law” implies a commitment to control society by law and not by arbitrary force. Within the context of this paper, it implies the symbolic order of the community, which has full formal expression in legal rules and precedents, but which also carries beliefs and ideologies that must be internalized by the subjects of the law. For an example of an overview of the concept see Helen Yu and Alison Guernsey, *What is the Rule of Law?*, available at [http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml).

<sup>53</sup> On mediation as “the sleeping giant of dispute resolution” as described by Sander, see Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 55 (1996). See also BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* 189

any dispute, mediation provides the most comprehensive intervention with the highest transformative potential. Conflicts that involve traumatic experience can transform by using victim-offender mediation designed to deal with the trauma. The development of different models of mediation in the ADR field can be described as representing a gradual shift from a more managerial positivistic perspective to conducting mediation to a more relational orientation and finally to an interpretive framework for mediation practice.<sup>54</sup>

The most interpretive model of mediation, inspired by the concept of “social constructionism,” as discussed in this paper, and built on a postmodern worldview, is the Narrative Mediation model.<sup>55</sup> This model views mediation as operating within narratives and discourse, and defines the core of the mediation process as the deconstruction of the dominant story of the conflict in favor of an alternative story in which parties can rearrange their relationship in a more constructive way.<sup>56</sup> Narrative mediators should be capable of reading the narratives of the parties and helping them to identify their claims for entitlement and to examine them critically. Under this view, mediation is perceived as a process of co-authoring an alternative story through cultural criticism,<sup>57</sup> and the assumption is that beneath the oppressive story of conflict, there is a liberating progressing narrative of tolerance and respect. In contrast to other models of mediation, which emphasize real needs<sup>58</sup> or emotions,<sup>59</sup> this model assumes the prevalence of language and social consciousness over material conditions or shortage of resources. Reality is always perceived and thus can always be reimagined. Of all models of mediation, this one seems the most appropriate to deal with trauma in its collective sense.

As the previous sections demonstrate, collective trauma can be portrayed as a shattered reality for the individual, existing within a social and cultural context, which can provide causal ex-

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(2000). On how the “law of ADR” represents the dispute resolution emphasis in law, see Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

<sup>54</sup> For an elaboration of this claim, see Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 315 (2006).

<sup>55</sup> WINSLADE & MONK, *supra* note 3, at 31–56.

<sup>56</sup> *Id.* at 108–11.

<sup>57</sup> WINSLADE & MONK, *supra* note 3, at 82–92.

<sup>58</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

<sup>59</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

planations for the event. An ideal treatment of trauma in its collective sense, according to this view, should aspire to politicize the experience of the individual by transferring her from sharing only the internal point of view to perceiving her location within a socio-political context. This involves a shift to the external point of view, or at least supplementing the internal one with an external perspective. A victim of sexual harassment by her superior in the workplace, for example, can shift from blaming herself and feeling weak and alone in the situation, to adopting a critical political perspective of the events and understanding them in the context of the subordination of women in general.<sup>60</sup> Understanding acts of sexual harassment in the workplace as a means of subordination and as having a political dimension may help to deconstruct a personal event and give it some meaning.<sup>61</sup> Thus, reinterpreting a traumatic event in terms of socio-political causes can neutralize its horrifying dimension and empower the victim.

In terms of narrative mediation, the “dominant discourse,”<sup>62</sup> which is the basic framework in which the mediation work is done, can be described as the closure of the individualistic narration of trauma, which reflects the internal point of view. Perceiving trauma as an evil suffered by the individual, which cannot be fully explained and which has only a private dimension, invites horror and surprise as natural responses to the event. The perpetrator of the traumatic event is perceived as malicious and evil per se, and the entire interaction does not embrace a cultural-social account of the case. Deconstructing this dominant discourse through Narrative Mediation methodology, can be achieved by exposing the ideological narratives, which instruct the supposed agent within the traumatic situation. Exposing the underlying socio-political context of male superiors’ abuse of women, for example, and presenting it as an “exaggerated entitlement” perception,<sup>63</sup> in terms of narrative mediation, can help to transform the abusive situation altogether. The operation of both victim and offender within an ideological narrative based on “exaggerated entitlement”<sup>64</sup> percep-

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<sup>60</sup> See discussion of MacKinnon, *supra* notes 36–38.

<sup>61</sup> See ORIT KAMIR, *EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW* (2001).

<sup>62</sup> WINSLADE & MONK, *supra* note 3, at 58.

<sup>63</sup> *Id.* at 94; see also *id.* at 58 (“The sense of what a person is entitled to expect from another person lies in the background of any conflict situation. Although individuals often have their own slants or emphases on these expectations, the expectations are also largely built on notions accepted within the individual’s cultural world.”).

<sup>64</sup> *Id.* at 97.

tions should be criticized and replaced by more progressive perspectives. Being constructed in language makes these perceptions more elastic and flexible. People do not function as fixed identities of perpetrators and victims, good and bad, but rather switch between subject positions and can become “progressive” through a specific gesture, within a certain conflict. “Gender entitlement,” for example, tends “to privilege the interests of men over the interests of women.”<sup>65</sup> Acknowledging this could contribute to an effort to switch to other more advanced notions of entitlement. Mediating patriarchal entitlements entails exposing them; questioning their legitimacy; challenging their hold upon the parties; and inviting them to take responsibility for their lives.<sup>66</sup> Shifting from the dominant traumatic discourse to the alternative healing story can be done by recovering repressed positive experiences in the relationship of the parties, developing a new narrative that emphasizes more care and collaboration, and asking open constructive questions.<sup>67</sup>

In cases of trauma, significant preparation and education should be carried out with the perpetrator before confronting the victim. A purely facilitative neutral mode of mediation is not possible in cases of trauma, where empowering the victim is a main focus. Thus, elements of restorative justice should enter the narrative mediation process and ensure a safe space for the mediation work.<sup>68</sup> In cases where no direct encounters can succeed, other forms of ADR should be considered.

## VI. FITTING THE FORUM TO THE TRAUMATIC FUSS

Understanding the notion of collective trauma does not imply choosing only one method of ADR and always facilitating direct encounters between victims and offenders through narrative mediation. Mediation can, indeed, be considered as the highest form of communication and transformation of conflicts, and can always be

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

<sup>66</sup> *Id.* at 105–07.

<sup>67</sup> *Id.* at 84–89.

<sup>68</sup> For a brief outline of the restorative justice principles, see Restorative Justice, <http://www.restorativejustice.org/intro/> (last visited Oct. 16, 2008). For a review of the process and its stages, see HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002).

offered as a default, preliminary attempt at overcoming trauma.<sup>69</sup> However, sometimes conditions are not ripe for encounters between victims and offenders. In other cases, the offender cannot be found, no defined offender can be articulated, or the victim has no interest in the mediation process. In such cases, other ADR processes should be considered, and arbitration and even adjudication may be the best mechanisms for dealing with trauma. A more recent alternative movement can also be mentioned here to determine how to process traumatic events that have a strong collective context. The field of Therapeutic Jurisprudence (TJ) represents an emerging movement whose main concern is to improve the therapeutic aspects of law. "Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences."<sup>70</sup> Following this approach, we can devise therapeutic management of traumatic events. In cases of collective trauma, we can construct an alternative scheme that considers the collective scale of the trauma. This scheme is more therapeutic than the traditional legal approach, and responds to the interests and needs of trauma victims. Combining the familiar basic ADR formula, called "fitting the forum to the fuss,"<sup>71</sup> which is usually based on an individualistic perception, with the therapeutic principles of TJ and the characteristics of collective trauma, offers a systematic approach to handling traumatic events. ADR principles offer a functional approach to sorting out disputes according to the goals of the client and the barriers to settlement.<sup>72</sup> Preliminary efforts to integrate the two fields have been discussed in the literature, and the following questions will try to use, revise and expand the suggested principles in the context of collective trauma:<sup>73</sup>

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<sup>69</sup> Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006).

<sup>70</sup> See Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj/> (last visited Oct. 16, 2008).

<sup>71</sup> SANDER & GOLDBERG, *supra* note 1.

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

<sup>73</sup> See Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution*, 5 PSYCHOL. PUB. POL'Y & L. 1084 (1999).

## A. What are the emotional concerns of the victims?

Since healing the victims of trauma is a prominent goal in every conflict that involves trauma, protecting the victims and listening to their concerns is an important stage in the treatment of trauma. Some victims are interested in meeting the perpetrators; for these, victim offender mediation would be the most therapeutic process. Others feel threatened and too weak to meet their perpetrators and would prefer a process that avoids any contact. The dimension of collective trauma, which can be inferred in any case of trauma, provides explanations for the arousal of emotions, whose understanding might help to reduce anxiety. Education and exposure of the cultural context of the trauma can help to make it less demonic in the victim's eyes and Narrative Mediation can help in this therapeutic task.

## B. What are the ideologies and cultural narratives that underlie the trauma and to what extent are they "settled" within the context of the dispute?

Some cases of collective trauma reflect identity clashes that have already been settled by law and education in the society surrounding the conflict. Cases that involve sexual harassment, child abuse or racist expressions are dealt with within a defined legal regime in most western countries. In such cultures, it is easy to define victims and offenders in a conflict, and transformation of the traumatic event entails internalizing the prevailing cultural norms or the Rule of Law<sup>74</sup> in the society of the parties. In other cases that involve identity clashes between ethnicities or other groups which have not yet settled their relationship by law or contract, determining who is the victim and who is the offender is not trivial. Each side usually perceives itself as a victim and portrays the other as the offender.<sup>75</sup> Ideal transformation should not be expected in such cases and Narrative Mediation would probably not work. Indeed, most of the successful examples given by the founders of this method involve the transformation of relationships of married couples, who learn to step out of suppression by internalizing the

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<sup>74</sup> See Yu and Guernsey, *supra* note 52 and accompanying text.

<sup>75</sup> The Israeli-Palestinian conflict is an example of such a bilateral counter projection, and in fact most conflicts involve such a counter projection.

more progressive norms, which now prevail in family law.<sup>76</sup> The norms in this field have changed significantly in recent decades and the mediation process can help to internalize such norms. In other cases that involve identity clashes, such as struggles between minorities or ethnic groups that are not yet settled within the international and national context, more detached management can help to avoid deterioration and more acute manifestations of the trauma. Supporting the victims on each side is an important component in such management.

### C. What are the therapeutic aspects of possible legal procedures?

Each ADR process should be assessed in light of its ability to provide therapeutic or emotionally beneficial results.<sup>77</sup> Negotiation is better for victims who are reluctant to communicate with perpetrators and prefer that their lawyers manage the conflict for them.<sup>78</sup> Negotiation has a disadvantage in cases of collective trauma since it tends to privatize the trauma, depicting the case as a matter for two parties to settle. An important stage in healing collective trauma is providing public recognition of the wrong. For such a purpose, at first adjudication seems the most therapeutic process, and events such as the Eichmann trial in Israel are considered as providing a cathartic moment on a collective scale.<sup>79</sup> On the other hand, trials of Jewish collaborators with the Nazis were considered less therapeutic in terms of the overall Israeli society and the publicity of adjudication was threatening to open old wounds for the recovering survivors and their absorbing community.<sup>80</sup> Mediation and arbitration, according to this view, lack ap-

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<sup>76</sup> See, e.g., WINSLADE & MONK, *supra* note 3, at 1–29 (presenting the narrative model which presents the example of Greg and Fiona).

<sup>77</sup> See SCHNEIDER, *supra* note 73, at 1089–91. See also Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000).

<sup>78</sup> See SCHNEIDER, *supra* note 73, at 1092.

<sup>79</sup> Eichmann was a leading figure in the Nazi regime, who was brought to trial for his part in operating “the final solution” which resulted in the extermination of Europe Jewry. His trial in Israel in 1961 was the first public opportunity for the survivors to tell their story, and the first moment of internalization of the trauma by the Israeli society. See IDITH ZERTAL, *ISRAEL’S HOLOCAUST AND THE POLITICS OF NATIONHOOD* (Idith Zertal trans., Cambridge Univ. Press 2003).

<sup>80</sup> See Idit Zertal, *From Catastrophe to Power: Holocaust Survivors and the Emergence of Israel*, 7 ISRAEL AFFAIRS 119, 119–28 (2000).

pearance in the public sphere and are thus less preferred in resolving traumatic events. Still, according to the analysis suggested in this paper, addressing the interdependence that exists in any traumatic event requires mediation practices. Narrative Mediation has been presented as the best process to transform both victim and offender and address the complexity of the case.<sup>81</sup> Thus, it can be argued that in cases in which there is readiness of the parties, Narrative Mediation would be the most therapeutic process.

D. What are the interests and goals of the parties involved, and of the institution managing the trauma?

This principle reflects the “classic” ADR inquiry of “fitting the forum to the fuss,”<sup>82</sup> and from the perspective of collective trauma, it is clear that the public has a strong interest in the way traumatic events are managed. Goals of the parties can be assessed through reference to their interest in vindication, confidentiality, time constraints and other considerations.<sup>83</sup> The state or another institution that handles the process has its own goals and interests which should be considered in managing the process. Considering the goals and interests of perpetrators is a question of public policy in each traumatic case, and sometimes, when conditions are not yet ripe, no consideration is given to such interests.

E. What are the barriers to conflict resolution in this case?

The second “classic” ADR test<sup>84</sup> aspires to view the conflict from above, and to diagnose the cause of the lack of consensual agreement between the parties. When people cannot negotiate a consensual resolution in cases of collective trauma, their failure can

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<sup>81</sup> For a critique of the demonization of Eichman during the trial and for the one sided perception of him, see HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 1994) (1963). Arendt has addressed the cultural conditions in which Eichman operated and has pointed to the banality of integrating in the evil Nazi structure. Professional ideals and technocracy were characterizing Eichman more than pure malice and evil, and his main problem was the lack of self reflection and moral thinking beyond the context in which he operated. The trial has not affected Eichman consciousness and conscious and he was executed believing in his innocence before God.

<sup>82</sup> See SANDER & GOLDBERG, *supra* note 1.

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

<sup>84</sup> *Id.*

sometimes be explained by reference to conventional barriers to settlement, as reviewed in the literature in reference to any private conflict.<sup>85</sup> Such barriers may be overconfidence, the need to express emotions, disagreement about facts and so forth.<sup>86</sup> In cases of collective trauma, other barriers, particular to a specific context, can be imagined: often, no rule yet exists to settle the relationship between victims and offenders. In cases of ethnic struggles and human rights violations, sometimes establishing a transitional mechanism is the only way to overcome the trauma; the lack of such a conflict resolution model is the cause of the unsettled conflict. This was the case in South Africa, where the Truth and Reconciliation Committee was established in order to process the trauma of apartheid in a therapeutic manner.<sup>87</sup> This was also the case in many other collective trauma situations which were part of mass human rights violations.<sup>88</sup> In intra-state cases of collective trauma, such as ringworm irradiation of Moroccan children in Israel,<sup>89</sup> new legal rights and enforcement mechanisms were established by the state.<sup>90</sup> In terms of the definition of trauma as given above, it is clear that part of overcoming it and “resolving” the underlying conflict is acknowledging its collective aspect, and not dismissing it as a conflict that has only a private dimension. Overcoming trauma, according to the perception developed here, requires transition from the internal to the external point of view, and thus a barrier to conflict resolution of collective trauma exists

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<sup>85</sup> See KENNETH ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (Pon Books 1999).

<sup>86</sup> See SANDER & GOLDBERG, *supra* note 1.

<sup>87</sup> See ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (Oxford Univ. Press 2001).

<sup>88</sup> See, HELENA CABBAN, *AMNESTY AFTER ATROCITY?: HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES* (Paradigm 2006).

<sup>89</sup> The case included mass irradiation by the Israeli public health administration of thousands North African Jewish Immigrant children during the 1950s as a treatment for the Ringworm disease. This treatment, which was considered acceptable at that time has later resulted in cancer and has left physical and emotional scars on the growing children, who accused the state for malpractice and abuse of practice. Their legal claim was denied but following public protest they were later approved as entitled to social security allowances according to their physical injury. For the description of the case as a collective trauma, see Nadav Davidovitch, Shifra Shvarts, *Health and Hegemony, Preventive Medicine, Immigration and the Israeli Melting Pot*, 9 *Israel Studies* 150, 150–79 (2004). See also Nadav Davidovitch & Avital Margalit, in *TRAUMA & MEMORY*, *supra* note 2, at 119.

<sup>90</sup> In the Israeli case of Ringworm irradiation, a specific statute called The Compensation for Victims of Ringworm Law, 1994 S.H. 1478 (in Hebrew) was enacted. The statute provided a dispute resolution mechanism that uses the national insurance criteria of unfitness to evaluate the condition of the victims and the compensation they deserve. A special committee was established to process the claims of the survivors. See Nadav Davidovitch & Avital Margalit, in *TRAUMA & MEMORY*, *supra* note 2, at 119

when privatization of the trauma is the prevailing response in society. An example of an area of law in which such a barrier once existed is gender relations in the workplace: once an employer could stalk his female worker and intimidate her while framing his attacks as personal attraction and courtship, today the law names this practice sexual harassment and acknowledges the collective-political dimension of such acts.<sup>91</sup>

F. What is the balance between emotional factors and needs, and legal and financial factors?

Recovery of trauma victims requires, first, the establishment of safety,<sup>92</sup> which can be achieved by working to return routine and normality to daily life. Second, victims need space for remembrance and mourning,<sup>93</sup> which can be facilitated by public ceremonies and various treatments. Third, they need reconnection with ordinary life. Compensation and reimbursement may help recovery, and, for the survivor, it is their symbolic representation that matters, much more than their material worth.<sup>94</sup> Balancing these needs against the legal and financial conditions that exist in the specific case will help to devise the right process. A long and expensive process of adjudication, or even a deep transformation through narrative mediation is not always possible in cases of trauma on a broad collective scale. Sometimes the pragmatic consideration of the managing institution will prevail in designing the proper process to deal with the case.

## VII. THE 9/11 VICTIM COMPENSATION FUND AS A CASE STUDY

In this section, the therapeutic sorting mechanism for traumatic events such as those described above will be used to retroactively evaluate the appropriateness of the American “September 11 Victim Compensation Fund of 2001”<sup>95</sup> (VCF) as a means to re-

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<sup>91</sup> See discussion, *supra* section IV.

<sup>92</sup> JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 155 (1992).

<sup>93</sup> *Id.* at 175–95.

<sup>94</sup> *Id.* at 190–92.

<sup>95</sup> See September 11th Victim Compensation Fund of 2001, <http://www.usdoj.gov/archive/victimcompensation/index.html> (last visited Feb. 15, 2007).

solve some of the conflicts that the 9/11 collective trauma created.<sup>96</sup> The VCF was designed to provide a no-fault alternative to tort litigation for individuals who were physically injured or killed as a result of the aircraft hijackings and crashes on September 11, 2001. It was handled by Special Master Kenneth Feinberg, who was responsible for the regulation and implementation of the fund.<sup>97</sup> The following analysis applies the principles above to the VCF's operation:

A. What were the emotional concerns of the victims?

The attack on the World Trade Center was an act of terror carried out by Al Qaeda, which traumatized the American nation. The direct perpetrators and most of the direct victims in the attack were all killed and thus no process of dispute resolution could be developed between them. The dependants of the victims and their close relatives needed compensation for their loss. Since in this case, there was no way to get compensation from the actual perpetrators, the state was expected to take part in the recovery process. Clearly, in terms of trauma treatment, no mediation could be devised, in spite of its transformative potential for traumatic events.<sup>98</sup> Emotionally and politically, mediation could not be imagined, and the state had a limited, though important, role in assisting the individual process of psychological recovery.<sup>99</sup> Processing the griev-

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<sup>96</sup> For another suggested model to deal with the 9/11 trauma, see EISEN, *supra* note 41, at 539–60. For an evaluation and overview of the Victim Compensation Fund, see George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?* 112 PENN ST. L. REV. 175 (2007); Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund* 42 GONZ. L. REV. 95 (2006); Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy* 10 HARV. NEGOT. L. REV. 135 (2005); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719 (2003); Robert L. Rabin, *Book Review Essay: September 11 Through the Prism of Victim Compensation: What Is Life Worth?* 106 COLUM. L. REV. 464 (2006).

<sup>97</sup> For a description and reflection by the special master on his work in the fund, see KENNETH R. FEINBERG, *THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005). See also Kenneth R. Feinberg, *Book Review Essay: Response to Robert L. Rabin, September 11 Through the Prism of Victim Compensation* 106 COLUM. L. REV. 483 (2006).

<sup>98</sup> See discussion, *supra* section V.

<sup>99</sup> See HERMAN, *supra* note 92, at 191:

A variant of the compensation fantasy seeks redress not from the perpetrator but from real or symbolic bystanders. The demand for compensation may be placed upon society as a whole or upon one person in particular. The demand may appear to be entirely economic, such as a claim for disability, but inevitably it includes important psychological components as well.

ances against the state was the victims' only resort. Such processing had to consider the emotional needs of the victims' families.<sup>100</sup> The shocking traumatic event, which operated on a national scale, required strengthening and empowering the victim community.<sup>101</sup> Efforts were made to unify the group and not to exhaust individuals in endless bureaucratic procedures in the courts. As is typical of cases of collective trauma, a more remote trauma community surrounded the immediate victims. This community, beginning with residents of Manhattan who witnessed the horror, and followed by the broader American community who witnessed the events through the media, even included the international community. All these circles of victims would have suffered from viewing drawn-out struggles by families in the courts to achieve recovery, and a broad consensus developed around the assumption that leaving the grievance processing to conventional legal litigation would be a disaster.<sup>102</sup> The prevailing view among elite lawyers and policy makers was that during this time of crisis, American society needed expressions of unity and compassion, not self-maintaining individualism and monetary concerns. An unusual event required an unusual process to treat it, and emotionally, victims in all circles sought a unifying response. The unusual way in which the actual processing of the fund's claims took place, the town meetings, which were held by the Special Master, and the innovative solutions that were part of this concerted effort, all helped to maintain the collective momentum which the trauma produced and to use the financial process as a means for empowerment and transformation.

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<sup>100</sup> Feinberg describes the relationship between financial and emotional needs for the victims' families by referring to his own personal change of perception:

I realized that it would be impossible to satisfy the expectations of everyone participating in the fund — rich and poor, privileged and underprivileged, bankers and bus boys. I began to view the program in a new light. It was not just about money, about providing bereaved families with a cash lifeline. It was about compensating for a catastrophic emotional loss — trying to fill the hole in a family's life with money.

KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?* xxiii (2005).

<sup>101</sup> *See id.* at 93–149 (describing the emotional needs of the victims' families).

<sup>102</sup> Gillian Hadfield, *The September 11th Victim Compensation Fund: 'An Unprecedented Experiment in American Democracy'*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=690401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690401) (last visited Oct. 16, 2008).

- B. What were the ideologies and cultural narratives that underlied the trauma and to what extent were they “settled” within the dispute context?

The ideologies underlying terror attacks in general and the 9/11 attack in particular are still being debated, and their articulation process raises polemic views. A common description of the struggle reflected in this event is the clash between east and west or between the Judeo-Christian civilization and the Islamic one. There is a religious aspect to the conflict, which resembles medieval struggles between believers and infidels, but the economic and political aspects of the struggle underlying the conflict seem much more prominent. As suggested in Slavojek’s description,<sup>103</sup> acts of terror can be considered a call to arms by the Third World against the wealthy West, and the fulfillment of a subconscious image produced by the West in Hollywood films. According to this view, the inequality among populations in our global world underlies the conflict, and addressing it may first require broad global economic reform and the reordering of economic preferences. Assuming that the roots of the conflict are indeed economic is not easily followed by the perception of the malicious act of terror at the World Trade Center as a consequence of them. Thus deconstructing the event by exploring its collective background as in Slavojek’s description, and through the use of Narrative Mediation, is difficult to imagine — both at the horrifying moment of the attack, and until today.

- C. What were the therapeutic aspects of possible legal procedures?

The urgency attached to the creation of the VCF stemmed from the perception that the American legal system itself posed an enormous threat to the financial viability of the economy as a whole.<sup>104</sup> The possibility of adjudicating the victims’ claims was considered a danger even by members of the legal elite. In terms of the victims themselves, adjudication seemed to be considered a preferred process, not only for monetary reasons. Obtaining infor-

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<sup>103</sup> See *supra* notes 39–41, and accompanying text.

<sup>104</sup> Gillian K. Hadfield, *The September 11 Victim Compensation Fund: An Unprecedented Experiment in American Democracy*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=690401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690401).

mation about what happened, promoting public findings of accountability and participating in a process that ensured responsive change were all important values that the victims seemed to seek in the adjudicative process.<sup>105</sup> However, the delay and emotional stress in pursuing the above were considered probably much more anti-therapeutic, whereas the values of accountability and information discovery could be obtained by other means and institutions.<sup>106</sup> Another ADR process, Negotiation, handled between state representatives and the families' lawyers, may have been considered more detached and lawyer-oriented than the communication that was needed. It could also have been too open-ended and unequal in terms of the need to reach an agreement in each separate case without developing objective standards. Mediation with the state would also have seemed too open ended considering the need to give the families rapid answers. In any case, it was not the ultimate mediation, which could not even be imagined between the victims and the offenders, or in this case between the relatives of both groups. The process that was finally adopted was closer to Arbitration, mainly an administrative, no fault compensation mechanism, which was limited by time and amounts of money.<sup>107</sup> The process included filing a standard compensation form for deceased victims and personal injury cases. These forms were processed by the Special Master, who determined the award using predetermined, fixed criteria, which he himself promulgated. He mainly used formulaic means through which compensation was determined with a minimum of fact-finding and advocacy. The formula mainly used tort principles, combining them with welfare considerations to balance large disparities and to answer special needs.<sup>108</sup> The process allowed the victims the opportunity to request either a hearing regarding their claim before the award was

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<sup>105</sup> See Gillian K. Hadfield, *Settlement Values: How 9/11 Victims Saw the Choice between Money and Going to Court* (June 2007). 2nd Annual Conference on Empirical Legal Studies, [http://hq.ssrn.com/Conference/Reports/conf\\_preliminary\\_program.cfm?conflink=CELS-2007](http://hq.ssrn.com/Conference/Reports/conf_preliminary_program.cfm?conflink=CELS-2007) (last visited Oct. 16, 2008). The author conducted a qualitative and quantitative empirical study of how the victims of the 9/11 attack evaluated the tradeoffs between cash payment — available through the VCF — and pursuing litigation. She claims that the decision to forego litigation sacrificed important non-monetary values for the victims. *Id.*

<sup>106</sup> Compare Hresko, *supra* note 96, at 105–30 (examining the VCF in terms of procedural justice principles and claiming that the procedural value of fairness was not answered by the VCF).

<sup>107</sup> See, September 11th Victim Compensation fund of 2001 FAQ, <http://www.usdoj.gov/archive/victimcompensation/faq.html> (last visited Feb. 15, 2007).

<sup>108</sup> For an evaluation of the principles behind the fund see Diller, *supra* note 96, at 728–47; See also Ackerman, *supra* note 96, at 143–79.

calculated or, once their award was calculated, to apply for a review before the Special Master. After either a hearing or a review, the Special Master made a final determination. His decision was not subject to appeal or judicial review. The VCF mechanism established to address the grievances stemming from the WTC terror attack was responsive to the needs of the victims both to receive acknowledgement of their rights, and to participate and to be heard in an inclusive process. In arbitration, a decision is made on the merits of the case, but with more speed and confidentiality than in litigation. Reports from the fund's actual operation show that a significant value of the procedures carried out by the Special Master's office was in the opportunity they gave victims to tell their story and share their pain with a listening authoritative figure.<sup>109</sup> Many arbitration procedures, particularly in labor, and in the case of the victim compensation fund itself, are equivalent to mediation in the opportunity they provide for the parties to tell their stories, to be heard, and to feel understood by the other side. The choice of the victims not to request a hearing enabled more efficiency and effectiveness in terms of operating the therapeutic listening only when it was necessary.

D. What were the interests and goals of the parties involved, and of the institution managing the trauma?

The parties in the 9/11 case sought quick financial redress to ease their pain and to compensate for the loss they suffered following the event. Since there could be no vindication vis-à-vis the perpetrators through private litigation against the state or insurance companies, a rapid and effective process that resembled arbitration and avoided extra time spent on liability questions was the most preferable in the post-trauma situation. In terms of the institution managing the trauma, in this case, the state, the establishment of the VCF was part of a series of legislative acts that aimed to preserve the continued viability of the air transportation system,<sup>110</sup> and to maintain and protect the public health of the American people in the face of the danger of bioterrorism.<sup>111</sup>

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<sup>109</sup> See Feinberg, *supra* note 97, at xxiii.

<sup>110</sup> Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101).

<sup>111</sup> See Conk, *supra* note 96, at 179-80.

E. What were the barriers to conflict resolution in this case?

Like many cases of collective trauma, defining the conflict and the parties to it was an important stage in partly overcoming the trauma. Since no direct encounter with the perpetrators was expected and the question was raised as to the level of responsibility of the state to compensate the victims, a legislative or governmental act had to be created to provide a unique legal regime to handle the processing of this unique event.<sup>112</sup> The main barrier to resolution in this case was thus mainly the lack of proper dispute resolution mechanisms, which establish their own system of rights.

F. What was the balance between emotional factors and needs, and the legal and financial factors?

Preferring an arbitration process to mediation, in the case of the VCF, responds to a familiar concern about the possible injustice that might occur in mediation in cases of imbalance of power.<sup>113</sup> Weak parties may compromise their rights and in the case of the 9/11 victims, even if mediation could be more therapeutic in terms of expressiveness and empathy, arbitration could give more protection and emphasis on rights when dealing with the government. The voluntary mode through which the VCF handled the process also overcame the resistance to mandatory arbitration, which is raised in special areas,<sup>114</sup> and enabled more choice and empowerment for victims who were not forced to choose an alternative method. The high level of compliance and acceptance of the process (97%) may show that it indeed answered the emotional and communal concern of the direct victims, while enabling unification and the beginning of recovery for the larger community as well.

To summarize the assessment of the VCF as a responsive mechanism to collective trauma, it can be noted that although therapeutic values were not the primary declared concerns of the VCF, and monetary compensation was considered the main task of this body, the Special Master and his team found themselves functioning as therapeutic agents and were able to use their award determination process as a channel for transformation and for healing the

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<sup>112</sup> See Ackerman, *supra* note 96, at 143–79.

<sup>113</sup> See SCNEIDER, *supra* note 73, at 1099.

<sup>114</sup> See MENKEL-MEADOW ET AL., *supra* note 51, at 545–59.

collective trauma. By providing a singular arrangement that addressed the victim community as a group and by avoiding individualization of the claims, while providing individuals with the choice to pursue their own suits, the collective trauma momentum was used for more inclusion and community strengthening.

### VIII. CONCLUDING REMARKS

Devising a systematic approach to dealing with collective trauma by using ADR mechanisms is a complex task, which is still in a very preliminary stage. This paper begins to address this task by exploring the notion of collective trauma, understanding its cultural background, exploring the role of Narrative Mediation as a method to transform traumatic events, and finally, understanding the role of other ADR mechanisms in addressing collective trauma. Therapeutic sensitivity, as inserted in law practice by TJ movement, and as discussed in trauma literature, can supplement the functional approach of ADR practice, and can promote a more comprehensive forum choice. Cases of collective trauma call for unique legal responses and sometimes for the establishment of new legal mechanisms. This paper claims that these mechanisms intuitively incorporate therapeutic sensitivity and combine it with a functional approach. Using ADR and TJ principles as explicit guiding methods in building these institutions can enhance a more effective and systematic treatment of collective trauma. The 9/11 Victim Compensation Fund was used in this paper as a case study of successful management of collective trauma through ADR processes.

