MEDIATING COMMUNITY DISPUTES:

THE REGULATORY LOGIC OF GOVERNMENT THROUGH PASTORAL POWER

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ABSTRACT

The protracted crises of authority that characterized the 1960s and 1970s left their imprints on a number of institutions in Canadian society. The dispute resolution arena, for one, was affected by the turmoil of this age as more informal, 'empowering' alternatives were sought to replace the disempowering procedures of courtroom adjudication. The present thesis focuses on one aspect of an ensuing 'alternative dispute resolution' movement in the Canadian province of British Columbia; namely, community mediation. In particular, it begins by looking at the rhetoric and practices through which community mediation has been deployed. Advocates tout this process as an 'empowering' method of resolving disputes because it encourages individuals to work conflict out in the 'community', thus - so their reasoning goes - limiting state intrusion into people's everyday lives. By contrast, critics of the movement argue that the deployment of informal justice actually expands state control, and contend that it does so rather insidiously under the guise of 'restricting' state activities.

Close scrutiny of this debate, however, reveals significant weaknesses in both positions, mainly relating to their unnecessarily narrow definition of the 'problem'; i.e., whether informal justice expands or reduces state control. This is a highly questionable formulation, for it demands a simple response from what is a much more complex and ambiguous event. Taking its cue from more recent developments in the literature, the following analysis reconceptualizes the 'problem' by asking: what is the logic of control embodied by mediation practices in a given context? It responds to the question by developing certain Foucauldian precepts into a theory that explicates the model of power through which mediation regulates action. Its implicit objective is to

understand the political rationale of mediation in order to pursue how this might be used to further social justice.

Various genealogical procedures are employed to formulate such a theory by responding to four central questions. What are the wider lines of descent that have helped to produce the particular version of community mediation that now colours British Columbia's landscape? What precise model of power does the rhetoric and practice of mediation reflect? How does this informal model of power link up with the formal power of the law/state? What are the implications of this for engaging politically with community mediation, if one's aim is to achieve social justice? Responding to each of these in turn supplies the basic thesis of the following text.

In brief, I argue that community mediation has developed in British Columbia in tandem with a shift from Fordist to Post-Fordist modes of regulation (politics) and production (economics) that characterized the 1970s. Influenced by legal reforms and experiments with 'alternatives' to courts, community mediation has assumed an identity which incorporates a 'pastoral' model of power. This model is articulated to the state's 'law-sovereign' model as a 'complementary,' but subordinate, alternative. The association between these results in an indirect form of governance - 'government at a distance' - that may expand the state's potential to control people, but which is also considerably less predictable. This offers both opportunities and barriers to political action in the informal justice arena. Consequently, while the current deployment of community mediation in British Columbia tends to support the professionalised justice of the existing legal system, it may yet be possible to transform its identity through an 'alternative' politics of law that strives for social justice.

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INTRODUCTION

Buying ecclesiastical indulgences for absolution is no longer common practice, but purchasing justice is. In a postmodern secular world, the aim of such purchase is not to find salvation in the Hereafter, but to rectify circumstances in the here and now. Many critical scholars engaged in legal thought, in *juris disciplina*, have suspended 'metanarratives' pertaining to an eternal law, a *lex eterna*, which promises equal and just treatment to all those who come before it (Lyotard, 1984; White, 1987/88). For in the everyday, temporal processes of law, the *lex temporalis*, a steady stream of bewildered litigants must endure the costly, time-consuming and inhospitable processes of the courthouse. The liberal promise of equality before the law today rings as little more than a formal, hollow abstraction, largely favouring those with the means to play the 'legal game.' Typically, its mechanisms usurp conflict from a given situation and transform it - almost unrecognizably to those involved - into a 'legal' dispute. As such, the immediacy of dissension is transposed into conceptually distant legal categories that render conflict accessible to the courtroom's adversarial rules of procedure. As the trial proceeds, many litigants become further removed from the process as they bear passive witness to an emerging 'case,' interpretatively constructed by legal counsel and decided upon by the lofty stroke of judicial decision. Undoubtedly, the inhospitable atmosphere of formal dispute resolution methods has something to do with the survival of, and a continued search for, more congenial, informal 'alternatives' (Auerbach, 1983).

The following thesis focuses on a relatively recent attempt to procure informal, 'community-based', methods of dispute resolution in the Canadian province of British Columbia. This

movement towards 'alternative dispute resolution' is part of a far wider tendency in many Western countries away from institutionalized social control towards procedures that regulate people in the 'community'.[1] Since the late Nineteen Sixties, the Welfare State models of many countries have experienced significant fiscal and legitimacy crises[2], resulting in diverse shifts towards flexible, 'privatized' and community-based modes of regulation (Liepitz, 1984; Harvey, 1991; Hirsch, 1988; Jessop, 1990). The quest for 'community control', which is directly pertinent to the present thesis, has fragmented the domain of 'social' control to which Keynesian 'social welfare' policies are directed (Donzelot, 1979, 1991), and has reorganized Post-Second World War modes of regulation (Jenson, 1989, 1990; Jessop, 1990).

In Canada, protagonists of alternative dispute resolution argue that the courts are simply unable to deal with certain community disputes effectively.[3] Their ineffectiveness is said to be obvious from the enormous case-loads 'clogging' up the 'system', making litigation costly, time-consuming, alienating and unresponsive to those whom it is designed to serve (Emond, 1988; Blair, 1988). Moreover, adversarial techniques, they reason, place people in relations of confrontation and, therefore, divide rather than unite individuals in a 'community'. Because litigation imposes decisions based on guilt and innocence, or degrees of liability, without due concern with restructuring 'damaged' relations between people, disputing parties often continue their disputes when they leave the courtroom. This leaves disputes unsettled which, in turn, limits the possibility of creating consensually functioning communities.

In response, one group of advocates in the alternative dispute resolution movement, on whom this thesis shall focus, argues that minor disputes between people with ongoing relationships should

be dealt with 'informally' in the community, using more hospitable mediation techniques to settle

their differences. For these advocates, mediation is a voluntary, individually empowering way of

resolving disputes in a forum where disputants can work out settlements, with the help of a

'neutral' third party from the community, which are acceptable to them. Mediation is seen to be

a freely elected process favouring 'individuality' and restricting state interventions into people's

lives. Although critics of the movement in Canada are conspicuous by their virtual absence,

various criticisms directed at informal justice in the United States and Britain are directly

relevant. The central theme of these critics' writings is that one ought to be deeply suspicious

of a movement in the justice system which is sanctioned by the very forces it is designed to

replace. For them, community mediation, despite its rhetoric, does not resist state control; instead,

it expands state regulation into more and more areas of individual life whilst deceptively claiming

to do the opposite.[4]

This confrontation between advocates and critics is an important one from which the present

thesis will take its cue. Nevertheless, their debate is in danger of leading to a sterile impasse

because it centres around the narrow 'problem' of whether community mediation expands or

reduces state control. As Matthews (1988) correctly notes, conceptualizing the problem in this

manner tends to divide authors into one of two camps: those who support mediation as opposed

to those who do not. Perhaps, however, it is more useful to focus on the actual workings of

particular community mediation programmes, to depict the precise ways in which they exercise

power and to evaluate their regulatory effects in context (Fitzpatrick, 1988). To do this implies

that we should avoid the advocates' naive optimism and simplistic explanations of community

mediation as a 'natural', or 'necessary', response to certain inadequacies in the court system. At

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the same time there is no need to be unduly pessimistic about using community mediation to change society, and to wander into an intellectual land of despair which cannot escape the 'nothing works' syndrome (Martinson, 1974; Matthews, 1988). Instead, it seems more valuable to shake off such political apathy and to focus attention on the techniques of power used by such programmes before developing strategies to thwart certain pernicious effects.

RESEARCH QUESTIONS AND THESIS STATED

In its reconceptualization of the 'problem' at hand, the present thesis seeks to elucidate the precise form of social control exercised through community mediation. It explores the *political logic* of informal justice by examining the nature and effects of the methods by which people are regulated in community mediation settings. This overarching concern provides a point of departure for the four basic research questions to be addressed in what follows. First, how can one account for the rise of community mediation in a specific context without succumbing to the simple explications of protagonists, or the reductionism of certain critics? Secondly, what sort of political logic, rationality of governance, or model of power does community mediation embrace? Thirdly, how does this political logic relate to the liberal state's formal legal model of power? Finally, what are the implications of this relationship on formulating an alternative politics of the dispute resolution domain? Responding to each of these questions provides the basic thesis of the following text.

In brief, I argue that community mediation is not simply a response to crises in the court system, as its advocates allege. Nor is it a mere expansion of state control, if by that one means mediation is instrumentally reducible to the state's political logic. Rather, community mediation

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emerges out of complex lines of descent in particular contexts and - if successfully deployed - modifies the dispute resolution arena somewhat by 'adding' a specific political logic to that domain. In British Columbia, this logic assumes a 'pastoral' form and yields a model of power that is quite different from the 'law-sovereign' political logic of liberal legality. Yet the two models of power are closely articulated and indeed, as we shall see, community mediation is constitutively related to the state's legal system. In order to comprehend the complex nature of these articulations, I suggest community mediation be seen as part of a wider 'governmentalization of the state' (Rose, 1990; Millar and Rose, 1990). Drawing on Foucault, I shall conceptualize the techniques of 'government' in community mediation as reflecting a pastoral model of power. This 'pastoral' power is articulated to the 'sovereign-law' model of power embodied by state legality. Having traced the links between these models of power, one is better able to assess the effects of community mediation on contemporary government, and to develop an alternative politics of law.

Such an endeavour strikes at the heart of a question of value underlying the present thesis: what sort of justice should community mediation further? In particular, the overarching theme of the present thesis is to resist the disempowering and hostile aspects of formal 'professionalized' justice, and to search for a more empowering version of 'social' justice (Miller, 1974). This immediately raises a number of further questions: first, what is the nature of professionalized justice, and why should it be resisted?; secondly, how should we conceive of 'social' justice?

The first of these questions becomes especially relevant to the present thesis when one considers the limited extent to which community mediation in British Columbia has been deployed as an

'alternative' to the formal justice system. Indeed, as we shall see in the next chapter, community mediation is currently a complementary, system-based version of informal justice that - using Cain's (1988) classifications - is *ipso facto* an 'incorporated' form of 'professionalized' justice. This 'professionalized' justice: conceals its class basis; defines conflict very narrowly in terms of individual conflict (i.e. it ignores the structural basis of conflict); appeals to universal rules of procedure; uses expert mediators to resolve the immediate manifestations of conflict; and places administrators and mediators in networks whose hierarchy and lines of accountability are not immediately visible.

Such a version of justice should be resisted for a number of reasons. The most important of these, however, lies in the failure of practices associated with professionalized justice to respond to the structural bases of conflict. By treating disputes as maladies arising between *individuals*, and not as conflicts resulting from wider, structural patterns of domination (e.g., gender, race and class), professionalized justice emerges as a profoundly conservative and reactive series of processes. It is expressly concerned with preserving a 'social order' by neutralizing conflict, creating consensus, and nurturing cohesion *within* existing social structures. By not directly seeking to redress social inequalities, it is all too often implicated in the perpetuation of various forms of oppression associated the social 'order' it tries to uphold. At best, proponents of professionalized justice presuppose a consensually driven social order which is free of gross inequities between people -- an extremely insidious pressumption to make, especially when one considers the harsh and various forms of oppression which many people - women, First Nations people, the poor - must endure on a daily basis as a product of their socially-created identities. In short then, the overall approach of professionalized justice in favour of a given order frustrates

concerted attempts to expunge oppression from within such an 'order'. For these general reasons (and more specific issues that should become evident from the ensuing analysis) allegiance to the professionalized conception of justice must surely be problematized.[5]

The second question raised above is rather less easy to respond to, and we shall have reason to return to it later. However, for the moment, suffice it to note that the genealogical approach of the present thesis disavows (modernist?) attempts at promulgating absolute and universal conceptions with respect to the precise nature of 'social' justice. Nevertheless, we have indicated the problems that professionalized justice faces in emphasizing the preservation of order - rather than the transformation of oppressive conditions - and this gives sufficient grounds by which to outline a general approach for strategies designed to achieve social justice. That is, the quest for social justice entails developing practices that force us to 'listen' to contextual subordinations (White, 1987/88), that highlight and respond to the oppression of a given power-knowledge formation. In the dispute resolution domain, at least, this orientation translates into a search for the various structural conditions that nurture particular types of conflict. Since such conditions are not likely to be common to all social contexts, it seems plausible to accept a pluralized vision of social justice (Walzer, 1983, Wickham, n.d) that cannot be formulated in abstract, universal principles, but which must take root in the contextual oppressions of particular power-knowledge relations.

In contemporary parlance, such a prolific conception of justice has come to be associated with a postmodern problematic (White, 1987/88), but I do not endorse the extreme relativism to which this might lead. Like Hunt (1990a) and Wickham (1990), I see social justice as requiring the

formulation of specific targets for struggle. As such, to achieve social justice in the dispute resolution domain it seems necessary to: determine its precise form in context through non-hierarchical, democratic forums that are themselves open to identification and scrutiny; define the origins of conflict widely to capture its structural bases; see conflict as indicating contests between social identities (Laclau and Mouffe, 1985); use conflict as a means of communicating social problems without the intervention of 'experts'; attempt to resolve conflicts by struggling to transform their structural basis in context; and, be part of an alternative politics of law that forges alliances with struggles designed to restructure power relations that breed particular kinds of inequity (e.g., forging alliances with new social movements). Since the objective of this social justice is to identify and to redress the dangers immanent in existing power relations, it should attempt to develop appropriate justice institutions.

One possible effect of this assessment is to commence the task of making dispute resolution more hospitable, less remote from people, and much more effective than is currently the case. It can also begin to trace the outlines of forums within which to resolve disputes without emulating the professionalized justice that perpetuates the inequalities of the *status quo*. Furthermore, by re-conceptualizing community mediation as part of a more general 'governmentalization of the state,' it becomes possible to transcend the state expansionist debate, and to move beyond the limited question of whether informalism 'expands the state' or not. In turn, this permits one to entertain the critical task of pointing out both the dangers and the political possibilities of community mediation in context.

At this point, some might object to the 'theoretical' - as opposed to 'empirical' - bent of this

venture. Despite qualms about the plausibility of distinguishing the analytical ('theory') from the synthetic ('fact')[6], I have elected to focus on developing adequate theoretical constructs through which to understand the governmental rationality of community mediation, not only because the task is crucial to achieving social justice through informalism, but also because it has not received sufficient attention from existing research. Nevertheless, my attempt to formulate such theories does embody an 'empirical' component - if by that one means a form of analysis that appeals explicitly to 'data'. Such a dialogue between various types of analysis is important to ensure that the practice of theorizing does not become entirely detached from the discourses to which it is directed.

SOME DEFINITIONS

COMMUNITY MEDIATION

Soon after commencing research into the topic of this thesis, I realized that the mutating identity of 'community mediation' is best unravelled as a series of shifting patterns, a changing social movement with multiple facets. Far from its having a fixed, rigid or absolute being, the community mediation movement seemed to materialize as an 'event' with shadowy outlines, fashioned by relentless antagonisms and struggle (Foucault, 1977a). Indeed, these dynamic and ongoing processes annulled any of my various attempts to clasp a presumed 'essence' in the grip of a simple, static concept. What I had come up against, I think, is the sheer contingency of social life which impedes attempts at enunciating fixed, or absolute, conceptions of 'existence' (Laclau and Mouffe, 1985). This had exposed, that is, the ongoing political battles that lie behind the presumed 'existence' of social identities. In view of this, I shall employ the concept, 'community mediation' with some trepidation, recognizing that its singular linguistic demeanour

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might contort the plurality and dynamism of the relations which sustain its identity. To be more precise, I use the concept without assuming the essential aspects ascribed to it in many current usages. Nevertheless, my use is articulated to various discourses which variously refer to the event as: 'informal justice'; 'community justice'; 'neighbourhood justice'; 'neighbourhood dispute resolution'; 'alternat(iv)e dispute resolution' (or ADR); 'conflict management'; 'minor dispute resolution'; 'mediation'; and so on. So long as one understands that we are here dealing with a plurality of practices (exemplified in chapter one) which define certain activities as 'minor disputes between people with ongoing relationship' amenable to 'resolution' through 'mediation' that is external to formal court procedures in British Columbia, the particular choice of term is not crucial.

DISCOURSE

The notion of discourse is central to the ensuing thesis, and it is therefore important to clarify its use here. To begin with, a discourse does not capture immutable truths about the world, as if its language were capable of attaching unchanging phenomena to absolute and rigid concepts. If Wittgenstein (1983) is correct, the meaning of concepts is highly variable across social contexts; the same words are put to quite different uses in different places. If Foucault is right, discourses say more about the complex relations of power and knowledge from which they emerge than they do about the entities they purportedly denote (Foucault, 1977; 1978; 1980). Both theorists urge us to see definitions in terms of their use in given (socio-political) contexts: they are not passive reflections of an assumed 'reality' but, rather, ostensive decrees enunciated from within given social contexts.[7] As such, 'discourses' are dynamic linguistic formations in which signifiers are related to one another through rules governing their use.[8] That is, identities

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(such as, community mediation) are produced through rules that situate 'elements' of language in relation to one another in discursive contexts (Laclau and Mouffe, 1985: 105-114).

These 'elements' are the raw materials of discourse and comprise any fragment of language. Elements are organized, or dispersed, within a discursive formation through processes of 'articulation' that supply rules for how given elements are to relate to one another.[9] These practices define what are reasonable, acceptable, appropriate, or permissable uses of statements. Laclau and Mouffe refer to such recomposed elements as 'moments,' to distinguish them from those elements that remain disarticulated from a particular discourse (1985: 105). The identity of a 'thing' is established when a discourse colonizes an element and, through processes of articulation, specifies how it is to relate to other moments or elements. As such, identity does not inhere in the sign, the signifier, or the signified, but in the discursive practices which specify rules for the 'acceptable' use of elements.

Thus, the identity of 'community mediation' emerges in particular contexts from the rules of dispersion erected through articulatory practices which, say, distinguish it from the formal procedures of the courts, or construe it as an 'alternative,' etc.. However, it is important to recognize the contingency of this identity for articulatory practices are ongoing and never completely decided. Indeed, these practices are no more than the terminal effects of continuing power struggles. As we shall see, power and knowledge imply one another directly because the moments of discourse are erected and sustained through underlying relations of force just as they are, in turn, used to justify particular forms of power.[10] Therefore, changes to accepted forms of knowledge imply transformations of underlying power relations and *vice versa*. As such, the

identity of community mediation is contingent since its moments are never completely, or rigidly, articulated to a discourse. They are never fixed because elements are 'floating signifiers' that entail a degree of openness from whence the contingency of identity, and discourse, derive (Laclau and Mouffe, 1985: 113).[11] This is significant because one of the aims of the present thesis is to work towards creating an identity for community mediation which does not seek to redress the administrative failures of professionalized justice. Rather, it tries to secure a social form of justice designed to release those entangled in the webs of contemporary oppression.

RESEARCH PROCEDURES

As is probably the case with all analytical ventures, there are many different ways of approaching a 'problem' -- the choice of a particular approach being significantly influenced by a number of factors, including, how one elects to frame the 'problem', the nature of one's research questions and objectives, practical problems of access to 'data', etc.. The present thesis adopts a genealogical approach (Foucault, 1977a; Minson, 1985; Dreyfus and Rabinow, 1982) in an attempt to develop a framework though which to understand the political logic of the knowledge and practices (the 'discourse') of community mediation. Its aim is neither a comprehensive empirical description of alternative dispute resolution (e.g., Richardson, 1988; McGillis, 1986; Canadian Bar Association, 1989; Stead, 1986; Tomasic and Feeley, 1982), nor an evaluation of specific mediation programmes (e.g., Turner and Jobson, 1990; Perry, *et. al.*, 1987). Rather, it attempts to chart a theoretical map, a genealogy, of the regulatory landscapes embodied in community mediation settings. Its acknowledged intention is to use such theory to help formulate effective strategies that resist those mediation practices which reinforce professionalized justice.

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The genealogical approach of this thesis takes its cues from Foucault's (1977a) interpretation of Nietzsche. It does not prescribe canons of enquiry, formalized sequences for the construction of social theories (Stinchcombe, 1968).[12] By contrast, it adopts Foucault's (1977a; 1980; 1990) rather more general 'rules of thumb' to orientate its analysis of community mediation as a contingent social identity. To begin with, it takes seriously Nietzsche's dictum that all claims to absolute 'existence' be placed in the flow of history; that is,

> "More strictly: one must admit nothing that has being - because then becoming would lose its value and actually appear meaningless and superfluous. Consequently one must ask how the illusion of being could have arisen (was bound to arise)" (Nietzsche, 1967: 708).

Foucault (1977a) interprets this as a call to reject the quest for 'origins' and not to accept as absolute, or given, the identities (such as, community mediation) that a genealogist may analyze. As such, the genealogical orientation of this thesis cautions against treating any social identity as an entity *sui generis*, as if it were possible to 'discover' its 'essences'. Instead, it focuses attention on the contextual 'plays of domination' which create the spaces for social identities to 'exist' as they do. It focuses, that is, on the complex lines of *descent* out of which community mediation has been created, and examines its *emergence* as a political event located in the interstices of wider power formations.[13]

Such an orientation is valuable in the context of the present thesis because it explicitly focuses our attention (i) on the power-knowledge relations that have created the identity of community mediation, and (ii) on the type of power that community mediation itself embodies. This is congruent with this thesis' overall objective of elucidating the regulatory logic of community mediation in a given context -- an endeavour which has been conspicuously neglected by existing research.[14]. In addition, such an orientation emphasizes the contingency of social identities, and

recognizes the importance of informed political engagement to help shape the eventual form of these identities. At the same time, it revokes simplistic assertions about the core 'nature' of community mediation at a given moment, calling instead for a detailed strategic map of the ways in which identities are created. Finally, the genealogy requires us to understand the discourses we study without accepting the 'absolute' quality they may attribute to their enunciations (1977a: 149-150). This is to say, the genealogy entails a 'dialogue' between two discourses - a critical discourse and a discourse at which its criticisms are directed - without seeking to ground 'theory' in the 'empirical'.

With this in mind, the following thesis has employed a number of practical research procedures over a two year period. It commenced with a broad library review of existing research in the community mediation field (especially in the United States, Britain and Canada), and some exploratory interviews with various advocates of community mediation in British Columbia. I also attended a conference in Vancouver whose main theme was alternative dispute resolution.[15] This preliminary research revealed the extent to which both advocates and critics of informal justice had failed to articulate a precise model of power, a logic of control, that was emerging through the deployment of such practices as community mediation. This conspicuous theoretical oversight prompted the present analysis' attempt to formulate an appropriate 'grid of intelligibility' through which to grasp this. More specifically, this endeavour took me through an extensive reading, and in some cases re-reading, of Foucault's work on power and governmentality (e.g., 1977b, 1978, 1979, 1980, 1981, 1982, 1984, 1988a, 1988b) in an attempt to translate the apparent relevance of these into a workable theory in the context of mediation. In order, however, to ensure that the theoretical map remained articulated to the discourse

through which community mediation was deployed, it seemed prudent to maintain a dialogue between my elaboration of a critical, theoretical discourse, and the advocates' discourse in British Columbia.

In an effort to sustain this dialogue, I conducted a series of nineteen unstructured, open-ended, in-depth, interviews with diverse actors involved in community mediation.[16] Most of these were tape-recorded, the exceptions being those cases where interviewees preferred not to speak 'on the record'. Along with my promise of anonymity, none of these interviewees will be identified by name or position. Most interviewees were open to my research, and welcomed follow-up telephonic contacts to answer specific questions as they arose. Even though the organizers of specific programmes seemed rather more reluctant to let me observe mediation sessions, I was able to observe seven sessions in all - four in British Columbia and three in the Chicago area as a means of comparison.[17]

As well, I spent many hours pouring over articles in journals at the Justice Institute of British Columbia's library, and watched video recordings available to local mediators.[18] It was also useful to attend a range of 'public education' events which advocates see as important opportunities to 'educate' the public about mediation through lectures, video presentations and demonstrations (i.e., "role-plays" where mediators act out the roles of different participants in a 'typical' mediation session). In addition, meetings of a large mediator network which I attended provided considerable insight into the local concerns and issues raised in different areas of informal justice. The most in-depth look at how mediators are taught to mediate came from observing three workshops (each about three hours long) in which student mediators were

'coached' by an experienced mediator before attempting to take their certification examinations. My status at two of these sessions was that of an observer, but the parties welcomed (and even solicited) any questions. On the other occasion, I was asked to substitute for an absent participant, and so was directly involved in the coaching session as a 'role player'. This afforded me an unplanned opportunity to canvass information by watching the coach's responses to certain of the cues I had provided.[19] Furthermore, informal conversations during and after these workshops - and indeed with the mediators of the actual sessions observed - proved to be a useful way of tapping further into the mediators' discourse.

Client perceptions of the mediation process was one area of my research in which problems of access were particularly acute. Indeed, since mediation claims to be an informal and confidential process, programme organizers did not permit access to the names of clients. As a result, I adopted a strategy of requesting programme organizers to distribute standardized questionnaires (see Appendix) to participants in mediation on my behalf. The head of a mediation network agreed to distribute 30 standardized questionnaires while the programme coordinator of a local mediation centre undertook to do the same with a further 80. In all, the response rate was rather low[20], and one can speculate on a number of possible reasons for this, including the possibility that not all the questionnaires were actually distributed.[21] In any case, the information received from these - especially from the open-ended questions - proved to be of value to the current analysis.

The basic objective of all these various research procedures was to immerse myself in the conversations, in the knowledge and practices, of those involved in community mediation in

British Columbia. However, the reader should bear in mind that since the focus of this thesis is to develop a theoretical map to grasp the logic of control embodied in these practices, it is important to reflect on - rather than to accept as valid - the enunciations of this discourse. In short, our genealogy requires that the statements and practices of the advocates be placed under 'erasure' (Sarup, 1989: 35), while placing a different - critical - slant on them. As such, the emphasis of this thesis is on developing a plausible (and critical) theory of such practices and statements, not on a mere description of them.

As should therefore be apparent, the approach of this thesis belongs to that variety of sociological research that might be referred to as critical analysis. It holds that,

> "theory does not express, translate, or serve to apply practice: it is practice but it is local and regional...not totalizing. This is a struggle against power, a struggle aimed at revealing and undermining power where it is most invisible and insidious...it is activity conducted alongside those who struggle for power...A "theory" is the regional system of this struggle" (Foucault, 1977: 208).

Such critical theory attempts to render the familiar strange, to point to the contingency in the purported necessity of 'being.' Against those who see informal justice as a necessary development, I point to its contingent, contextual and unessential nature. This is not a form of criticism employed,

> "in the search for formal structures with universal value, but rather as a historical investigation into the events that have led us to constitute ourselves and to recognize ourselves as subjects of what we are doing, thinking, saying" (Foucault, 1984: 46).

It is a form of criticism that continually scrutinizes the power-knowledge relations which establish the limits of our social identities. It reflexively examines our 'existence' and problematizes those identities that might previously have appeared as quite unproblematic. Such criticism is there to expose the potential pitfalls of given power formations, their political

rationalities, in an effort to diagnose their oppressive effects.

I do not, however, pretend to be an isolated iconoclast, an enemy of my age. Instead, mine is the language of a critic who cannot be separated from a particular ethos, and who uses sociology to chart some ways in which subjugation in a given power-knowledge formation is produced. It is a critical interpretation, a 'connected' critique of ourselves as we exist in a particular moment in history (Walzer, 1987). Of course, this conception of genealogical criticism raises an immediate question: if knowledge implies power, then in what power-knowledge formation is the ensuing critique located?[22] One response is to suggest that the discourse of this thesis is located in an amalgamation of erudite and local knowledge that tries to provide an "historical knowledge of struggles and to make use of this knowledge tactically today" (Foucault, 1980: 83). This stance incorporates a notion of 'effective history' because it places our own analysis within the overall passage of time (Dreyfus and Rabinow, 1982: 110-111). As such, the genealogy offers a strategic map - itself charted within a given socio-historical horizon - of the power-knowledge relations associated with the rise of specific identities, in its attempt to diagnose their possible dangers.

In many cases this approach will place the genealogy at the margins of existing power-knowledge formations, since it focuses on local knowledges that are silenced, ignored, or trivialized by dominant discourses.[23] By reactivating minor knowledges, pushed to the periphery by the formal (scientific in our age) discourses of the pundits (Foucault, 1980: 85), the genealogy strives to invigorate conflicting interpretations of existing social limits.[24] This is not so much an attack on the contents (or even the methods) of science as it is an exposure of the effects of the power formations out of which scientific discourse and its institutions emerge (Foucault, 1980: 84).

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WHAT IS TO FOLLOW

I have organized my chapters in the following way. *Chapter one* is mainly descriptive, detailing the rhetoric and practices of community mediation advocates in British Columbia. It maps out the scope of community mediation in the province and provides an examination of its core features. *Chapter two* turns to four main critical responses to the advocates' images of community justice. Although these critics do not direct their attacks specifically to British Columbia's advocates (their criticisms are directed at trends in the United States and Britain), I suggest that many of the points they raise are directly pertinent. This is hardly surprising, given that the advocates' discourse is closely aligned with continental - and even global - trends in the alternative dispute resolution field.[25] The more analytical *chapter three* notes that while critics correctly identify incongruities in the advocates' naive rhetorical optimism, they nonetheless fail to place sufficient emphasis on the political rationality of informal justice. Even so, working with the strengths of the critics' discourse, this chapter redefines the 'problem' at hand and presents a 'grid of intelligibility' through which to analyze a reconstituted 'problem' that refocuses research on the history, nature and effects of the regulatory logic of community mediation.

The lengthy *chapter four* provides a 'genealogy' of community mediation in British Columbia as a response to the simplistic explications of the advocates, as well as to the reductionism of certain critics. It maps out the 'lines of descent' which have produced community mediation as a contemporary event in the province by explicating certain constitutive links between the economic, political and legal fields and the identity of community mediation noted in chapter one. *Chapter five* moves from contextual background to an explicit analysis of the political rationality behind the characteristic practices of community mediation. It outlines the 'pastoral'

model of power through which community mediation regulates individual 'disputants' in 'communities'. Finally, *chapter six* details the mutually constitutive articulations between the pastoral power of community mediation and the sovereign-law model of liberal legality in the province, referring to the effects of this alliance as 'government at a distance'. The latter concept demonstrates that community mediation does not simply expand state control: it 'complements' state regulation with techniques of government. The chapter concludes the thesis by examining certain consequences of 'government at a distance' on an alternative politics of law that strives for a version of community mediation which nurtures a social - rather than professionalized - form of justice.

END NOTES: INTRODUCTION

1. Scull (1984), Cohen (1985) and Lowman, Menzies and Palys (1987) provide detailed accounts of various aspects of the impetus towards 'community control' in the United States, Britain and Canada.

2. For more detail on the nature of these crises, see O'Connor (1973) and Carnoy (1984). Scull (1984) provides a critique of the 'decarceration' movement in light of this theory.

3. See the Alberta Law Reform Institute (1990), Canadian Bar association (1989), Emond (1988), Pirie (1987), and Pitsula (1987).

4. See, for example, Abel (1982), Hofrichter (1987), Baskin (1988), Santos (1982), Harrington (1985), and Matthews (1988).

5. This raises yet another question pertaining to why one ought to choose one form of justice over another. In the absence of overarching metanarratives (Lyotard, 1984) from which such a choice might be justified absolutely, I find recourse in history: our own personal biographies, situated as they are within wider power formations, are directly implicated the 'Gods and Demons' we choose. But this choice is never simply a matter of offering an opinion; it is something inextricably linked to our very constitution as particular kinds of 'selves' in specific contexts (Giddens, 1991; Foucault, 1988b). My own 'self' has in large part been fashioned by bearing witness - even if from a position of relative privilege - to the harshness, the denigration, the horrible oppression imparted by apartheid measures in South Africa. The dire poverty of a life lived in a shack on an open plain, the forlorn glint in the eye of a forsaken African child, the furious surge of a crowd accepting the possibility of death over the certainty of continued subjugation, the sound of a police quirt striking into the flesh of a defenceless body, the blood that coagulates in the sand after the guns have spelled their final coercion - these (and so many others) are images that have inscribed themselves into a self (my self?) that has taken its stand against forces of oppression and which searches for that difficult and elusive condition of social justice.

6. Indeed, by now Hume's distinction (see Russell, 1973: 46-51) is at best a tired one that has come under increasing attack. As one commentator perceptively observes,

> "The critics of positivism (both rationalists, such as Popper and Putnam, and non-rationalists, such as Kuhn and Feyerabend) attacked the conception of a dichotomy between theory and observation. The rallying cry became: all observation is theory-laden" (Newton-Smith, 1983: 12)

If these critics are correct, if observation is governed by prior theory, then the importance of developing adequate theoretical constructs becomes all the more urgent.

7. This standpoint does not deny existence *per se*, but merely rejects that the enunciated identity of a thing at a specific moment in history is essential, or absolute. Thus, different societal contexts may well have different modes of talking about things, for the coherence of such discourse is not constituted by the 'things' themselves but from the 'rules of formation' that specify how statements are to be dispersed within a theoretical space (Foucault, 1972).

8. This is remarkably similar to Wittgenstein's (1983) notion that the meaning of a word lies in its use. If he spoke of language-games as the indissoluble combination of sign, social practice and referent, then we are here using discourse in a rather similar way. However, we shall not be content with Wittgenstein's turned spade of conventional practice, but will seek to show how such practice is unrelentingly antagonistic and forged through relations of struggle.

9. That is, articulation is,

> "...any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice" (Laclau and Mouffe, 1985: 105).

10. As Foucault puts it,
> "there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations" (1979: 27).

11. Some might object that if elements are floating, if the transition to moments is never complete, then how is it that identity appears to be 'fixed'? Laclau and Mouffe (1985: 112) respond by suggesting that practices of articulation construct certain privileged "nodal points" which appear to have fixed meaning. But this fixed quality is illusory, not only because signifiers are intrinsically 'floating', but also because the social domain in which articulations are forged is open. As such, the appearance of determinism, or absoluteness, in truth statements is wrested out of complex struggles and antagonisms which forge articulations and produce the form of identity. The crucial point, however, is that such identity is neither fixed nor universal; it is no more and no less than the product of struggles to give form to the malleable indeterminacy of both linguistic categories and the social domain.

12. As indicated above, nor does it make an absolute separation between theory and other forms of analysis (as does Alexander, 1980).

13. But, as Foucault cautions,
> "The search for descent is not the erecting of foundations: on the contrary, it disturbs what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself" (1977a: 147).

14. It seems to me that part of the reason for such an oversight is the absence of a research orientation that **explicitly** focuses attention on the nature of power in a given setting. The genealogy not only suggests, but demands, that we focus on the forms of domination which produce identities.

15. This was an annual meeting of the Canadian Bar Association in which the findings of a Task Force on alternative dispute resolution dominated the proceedings (Canadian Bar Association, 1989).

16. In particular, I conducted nineteen interviews with: 6 programme organizers (one interviewee - regarded by other interviewees as running one of the most successful programmes - was interviewed twice); 2 board members who were also involved in mediation education (both dominant figures and members of the board of a founding programme - one was interviewed twice); 2 lawyers involved in mediation (one was a leading figure in the Mediation Development Association of British Columbia); 3 academics, one of whom is the head of a project; 3 community mediators; 1 extremely influential individual in a prominent funding organization; and, 1 client (see reasons for this shortage later) who participated in a mediation session that I observed. Of course, I do not claim to have presented a random statistical sample of the mediation 'community' in British Columbia, but then, that is not my intent. Instead, I have focused on a good sample of those people who - in the estimates of their peers - have had a marked influence on the deployment of mediation in the province.

17. I observed a reasonable cross-section of disputes being mediated, including landlord-tenant, consumer, divorce and neighbourhood conflicts. A further (commercial) mediation that I was about to observe was cancelled because one party did not arrive. Nevertheless, this afforded an opportunity to speak directly - and informally - to the present client and the mediator.

18. In particular: The Case of Willie: Three mediation Approaches (video, 112 minutes, 1988); Family Mediation: Co-Parenting (video, 60 minutes, 1989) - this demonstrates Burdine's (1990) four-stage mediation model; and, Working it Out (video, 24 minutes, 1990); Mediation, (video, 28 minutes).

19. For example, I was able to assume the role of the obnoxious participant to see what techniques of power mediators had at their disposal.

20. In all, 23 completed questionnaires were returned to me, and the one programme returned 9 incomplete questionnaires that were never distributed. The overall response rate was therefore about 23% (23 out of a total of 101 - assuming, of course, that all 101 were distributed).

21. One could also conceive of situations where participants found mediation to be unhelpful and thus might have ignored the questionnaire out of not wanting to have anything more to do with the process.

22. This should not be confused with the possible objection that epistemological relativism always leads to the so-called 'liar's paradox'. The latter suggests that statements such as 'there are no universal essences' echo the semantic difficulties of the assertion: 'all that I say is a lie.' In both cases there appears to be a paradoxical element that undermines their respective truth values. However, this paradox is pernicious only to the extent that one assumes the existence of an *a priori* 'truth value', for then the tension is problematic. If we reject this, as we have done, then clearly the paradox falls away, because now we recognize that even the statement 'there are no universals' is temporally and contextually bound by its pragmatic importance for a particular strategy. There is therefore no contradiction as indicated by the purported paradox.

23. In some cases the genealogy is useful for,

> "those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in programming. It is a challenge directed at what is" (Foucault, 1987: 114).

24. For this reason, an emphasis on empiricism may not be particularly helpful, for its methods often serve the dominant modes of power-knowledge by eliminating from its purview the very types of (subjugated) knowledges that we seek to elucidate (see Fitzpatrick, 1988).

25. Indeed, local advocates see the importance of 'keeping up' with research developments in the field elsewhere (especially in the United States). Most mediation courses expect students to be conversant with such research (Burdine, 1990).

CHAPTER 1

RHETORICAL ADVOCACY IN BRITISH COLUMBIA:

COMMUNITY MEDIATION DEPLOYED

Consider the following scenario. The end of a busy work week finds you lying on your sun-deck, reading a novel and enjoying the booming sounds of your favourite music. The solace of the setting is brought to a sudden halt by the screams of a next-door neighbour who threatens to destroy the source of the 'noise' unless there is complete quiet. Since it is early afternoon, and since you have recently endured, without complaint, an extremely noisy party at the same neighbour's house, you decide to ignore the threat. Even so, it is not long before you realize the sincerity of your neighbour's threats: s/he hurls a stone that lands in your lounge having smashed a window pane *en route*. After the initial shock of the event, you realize how angry you are at his/her sheer audacity, not to mention the damage caused. The situation escalates into a raging conflict in which reciprocal insults are hurled, ending with your withdrawing to contact the local police. By the time the officers arrive - several hours later - your fury has subsided somewhat, leaving you without any real desire to lay criminal charges against your neighbour. However, you do expect an apology as well as material restitution for damages and for the inconvenience involved. What courses of action are open to you?

Were we, for the sake of argument, to step back into the opening years of the Nineteen Seventies in British Columbia, one could envisage a number of possible responses. For example, one could confront the neighbour again, simply 'lump' the case, call for third party intervention (e.g., a church), or file a writ in small claims court. If the last of these options were selected, it is

probable that legal counsel would be solicited to negotiate the case through the formal procedures of the court system. No doubt, this would have entailed considerable cost, and delay, offering you little control over the outcome of the dispute. It is quite likely for you to have found yourself sitting passively in court bearing witness to 'your' emerging case constructed and presented by counsellors, and pronounced upon by the silencing stroke of a judge's gavel. The binding decision may, or may not, have served to alleviate the tension and hostility between you and your neighbour.

Some thirty years later, in the early years of the Nineteen Nineties, over and above these options, there are a range of so-called 'informal alternatives' to which one could turn; for example, in certain parts of British Columbia, it is possible to seek out the mediation services of local community mediation programmes.[1] By way of introducing the rudiments of the mediation process, it may be helpful to continue with the example above to provide a composite sketch of a typical mediation session.[2]

Suppose you call a local Community Mediation Centre to ask for assistance with your dispute. A case manager at the centre listens carefully to your account and assesses its suitability for mediation. If considered appropriate, both parties are invited to attend an informal, legally non-binding, mediation session which is described to you as a voluntary process that helps disputing parties to work out their own settlements under the guidance of trained mediators. Mediation, you are told, is a 'nothing to lose' option that allows you to work through conflicts in an informal way, but which does not exclude the courtroom as a final option if no settlement can be reached.[3] Furthermore, it is said to be inexpensive (usually fees are calculated on a sliding scale

in accordance with one's income), quick, convenient, and confidential. Assuming both parties agree to mediate, the Centre calls on the services of a senior mediator and a co-mediator (usually volunteers) and arranges a convenient time for all concerned.

At the appointed time and place, the senior mediator introduces everybody and attempts to 'break the ice' by encouraging a cordial and casual atmosphere. S/he explains that mediation aims at helping people to work out settlements which are most appropriate to their given circumstances, emphasizing its relative indifference to questions of guilt or innocence. The mediator also sets out specific rules for the mediation; e.g., no abusive name-calling, no threats or disparaging language, one person to talk at a time, etc.. Having obtained a signed commitment to mediate from both parties, s/he requests that you convey your perception of events and how you would like to resolve the matter. To ensure that the neighbour has understood your point of view, s/he is asked to paraphrase the concerns raised. You are given an opportunity to respond before the neighbour's perceptions are solicited and the paraphrasing process reversed. Throughout the session, the mediators encourage you to direct all communication to your neighbour. They constantly summarize the two different conceptions of events in the dispute, checking the accuracy of their assessments through such expressions as, "Tell me if I'm wrong, but I hear you saying...," or "Are you comfortable with that?" or "Let me summarize where I see both of you are at."[4]

The mediators repeatedly emphasize points of agreement, the 'common ground', between the two of you, suggesting that "You are in the same boat" because neither particularly wishes to take the matter to court. At first, the mere suggestion that you could agree with your neighbour on

the fundamental aspects of the conflict is difficult to accept, given the recalcitrance that s/he has demonstrated. Indeed, your anger surfaces in an outburst where you cannot contain yourself in the face of what appear to be blatant lies told by your neighbour. The latter responds with equal abuse and the generally cordial atmosphere of the room is sharply interrupted. Curiously enough, the head mediator reacts quite calmly, and with some humour, by calling a "time out" and then acknowledging the respective sources of your anger, but firmly emphasizes that if the dispute is to be resolved, it is necessary to adhere to the rules of the process agreed to at the outset of the session. This calms the situation somewhat as you both agree to cease interrupting and swearing at one another.

After further discussion about what is at stake in the dispute for each of the parties, it becomes clear that you had not considered many of the effects your actions have had on the quality of your neighbour's life. For instance, s/he has insomnia and sleeps in the afternoon - the position of your speakers is such that their sound travels directly into her/his bedroom. Similarly, your neighbour discovers, with some surprise, that you were actually at home on the night of his/her party, and that the guests had indeed made such a noise. Reciprocal apologies on these matters begins to pave the way, despite initial impressions, for you to see that there may well be some common ground in the dispute. Indeed, as the mediators clarify more fundamental interests behind the positions you have taken (e.g., your desire for peace and quiet at night, and your neighbour's desire for the same by day) and show how these might bear on the possible resolutions of the conflict, you begin to see aspects of the problem you had not thought about before. At this point, you begin to accept the head mediator's notion that the 'core' of the dispute revolves around your desire for restitution and a formal apology, as opposed to your neighbour's

desire for consideration.

With this agreed upon, you are now both asked to 'brainstorm' possible ways to settle the dispute. Various possibilities are entertained and written on a flip-chart in point form. The mediators focus attention on each of these points in turn to establish the degree to which either party agrees with them. Using the agreed-upon aspects of this discussion as a base, the mediators provide various possible combinations for an acceptable agreement. In the end, the co-mediator suggests the following possible settlement: you agree to accept payment only for replacing the window (not for cleaning up the broken glass); your neighbour pays the sum requested; both apologize to each other for their respective 'mistakes'; and, both agree to reposition your stereo speakers and to be more considerate when playing music - day or night - in the future. Since this is acceptable to all, it is drafted in the form of a written settlement in which specific conditions (e.g., how much is to be paid, by when, etc.), and ways for evaluating whether both parties have complied with these, are explicitly stated. At this point the 'dispute' is deemed to be well on the way to being 'settled' - all that is left is to make sure that the conditions of the agreement are adhered to.

Let us now leave this hypothetical case study to commence a more detailed examination of the discursive environment in British Columbia through which such practices are justified and accorded a specific meaning.

THE SCOPE OF COMMUNITY MEDIATION IN BRITISH COLUMBIA

The rise of community mediation in British Columbia should be silhouetted against a more

general interest in the value of alternative techniques to litigation that emerged in diverse disciplines, including legal anthropology[5], jurisprudence[6], and a growing alternative dispute resolution movement in Britain[7], the United States[8] and Canada[9]. Notwithstanding its history in labour disputes, mediation - specifically - is currently used to 'settle' numerous local conflicts, including: victim-offender reconciliation[10]; family conflict[11]; community (neighbour) disputes; commercial disputes[12]; criminal disputes; environmental disputes; First Nations issues[13]; and school-based conflict (CBA: 1989; Peachy *et al*, 1988). However, in a quest for focus, the present thesis will concentrate on non-profit, "community mediation" programmes in British Columbia whose institutional base is outside (though not necessarily independent) of the formal justice system, and that target ("minor") disputes between parties with ongoing relationships in the community. Such programmes employ techniques of "mediation" in an attempt to 'resolve' community disputes. Using the language of advocates in the field,

> "Community disputes can be defined as those disputes involving persons with an ongoing relationship because of a community connection" (CBA, 1989: 42).

And this 'connection',

> "may be geographical, social, family, religious or other similar type of relationship" (*op. cit.*, 1989: 42).

Within this defined domain, there are a range of philosophies behind the aims and provision of services. One of the earliest mediation projects, the Victoria Diversion-Mediation Project, which opened in 1974, granted 'minor' criminal offenders an opportunity to make reparations before being processed through the court system (Solicitor General, 1977). Although not 'outside' of the justice system in any meaningful sense, such programmes served to open debate about the possibility of moving outside of the justice system to resolve specified disputes. One of the first

attempts to provide a specifically 'community-based', 'non-profit', mediation programme in the province arose out of the Justice Development Commission's (JDC) Small Claims Project in the summer of 1975 (15th May to 30 August). This project was run in tandem with the Small Claims Court to assess the effectiveness of mediation in dealing with the "justifiable criticisms" of this Court. The recommendations arising from this experimental project were unequivocal:

> "The use of 'mediation' as an integrated part of the court process was successfully demonstrated to the satisfaction of both the public and the judiciary. Mediation can be used to increase the perceived quality of 'justice' while complementing the present role of the courts" (JDC, Courts Division, 1976: 46).

While the perceived success of this programme fostered a certain receptiveness to the idea of community mediation, a *prima facia* reading of the Nineteen Seventies does not suggest a rapid increase in the number of informal justice programmes (Peachy, *et al.*, 1983). Nevertheless, during this period, foundations were being laid for the more explicit identity that community mediation eventually assumed in the Nineteen Eighties. In particular, at the beginning of the decade, the Justice Institute of British Columbia offered a course in mediation, and its popularity led to the formation of The Westcoast Mediation Services Society.[14] This society opened a mediation service centre in 1983 to house the newly trained mediators. By the end of the decade there were: two other specifically community mediation Centres (one in Victoria and the other in Surrey[15]); a well-funded British Columbia International Commercial Arbitration Centre (BCICAC)[16]; a mediation section in the Better Business Bureau[17]; various VORP programmes in the Fraser Valley, Greater Vancouver and Kelowna[18]; two school-based mediation programmes[19] that commenced a rapidly rising trend in this area[20]; and, a well-endowed project focusing on the causes and nature of multicultural conflict.[21]

If these programmes betoken the rumblings of an emerging community mediation field, there are also numerous other indications of an expanding trend. For example, by the end of the Nineteen Eighties, a number of networks had been established as working organizations, many of which put out regular newsletters (eg., "Accord", "Resolve", "Interaction", "The Mediator"). There are international (e.g., The Community Justice Initiatives Network), national (e.g., Family Mediation Canada established in 1985)[22], provincial (e.g., Mediation Development association of British Columbia[23]) and some regional (e.g., Southwest Mediators' Network) mediation networks. Of particular interest to us is the Mediation Development Association of British Columbia which by 1985 had approximately 75 members[24] and by 1987 boasted a paid-up membership of 600.[25] It has also recently affiliated itself with the Community Justice Initiatives Network and Family Mediation Canada.[26] The formation of such networks reflects an intense desire for unity amongst mediators to entrench and protect common interests in society; as one advocate put it, borrowing heavily from a famous United States' statesman, "If we don't hang together, we'll hang separately" (Moir, 1987).

A further possible indication of community mediation's impending expansion lies in the increased number of training facilities for mediators that have emerged over the last decade. For instance, in 1985 the Justice Institute developed a formal Conflict Resolution Certificate Programme out of its early, less structured, Extension Programme Courses[27]. In addition, the Continuing Legal Education Society of British Columbia periodically offers a five day course in family mediation, as well as a number of other courses in alternative dispute resolution.[28] Furthermore, some programmes offer in-house training courses for volunteer mediators (e.g., Surrey/White Rock, and the Dispute Resolution Centre of Victoria). In all these ways, a pattern of increased training

facilities for mediators has become markedly evident. Indeed, as a prominent trainer in the field puts it,

> "The pressure to certify mediators is increasing rapidly as changes in legislation expand the opportunities available to trained skilled mediators" (Burdine, 1991: 7).

This pattern is reinforced by the increased interest that universities in the province are showing towards alternative dispute resolution (Sloan, 1989). The most prominent amongst these is the University of Victoria's Law Faculty which has established an Institute of Dispute Resolution (in 1989) that is "devoted to improving the ways in which disputes are resolved in our society." It aims - *inter alia* -

> "to enhance awareness and acceptance of alternative dispute resolution (ADR) procedures in the community" (UVIC Institute for Dispute Resolution, pamphlet).[29]

In addition to these forces for expansion, the legal establishment continues to assist the development of the alternative dispute resolution field in various ways. First, a number of lawyers and judges afford a certain credibility to the field by actively participating in mediation, especially in the areas of Family, Environmental and Commercial law. Also, the Canadian Bar Association commissioned a Task Force to examine alternative dispute resolution in Canada and one of its recommendations is:

> "That the Canadian Bar Association recognize credible and responsible ADR organizations and programs as a valuable aspect of the Canadian Justice system and that appropriate institutions be urged to give the necessary support, on a long term basis, to enable these organizations and programs to develop, improve and maintain the quality of ADR services" (CBA, 1989: 75).

As well, various Small Claims Court judges either support mediation programmes by including information about their services in writ packages, or by using techniques of mediation themselves[30].

Secondly, statutory legislation has been drafted to actively support mediation; e.g., the *Divorce Act*, 1985, S.C. 1986, c. 4. This Act imposes a duty on lawyers to tell clients involved with divorce proceedings of the possibility of trying mediation and of known mediation services in the area. A federal government guide to the Act describes this duty thus:

> "A lawyer consulted by a person seeking a divorce must point out the advisability of negotiating support, custody and access matters. The lawyer must also inform the client of any appropriate mediation services that are known to the lawyer" (Canada, 1986: 24).

Thirdly, the British Columbian Attorney General commissioned a report to increase access to justice in the province (Hughes, 1988). In both the findings of the commissioners, and in the government's response (Smith, 1989), alternative dispute resolution was actively advanced as a promising way of increasing access to justice. As part of this apparently expanding alternative dispute resolution field, community mediation might be poised for development in the province.

In sum, the overall scope of community mediation in the province appears to be increasing in size, but should not be overestimated (Huber, 1990). This is a movement in its infancy, an experimental movement whose organizational and institutional bases are still in rapid flux. Its apparent growth must be seen in the context of various funding agency's enthusiasm to provide "seed money" to start programmes in conjunction with their general unwillingness to provide ongoing funding (interviews, 29/01/1991; 12/09/1991).[31] The precariousness of this position is evident when one considers that programmes must submit renewed proposals for re-evaluation each time funding contracts expire (every one or two years).[32] In this situation, funding is often predicated on a programme's ability to maintain high case loads and settlement rates[33], and as a result, those mediation programmes that fulfil the technocratic requirements of funders are more likely to receive funding. Nevertheless, it is important to bear in mind that the informal dispute

resolution arena is a contested one, and its form is contingent upon ongoing contests between significant agents in the field. Therefore, let us focus on the discourse of those who advocate community mediation as a viable option, because they provide the rhetorical justifications for the deployment of informal justice in British Columbia.

THE ADVOCATES: REFLECTING ON COMMUNITY JUSTICE

When considering the present scope of community mediation in the province, it is useful to examine the various ways in which programme participants explain what it is they are doing. That is, it seems important to profile the discourse of those who have helped to define, and who participate actively in, this social field. I shall offer but a synoptic overview of this discourse by examining its descriptions of: how mediation has emerged; the nature of the mediation process; the role of the mediator; who the mediators are; the potential benefactors of mediation; and, why mediation should be deployed in contemporary society. In tandem with this, I shall outline some client perceptions of the mediation process before concluding the chapter with a synoptic overview of dominant features of the community mediation landscape in the province.

THE RISE OF COMMUNITY MEDIATION

Certainly the most prevalent theme in my interviews with mediators and programme executives was that community mediation had emerged in response to two main factors: first, the inability of the court system to deal with the needs of the 'community'; and, secondly, because of the 'enterpreneurial' activities of community members in deploying specific mediation programmes. Turning to the former, many advocates reason that the courts are in crisis because they are unable to deal properly with 'minor' disputes between community members with ongoing relationships.

Typically, (as in various public education forums I attended), the courts are presented as somewhat archaic institutions that are certainly suitable for 'serious' disputes, but which are equally unsuited to 'minor' community disputes. Their procedural inflexibility results in high costs, time delays and inhospitable settings for users. By contrast, community mediation is described as a much more efficient procedure that grants people the opportunity to, "resolve their issues in a less formal, less structured, less expensive and more satisfying way" (interview, 26/09/1990). It is usually said to have arisen out of a "need" in the community to resolve conflicts effectively without having to endure 'a day in court'. As one interviewee put it, advocates saw the need for community mediation because,

> "we were hearing about all these problems in the community that didn't seem to have a logical place to go...to be resolved" (12/09/1991).

That is, it arose because,

> "Citizens in various communities decided there had to be another way to resolve conflict and bring harmony to the area where they live" (Brown, 1991: 1).

Consequently, alternative dispute resolution in Canada is regarded as, "simply a modern restatement of the pursuit by all Canadians for social justice and peace" (Brown, 1991: 2).

Apropos the second factor, advocates refer to various proximate impetuses for the emergence of specific programmes in particular communities. For example, one of the first specifically community mediation programmes to establish itself in the early Nineteen Eighties, under the auspices of the Westcoast Mediation Services Society, arose through the active input of a few individuals on the Board of this society.[34] Its emergence is said to have coincided with the success of a mediation course at the Justice Institute of British Columbia that offered practical training in mediation. By all accounts, the course was extremely successful[35], yet those who

completed the initial course had no easy vent for their newly-acquired skills:

> "Out of our training here a number of the people that had taken some of our courses said, 'Where do I now go to get some experience in mediating community disputes?'" (interview, 12/09/91).

In direct response to this appeal, the Westcoast Mediation Services Society was constituted - in close association with the Justice Institute - by a Board of some four volunteer members. They drafted detailed proposals for a mediation programme, submitted these to various potential funding sources and finally received limited funding from Canada Employment and Immigration Commission, as well as the British Columbia Ministry of the Attorney General.[36] This programme has continued to operate despite its somewhat less than expected case-load, but is currently experiencing difficulties in obtaining renewed funding.

Similarly, the immediate events deemed important in the rise of a mediation programme can be gained by looking at how the advocates' discourse describes the opening of the Victoria Dispute Resolution Centre. This programme commenced operations in April 1988 because of the purported involvement of two sources. First, the Victoria Association for Community Diversion/Mediation Services sought to fill what it perceived (from a needs assessment) to be a void in the provision of mediation services for citizens involved in minor civil disputes (Dolan, 1989: 3). Secondly, the Faculty of Law at the University of Victoria sought a way of making its students more aware of alternative dispute resolution mechanisms, and to gain practical training/experience in using such methods. In tandem, members from both organizations cooperated to establish a two year dispute resolution pilot project. The funds for the project were provided by: the British Columbia Ministries of the Attorney General and Labour and Consumer Services; the federal Department of Justice; and the Law Foundation of British Columbia (Dolan,

1989: 4).[37]

From these two examples, one sees the kinds of responses that the advocates' discourse provides

for the rise of specific community mediation programmes in the province.[38] In sum, one might

say that they emphasize the 'entrepreneurial' impetus provided by volunteers on the Boards of

the respective societies, the procurement of funding and the presence of trained mediators in

response to a general dispute resolution climate in which courts have failed to 'resolve'

community disputes adequately. But how does mediation improve upon the performance of the

courts? In order to address this, let us turn to the advoctes' conceptions of mediation.

WHAT IS MEDIATION?

"Mediation is a voluntary process where an impartial third person, the mediator, maintains a respectful environment for two or more people to resolve a dispute" (Pamphlet, Westcoast Mediation Services).

"Mediation is a voluntary process during which people in dispute resolve their problems with the assistance of an impartial third person called a mediator" (Pamphlet, The Dispute Resolution Centre, Victoria)

"Mediation is a voluntary, confidential approach to conflict resolution. It offers people a legal, peaceful, informal alternative to the adversarial system. Mediation brings people together in a neutral setting to discuss their situation and find a lasting solution to it" (Pamphlet, Surrey/White Rock Mediation Services Society)

As may be gleaned from the above quotes, the advocates' discourse coalesces around at least

three nodal points when enunciating the nature of mediation. First, almost without exception,

community mediation is portrayed as a "voluntary" process which is sharply differentiated from

the more coercive nature of the court system, or as a means of releasing people from the

ubiquitous tutelage of the modern state. With this in mind, one can better understand why it is

described as a flexible process that does not require individuals to yield control over their disputes to a court. On the contrary, advocates argue that,

> "Our goal is to help people to be empowered to resolve their own disputes whenever they can" (interview, 12/09/1991).

Individuals who participate in mediation are therefore required to work *actively* towards developing and finding a settlement that they feel is acceptable. As one programme advertisement puts it,

> "Mediation is dedicated to the principle that we all have a right to be actively involved in determining the outcome of our conflicts." (Pamphlet, Surrey/White Rock Mediation Services Society)[39]

Aside from the purported empowerment that is derived from such voluntary participation, the process of mediation itself is said to contribute to building communities by encouraging the active participation of members.[40] Moreover, advocates argue that mediation educates people to resolve potentially disruptive disputes cooperatively rather than through confrontation. Consequently, mediation furthers a 'restorative' as opposed to a 'restitutive' form of justice[41], and thus seeks to,

> "improve the quality of community life through more direct citizen participation, reduced community tension and increased community problem-solving skills" (Peachy and Tymec, 1989: 43).

Secondly, advocates of mediation emphasize the settlement of disputes. Indeed, some even describe mediation as,

> "a settlement conference that has many advantages over the normal discovery procedure [of the courts]...You can sound [the other disputant] out about settlement in a way that isn't possible within the confines of the litigation system." (interview, 26/09/1990)

This underscores a basic theme in the discourse that mediation should 'settle' conflicts, that it

should bring,

> "about an understanding of the real dispute, an understanding of the dispute that leads them to settle...The commitment to settle is really key, and you have to keep testing for that again and again" (interview, 26/09/1990).

This emphasis on settling disputes is related to a pervasive trend in the discourse that equates the success of mediation with its ability to produce the tangible result of 'resolving disputes' (Merry, 1982).

But how do advocates conceptualize the 'settlement' of a dispute? From interviews, it seems that a dispute is deemed to be settled if both parties agree to a 'reasonable' resolution. Thus, as a local mediator suggests, a settlement is obtained when,

> "There is something mutually acceptably agreed on by both parties; and that could take the form of something written which they then sign and agree to abide by, it may not - it may be verbal" (interview, 15/01/1990).

The basic message here is that an acceptable agreement is one that is made 'voluntarily' by the (usually two) disputants involved in a conflict. Settlement is, therefore, defined within the extremely narrow confines of a specific dispute between two parties: if both parties are satisfied with the outcome of their dispute, and agree to abide by its conditions, then the dispute has for all intents and purposes been settled (assuming the people do actually abide by the conditions).[42] What is deemed to be significant here is the "closure" that a settlement provides to a dispute between parties, allowing them to 'take up' their relationship without the tension of conflict (interview, 26/09/1990). The discursive exemplar is that harmony between individuals translates into cohesion within communities because it 'restores' peace to tense relationships.[43]

The third and final discursive nodal point with respect to the nature of mediation centres around

the advice that is offered to those who wish to mediate. In other words, it provides some guidelines on how (by what techniques) to mediate conflict and to sucessfully 'settle' conflicts between specific disputants. Whilst there are a range of books which serve as practical guides to the process of mediation generally[44], and to the nature of power available to mediators[45], in British Columbia - at least - there are two commonly referred to source books. On the one hand, used particularly in the area of family disputes, Landau *et al.* (1987) details a variety of procedures, skills, techniques and issues that are of particular relevance to lawyers who provide mediation services. On the other hand, the Justice Institute's Conflict Resolution Certification Programme uses a manuscript written by one of its key instructors (Burdine, 1990). Since so many mediators in the privince have attended this training course, and rely upon Burdine's basic model when practicing mediation, let focus on her guide for mediators.

Burdine details a four "stage" model of the mediation process which is widely used by the mediators who have attended the Justice Institute's Certification Programme.[46] The first stage requires mediators to "set the tone" of a given mediation by attempting to put disputants at ease through relaxed conversation. The idea is to underscore the 'informal' nature of the process. In this stage, the nature of the mediation process is explained, its rules of conduct expounded and a "commitment" to mediate obtained from disputants (often this entails signing an "Agreement to mediate"). Burdine's second stage, "generating the agenda", affords both parties the opportunity to present their respective sides of the dispute. Here the mediator must identify and focus discussion on, possible areas of "common ground" between parties by "identifying agenda issues" through such techniques as "reframing."[47] The third stage involves "establishing" and elaborating upon the common ground that is assumed to exist between parties. This is achieved

by clarifying positions, needs and interests through such techniques as reframing, skilful questioning, probing, breaking large issues into manageable components, and emotion management (defusing anger or hostility). Burdine's final stage of the process attempts to find a settlement that is feasible, fair and satisfactory to both parties (and the mediator). This entails such activities as: "brainstorming" to search for resolutions; reflecting on the implications of specific agreements; explicating practical aspects required; drafting an agreement between the parties; and, monitoring settlements.

At this point, it may be fruitful to emphasize that while the advocates' discourse focuses on the technical aspects of how to get two people to settle a dispute, it almost entirely omits an analysis of what would constitute a just resolution in a given case. In other words, the question of justice is subordinated to more encompassing discussions of a technical nature. The upshot of this is to evaluate the effectiveness of mediators, not in terms of their ability to promote social justice, but through their technical skills at encouraging parties to reach a settlement. For example, in a case where one employee hurls racial insults at another, it is surely a pyrrhic victory for a mediator to procure an agreement from the disputants. Perhaps, a more empowering informal justice response to this would be one that does not treat the dispute as an isolated malady in the relationship between two individuals, but which recognizes the structural conditions that have nurtured such disputes (Mica, 1992). Indeed, for community mediation to pursue social justice in this case would seem to require programmes to locate themselves within a wider political strategy directed at expunging racism from society, and not to evaluate their success in simple terms of individual settlement. In any case, the advocates' discourse absolves mediators from the responsibility of ensuring that the 'resolution' of a given dispute is a just one, and fails to

measure the 'success' of a mediator in terms of his/her ability to promote justice.

WHAT IS THE ROLE OF THE MEDIATORS?

> "The mediator ensures that the parties:
> clearly communicate their and needs and concerns
> listen and understand each other
> focus their discussion on resolving the conflict
> develop an agreement acceptable to both of them"[48]

A pamphlet of the Dispute Resolution Centre adds to the above statement that the mediator "sets ground rules" and "assists parties to come to their own solutions". The advocates' discourse here portrays the mediator's role as no more than a passive, facilitative one which opens closed channels of communication between disputants. The mediator applies mediation techniques (such as Burdine's model) to help parties to resolve their disputes without 'forcing', or coercing people to reach solutions. Mediators, we are told, do not make decisions, offer legal advice, assign blame or establish guilt and innocence. The mediator's role is to facilitate the flexible process of resolving disputes by opening communication between parties in order to increase the chances of individual disputants reaching an agreement.

Here, the mediator is portrayed as a *neutral* third party who builds a safe environment from which to secure an acceptable resolution (Burdine, 1990). Interviews with various mediators indicate that there are differing conceptions of neutrality, and the possibility of ever entirely achieving this. However, for most, the central issue here is captured in the following statement by a prominent mediator apropos her understanding of mediator neutrality:

> "What I would like to see happen does not become an issue in this mediation. I have to step back and recognize that its these two people trying to resolve a problem and I'm here to help them" (interview, 11/01/1990).

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In my observations of practical training sessions for prospective mediators through 'role plays' (i.e., simulated mediation sessions where other trainees assume the roles of disputants), a qualified "coach" underscored this conception of neutrality by encouraging mediators to focus on the 'process of interaction' in a given mediation context and to avoid getting 'caught up' in the details of what disputants had to say. The general theme here was not so much that mediators ought not to intervene in a given dispute - on the contrary, they were encouraged to keep control of the session -but rather that their interventions should be directed at facilitating a settlement acceptable to the parties involved.

This focus on mediator neutrality, no doubt, addresses the possible objection that community mediation is too partial a process to deliver fair settlements. At the same time, it distinguishes mediation from litigation because the mediator, unlike the judge, does not impose a judgement on disputing parties. Indeed, by assuming a degree of common ground to exist between disputants, advocates require no more than the 'neutral' assistance of a mediator to recover the consensus lost through conflict. In more abstract terms, one might even say that the idea of 'neutrality' here is predicated upon the assumption of a primordial 'community' consensus which supersedes any conflicts that may arise between individuals - hence the call for mediator's to adopt a neutral role.

WHO ARE THE MEDIATORS?

> "Our mediators are professionals from a variety of backgrounds who have special training in conflict resolution" (joint publication, Surrey/White Rock Mediation Service and Westcoast Mediation Services)

> "A member of your community, who is fully trained and assessed by the Centre" (Pamphlet, the Dispute Resolution Centre of Victoria)

The above descriptions offer a somewhat dichotomous conception of who the mediators are: they are trained 'professionals' but, at the same time, ordinary non-threatening members of the community from a diversity of backgrounds. As one pamphlet suggests,

> "In British Columbia, mediation is provided by counsellors, educators, lawyers, psychologists, social workers or trained volunteers in either private practices or family counselling agencies, community mediation centres or Family Court Counsellors' offices" (Mediation Development Association of B.C.)

In general, mediators - especially those that volunteer their services - are portrayed as altruistic people with a vision and a desire for 'social change,' who "really feel the need to help people" (interview, 11/01/1990).

While this may give some indication of the range of people that serve as mediators, it does not give sufficient indication of the fractions that exist between groups of mediators. Despite the previously noted calls for unity amongst mediators, my research indicates one clear divide between mediators who are in private practice and therefore charge a set fee for their services, as opposed to volunteers who do not get paid (or only receive token amounts) for services. Typically, this split coincides with a definite cleavage between lawyers who use mediation, as opposed to people with non-legal backgrounds - mainly 'social science' or church-associated - who have trained as mediators. As one prominent member of the community mediation movement puts it,

> "What I find intriguing in this field is there's a struggle between whose going to dominate it. Is it going to be the lawyers (and judges and court system) or is it going to be the human service people and community-based people?...That's the same all over North America. There's always an interplay between these two groups" (interview, 12/09/1991).

For the sake of clarity, the latter may be referred to as 'social expert' mediators and the former as 'legal' mediators.

In general, social expert mediators are located in the so-called 'new middle class' (Howlett and Brownsey, 1988) and advocate community-based versions of mediation that are complementary, but outside of, the legal system. This is hardly surprising, given that they are 'outsiders' to the formal legal field since they are not members of a Bar Association and cannot practice as lawyers. No doubt, their common fear is that if mediation should fall under the exclusive jurisdiction of lawyers, non-lawyer mediators would soon be excluded from the informal justice domain. If the social experts are reasonably united on this score, lawyer mediators seem rather more divided: there are some who support the social expert vision of community mediation; others oppose the use of mediators who are not formally trained in law[49]; and, still others are simply indifferent, so long as no untrained mediator spoils the reputation of the mediation process.

One consequence of this division within the body of mediators is a pre-eminent concern with devising and implementing standards of practice for mediators.[50] With certificate (and other) courses, social experts can entrench their credibility as mediation experts while lawyer mediators - in the field of family law - can extend their insurance coverage into mediation, provided they have completed an accredited course (CBA, 1989). But even here, the division in question surfaces again in the courses that people elect to attend. In particular, social experts (and their lawyer supporters) tend to favour the Justice Institute's Conflict Resolution Certificate Programme, whereas lawyer mediators favour courses and practicums offered by CLE[51], or the BCICAC. Moreover, my interviews with, and observations of, mediators in the different 'camps' revealed a rivalry that influenced the kind of recognition accorded to these different courses. For example, in one interview (and confirmed in others), a social expert derided the CLE programme

as a "Mickey Mouse" course, especially when compared with the more rigorous training offered by the Justice Institute. Equally, in a revealing omission, the CBA completely ignores the Justice Institute's programmes in its overview education in the ADR field (CBA, 1989: 45). In sum, then, these various observations suggest that mediators are not a homogenous group, but rather are split into various groups that include 'volunteers' versus 'paid mediators', and 'social experts' versus 'legal mediators'.

WHO BENEFITS FROM MEDIATION?

Brochures from the different programmes suggest that mediation can potentially benefit all people involved in ongoing relationships and who are involved in 'minor' community disputes. A central idea here is that if sufficient numbers of disputants resolve their disputes through the active processes of mediation, it is possible to counter individual apathy and commence the task of rebuilding communities (Shonholtz, 1984).[52] The advocates' discourse targets various specific groups of people who benefit from mediation; e.g., in cases with "racial/ethnic or religious tensions" (Surrey/White Rock Mediation Services), neighbourhood disputes, roommates, or disputes that arise from changes in communities. As well, mediation is said to be useful for dealing with disputes between spouses and/or other family members, and is effective in working out custody, access, divorce or separation agreements (pamphlet, West Coast Mediation Services Society). Also, mediation can be used to settle small claims disputes including those between landlord and tenants, employers and employees, consumers and merchants, victims and offenders, or for settling contested insurance claims, business transactions and the like. The head of a local VORP programme identifies the "victims", the "offenders", the "criminal justice system" and the "community" as benefactors of mediation.[53] The general point here is that a great variety of

community disputes are likely to benefit from community mediation.

In addition, under the general rubric of benefit, a recently emerging aspect of the advocates' discourse has concerned itself with the possible value that the rather less rigid process of mediation might have for advancing the position of women in society (Whittington and Ruddy, n.d; Rifkin, 1984, Scambler, 1989).[54] As Turner and Jobson put it,

> "Further thought should be given to mediation as a process that is more receptive than the adversary system to women's values" (1990: 46).

Others are much more sceptical of the purported 'empowerment' that mediation can provide to women in certain cases (e.g., spousal abuse) who enter mediation sessions carrying the burden of structurally-based oppression that cannot be diffused by individual mediation sessions (Lerman, 1984). However, it is important to note that the feminist analysis of mediation is still very much in the process of being developed, and has up to this point suffered from an (implicit) over-reliance on liberal theory at the expense of many important insights that radical, dual-systems, or postmodern feminist theories could no doubt bring to bear on the topic.

In spite of the advocates' claims that mediation can benefit so many different groups of people in the community, most programmes complain of a decided paucity of cases. This problem is succinctly captured by a prominent member of a funding agency thus:

> "If mediation is so magical, why aren't people clamouring for the services? Because that's not what is happening. In fact, the opposite - when community mediation programmes open, there's trouble getting clientele" (interview, 29/01/1991).

This point is confirmed in an article which suggests that,

> "Mediators in B.C., including the Mediation Development Association of B.C...have bewailed the dearth of clients and the general lack of information and knowledge about mediation in our community" (The Mediator, (12), 1987: 1).

With this in mind one can better understand the spirit of this jocular poem entitled, **The Mediator's Lament**:

> "Mediate, not litigate
> Cooperate, not obliterate
> Facilitate, not vindicate
> **AND HOPE TO GET SOME BUSINESS"** (The Mediator, (June), 1985: 13).

More concretely, Dolan's (1989: 77) analysis of the caseload at one mediation programme gives some idea of the quantitative dimensions of the problem at hand. The caseload - as compiled by the programme for the period April 1, 1989 to March 31, 1990,[55] - reports 544 (mostly telephone) inquiries and 237 cases opened. Of the open cases, only 42 actually resulted in mediation (28 reached agreement) and 28 in 'conciliation'.[56] Some 100 possible mediations were cancelled because respondents refused to participate in the process. By way of comparison, from April, 1989 to April 1990, another programme reports taking only 26 cases to mediation.[57] What these rather low participation rates suggest is that in spite of the growth in the number of community mediation programmes in the province, and despite the apparent expansion of alternative dispute resolution more generally in the province, there is still a rather limited demand from the 'community' for community mediation services.

Undeterred by the apparent contradiction in portraying community mediation as a response to a 'need' in the community, and yet finding a dearth of cases to mediate, advocates explain the discrepancy as being no more than a problem arising from a lack of "public awareness".[58] Consequently, most programmes emphasize the importance of 'educating' the public, and of 'marketing' mediation.[59] For most people interviewed, public relations is an essential component of ensuring the success of community mediation and hence many advocates actively participate

in community events (e.g., law days, public lectures, education forums, radio and television programmes, etc.) . But, how do advocates "sell" their services? This takes us to the next aspect of the discourse pertaining to the purported advantages of mediation.

WHAT ARE THE CLAIMED ADVANTAGES OF COMMUNITY MEDIATION?

> "The decision to enter into mediation is voluntary and any agreement realized must be voluntarily agreed upon by both parties, thus maintaining control over the decisions that affect them" (pamphlet, Surrey/White Rock Mediation Services Society).

There are a number of common symbolic images which advocates invoke to justify the deployment of community mediation. Most of these images are founded upon implicit criticisms of the court system, and serve to elevate mediation as a preferable alternative to litigation when dealing with 'minor community disputes'. This rhetorical strategy has the effect of emphasizing differences between the courts and mediation, and of portraying it as an 'alternative' to (i.e., something quite different from) litigation.[60] Indeed, the above quotation draws on an image that is frequently appealed to; namely, mediation is a voluntary process because people 'freely' elect to make use of it, and because participants cooperatively negotiate their own resolutions to specific disputes. This emphasis on voluntarism stands in clear opposition to the court's adversarial methods which are not always voluntarily chosen, and which coercively impose judicial decisions on litigants.[61]

Furthermore, many advocates laud the administrative and procedural advantages of mediation over the court system[62], arguing - as noted - that it is a more "cost effective", "inexpensive" and "time saving" alternative to litigation which,

> "can usually be scheduled within a short period of time, avoiding court delays" (pamphlet, Westcoast Mediation Services).

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As such, they reason, mediation effectively increases access to justice, because it is unencumbered by the court's procedural constraints. This permits administrative flexibility which - we are told - translates into convenience, and a more hospitable environment for disputants to work out their difficulties.

Procedurally, mediation is praised because it is "private and confidential" (rather than public), and employs informal methods where,

"Disputes are resolved using a cooperative rather than an adversarial approach" (*op. cit.*). This, advocates allege, has "emotional benefits" in that disputant's concerns are heard, acknowledged and addressed. Moreover, mediation teaches "problem solving skills" that "strengthen relationships and improve ongoing communication" (*op. cit.*), and "lets you make decisions" (pamphlet, Dispute Resolution Centre of Victoria). As well, mediation "reduces anger and sets the stage for future cooperation" (pamphlet, Surrey/White Rock Mediation Services Society). In sum, mediation helps to rebuild communities by emphasizing cooperation between people on a long term basis rather than seeking the short-term solutions imposed by an adversarial system of justice. This is to say, mediation reestablishes community networks and ties by encouraging (educating) cooperation between members when conflict arises.

Over and above these purported advantages, advocates insist that mediation has proved itself to be successful (i.e., "Its effective!"), claiming that most mediations are "successfully concluded in one or two sessions" (pamphlet, Westcoast Mediation Services).[63] As such, they portray community mediation as a much-needed corrective to certain aspects of the existing court system, but stop short of suggesting that it replace the lower courts. On the contrary, mediation is

depicted as a process that must *complement* existing court services.

> "There are a lot of disputes out there and there are more than enough for ADR to exist *within* the justice system as a *complement* to the justice system..." (interview, 26/09/1990 - emphasis added).

Therefore, Turner and Jobson recommend that,

> "legislative assistance should be made to facilitate mediation as a mainstream justice service" (1990: 46).[64]

The judge's rule is acknowledged as final, and adversarial litigation is thought to be better suited

to dealing with the more 'serious' conflicts of society. With this in mind, community mediation

is lauded as one means of increasing access to justice, for as the CBA's Task Force states,

> "Unlike in the United States, alternative dispute resolution in Canada must not be seen as a movement that is separate from the courts or superior to judicial decision-making. ADR in Canada must be seen by interdisciplinary professionals, individuals and community organizations as an expression of commitment to fair, effective and accessible dispute resolution" (1989: 77).[65]

CLIENT PERCEPTIONS OF THE MEDIATION PROCESS

Turning somewhat away from the advocates to the clients who participated in mediation, let us

tap into an admittedly limited fragment of their discourse. What follows is largely based on the

instructive responses to open-ended questions by twenty-three participants who returned the

questionnaires compiled for the present thesis (see Appendix I).[66] In addition, this section uses

some information from Dolan's (1989) more comprehensive evaluation of the Victoria Dispute

Resolution Centre (in which 238 case files were examined and 235 participants interviewed by

telephone).

Both sources of information suggest that most clients attracted to mediation are between the ages

of 30 and 50, are either male or female (in both studies, cases were about evenly split between

male and female respondents), and hold at least high school education levels (most are employed in professional, managerial occupations). The most common types of dispute varied in the studies, probably reflecting variations in the emphasis of particular programmes: in my study, most disputes (18) involved spouses, lovers, partners or friends; in Dolan's study, 32% of all cases involved consumers and merchants, while 25% revolved around landlord-tenant disputes (1989: 39). Most people turn to community mediation after unsuccessfully exploring other options (e.g., face-to-face interactions, counselling, etc.), but before facing the possibility of courts. Thus, many clients perceive mediation - in the words of one respondent - as "the last stop before court".

For the most part, participants viewed mediation in a positive light; for instance, 94% of Dolan's respondents, and 95% of the respondents in my questionnaire, would recommend mediation to others. Yet, a number of different reasons are offered for endorsing the process. For some, the "positive affirmation," or the "ease of settlement," or the "atmosphere of empathy," or the "non-threatening" nature of mediation, and "the lack of judgement from the mediators," were seen to be attractive features of the process. Others liked the confidentiality provided by mediation, and saw it as offering,

"a safe environment to air out the dirty laundry and hopefully come clean."

Still others regarded mediation as, "a sensible approach for people who for the most part are leery or unknowledgable about court procedure," and who have (to quote from another respondent) a, "fear of...uncertainty of a resolution influenced by trial lawyers and supreme court judge". This fear of losing "ownership of a solution" coupled with a "dislike of the cold-hard business approach of 'the law'," of having to deal with an "expensive, adversarial court battle", or with a "patriarchal" legal system, makes the "softer, cheaper, friendlier" mediation environment

extremely attractive to many. An underlying wish in these statements seems to be reflected in this response: "Hopefully mediation remains simple and unbureaucratic."

Despite such positive statements, many people who participated in community mediation were not sure of its actual success. In my study, only seven out of twenty three people responded in the affirmative to a question asking them whether mediation made them see things more clearly. Another seven felt that their positions were not adequately represented (e.g., the other person "talked more", or extracted more "sympathy" from the mediators). In addition, most participants seemed critical of one or more aspects of the mediation process. For example, some felt that their expectations had not been met because they wanted "more input as to ways to resolve issues - more direction." My interview with a client revealed a similar sentiment:

> "I would like to see a little more input from the mediators towards problem-solving" (interview, 30/05/1990).

By contrast, other clients felt that there was too much mediator intervention, that there was, "More input from mediators (content wise) than I had expected". While most clients viewed their mediators positively (a position confirmed by Dolan's (1989) report), there were some respondents who were quite unhappy with lawyers who acted as mediators: "I would advise against using a lawyer as a mediator. [A] counsellor would be much better suited to the process"; "Mediator acted more as legal counsel in points of conflict rather than trying to open lines of communication"; and, "Mediator spent too much time relating stories of court cases she had won in favour of the wives and upon the size of settlements awarded."[67]

The most scathing attack on the process, however, was worded by one participant as follows:

> "If people are adult enough to make mediation work they either don't need it or only need

a little help organizing their agenda...At worst it is a passing fad that people feel they must be hip enough to handle"

Whilst none of the other respondents were quite as dismissive of the process, 32% openly stated that they had no intention of adhering to the settlements they had reached at mediation sessions. One such person suggested she had been over-hasty in signing the agreement,

> "Because we were on a time limit for our money and he was being unusually unreasonable. I jumped the gun and settled for much less than is justly and rightfully mine out of emotion"

The "out of emotion" phrase here is not insignificant for it implies that the mediating situation produces emotions favourable to "jumping the gun" to settlement. No doubt, the cost per hour that some programmes levy may be sufficient incentive in and of itself to speed up settlement. But, even when settlement is reached, there is no real means of enforcing this. As one respondent indelicately put it, "I wish that the settlement had 'balls' or was more effective at getting the actual payment." The overall point here seems to be that some respondents perceive mediation as a process that encourages ill-suited settlements, or feel that mediation is unable to ensure that agreements are actually adhered to.

In short, what emerges from the above discussion is that participants in the mediation process are generally favourably disposed to the idea of an informal, hospitable, less alienating alternative to the adversarial procedures of the courts. However, on closer inspection, their actual experiences with specific community mediation programmes leads them to offer only qualified endorsements. In particular, most participants criticized one or more aspects of the mediation process, including those directed at its capacity to: clarify and represent both sides of a dispute; guide dispute resolution without influencing content too markedly; reach non-pressured and fair settlements; and, ensure that conditions of settlement are adhered to. Furthermore, some clients

commented on the unsuitability of certain lawyers as mediators, suggesting that they are not sufficiently skilled in the more 'human' dimensions of the mediation process.

CONCLUSION: THE CHARACTER OF COMMUNITY MEDIATION IN B.C.

With the previous discussion in mind, it is possible to single out what seem to be core features of community mediation as it has been deployed through the advocates' discourse in British Columbia. In general, the last decade has witnessed the growth of community mediation programmes such that a recent directory of programmes in the province lists a total of five community and court alternative programmes, four commercial programmes, two university initiatives and two private practice mediators[68] (The Network, 1991a). Another document reflects the dramatic growth of school-based mediation projects in the province by identifying sixteen currently operative programmes, fourteen more than the two that began this trend in 1988-1989 (The Network, 1991b). The expansion of programmes and mediators, however, does not appear to be accompanied by a solid commitment to mediation by funders, or by members of the community, and consequently, the future status of community mediation - beyond that of being of an experimental nature - is difficult to predict.

Nevertheless, the current thesis is directed at understanding the development of the discursive formation outlined above, and of examining the way in which it controls its clients, before exploring the consequences of this for political action in the informal justice domain. For the heuristic purposes of such an endeavour, it may be of some value to assemble - in a broad analytical sweep of the above discussion - ten core features of community mediation in British Columbia which will form the point of departure for the ensuing analysis. These are as follows.

1. Community mediation is described by its advocates as an individually 'empowering' way of resisting the omniscient tutelage of the modern state. In British Columbia, it is said to have emerged in response to crises in the court system (which have generated a "need" for informal alternatives in the community), and as a result of the initiative of community members to develop specific mediation programmes.

2. Despite a quantitative increase in the number of community mediation programmes in the province over the last decade, there is a limited demand for such services from the 'community'. This translates into an oversupply of mediators, many of whom have actively participated in the development of mediation, and into relatively small caseloads. In response, all programmes embark on concerted efforts to market their services through pamphlets, 'public education' schemes, etc..[69] Such activities render problematic the discursive assumption that there is a 'community' that 'needs' mediation services.[70]

3. Mediation programmes rely to a great extent on volunteers for initiating, developing, staffing, promoting and conducting mediation sessions within parameters acceptable to funders.

4. When considering the cadre of mediators in the province, there is a decided split between those who are paid, as opposed to those who volunteer their services. This largely coincides with a wider dichotomization between what we have called 'social expert' and 'legal' mediators.

5. Characteristically, funding patterns for community mediation programmes are precarious and unstable. That is, funds are usually provided on a project-specific basis, requiring the submission (or resubmission) of proposals to funding agencies once grants expire. Moreover, there is a conspicuous diversity of agents that fund community mediation

projects. Yet, the funding agents exert considerable control over the specific identity of given programs, and therefore over the identity of community mediation as a whole. Indeed, this is most notable when one considers that funders favour certain kinds of mediation over others. In particular, as noted, mediation directed at family, commercial and school-based disputes is encouraged over, say, programmes that target neighbourhood disputes.

6.   Typically, the 'success' of particular mediation programmes is evaluated in terms of the number of cases they are able to resolve. This requires an ongoing concern with statistical information apropos case numbering, with no real assessment of the quality of mediation, or whether its outcomes are just. In this respect, there is a far greater concern with technocratic measures of 'success' than with the qualitative ability of a programme to address structural conflicts in a community.

7.   The advocates' discourse on mediation assumes that there is always some common ground between individual disputants, no matter what the dispute may be. As such, conflict is dealt with on a case-specific basis where individuals are encouraged to search for the 'common ground' between them, and to develop a settlement from this. Here, settlement is viewed as no more than finding an agreement that is satisfactory to both parties of a dispute. Such an approach precludes viewing conflicts that are common to groups of people in a non-individualized way, and fails to recognize that 'settlement' in these cases may well be dependent upon structural transformations of a given social setting.

8.   There is a growing trend towards professionalism in the mediation field in the province, and this expresses itself in an emphasis on certification, and a concern with 'standards'.

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There are, for instance, numerous training facilities that deal specifically with the certification of mediators. (Clearly, this quest for professionalism is at odds with the practice implied by the initial rhetoric of mediation: using lay, volunteer mediators to mediate community disputes).

9.   The advocates' discourse offer community as a 'complementary', 'system-based' alternative to the courts that is cost-effective, voluntary, empowering, time-efficient, restorative and hospitable.[71] In short, it identifies community mediation as a symbiotic addendum to the formal court system, and endorses it as a 'system-based' technology.

10. Finally, whilst participants in the mediation process seem overwhelmingly in favour of an open process that provides a comfortable environment in which to resolve disputes, many are unhappy with its current deployment in the province because it: does not offer enough input into disputes; has the potential to entice people to make rash settlements that may be neither fair nor just; and, is unable to ensure that the conditions of settlement will actually be abided by.

Having thus profiled aspects of the advocates' and client's discourse with respect to mediation, we can commence the task of critical analysis. Although one finds few criticisms relating directly to the deployment of community mediation in this province, various criticisms of informal justice in other parts of the world are directly pertinent. It is to these that we now turn.

END NOTES FOR CHAPTER 1

1. It should be noted that community mediation is not restricted to Small Claims disputes. On the contrary, it is used to settle a range of disputes that arise between people who are involved in ongoing relationships (e.g., disputes between landlords and tenants, employers and employees, spouses, partners, friends, etc.). Its flexibility is immense, but its fundamental procedures are remarkably similar (see, for instance, Canadian Bar Association, 1989; Medycky, 1988).

2. Though such a case study may be hypothetical, it is here infused with the rudiments of several mediation sessions that I observed in the course of my research.

3. One might emphasize here that the settlements, though written up, are not necessarily legally binding, and since no records of what goes on in mediation are kept, they cannot be used in court.

4. Although these specific statements derive from my observations of mediation sessions, variations of the same theme are used to reinforce the voluntarism of mediation and to entrench the mediator's appearance of being a mere 'facilitator'.

5. For example, Bohannan (1957; 1967), Gluckman (1965), Schapera (1955), Nader (1979), Nader and Todd (1978), Gulliver (1963), Hamnett (1977), Bossy (1983), Comaroff and Roberts (1977; 1981), Merry (1984), Starr and Collier (1989) and Roberts (1979).

6. Fuller (1971), Galanter (1981), and Frank (1970).

7. Matthews (1988).

8. See Danzig (1973), Fisher (1975), Sander (1976), Alfini (1986), Ford Foundation (1978); Auerbach (1983), Bell (1976; 1978; 1982); Buckle and Thomas-Buckle (1982), Cook et al. (1980), Ray (1989; 1990), Walker (1980), Tomasic and Feeley (1982), Conner and Surette (1977), Eliff (1971), Fisher (1975), Nader (1979; 1984; 1988), Nader and Singer (1976), McGillis (1979; 1986), McGillis and Mullen (1977), Goldberg et al. (1985), Abel (1982), Hofrichter (1987), Harrington (1985), Sander (1977, 1990) and Rifkin (1982).

9. See, for instance, Emond (1988), Pirie (1987), Pitsula (1987), Peachy et al. (1988), Estey (1981), Benoit et al. (1984), Kennedy (1985), Peachy (1989a; 1989b), Alberta Law Reform Institute (1990), Horrocks (1982), Perry (1987) and Pavlich (forthcoming). Canadian interest in mediation escalated after the perceived success of the first experiments with a Victim Offender Reconciliation Programme (VORP) programme in Kitchener Ontario (Peachy, 1989b), the Victoria Diversion-Mediation Project which opened in 1974 and a mediation project in Moosejaw (1975). By 1988, Peachy, et. al. (1988) enumerate at least 52 alternate dispute resolution programmes that offer mediation as a technique for resolving disputes. In conjunction with the expansion of specific programmes, the informal justice field in Canada has expanded with the emergence of national networks (e.g., Network for Community Justice and Conflict Resolution, Family Mediation Canada), newsletters, directories of services and mediators, legislation, etc.. All such trends have accorded a greater coherence to this field and are an integral part of a process which could entrench informal practices as institutions in the dispute resolution arena of Canadian society.

10. For more on this, see Worth (1986) and Gustafson (1989).

11. See Department of Justice, Canada (1985) and Richardson (1985) for a view of family mediation across the country. Floyd (1991) points to the importance of this form of mediation in the province.

12. See Chalke (1991: 3).

13. Stevens (1991) and Huber (1991).

14. Interviews with the founder of this programme (11/01/1990; 12/09/1991). See also **The Mediator** (October, 1985: 1).

15. **The Mediator**, (Winter, (no.19) 1988: 5).

16. Some might legitimately question whether this is a community mediation project since it was part of a government initiative to establish Vancouver as an international commercial and financial centre (Pitsula, 1987: 26-27). Clearly, this casts some doubt on its 'community' status, for at best the odd commercial mediation will involve members of the 'community'. I mention it, however, to suggest the scope of government commitment to alternative dispute resolution. Its annual budget is approximately $495,000 (Peachy, et. al., 1988: 58).

17. In recent years, the Better Business Bureau has incorporated mediation sections into its existing operations.

18. The newsletter **Accord** is an important source of information about VORP programmes.

19. See Edwards (1988; 1990) and **The Mediator** (no. 20), 1989: 3.

20. For instance, by the early 1990's, **The Network** (1991b) had noted 14 other school-based programmes in the province.

21. See **The Mediator** (no. 28), 1990 and **Interaction** (no. 2:3), 1991: 3 for details of this project which is sponsored by the Canadian Donner Foundation.

22. See, Knowles (1987: 1).

23. See Chalke (1984: 7), an important agent in the eventual formation of this network.

24. **The Mediator**, 1985: 5. This is rather significant when one considers that only one of the several community mediation centres was operating at this time.

25. **The Mediator**, (13), 1987: 1.

26. See "Mediation B.C. affiliates with the Network and FMC", Interaction, 1992, 4(1):1.

27. For more details, see **The Mediator** (October, 1985: 1) and The Justice Institute of British Columbia, 'Conflict Resolution Certificate Program' (Extension Programs' pamphlet).

28. Lawyers must complete this, or another approved course, to practice as family law mediators and not risk loss of insurance. For more on the Continuing Legal Education Society of British Columbia's (CLE) curriculum on Alternative dispute resolution see CBA (1989: 46-47) and the CLE calendar of courses.

29. The University of British Columbia's Law Faculty has established a modestly active Nemetz Centre for Dispute Resolution, and Simon Fraser University has a programme linked to school-based conflict resolution (Pitsula, 1987: 58). For a more general overview of law school involvement in the field, see **The Mediator**, Spring (24), 1990: 1.

30. Interviews (11/01/1990; 30/05/1990). More recently, however, there seems to be a "jurisdictional grab", as one interviewee (05/09/1991) put it, where Small Claims Court judges attended brief mediation courses and now conduct mediations themselves within the new, and more flexible, procedures of the court. As Burdine suggests,
> "In British Columbia and the Yukon, mediation has been built into the procedures for resolving small claims disputes" (1991: 7).

31. The chief funding agents for community mediation in British Columbia are: Canada Employment and Immigration Commission (Job Development Grants); the federal Department of Justice; the Ministry of Labour and Consumer Affairs; British Columbia's Attorney General's Office; and, the British Columbia Department of

Corrections. In addition, there are a number of private funding sources including: the Law Foundation of British Columbia; the Mennonite Central Committee; a School Board; and, the Canadian Donner Foundation. Most grants offered are neither strict service contracts, nor sustaining grants, but rather project-specific and term grants. Over and above these sources, some programmes raise funds through private donations (especially church-based), fund raising events (Bingo, Casino nights) and through a sliding scale of user fees according to level of income.

32. Indeed, at the time of writing this thesis, the continued funding arrangements of two of the more prominent community mediation centres seem to be in jeopardy.

33. Therefore most programmes maximize their referral sources ranging from word of mouth, advertising, community centres, members of the justice system (police, prosecutors, lawyers, judges, court administrators, etc.) to the criminal justice system (i.e., VORP programmes).

34. The following discussion is mainly drawn from three interviews with two of the founding members of this Society.

35. This is "a provincially funded organization providing training and education programs to people working in the fields of justice and public safety" (The Justice Institute, pamphlet). Most of the people trained here are: correction and court service workers; police; fire and emergency health service workers. However, the Justice Institute does offer "extension programs" designed for community and business groups. (See **The Mediator**, October, 1985: 1).

36. It later received a grant form the Law Foundation of British Columbia.

37. Despite Dolan's (1989) extremely favourable evaluation of its services, my interviews suggest that this project is experiencing serious funding difficulties.

38. For another account - of VORP in the province - see Northey (1990).

39. Most people interviewed confirmed this point with some emphasis.

40. One interviewee referred me to Shonholtz's (1984) work in the United States, and it is clear that he sees the active participation of individual as essential for the functioning of a democratic community.

41. Peachy (1989), Zehr (1986) and Husk (1990) detail a form of justice that 'restores' peace and harmony to communities. Even though the rhetoric of this conception of justice is different from that of professionalised justice, both conceptions make the dubious assumptions about societal consensus and the 'common ground' between members of a community.

42. Of course, this discursive rendition focuses only on the individual aspects of the dispute, ignoring that a genuine resolution of certain disputes may well require redressing the structural conditions that might have nurtured them in the first place. For example, one might refer to sexual harassment disputes with their inextricable nexus with wider conditions of patriarchy in society (Abel, 1982a).

43. Hence Peachy's (1989) quest for a 'restorative' form of justice to which many VORP programmes subscribe.

44. For example, Folberg and Taylor (1984), Peachy **et al.** (1983), Kessler (1978), Fisher and Ury (1988), Kressel and Pruit (1989), Kolb (1983), etc..

45. For an overview of local thinking on this, see Sloan (1992).

46. See Floyd (1991) for an examination of this process from the perspective of exchange theory.

47. This technique involves restating an idea in a way that 'focuses' the dispute, but which is stated in a 'neutral' way. That is,

"The mediator changes the frame of the communication by eliminating the harshness, the confusion or the glare, thus allowing the communication to reach its intended receiver" (1990: 41).

48. Pamphlet, 'Separation and Divorce Mediation: What is it and How Can it Help?', Mediation Development Association of British Columbia. It is somewhat revealing that the parties should be referred to as "both of them". This clearly confirms allegiance to the dyadic individualization of disputes.

49. For example, one interviewee, a 'social expert' mediator, relayed an anecdote of being invited to speak at a function alongside a lawyer who stated - in a most discourteous and inconsiderate fashion - that she did not think non-lawyers should be permitted to practice mediation (12/09/1991).

50. For the kinds of standards (which are to be decided by the "mediation community") this discourse has in mind, see **The Mediator**, (3), 1990: 3-4 and **The Mediator**, (18), 1988: 5. By contrast, advocates of VORP (mediators associated with the church) are rather more cautious of the quest for mediation standards, and the possible effects this might have on the community-focus of mediation (e.g., Worth, 1989: 12). Similar concerns have been raised in the United States by such authors as Pipkin and Rifkin (1984), Shonholtz (1988-89) and Wahrhaftig (1982, 1984).

51. See Sloane (1989) for a look into the curriculum of this course.

52. Interviews (12/09/1991; 11/01/1990).

53. Personal correspondence.

54. Similarly, in the United States, Rifkin (1984) and Harrington and Rifkin (1989) provide various suggestions as to where this line of thinking might head.

55. Annual Statistical Review 1989-1990 - Dispute Resolution Centre.

56. It is important to bear in mind that one mediation may involve a number of sessions and therefore require a great deal more organization than the statistics might imply.

57. Statistics, Westcoast Mediation Services Society.

58. One interviewee suggested that the problem of numbers is related to a certain "Canadian mentality" which purportedly reflects a reluctance on the part of Canadians to, "air our laundry in public" (12/09/1991).

59. See, for instance, Connor (1988) and **The Mediator**, (21), 1989: 3.

60. This is something that a number of lawyers have objected to, and indeed, there appears to be an emerging consensus that the term 'alternative' may well be an anachronism since, since it should be part of the justice system anyway (CBA, 1989: 77)

61. For example, one programme suggests this as a benefit of mediation: "solutions are not imposed by the mediator" (pamphlet, Westcoast Mediation Services).

62. The following discussion derives from pamphlets distributed by the various dispute resolution Centres as well as from several interviews conducted over a two-year period.

63. This point was emphasized in various interviews with mediators - one even claimed to have a 100% settlement rate in her mediations! (26/07/1990). See also, for example, Turner and Jobson (1990).

64. This perception is held by both lawyer mediators and the new middle class mediators, although the former tend more towards the multi-door court house model (where mediation would be one of the services provided by a court), whereas the latter seem to prefer that mediation be outside - but related to - the court system (even those receptive to Shonholtz's (1984) model, suggest that connection to courts is required for the practical reason of needing a secure case referral base).

65. Indeed, the CBA argues that skilled lawyers will acquaint themselves with alternative techniques so that they are better equipped to deal with the vastly different kinds of conflict that exist in a complex society. In this way, they can only enhance their existing training and become far better dispute resolvers and hence more efficient at keeping the peace, helping to integrate social justice into the very "fabric" of Canadian society (CBA, 1989: 77). If this were to occur then,

> "Alternative dispute resolution will not be viewed as superior or inferior to, or indeed even separate from, court adjudication" (CBA, 1989: 4).

The report is thus impressed by the idea of a "multi-door courthouse" that some people in the United States are now advocating (Sander, 1977; Finkelstein, 1986).

66. Initially, 120 pre-stamped questionnaires were distributed by two sources: 30 by the head of a regional network and 80 by the executive of a local community mediation programme (10 were not distributed at all). While the response rate is somewhat disappointing, it may nevertheless speak volumes about their perceptions of mediation, of the questionnaire itself, or of their commitment to community-based initiatives.

67. Here are glimpses that certain gender discrepancies and inequities of the wider society are replicated in the mediation session (See Harrington and Rifkin, 1989).

68. In addition, the Vancouver Area Yellow Pages lists a total of eight private consulting mediators.

69. This clearly militates against the assumption that mediation is a 'community-based' option of choice, because it suggests that the initiative for this form of dispute resolution has not come from a 'need' in the 'community'. On the contrary, as we have seen, the definition of what 'community' to 'serve' seems to have been negotiated through funding proposals with little or no endogenous, local political input. Indeed, this is clear from a number of telling points. First, the consistent complaint of mediators that the 'community' needs to be 'educated' to perceive the value of mediation suggests an absence of endogenous 'community' initiative. Secondly, recall that a proximate impetus for the erection of many community mediation centres came from the initiative of specific individuals on society boards and in educational institutions dealing with mediation. Here, the so-called 'community' seems to have been designated more by the practical exigencies involved in finding a niche for services and being able to 'sell' proposals to potential funders, than through autonomous community activity. In this respect, the 'community' to which a programme is directed is often enunciated through the proactive planning of Society Boards, funders and the legal establishment, rather than the retrospective reflections of grassroots activity defining the boundaries of its operation. In any case, what is important here is the discrepancy between the practical top-down deployment of community versus the rhetorical appeal to community mediation as a grassroots initiative.

70. This raises some questions about the assumption that there is an *a priori* "community" out there. My interviews indicate that most advocates assume such a community, based on peace and harmony between people. From this perspective, conflict disturbs the existing order and has the potential to destroy its very fabric. Here, mediation is touted as a means of "restoring" peace to a community by rebuilding bonds between disputants and thereby reconstituting the foundations of the 'community' (Peachy, 1989; Worth, 1989). However, there is good reason to question this assumption because as Taylor suggests, the 'organic communities' that spread across Canada in the Pre-War years,

> "have been more or less replaced by much more fluid and transitory 'areas of residence'" (1983: 143).

71. This reflects a model advocated by Danzig (1973) in the United States which portrays mediation as complementary to the formal justice system. His is quite different from Fisher's (1975) rival model which seeks to replace the lower rungs of the justice systems with independent community moots (see also Shonholtz, 1984).

CHAPTER 2

CRITICAL ENQUIRIES:

TRACING THE SHADOWS OF COURTROOM JUSTICE

"Beware the Rulers Bearing Justice"[1]

If optimistic community mediation advocates characterize informal justice as a dignified escape

from formal court procedures, critics are rather less sanguine about the purported 'empowerment'

it offers those involved in 'minor' disputes.[2] Although their's is a heterogenous critique, they

seem to agree on two common themes. For one, most reject the advocate's claim that community

mediation is merely a response to an overburdened, expensive and time-consuming court system.

Secondly, they repudiate the view that community justice is an emancipating 'alternative' to the

state's justice system. Instead, they see it as a way in which the state expands and intensifies its

control over individuals.[3] That is, through such mechanisms as community justice, the state is

said to be growing in an insidious way because,

> "*it is expanding through a process that, on the surface, appears to be a process of
> retraction*" (Santos, 1982: 262).

Whilst critics emphasize different aspects of this complex theme, most see community

mediation, not as a mechanism to increase voluntary participation in disputes, but as a means of

making 'individuals' more accessible to state control.

One can identify at least three different points of emphasis in the critics' discourse on community

justice.[4] First, some attempt to demonstrate the incoherence of the advocates' rhetoric, and to

show that it is little more than an ideological justification for state expansion.[5] Others focus more

specifically on the underlying structural crises within contemporary capitalist societies that have

promoted such regulatory forms as community justice.[6] Thirdly, still other critics examine the nature of the political transformation implicated in the shift to informal, community justice.[7] Since the present thesis aims to develop out of the strengths of this critical discourse, it is important to focus on each of the three positions in turn.

THE IDEOLOGY OF INFORMALISM: CONTROL THROUGH CONSENSUS

The first series of critics concentrate on the apparent paradox in creating a decentralized justice ideology from within a centralized criminal justice system. They view mediation as a reform 'ideology' created and implemented by ongoing political struggles. In particular, they: (1) describe and challenge the precepts of the ideology itself; (2) explicate how and why this emerged; and (3) examine the political consequences of this ideology.

Turning to the first of these, Nader (1988) notes that alternative dispute resolution has been deployed under the auspices of a "harmony ideology." This ideology advocates a shift away from confrontation and adversarial litigation to community-based, harmonious forms of dispute resolution. It equates mediation with the peace, well-being and consensus of actively functioning communities whilst associating litigation with their destruction. But advocates did not only welcome community justice as somewhat of a panacea for an ailing, overburdened, expensive, alienating, court system (Nader, 1988, Harrington, 1985); they also saw it as a way of increasing individual voluntarism and reversing the conflict-based, tension-ridden climate of modern social life. For many critics, however, the precepts of this ideology are flawed because its claims are either contradictory, or not confirmed by existing research.[8] Yet, to the extent that it has been successfully enunciated, it has entrenched a series of misleading myths and distortions about the

nature of informalism (e.g., Tomasic, 1982; Abel, 1982b).

One such visible deception is the advocates' portrayal of community mediation as a decentralized alternative to the formal courts, for mediation is clearly planned, developed and implemented in large measure by central state agencies (Abel, 1982a: 9; Harrington, 1985: 69). This, in turn, raises serious questions about many of the harmony ideology's other claims; e.g., what does this mean for the so-called "expanded participation" mediation is said to provide disputants? Or, what is the nature of a voluntarism, or empowerment, that is extraneously granted by central planning? (Abel, 1982b, Harrington, 1982). With such concerns in mind, these critics further question whether mediation is actually capable of relieving an overburdened court system since there is little evidence to suggest that it is less bureaucratic[9], speedier, less costly, fairer, or more flexible than litigation.[10] Some even wonder whether there *is* a crisis within the court system (Nader, 1988: 281). As well, community mediation is not seen to be quite as 'voluntary', or non-coercive, as its advocates allege. Instead, it appears to be subordinate to formal legality, and is always bounded at its margins by the threat of legal sanction (Tomasic, 1982: 225-229; Abel, 1982b).

Furthermore, by focusing on individuals in conflict, the mediation ideology helps to individualize disputes that may have structural roots, thereby offering no more than a superficial resolution (Abel, 1982b: 286; Tomasic, 1982: 222). As such, the ideology supports a conservative model of conflict (Abel, 1981), and reduces the "potential for social disruption" through collective action (Abel, 1982b: 288). Indeed, the ideology's focus on individual voluntarism may even militate against its purported quest to rebuild lost communities (Abel, 1982a: 9; Tomasic, 1982: 230-234; Cohen, 1985: chapter 4) and question the notion that informal justice is a 'community-based'

initiative. Abel (1982a: 8) and Tomasic (1982: 229-230), for example, argue that there is "considerable" evidence to suggest that many members of communities prefer the authoritative decisions of the courtroom above informally reached settlements, not least of all because the former can potentially redress power imbalances between litigants.[11] Perhaps, this partially explains the almost universal problem informal justice programs experience in securing a steady flow of cases for mediation (Tomasic, 1982). In sum, then, these are some of the ways in which mediation, despite its advocates' ideological exhortations to the contrary, helps to perpetuate the *status quo* and expand state control. After all, so these critics charge, if

> "informal institutions render law more accessible to the disadvantaged, they also render the disadvantaged more accessible to the state; this latter consequence may be the more significant" (Abel, 1981: 258).

But how and why, one may ask, did this problematic harmony ideology develop? The ideology critics rather different responses to this question are united in an overt rejection of the view that the harmony ideology was somehow inevitable or 'natural'. The more radical amongst these critics argue - not unlike those who emphasize structures - that informalism is integrally related to crises in capital accumulation. For instance, Abel asserts that,

> "Informalism is a mechanism by which the state extends its control so as to manage capital accumulation and defuse the resistance it engenders" (1982a: 6).

It is one of the "endless projects of legitimation within the legalist paradigm" (1982b: 25) that seeks to maintain the legitimacy of state authority, even in the face of the massive "rights explosion" that had occurred in the United States (1981).[12] In particular, Abel suggests that informal justice represents an effort to resuscitate the failing legitimacy of law - which had encountered unprecedented strains as a result of an increased rights-related caseload - by providing "relatively new," "untested" and peripheral experiments for resolving disputes. That is, these experiments attract intense scrutiny and thereby deflect critical attention away from the

"older formal institutions that lie at the core of the legal system" (1981: 256).

However, he argues, informal institutions also strengthen the state in other ways. For one, the ideology of informalism underscores the liberal state's focus on individuals by denying the class-based nature of any conflict: it relies on an individualistic and "conservative" model of conflict which assumes that all conflicts can be resolved individually (Abel, 1981).[13] As well, mediation takes little account of the wider social structures and inequalities that bring people to mediation in the first place, thereby denying the potentially liberating aspects of conflict. It therefore helps to perpetuate the *status quo* and undermine non-state resistance (e.g., collective neighbourhood action, etc.) by defusing, or trivializing, legitimate conflicts. In short, informal justice is seen to defuse resistance to accumulation, to re-legitimate the court system and to strengthen the state. Moreover, Abel argues that an informalist ideology benefits certain occupational groups (including judges, lawyers, mediators), and they help to shape the eventual form of community justice (Abel, 1982b: 301-304)[14].

Taking more of a pluralist, 'neo-Weberian' tack, Harrington and Merry (1988: 710) argue that ideologies, such as the reform ideology of community mediation, are produced and sustained by the social action of agents who operate in given structural contexts.[15] Consequently, they explain the rise of an informal justice ideology by focusing on the political contests in which it was developed. These contests include those that relate to "mobilizing funding", gaining institutional support, forging the necessary judicial connections, securing and maintaining caseloads and ensuring legitimacy (Harrington and Merry, 1988: 710). Within these contested domains there are multiple struggles between a plurality of agents and interest groups (e.g., mediators, lawyers,

judges, etc.) who try to impart a particular vision of community mediation, and then colonize symbols of this to rationalize the implementation of specific kinds of mediation programmes.[16] Such processes have been examined in various ways. Auerbach (1983), for instance, provides a broad outline of the political contests that have fuelled the recent interest in alternative methods of dispute resolution, suggesting that the current ideology is itself deeply rooted in a once dominant culture that opposed, and - even though now less dominant - continues to oppose, the litigious tendency sparked by increased commercial interaction.

In a more general discussion, Harrington (1985) analyzes how the ideological concerns of Progressive judicial management strategies, deployed at the turn of the Twentieth Century in the United States, were substituted by those of informalism (see also Auerbach, 1983). Her account discusses the importance of political contests in forging this ideology. For instance, she examines how the initial emphasis on "effective justice" and "rights" in discussions on the introduction of a Dispute Resolution Act in the Unites States were transformed into a debate concerned with matters of administrative "efficiency" and how to ensure the creation of "effective" institutions (Harrington, 1985: 73-99). This occurred, she suggests, through a series of subtle contests in which dominant political agents gained control over the development of the ideology, allowing them to define informal justice in terms expedient to an emergent judicial management strategy. They did this by selecting sympathetic agents to serve as core mediators, as 'experts', who then disseminated their preferred ideology (Harrington and Merry, 1988). As 'experts,' these mediators not only came to dominate the 'thinking' on mediation (at conferences, presentations, in articles and books, or through their organizational positions), but were also uniquely portrayed as competent to train other mediators. In this way, a truncated, and undoubtedly politically

expedient, version of what 'proper' mediation ought to entail was dispersed.[17]

Finally, what are the consequences of the informalist, harmony ideology? To begin with, it maintains a dubious separation between the voluntarism of the community and the formalism of the state through the use of rhetorical formulae (e.g., "buzzwords", "false comparisons," etc.[18]) and other devices (e.g., 'folksy,' informal procedures in hospitable settings[19]). However, critics see this as a false dichotomy, pointing instead to the fundamental continuity between formal and informal controls.[20] Indeed, for them, the ideology of informalism justifies the expansion of formal control; and so,

> "the shift from an adversary, formal ideology to informalism should thus be seen as a rationalization of management style rather than a fundamental change in the processing of minor conflicts" (Harrington, 1985: 171).

In so doing, this ideology has facilitated and justified the deployment of an 'administrative-technocratic' judicial management strategy that serves to stifle genuine political discussion (Harrington, 1985: 69). Such a strategy, we are told, links local control sites to centralized institutions in a "decentralized unification" of the justice arena. In such an ethos, politically contentious issues are evaded by reframing them as mere 'problems' of inefficient administration to be 'solved' by technical means.

Thus, for example, questions pertaining to disputants' rights, or to the fairness of the mediation process, are considered only in light of their possible effect on practical steps to implement 'workable' programmes. Politically contentious discussions on whether justice is measurable in cost-benefit terms, or whether mediation is really necessary to 'solve' administrative problems in the court system, are conspicuously absent from this approach. By impoverishing the theatre

of political debate in this way, informal justice encourages a 'consensus-based' politics in which the contingency of political choice masquerades as technical necessity (Harrington, 1985: 64; Abel, 1982b). In other words, these critics argue, to the extent that mediation seeks an assumed 'common ground' between its participants, it helps to further a politics of "consensus building." It helps, that is, to foster complacency and to extinguish political dissent (Harrington, 1985: 173).[21] The overall effect of this is to licence a unification of informal and formal control institutions and to increase, "the quantum of state resources devoted to social control" (Abel, 1982b: 273). In the process, "coercion, centralization and dominance" are disguised, while the state looms as an ever larger Leviathan, regulating behaviours that previously had escaped its social control network (Abel, 1981: 262).[22] Consequently, the frequency and type of comportment subject to regulation is increased.[23]

While this approach isolates a number of problems in the ideological rhetoric through which community mediation is deployed, it does not quite go far enough. For instance, as Foucault (1980: 77, 102, 118, 203) rightly suggests, the notion of ideology is problematic when used, as it is in this perspective, to connote a departure from an assumed 'truth'.[24] This fails to recognize that,

> "every society has its regime of truth, its general politics of truth: that is, the types of discourses which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned..." (Foucault, 1980: 131).

In other words, these critics, in a quest to separate myth from truth, have paid insufficient attention to the array of apparatuses, and techniques of power, which are geared to the production of ideas, and their presentation as 'truths'. They have not adequately explored the political apparatuses that are set up within the community mediation movement for the formation and

accumulation of knowledge, and the significance of this within the relational complex that constitutes informal justice. Surely, a few statements on the influence of 'expert' trainers, or academics, on the formation of the ideology does not canvass the entire range of techniques involved in the production of 'truth' in this domain.

Furthermore, the ideology critics do not sufficiently explicate the historical conditions and the political framework within which community mediation makes sense. Even though some (e.g., Abel, 1982b) allude to the 'structural roots' of conflict, they do not outline these in any detail. Nor do they offer cogent accounts of how such structures may influence the relational patterns of society and its historical modes of regulation. In this light, the pluralism of some accounts here (e.g., Harrington, 1985, Nader, 1988) is inadequately theorized, for contextual ideologies - and the struggles from which these emerge - may indeed form crucial elements of wider structural patterns. At least, however, the articulations between related domains of society (e.g., law, state, economy, etc.) are more integral than a loose assemblage of conflicting 'interest groups'. This is not to suggest that there is a necessary hierarchy between these domains, or to imply some sort of reductionism, but only to suggest that certain arenas are more constitutively related to one another than some critics here might grant.

COMMUNITY MEDIATION AND STRUCTURAL CRISES

a) Hofrichter's Eclectic Materialism

By contrast, Hofrichter's (1987) eclectic materialist account offers a far more structurally-orientated view of 'neighbourhood dispute resolution'. 'Ideology', however, is present in this account to the extent that it bears on his attempt to merge Gramsci's notion of hegemony[25] with

state-derivation theory.[26] This is not an easy theoretical project to accomplish, especially when one considers the ambiguity of Gramsci's concept.[27] Nevertheless, Hofrichter (1987: Part 1) uses it to ground his conception of 'neighbourhood dispute resolution' as part of the state's non-coercive mechanisms of control which serve to produce consent and secure hegemony in the social domain.

Hofrichter's argument begins with this premise: capitalist societies may assume different forms, but they always develop in response to the logic of capital accumulation. This logic is founded on the continuous attempts of,

> "the social class that owns and controls the apparatus of production to increase the rate of capital accumulation and to maintain control over the surplus produced by labor" (1987: 4).

As a result, there is an ongoing class struggle between capital and labour, which is "formally" waged in the changing sets of relations referred to as the 'state'. Somewhat more contentiously, and in opposition to the contingency implied by Gramsci's conception of hegemony, Hofrichter depicts the state as a "...system of social relations that create order and maintain the rule of capital..." (1987: 30). Its task is always to create and perpetuate certain "conditions" for unhindered capital accumulation by regulating the social environment. It is a class-based set of institutions favouring one class (capital) over others.

Paradoxically, however, the state's effectiveness is directly proportional to its ability to present itself as legitimate in the eyes of those whom it does not represent (i.e., the working class).[28] Such legitimacy, however, is not to be won by constantly resorting to coercive repression. Hence, Hofrichter notes,

"In order to survive, capitalist rule must be secured and obscured without direct force and without the appearance of promoting direct class interests or indeed, any exercise of power." (1987: 33).

As such, he tells us, the state seeks to organize the consent of the governed, to foster consensus through ideological regulation, by relying on consensus-based forms of control in 'civil society.'[29] Here, he recognizes the importance of Gramsci's suggestion that the state's power extends beyond the limits of formal structures to the cultural forms and 'moral imperatives' of everyday social life (Hofrichter, 1987: 34). In other words, consent is mobilized in diffuse institutions (eg., the church, mass media, schools, family), all of which seek to impart a particular view of the world through ideological education.[30]

With this in mind, Hofrichter suggests, community justice has been developed in an attempt to secure ideological 'hegemony' in civil society, not least of all because of the declining significance of various traditional institutions in this arena (e.g., the church). It does this in a number of ways. For instance, mediation fragments the potential for collective labour opposition by individualizing disputes. That is, since its 'cases' are defined in individual terms, mediation disallows collective responses to social problems (e.g., through unions, neighbourhoods, etc.).[31] Moreover, by preserving the appearance of everyday life in mediation sessions, neighbourhood dispute resolution masks the exercise of power by emphasizing the values of consensus and agreement (Hofrichter, 1987: 142). Its singular objective of settling disputes, regardless of the disputants' rights or interests, moreover, helps it to reinforce middle class norms (*op. cit.*: 134-142). Should it fail, however, informal justice has the backing of coercive state apparatuses (e.g., the courts, *op. cit.*: 150). In Hofrichter's view then, while community justice may appear to be an open-ended process by which participants work out their own settlements, its mechanisms seek

to organize the consent of the governed by promoting a "predefined order" which serves to "automatically suppress working class interests" (*op. cit.*: 89).

In short, this implies that neighbourhood justice is not - as its advocates allege - a community-orientated initiative; it is instead a vital element in the state's bid to secure ideological hegemony. This is supported, we are told, by the significant degree to which neighbourhood dispute resolution programmes rely on local governments or other state agencies (or Foundations and Bar Associations), not only for their funding, but also for case referrals. Through these ties, the state defines and develops the discourse, institutional structure and target population of neighbourhood justice in accordance with its own priorities. (Hofrichter, 1987: 153). As such, it is a state-planned form of social control that aims at regulating greater areas of society. It expands the state's administrative network into new areas of social life (Hofrichter, 1982: 228-229; 1987: 94-100). Neighbourhood dispute resolution casts a larger, and more finely meshed, control network over social life in a regulatory arena created by the state, but which presents itself as an independent domain (Hofrichter, 1987: 89). The supposedly passive, congenial and voluntary arena of informal justice actually "expands and intensifies" state power into areas of society which ordinarily exclude formal control (*op. cit.*). In other words, through this strategy, the state amalgamates centralized planning with decentralized community regulation to ensure the consent of those whom it governs.

But why, one may ask, has the community mediation movement emerged at this juncture in history? Hofrichter offers two related, but different, sets of reasons. First, he agrees that the formal legal system is unable to deal with the scope of resistance produced by the recent crises

of capital accumulation. Indeed, he suggests,

> "Legal rationality obstructs the ability of the courts to manage new forms of class conflict and economic dislocation arising from the irrationalities of capitalist production" (1982: 227).

Presumably Hofrichter is here driving at the kinds of issues raised by Selva and Bohm (1987) and Spitzer (1982). For these writers, while the market 'anarchy' of competitive capitalism may have demanded the universality and predictability of a formal legal system to avert social dissent, the organized markets of contemporary monopoly capitalism require far more flexible control mechanisms that can respond to the particularities of accumulation crises in local contexts.

The rise of informal justice can then be seen to be part of a wider tendency to realign economic and political rationalities. It emphasizes *settling* disputes that may arise from a transformed economy without concern for the intricacies of due process (the rule of law). As such, mediation sessions offer a means of reinforcing the fundamental integrity of existing circuits of capital. Moreover, with the rise of monopoly capital, the state has become increasingly involved in capital accumulation to short-circuit the magnitude and scale of *accumulation crises*. It accomplishes this through greater involvement and increased expenditure in production, the net effect of which is a rather severe *fiscal crisis*.[32] In an attempt to redress the latter, the state has been forced to withdraw funding from institutions that do not produce capital; hence, the reorganization of the justice system and the rise of neighbourhood dispute resolution. In short then, informal justice is an essential part of the,

> "transformation of the political economy from the stage of competitive capitalism to the stage of late monopoly capitalism" (Selva and Bohm, 1987: 43).

The second set of reasons Hofrichter offers for the rise of neighbourhood dispute resolution

pertains to more specific trends which he identifies in the United States. For example, he refers to the social disruptions caused by the ascent of non-labour social movements in their resistance to the prevailing order (eg., neighbourhood and welfare rights, consumer rights, women's and environmental movements, etc.). Resistance of this kind complements labour's purportedly increased intransigence to the more "direct" forms of exploitation associated with massive capital centralization by monopolies. Also, many of these struggles have been waged in contexts of expanding urban problems (eg., congestion, decay, unemployment). In tandem, such resistance has heightened an awareness of social disintegration and put a peculiarly social slant on contemporary accumulation crises, leaving the state to manage an acute series of legitimation crises. The initial Fordist response to these threats to social stability was to colonize more areas of social life, but this only exacerbated its fiscal crises and multiplied the points at which its legitimacy could be challenged. Over the past few decades, according to Hofrichter, the Neo-Fordist state has altered its course by retracting its formal apparatuses from the social arena (e.g., the courts), opting to regulate this domain informally (e.g., through community mediation).[33]

Hofrichter's perspective has been criticized in various ways, but his eclecticism is most vulnerable to the charge of insufficiently reconciling his attraction to the contingency of Gramsci's politics with his use of state-derivation theory. The upshot is that Hofrichter's thesis tends towards an unacceptable reductionism.[34] In particular, one might question his assumption that informal social control always performs the function of servicing the so-called 'needs' of capital and the state. As one commentator suggests,

> "Hofrichter's functionalist perspective presupposes more than it explains" (Gallagher, 1988: 138).

That is, he seems to presume in advance what should be investigated, offering little empirical

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evidence when forging connections between mediation and the state (Gallagher, *op. cit.*; Etheridge, 1988: 234). In addition, another structuralist critic, Baskin, argues that Hofrichter's perspective is,

> "inadequate, since it views community mediation as a *fait accompli* in the ongoing attempt by the capitalist class to maintain its hegemony" (1988: 100).

In response, and in an attempt to 'historicize' the analysis of mediation, Baskin examines community justice as part of a wider mode of regulation, an emerging strategy of social reproduction in late Twentieth Century capitalist societies.

b) Baskin: Social Reproduction and Neo-Fordist Modes of Regulation

Whilst Baskin does not discount the importance of 'hegemony' in her analysis of informalism, she shifts emphasis from this concept to the 'modes of regulation' by which 'social reproduction' is achieved. Drawing explicitly on regulation and state derivation theory[35], she describes community mediation as an element in a changed mode of regulation corresponding to the movement from a 'Fordist' to a 'Neo-Fordist' regime of accumulation.[36] She views community mediation as a "process" aimed at reproducing the conditions from which the "lived experience" of capitalist society can emerge. It is part of a changing strategy of "social reproduction and regulation", a "component process of social administration" (1988: 100), which has emerged to cope with historically-specific crises arising from the ongoing contradictions of capitalist exploitation.

For Baskin, a notable feature of the Fordist state, associated with the increased accumulation that followed the Second World War, was its capacity to extend the quantum and scope of 'commodity relations'. By penetrating into the heart of social life, the Keynesian Welfare State

had effectively subjugated other social relations to the dictates of wage labour and exchange (hence residential and employment mobility, the emphasis on work, and so on). One of the effects of this was widespread social disintegration in which "traditions and mediating institutions" were eroded by "the process of commodification" (Baskin, 1988: 101). This disintegration rendered social reproduction 'indeterminate', for without the active influence of "indigenous helping networks" (e.g., the family, the church, etc.) and other "traditional helping institutions", social behaviour remained unregulated - a situation unlikely to secure the conditions for social reproduction. In response, the state has become a "compensatory mechanism," deploying bureaucratic modes of regulation throughout the social arena; but this trend has been curtailed by the acute fiscal and accumulation crises which the state continuously faces.

Through its advance into the social arena, the state has effectively threatened the ideological bases of the public/private distinction and provided an impetus to alter the relationship between state and civil society. For Baskin, the shift to "community-based" control institutions has transformed this relationship by expanding state control through a process of diversification:

> "State, semi-state, and private entities have been empowered to intervene into personal relations for the purposes of preventing, identifying, and/or correcting disruptive behaviour" (1988: 103).

In other words, state expansion is achieved through 'deregulation' (or community regulation) in which private agencies are recast as agents of state control. In practice, this means that one does not have to break a law to be ensnared by the state's ubiquitous and informal network of control.[37]

With this in mind, Baskin describes community mediation as one of a number of reforms

implemented to "expand regulation", "neutralize conflict" related to social disintegration, and "reinforce the commodity form" (1988: 102). It expands regulation by seeking to control aspects of social existence that were previously deemed to be 'private'; i.e., exempt from public scrutiny. By transferring regulation to the "community", the state blurs the public/private distinction, thereby expanding its control network while making this expansion appear as a retraction. For instance, in mediation sessions, people are required to expose minute details of their lives pertaining to a dispute (e.g., attitudes, sleeping habits, how one feels about children, etc.) for the scrutiny of a mediator. This inserts regulation into the very fabric of social life, and produces a modality of control that encourages 'self-management'. Community mediation neutralizes conflict by "reducing social problems to interpersonal and individual ones" (1988: 105). The structural dimensions of conflict (e.g., racism, sexism, poverty) are simply translated into failures of communication, or unintended individual quirks.

Finally, Baskin describes mediation as an extremely efficient control mechanism because it simultaneously reproduces the social conditions required for capital accumulation and expands the circuits of capital.[38] By privatizing the field of social regulation, and encouraging private payment for social regulation, the state: appears to be retracting from the private sphere; enlarges the exchange of commodities to greater areas of social life (as 'services'); and entrenches the "motivational patterns" of (i.e., the subjective orientations required for) capitalist production and consumption (1988: 107)[39]. In short, under different pretexts, this process inscribes the commodity form into greater areas of the social arena and reinforces the basic motivations of existing modes of production and consumption, namely, "possessive individualism" (1988: 109). As such, informal justice simultaneously increases the number of circuits capital may traverse

while bringing subjective dispositions closer in line with the requirements of capital accumulation.[40]

Despite Baskin's criticism of Hofrichter, and her somewhat optimistic conclusions about the "potentially liberating element" of community mediation (1988: 112), her analysis does not escape the very teleological explanations of informal modes of regulation she seems to reject. While it clearly is not a crude economistic account, it describes mediation through a functionalist reasoning that seems insensitive to the contingency of struggles in social reproduction, or to the autonomy - restricted though it may be - of informal justice. Furthermore, and related to this, her account seems ill-equipped to deflect the charge that there is a state conspiracy controlling the movement towards informalism. In other words, Baskin has not adequately captured the diverse, complex, and sometimes haphazard, processes that have inscribed community mediation as one aspect of a wider Neo-Fordist mode of regulation. Whilst the state is surely a crucial part of this complex, it is important not to exaggerate its role in organizing, or initiating (rather than, say, responding to), community mediation (Cohen, 1988: 206; Santos, 1982: 264). To do so is to overestimate the state's role and to ignore other significant influences involved in negotiating the identity of informal justice.

In addition, what is conspicuous by its absence in Baskin's account is a comprehensive analysis of the different intersecting political rationales of those power relations which comprise a Neo-Fordist mode of regulation. This is to say, it is not enough to describe only those elements of community mediation which seem functional for an emerging neo-Fordist economy. Instead, one ought also to isolate its political logic *sui generis*, seeking, and elaborating upon, those elements

of a mode of regulation that may not be directly functional for a given mode of production. This would probably require one to focus explicitly on the power-knowledge relations through which specific political technologies, such as informal justice, seek to reproduce 'society'. With this in mind, let us now turn to two perspectives that do attempt to describe the model of power reflected by community mediation.

POWER AT THE MARGINS

a) Santos: Community Justice, Cosmic and Chaosmic Power

For Santos (1982), the emergence of community justice is related to changes in the forms of power within the legal system, which are, in turn, related to wider dislocations in the nature of the capitalist state. Like Hofrichter and Baskin, he views the state as no more than an historically-specific set of structures and relations that responds to economic crises.[41] It seeks to "disperse" threats to the order by 'integrating', 'trivializing', or 'neutralizing' conflicts through force and techniques of 'exclusion' (e.g., prisons; 1982: 251). As such, it assumes various forms to cope with the relentless crises that arise from structural contradictions in the "non-state" (economic and social) domains.[42] Yet its ability to integrate, trivialize or neutralize conflicts in these arenas depends in large measure on its ability to preserve a semblance of neutrality in class struggle. It does this by granting a certain 'independence' to its legal system, thereby masking the fundamental symmetry of interests between state, capital and law.[43] In this account, the law emerges as a fragmented and pluralistic entity which bolsters the state's legitimacy by aiding its claims to neutrality in the class struggle.

Santos subscribes to a certain legal pluralism, and sees community mediation as one

manifestation of law. Structurally, for him, 'the law' is best seen as a heterogeneous complex that adopts three basic strategies by which decisions on particular conflicts are made and communicated: "rhetoric", where judgments are made on the basis of socially accepted arguments; "bureaucracy", where decisions are imposed through authorities that appeal to professional knowledge, formal rules, hierarchies, etc.; and, "violence", where decisions appeal to the threat, or use, of physical force.[44] Using this pluralist conception of law, Santos describes community mediation as part of a recent trend in which structures of rhetoric at the periphery of political domination are expanding at the same time as bureaucratic and violent structures at its core are becoming more pervasive. The symbols of increased participation, self-government, informalism and community participation may be used to distinguish mediation from the adjudicated coercion of courts, but both serve to expand structures of state control.

In other words, while informal justice expands rhetorical structures by extending into peripheral areas of the legal domain, it does not hamper the dominance of formal bureaucratic and violent structures at the core. On the contrary, Santos argues that in Western law, the peripheral expansion of informalism actually facilitates a concomitant expansion of bureaucracy and violence at the centre of the legal system.[45] Yet, he adds, structures are never impervious to influences from other legal structures (hence, 'structural interpenetration'); indeed, bureaucratic and violent structures have expanded into the very form of rhetoric. Thus, peripheral structures (e.g., informal justice), while grounded mainly in legal rhetoric, have also become contaminated with the logic of bureaucracy and violence. (For example, mediators frequently allude to the court as the 'only other option' if participants fail to reach agreement, thereby invoking the threat of having to resort to the formal legal bureaucracy, and possibly the coercion of the state).

In tandem, these reflect a more general transformation of the way the capitalist state exercises power. Santos suggests that it typically, exercises power in two complementary - but "mutually exclusive" - ways: on the one hand, it exists as a centralized and hierarchical "cosmic power" which operates through "formal" institutions at a macro level; on the other, it is exercised through a less organized, but more diffuse, ubiquitous and flexible "chaosmic power" that emerges,

> "wherever social relations and interactions are unequal, in the family, at school, on the street, etc. It is a micro power." (1982: 261).

Even though these may appear in different institutional guises, and operate at different levels (i.e., macro and micro), Santos feels they have always cooperated to perpetuate the same basic inequalities of capitalist society.[46] But in early capitalism the residues of Feudalism helped to sustain a genuine division between 'civil society' and the 'state' such that cosmic power was excluded from the former.[47] However, in late capitalist societies there is no 'civil society', for it is neither distinct from the state, nor in opposition to it. At best, there is a "secondary civil society" which is no more than "state produced non-state areas of social life" (1982: 262 at note 15).

This reflects a fundamental shift in the nature of state power in that closer links are being forged between cosmic and chaosmic power such that the latter increasingly carves out areas in which the former operates. As such, community mediation articulates cosmic power to aspects of chaotic power in its quest to exercise power in situations that previously did not fall within the ambit of state regulation; that is, conflicts between people involved in ongoing relations. It helps to expand state power whilst simultaneously assisting the state to cut back fiscally. Consequently, the state is expanding even though it claims to be retracting and leaving regulation to the 'community'. In the process of such expansion, the state and non-state realms begin to converge,

resulting in a stronger and more pervasive, but also a more flexible form of the state.

Santos argues that this transformation of state power was prompted by the need to revive a bond between the state and the working class in a situation of stagnating accumulation. Hence, the state has expanded materially to absorb some unemployed people, but it also expands symbolically to neutralize the resistance that such crises evoke.[48] Community justice is designed to stabilize power relations and thereby deal with certain structural contradictions in capitalist society.[49] In as much as community justice deals with conflict by assuming the value of - and appealing to - "consensus", it reinforces the *status quo* and achieves a dubious "repressive consensus" (1982: 261). As such, it serves to disarm and fragment the working class in late capitalist society. Santos predicts that core areas of political domination are increasingly likely to assume a chaosmic form. In so doing, the distinction between core and peripheral will be blurred, leaving very little room for political contestation at the periphery. In such an ominous Orwellian environment, the ubiquitous state will face all people directly as it shifts from formal institutions to "informal networks". The net effect of this for Santos is that,

> "Social networks will then become the dominant unit for the production and reproduction of power - a source of power that is diffuse and interstitial, and therefore is as familiar as it is remote" (1982: 263)

The significance of Santos' analysis should not be underestimated, for it is one of the first attempts to explicate the underlying model of power - and its links with formal models of power - behind informal justice, thereby providing important conceptual tools for a detailed analysis of emerging post-fordist 'modes of regulation' in the dispute resolution field. However, Santos offers rather little detail on the precise nature of the two models of power he invokes. As such, his interpretation does identify a central distinction between the two forms of power and their

relation to community mediation, but ignores the actual ways in which the respective models operate. Without this, his account is ill-equipped to detail how power operates through the practices of community justice, or how it links up with the law's model of power, and moreover, what sort of 'expansion' this implies. It also may explain his failure to offer theoretical grounding for the potentially liberating dimensions, the utopian 'positive functions', of community justice to which he refers in conclusion (1982: 265). In what may be seen as an attempt to rectify this, Fitzpatrick concentrates his analysis on the nature of the dispersed (chaosmic) power that characterizes community mediation.

b) Fitzpatrick: Informal Justice and Disciplinary Power

For Fitzpatrick (1988), community mediation is part of a developing trend towards informal, decentralized modes of exercising power in liberal democratic states.[50] In particular, he draws on Foucault (especially 1975 and 1980), to point to the declining importance of hierarchical models of power in which lines of command emanate from a central force (a sovereign) to dispersed subjects, discontinuously, through the formal dictates of law.[51] While not obsolete, this model of power has - he suggests - been surpassed by another in modern societies. Here power operates more continuously in a less visible and more diffuse way. It is a pervasive (if not invasive) type of power which uses techniques of discipline in local contexts to structure the social fields within which individuals act. It is productive since it shapes actions in these contexts through 'tactics', and these may or may not link up with tactics in other local contexts to form wider 'strategies'.

With this in mind, he identifies two contemporary types of power. On the one hand, at the local level, "syncretic" power takes the form of ongoing struggles in which mechanisms of inclusion and exclusion are employed to stultify specific forms of opposition, or 'counter powers'. On the other hand, there is another form of power - "synoptic" power - which is the composite of syncretic powers, seeking to, "unify component powers into a singular power" (1988: 188). Synoptic power produces a 'working map' of the complex struggles within and between component syncretic power relations at a given point in history. Such power is neither stable, nor static, nor a "settled resultant"; instead, it is in constant flux, changing in tandem with the ongoing struggles and resistances in the multiple local contexts from which it emerges.

For example, if one were to take the case of racism in South Africa, there are diverse instances of syncretic powers that effectively subjugate people because they are defined to be part of a particular 'race' and bar them from equal treatment in local contexts (e.g., impediments to promotion at work, social ostracism, etc.). These various syncretic techniques might be linked up into broader 'synoptic' strategies which impart a wider hegemony to this racism (such as the statutes of the Apartheid State). In consequence, there is a constitutive and recursive articulation of syncretic and synoptic powers, a link that is sustained through techniques of discipline, normalization and self-regulation. The ensuing political pattern has important effects, especially through the kinds of identities it creates, but it is never written in stone and can be altered through effective struggle.

Now, in view of this, synoptic power is the means by which power achieves 'hegemony' in a given social field, and thereby regulates the actions of individual subjects 'comprehensively; that

is, across local contexts (Fitzpatrick, 1988: 188). Hegemony is achieved in given social fields (e.g., the economy, the law; the family), but it is usually related to powers in other social fields, even though such relations accord with no specific, or necessary, hierarchy. Moreover, it is possible to turn Fitzpatrick's model in on itself:

> "A synoptic configuration of power can be seen in its particularity as itself a power entering into syncretic relations with other powers" (1988: 170).

That is, syncretic power relations can form part of wider synoptic powers and these synoptic powers, in turn, may relate to one another as syncretic powers.

With this framework, he attempts to characterize informal justice by examining "the mutual constitution of law and the informal" (1988: 190). Fitzpatrick views law as simultaneously part of, yet more than, the liberal state. For him, it is a synoptic power which emerges out of disciplinary mechanisms that link up component syncretic powers. The law also creates the 'general space' within which particular forms of informal justice operate (1988: 191). It does this, in part, because of its very constitution. That is, the law is not simply a negative mechanism of restraint on the natural, 'unbounded freedom' of the individual subject, as liberal conceptions may insist. Fitzpatrick does not accept that subjects are 'natural' in any primordial sense, but rather that they are continuously crafted by techniques of disciplinary power. Thus, in so far as the law is predicated upon the 'unbounded freedom' of an individual 'subject,' its very identity requires a space in which this may be produced. As such, the law creates an informal domain, an "area of action in which the subject is 'free' to accept the dictates of disciplinary power" (1988: 190). The law conceptualizes this domain as one of 'freedom,' self-realization, non-power, and in so doing masks the disciplinary techniques used to create so-called 'normal' individuals. As such, the law hides its reliance on the normalizing techniques of discipline, and sets up conditions for

informal justice to exist. In this way, the informal is constituted by the law.

By the same token however, the informal domain bolsters the integrity of law by 'coming between' the syncretic and synoptic dimensions of law. It does this in order to buffer the contradiction which emerges by law presenting itself as an independent and universal power while depending on particular forms of discipline in local contexts. We have already alluded to ways that informalism obscures the disciplinary grounds for the 'natural' and 'free' legal subject. But it also 'accommodates' the opposition between the universal and the particular aspects of law in two related ways: first, it reduces or 'disaggregates' collective challenges to the legal system and translates these into support for the law (1988: 193); and, secondly, it individualizes conflicts and deals with them in informal contexts where they are unlikely to call the integrity of law into question. Furthermore, by counterpoising itself to formal law, informal justice obscures the fact that it is a "constitutive condition" of law. As such, the informal social field can be seen as integrally related to its legal counterpart.

But why should community mediation have arisen at this juncture in history? Fitzpatrick argues that in order to maintain its hegemonic dominance in the legal field, and to thus perpetuate a "liberal social ordering", liberal legality has established a space for informal justice. This has become necessary because while modern capitalist societies are grounded in "coercive authority", this form of authority runs counter to their liberal democratic values. Thus, the rule of law has proved unable to sustain a liberal social order efficiently, since its coercive nature tends to foster, rather than limit, legitimacy crises. As a result, the liberal order has come to rely more and more on the invisibility (and therefore efficiency) of disciplinary mechanisms, and hence the growing

importance of informal justice in modern society. Thus informal techniques of discipline have developed as the "dark side" of law since the law "relies integrally on disciplinary powers to constitute a massive, non-rebellious normality" (1988: 190)

Even though Fitzpatrick presents informal justice as a significant aspect of both the law and the state's disciplinary powers, it is not simply subservient to either. Indeed, while undoubtedly constituted, in part, by the legal field, informalism has autonomous aspects, just as the legal field is not completely surrounded by the state.[52] As a buffer between the synoptic and syncretic dimensions of modern law, informal justice resides in a delicate and unstable interstice that is subject to ongoing transformation. Here, Fitzpatrick draws attention to the transient and shifting character of informalism as it accommodates itself to the ever-changing nature of the interstice in which it resides. It is therefore never entirely embraced by the state or law, because there is an "unembedded" dimension to community justice wherein lies the capacity to escape strictures of formal legality. However, this potential is seldom manifest and is often actively denied through procedures of exclusion that reduce it to silence. In examining how one might engage politically with informalism in a progressive way, Fitzpatrick is pessimistic about the value of 'taking law seriously,' or engaging with current forms of informal justice. But he does not wish to succumb to an 'analytics of despair' either; instead, he urges that a progressive politics of law develop out of the 'silences' of the unembedded dimensions of community justice, to unearth its subjugated discourse, and to begin creating a counter-power from this arena (1988: 197).

From the point of view of analyzing the types of power implicated in the deployment of mediation as a mode of regulating disputes in contemporary society, Fitzpatrick's analysis is

clearly the most sophisticated of these critical analyses. Indeed, as will become increasingly apparent, the ensuing analysis continuously refers to various insights in his extraordinary essay. However, there are significant problems which place some unnecessary restrictions upon his theory, and which are related to the manner in which Fitzpatrick has interpreted Foucault's work. First, I think Hunt (forthcoming) is quite correct to criticize Foucault for underestimating the significance of formal legality - and its associated political model - in modern societies. This is especially so in Canada, where there appears to be a great reverence for liberal legality, and indeed, if Mandel (1989) is correct, a considerable move towards a legalization of politics. The point here, is that one should avoid either underestimating the importance of the law and sovereign model of power in modern capitalist societies, or exaggerating the role of discipline in these.

This bears directly on the second problem with Fitzpatrick's analysis; namely, his somewhat impoverished interpretation of the model of power implicit in community mediation. That is, Fitzpatrick over-emphasizes discipline as a modern political technique without considering the wider influence of other techniques, such as, 'confession' or other 'technologies of the self' (Foucault, 1988). Indeed, were he to have explored other Foucauldian texts (e.g., 1978, 1979, 1981, 1982, 1984) in more detail, he too might have recognized the salience of the 'pastoral' model of power to community mediation, for it provides a framework for examining how both discipline and confession operate in complementary ways in such political technologies as informal justice. In this more expanded interpretation, discipline - though significant - can be seen as but one of the techniques that help to secure the 'pastoral' form of power which creates 'individual disputants' in a 'community'. Whatever the merits of his analysis, Fitzpatrick's

oversights detract from his praiseworthy quest to elucidate the model of power implied in community mediation, and to suggest how this is located within the broader context of a given mode of regulation. It is to this very problem that much of the remaining thesis is directed.

CONCLUSION

By way of conclusion, this chapter has explored the more prominent aspects of the critics' discourse on community mediation. Were one to identify a *leitmotif* of the discourse, it would surely be that community mediation is part of a process by which the state casts a larger, more finely meshed, control network over a regulatory arena - in the social domain - which it has created but which appears as an independent realm of freedom (e.g., as is implied by the notion of 'community'). Depending upon which perspective is adopted, the critics examine this theme in relation to: ideology; accumulation-hegemonic, or regulation structures; or, power. Each of these offers important insights into the nature of community mediation. The ideology theorists persuasively problematize the advocates' optimistic glosses of informal justice. But in their laudable effort to expose the dangers of that 'ideology', they evoke a certain pessimism about the possibility of successfully reforming the court system (Matthews, 1988). This pessimism - and even cynicism - is further ensconced in the structuralist critiques which tend to emphasize the functional significance of informalism in neutralizing resistance that emanates from underlying structural contradictions. These analyses are instructive to the extent that they locate the development of community mediation in historical perspective. But in accentuating the functional significance of community mediation for the state and capital, they offer an overly deterministic account of informalism in contemporary society and fail to explicate its unembedded, autonomous, dimensions. Consequently, they do not clarify potentially progressive

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contributions that community justice might make to furthering social justice in society (Cain, 1988).

Santos's work was shown to be important in that it - more than the previous accounts - points to the open-endedness, the contingency, of political struggles. By focusing on different forms of power, he underscores Gramsci's contention that hegemony is the product of ongoing struggle. In emphasizing the contingency of social arrangements, this conception breaks with the functionalism of more rigid accounts of history. As such, Santos shifts the debates into an historical, contextual analysis, which focuses on the nature of power in informal justice settings. Fitzpatrick (1988) develops this further and rejects both the untoward optimism of the advocates, and the cynical pessimism of the ideology and structuralist critics, in his attempt to chart the nature of power as it pertains to informal justice settings. On the basis of this, he points to ways of working with its unembedded dimensions whilst resisting its dangers. His is a version of 'left realism' (Matthews and Young, 1986), which avoids simple 'correctional' approaches but does not fall prey to a pessimistic 'adversarial nihilism' that fosters estranged political apathy.[53] He does not simply dismiss community justice as an ideological ruse, or a structural masquerade, but takes it 'seriously' (Cohen, 1988: 213; Matthews, 1988: 16). The important issue he raises here is how precisely to engage with informal justice without being coopted by state initiatives, or by rejecting informalism out of hand. And it is to this 'problem' that the present thesis is directed. In particular, when applying this logic to community justice in British Columbia, one needs to chart a sophisticated map of the political environment in which this mechanism has been developed and deployed. In turn, this requires us to reformulate the 'problem' at hand, before conducting a more detailed analysis. But, clearly, we do not have to start afresh, for we have an

insightful critical discourse from which to proceed. Our task is to negotiate a theoretical path out

of its strengths, to write *in* the insights of the critics' discourse, and to write *out* its weaknesses.

END NOTES FOR CHAPTER 2

1. Cohen (1988: 203).

2. While the images of this critical discourse have largely been constructed in the United States, and to a lesser extent in Britain, its precepts are directly relevant to the deployment of community mediation in Canada. Indeed, part of the project of this thesis is to elaborate upon these criticisms in an effort to demonstrate their direct relevance to the Canadian context.

3. That this is seen as a central theme is evident from Abel's important introduction to informal justice where he suggests that since informal institutions are primarily agents of social control,
   "the central question must be: Do they expand or reduce state control?" (1982a: 6).

4. This is not, of course, to suggest that critics fall clearly into one of these three camps. Rather, the categorization according to their central concerns should be seen as a heuristic device to commence a discussion of the discourse, recognizing that - as should become apparent - there is considerable continuity and overlap between writers.

5. For instance, Tomasic (1982), Harrington (1982, 1985), Harrington and Merry (1988), Nader (1988), Abel (1981, 1982a, 1982b), and Adler, Lovaas and Milner (1988).

6. For example, Hofrichter, (1982, 1987), Selva and Bohm (1987), Spitzer (1982) and Baskin, (1988, 1989).

7. Here, I am specifically referring to the work of Santos (1982) and Fitzpatrick (1988).

8. See especially Abel (1982a) and Tomasic (1982), but also, Abel (1982b), Harrington (1982, 1985, 1988), Merry (1982), and Auerbach (1983).

9. Harrington and Merry point out that even though there may be divergent philosophies within the informalism movement, most protagonists are committed to the "consensual justice" of the courts (1988: 717). It is therefore not surprising to find increasing pressure to professionalize the mediation movement and to increase legislation over mediation in the purported interest of standards. From this perspective, it seems likely that mediation will be institutionalized as no more than another tier in the overall justice system. In addition, the pressure to professionalize mediation comes from the legal organizations and mediator umbrella groups, under the guise of keeping 'standards' (see Harrington, 1985: 71-72).

10. For instance, Tomasic (1982) and Abel (1981, 1982b).

11. Nader (1988) makes a similar point in reference to the wider alternative dispute resolution movement.

12. That is, while the ruling bourgeois class had relied explicitly on the concept of "rights" to overcome Feudalism, this became a progressively redundant anachronism that hindered capital accumulation. The movement to informalism is a way of undermining the constraints that rights issues place on the expansion of capital.

13. Indeed, Abel suggests that because informalism merely responds to surface manifestations of structural conflicts, it will not be able to resolve grievances on a lasting basis (1982b: 309). That is, because it encourages compromise and mutual blame, avoids "fundamental structural conflict," and "seeks to convince the parties that their interests are really harmonious," it is not likely to resolve disputes effectively (Abel, 1982: 286, 289). Indeed, by de-legitimizing class conflicts it fails to observe the real sources of conflict in a capitalist society (eg. class, race), and by focusing on the individual it reproduces politically counter-productive disputing strategies. As such, Abel predicts that informalism is likely to fail, and as it atrophies it will discourage participants; both tendencies, he thinks, will necessitate the recall of formalism to enforce participation.

14. See also Cohen (1985: 161-196).

15. They clearly follow (via a reference to Cotteral) a Weberian model whereby ideologies are seen to be both structurally constrained by the limits of past history, and yet open to the contingent potential of human agents in social interaction.

16. See Cohen (1985) for a more detailed analysis of the role that "professionals" play in the deployment of informalism.

17. It was, as one commentator suggests, a conservative resolution that,
> "stifled discussions of power by means of indirect controls...by means of harmony ideologies" (Nader, 1988: 286).

18. Terms like "empowerment", "informal", "community" are examples of often-used 'buzzwords' in the advocates' discourse. An example of a 'false comparison' in the discourse is the tendency to compare mediation with adjudication when, as Abel notes, "most mediated cases would have been handled by negotiation" (1982: 9), not by court adjudication. This creates the illusion of separation through a deceptive comparison.

19. See Abel (1982a: 8-10) and Wahrhaftig (1982: 83).

20. See, for example, Cohen (1985, 1988), Abel (1982a), Harrington, 1982, 1985), Tomasic and Feeley (1982) and Auerbach (1983).

21. Some even suggest, as does Abel, that in this ideology,
> "Political choice is portrayed as blind necessity, the interests of dominant groups are dressed up in the wishes of the dominated, and informal processes appear as their mirror images..." (1982a: 7).

22. See also Cohen, 1985 and 1988.

23. Moreover, the objects of such control are not random; on the contrary, Abel notes, informal justice targets the,
> "dominated categories of contemporary capitalism; the poor, ethnic minorities and women." (1982a: 9).

24. See Smart (1986) for a more detailed analysis of this point.

25. See, for example, Gramsci, 1980; 1985; Boggs, 1984; Bocock, 1886; Bobbio, 1989; Anderson, 1976-7; Mouffe, 1979; etc..

26. See Carnoy (1984: 128-152) for a more detailed analysis of this conception of the state.

27. Gramsci used the concept ambiguously, in at least three different ways (Anderson, 1976-7). In many case, his use of this concept marks a deliberate attempt to redress the 'fatalism' of rigid, economismistic interpretations of Marx's work that reduce political struggles to purportedly underlying economic processes (1980: 175-185, See also, Laclau and Mouffe, 1985). Through it, he emphasizes the importance of political contests, especially those that seek to organize the consent of the governed (as opposed to those that involve coercive force to secure social 'order'). His analysis outlines the means by which a ruling class secures hegemonic control over all other classes in society by making its 'ideology' synonymous with 'common sense', or the 'natural order' (eg., Gramsci, 1980: 257-264).

28. That is, an illegitimate set of institutions is likely to face uncontrolled resistance and instability rather than secure the stability required for capital expansion. As a result, the state must at least appear "neutral, universal and autonomous" to most people (1987: 28).

29. Hofrichter includes the family, community, culture, art, and so on in this realm (1987: 35).

30. Hofrichter also suggests that if hegemonic, this view will be accepted as 'natural', universal, inevitable, neutral, obvious, etc., by members of a society. And when this occurs, the power struggles which have produced such a commonsensical world view fade into the background and become obscured (1987: 34). But this process is never a **fait accompli**, nor is it entirely stable, for it is the outcome of ongoing struggles. But one should note that these struggles are further complicated by the state's ability to resort to coercive force should its hegemony become threatened (1987: 38).

31. See Hofrichter (1987: 131-142).

32. One reason for the protracted nature of these crises lies in monopoly capital's tendency to spread crises across production sectors rather than isolating them more locally.

33. Apropos predictions about its future, Hofrichter feels that by blurring the distinction between the state and civil society, "such that the state does not appear to be the state but rather part of the landscape of community social life" (1987: 153), neighbourhood justice is likely to have various unintended effects. For example, he predicts this would increase the state's discretionary powers and, in turn, undermine the "rule of law" and the importance of state professionals; these would sabotage the state's claims to neutrality and competence. While this might translate into a legitimacy crisis for the state, it is almost sure to weaken the rights of moderate or low income groups and obfuscate underlying conflicts (1987: 157). In his opinion, the movement is sure to fail because of its internal contradictions and inherently exploitative nature (1987: 159). Indeed, because it is an "alien state institution" incapable of resolving collective problems (1987: 159), using sham rules and an artificial notions of participation, neighbourhood dispute resolution is unlikely to receive widespread support.

34. See Cohen (1988: 206) and Gallagher (1988: 138).

35. See Jessop (1990) for an excellent overview of regulation theory, and Carnoy (1984) for a synopsis of state derivation theories. The theorists that Baskin seems to use most are Hirsch (1981, 1983) and Aglietta (1979).

36. This movement, so the argument goes, entailed the progressive involvement of the state in social life as more traditional institutions disintegrated. Thus whereas Taylorism sought to create the most efficient worker through effective training, the Fordist state seized the opportunity to expand such training to the social domain in the form of 'welfare'. Given the escalating cost of this strategy, the state soon faced a 'fiscal crisis' (O'Connor, 1973; Offe, 1984) and hence the neo-Fordist (sometimes referred to as the 'post-Fordist') state which attempts to secure the same effects but by using so-called 'private' agents of control.

37. This explains why many of the cases which are mediated would not reach the formal state (courts) anyway (Baskin, 1988: 104).

38. Most simply, community mediation expands the commodity form to social life by requiring a fee - minimal though it may be - for service. Ironically, this injects the appearance of voluntarism into the regulatory form, because people are now presented with a 'choice' as to which type of regulation they which to be subjected. Perhaps, as Offe notes, this is all part of a trend, from the 1960's onwards, in which the state tries to,

> "solve the problem of the obsolescence of the commodity form by politically creating conditions under which legal and economic subjects can function as commodities" (1984: 124).

39. These motivational patterns are nurtured through encouraging "possessive individualism" and by individualizing conflicts. It thereby reinforces the "basic motivational patterns constitutive of the social norms of production and consumption" (Baskin, 1988: 109-110). This is not an insignificant contribution, for,

> "As profits under capitalism have come to depend less on price consumption and cost of production and more on maintaining monopolistic control over markets and elevating levels of demand, the cultivation of consumer habits, the creation of 'consumptive communities', and the shaping of consciousness have become the *sine qua non* of capitalist growth" (Spitzer, 1979: 199).

40. This occurs at two levels: first, to the extent that people settle their disputes they are less motivated to resist dominant relations; and secondly, payment for mediation service reinforces the idea that everything can potentially be converted into a commodity.

41. In this sense,

> "the state has to concentrate itself in areas of social life where the intensification of class struggle has become disruptive..." (Santos, 1982: 251).

42. In general, he suggests that the state disperses tensions into, "an apparently chaotic sequence of administrative failures and successes, of honoured and violated political compromises, and acts of repression and facilitation (whether enforced or merely announced)" (Santos, 1982: 251). While that state has some autonomy in its responses, it is limited by structural "homologies" that link the political and economic spheres such that, "state action is subordinated to the logic of capital" (1982: 251). To support this claim, he refers to the "non-capitalist" residues of the past which still exist in contemporary society as well as to the apparent need to disguise the nature of capital's real logic for it to operate effectively (1982: 250). This provides the basis for the state's 'autonomy' from purely economic processes.

43. That is, for Santos (1982), the law's autonomy is severely truncated because the state manages its 'independence' from the economy.

44. Because these are presented as Weberian 'ideal types', they seldom exist in pure forms in concrete contexts and, instead, combine in complex (and often unanticipated) ways. Such is the nature of the legal pluralism in this account. While there may be many possible articulations between these structures of law, Santos describes three that are commonly present in capitalist societies (1982: 52-55). First, he speaks of "quantitative co-variation" which suggests that the more dominant structures of bureaucracy and violence are in a particular society, the less significant rhetorical structures will be. Secondly, "geo-political combination" refers to the notion that political domination is not uniform across a field, since the state uses different forms of domination. For instance, it may use mechanisms of neutralization and exclusion to disperse contradictions at the centre of the social network, while resorting to integration and trivialization (e.g., informal justice) at the periphery. Thirdly, one often finds "structural interpenetration" in capitalist societies, which is to say that these structures tend to 'contaminate' one another, thereby assuming hybrid forms. Thus, he argues, rhetoric has been "qualitatively" contaminated by the more dominant structures of bureaucracy and violence in our society so that even rhetorical appeals make use of threats of violence, or are cast in technocratic discursive moulds.

45. Hence the increased use of neutralization and exclusion evident in modern capitalist societies.

46. Thus, he argues, these forms of power are quite, "complementary - each is made tolerable (and is reproduced) by the other" (1982: 262).

47. Nevertheless, Santos argues that even here, 'civil society' served to mask the fundamental continuity between the so-called private and public (state) domains (1982: 262 at note 15). He thus clearly rejects the tendency in liberal theory to separate state (power and violence) from civil society (freedom and equality).

48. However, he predicts that while this material expansion of the state is likely to be curtailed (because of a wider fiscal crisis), it will continue to expand symbolically (and hence ward off its legitimacy crises).

49. He also sees the joint effects of the fiscal and legitimacy crises as an important impetus for the rise of informalism (see 1982: 260).

50. Fitzpatrick sees merit in both the advocates' perception of informal justice as an autonomous identity, and the critics' conception of it as a residual feature of something else (economy, state, etc.). Indeed, he sees this 'divide' as a reflection of two forms of power in modern societies that are linked together in ways that need to be analyzed in more detail (1988: 179).

51. Fitzpatrick acknowledges his reliance on Foucault, but feels his work marks an "axial shift" within the latter's framework. In my opinion, his most important such shift is to offer an account of resistance, counter-power, that improves upon Foucault's (1982) rather schematic account of this.

52. As Fitzpatrick argues, "'Law' need not continue to reside definitively with the state...Indeed, if we set aside those sociological and jurisprudential arrogations of law as simply emblematic of 'society', law is revealed as an object of unresolved contestation between different sites of power and not as located definitively with the state" (1988: 195).

53. There are a number of people who share this view, including Cohen (1988), Matthews (1988), Fitzpatrick (1988) and Cain (1988).

CHAPTER 3

ENUNCIATING A GRID OF INTELLIGIBILITY:

REDEFINING THE ANALYTICAL 'PROBLEM'

The previous two chapters point to a conceptual divide between advocates who portray informal justice as a way of restricting state encroachments into the community and critics who denounce it as a subtle means of expanding state control over individuals. However, as implied, this formulation of the 'problem' unnecessarily limits a detailed theoretical elaboration of community mediation's regulatory logic by restricting debate to whether informal justice expands or restricts state control. One effect of this approach is to eclipse the logic(s) of control that is(are) promulgated by specific versions of community justice. In an attempt to redress this oversight, the current chapter outlines a way of problematizing the political logic of community mediation by offering a 'grid of intelligibility' from whence the theoretical elaborations of the present thesis will develop.[1]

From what has been said thus far, such a grid must surely refuse the unqualified optimism of the advocates without falling into the pessimistic 'analytical despair' that flows from the work of certain critics.[2] Both postures hinder the quest for effective forms of political engagement designed to achieve social justice. A more fruitful stance would be one that develops a theoretically 'adequate' means of assessing the contributions of informal justice in context (Cain, 1988). Since what follows is itself a critical enquiry, and since the critics have enunciated precise theoretical constructs that are absent from the advocates' analysis, I shall use the former's discourse as a point of departure in framing a suitable grid of intelligibility. It is perhaps

inevitable that the critics' discourse will be altered somewhat in the process of recasting the 'problem', yet such revision should be seen as a way of continuing a critical dialogue on informal justice, as well as attempting to ensure theoretical adequacy outside of the geographical contexts in which the critics' propositions were originally enunciated (i.e., Britain and the United States).

TAKING A CLOSER LOOK AT THE CRITICS' DISCOURSE

Extrapolating from the previous chapter, one can identify two ways in which the deployment of community mediation is problematized by critics. As noted, most focus their enquiries on the 'problem' of how, or to what extent, community justice extends the state's control. For them,

> "the central question must be: Do they [informal justice institutions] expand or reduce state control?" (Abel, 1982a: 6)

Despite their different approaches, the various critics who address this dichotomous question respond unequivocally: the community justice movement expands state control and, ironically, it does so by denying that it does.[3] To the extent that community justice is here understood through the control functions it performs for the formal state, this perspective offers a 'reductionist' thesis which, in effect, denies that community mediation is, or can be, autonomous in any important sense.[4]

By contrast, another set of critics - the so-called new informalists (Matthews, 1988; Fitzpatrick, 1988; Cain, 1988) - argue that the 'problem' ought to be expanded beyond the confines of this narrow research question.[5] They take issue with the reductionists' pessimistic outlook on whether informal justice can achieve progressive social change, and criticize its functionalism (or economism) which has,

> "precluded the need for a detailed investigation of the political dynamics which were

implicated in the expansion of informal justice" (Matthews, 1988: 16).

The upshot of this, so they charge, is an unduly state-conspiratorial view of mediation that has promoted a "chorus of despair" whose refrain is 'nothing works' (Cain, 1988: 51; Matthews, 1988: 17). In response, the 'new informalists' argue that mediation is not always a mere instrument of formal state legality; it is therefore important to distinguish (in a "theoretically adequate way") between specific community mediation programmes on the basis of contextually-determined articulations to state justice (Cain, 1988: 51).

In their attempt to 'take mediation seriously', the new informalists adopt a pluralistic conception of 'the law' and view community mediation as one of many elements comprising a dispute resolution arena. In this sense, informalism can be regarded as a 'semi-autonomous' identity that could potentially operate as a progressive force in the struggle for social justice.[6] In other words, the new informalists see the identity of community mediation as a contested one. They grant that whilst its current deployment in the United States and Britain could hardly be described as progressive, it is not inconceivable that in a different political environment informal justice could become a force for emancipation; that is, it could assume a social identity directed at transforming, rather than reinforcing inequable professionalised judicial structures. In this formulation, community justice is neither simply a state agency, nor an obvious institution of civil society. Instead, it is located in the domain of the 'social,' "a hybrid sphere which links up the 'state' and 'civil society'" (Matthews, 1988: 18).[7]

With this in mind, one might contextualize the differences between the advocates, the reductionists and the new informalists by noting where they locate community mediation as a

means of dispute resolution on a state-civil society (non-state) continuum. For the advocates, community mediation falls squarely in the realm of civil society, as an alternative to state justice. For the reductionists, community mediation is no more than a state creation and can be located in a "secondary" civil society, or a state created image of the non-state.[8] By contrast, the new informalists locate community mediation in another domain - the social - which is only partially regulated by the state and which serves to preserve the distinction between the state and non-state domains. Depending on where one is located in this debate, no doubt, accounts for the advocates' optimism, the reductionists' pessimism and the new informalists' cautious engagement.

Which of these positions holds most promise for our grid of intelligibility? In light of the critics' thorough and poignant critiques, many of the advocates' claims must certainly be questioned. Indeed, their basic assertion that community mediation provides an 'alternative' form of dispute resolution to the professionalized justice of the courts is surely contradicted by their ongoing quest to deploy a 'system-based', 'complementary' version of informal justice in British Columbia. Moreover, setting up and evaluating community mediation programmes with their technical capacity to 'resolve' individual disputes firmly in mind is not commensurate with the advocates' suggestion that community mediation is a grassroots, 'community-based' innovation. Even if one were to laud the search for more open and empowering ways of resolving disputes than is offered by the courts, the important discrepancies noted by the critics warrant a healthy scepticism towards the advocates' discourse.

At the same time, however, the reductionists must face certain intractable problems of their own, making the political openness of the new informalists an attractive proposition. But to avoid

risking an over-hasty judgement, let us turn to four major problems associated with the reductionist position before evaluating the new informalist vision itself.

RIDDLES OF REDUCTIONISM

First, by describing community mediation as an 'expansion' of state control, the reductionists implicitly assume that comparisons between different modes of state control (e.g., past and present) are possible. That is, even if one were to accept the heuristic feasibility of distinguishing between specific types of control, there is something troubling about the comparative precision required to make clear-cut assertions that present forms of state control have 'expanded' those of the past. Indeed, the idea of expansion presupposes a degree of commensurability between modes of control that is difficult to accept, especially when considering the complex mechanisms of control that operate in a given social context, let alone when one tries to make historical comparisons.[9] In particular, this raises vexing questions about how to distinguish between one state form and the next, to compare these forms and to provide a basis for declaring that one form expands another. Whilst these may be important and interesting questions to pursue, they do nevertheless detract from the focus of the present analysis and its attempt to detail the logic of control embodied in community mediation.

Secondly, the reductionist formulation emphasizes continuities between centralized and decentralized regulatory mechanisms while largely ignoring their possible discontinuities. This promotes a search for functional alliances between the state and community mediation at the expense of the potentially non-functional dimensions of such a relationship. Although the reductionists point to ways in which informal justice brings the state in closer contact with what

were previously seen to be 'private' matters, they fail to examine how this very process renders state control quite indirect and indeterminate. Indeed, in as much as 'experts' act as relays to reconcile the goals of state authority with the immediacy of personal experience in mediation sessions, political domination becomes less direct and, at times, its outcomes are less predictable.[10]

As such, and this is a third problem, the reductionist problematic ignores the possibility that informalism might be more than a mere expansion of state control. In short, if community justice is not simply a residual feature of state expansion, then it may indeed embody an idiomatic logic of control through the very ways in which it individualizes conflicts, 'normalizes' disputants and 'settles' disputes. Whilst regulation of this kind may (and often does) intensify the state's control over everyday life, it is possible to conceive of situations in which its indirect and less predictable nature might be exploited by progressive strategies. This criticism is directed at notions of state-conspiracy that lurk in the shadows of some reductionists' work (e.g., Hofrichter, 1987) because, as Rose reminds us, regulatory innovations are often,

> "made in order to cope, not with grand threats to the political order, but with local, petty and even marginal problems" (1990: 9)

If nothing else, this serves as a sobering reminder not to exaggerate the importance of community justice to the modern state, for one could quite easily imagine the disintegration of the former without the collapse of the latter!

Finally, despite the pessimism surrounding their damaging critiques of community justice (Matthews, 1988), most reductionists make surprising references to the potentially "liberative" dimensions of informalism.[11] This apparently Janus-faced position, I suggest, arises from their

unnecessarily truncated formulation of the 'problem'. For if one reduces community justice to a mere expansion of the state, it is difficult to see how it could serve as a point of progressive resistance (Cain, 1988). In turn, this reinforces an 'analytics of despair' referred to above and promotes a certain political apathy (Matthews, 1988). Ironically, it may even licence an acceptance of adjudication by implying that,

> "the devil of formal justice whom we know may, after all, be better than his (sic) dangerously unfamiliar informal brother" (Cain , 1988: 51).

Stated somewhat differently, the reductionists' conception of the problem suppresses a "search for progressive alternatives" in the justice system (Matthews, 1988: 17). Of course, this is not to condone the specious optimism of the advocates, but merely to endorse a more pragmatic assessment of the potentially progressive dimensions to community justice than is permitted by this formulation.

In sum then, the reductionists' definition of the problem is too constraining because it: leads to commensurability difficulties implied by the notion of 'expansion'; disregards the non-functional aspects of the formal-informal justice relationship; fails to elucidate potentially autonomous dimensions of informal justice; and, promotes political apathy, thereby constraining the quest for progressive alternatives to the formal justice system's hegemony over the legal field.

THE NEW INFORMALIST VISION: A CRITIQUE

In an attempt to avoid such pitfalls, the new informalists reconceptualize the 'problem' in such a way as to examine the potentially autonomous (and non-functional) dimensions of informal justice. For them, the central issue is to be able to distinguish, in a theoretically useful way,

between community mediation programmes that perpetuate the *status quo* as opposed to those that resist professionalised justice (e.g., Cain, 1988; Matthews, 1988). These critics recognize community mediation's constitutive relations with other fields (e.g, the state, formal legality, the economy) but insist that these very relations spawn areas of autonomy in the identities they create. Herein lies the contingency of history, for it is in the open-endedness of such spaces that social transformation becomes possible (Fitzpatrick, 1988). Therefore, they suggest, it is necessary to grasp the contingent relations which help to create the identity of given community mediation programmes, to explore the ways in which this identity is implicated in the struggle for the hegemony of professionalised justice and to locate effective forms of a counter-hegemonic political strategy.

In short, the new informalist position avoids the problems that the reductionists must face, and so it seems prudent to begin by articulating our grid of intelligibility to its core precepts. As a result, it would be more useful to conceptualize the current deployment of community mediation not simply as an expansion of state control, but rather as a contingent 'social' identity that has developed out of ongoing struggles in a given context. It has emerged out of a contested arena, the 'social' domain, which could potentially provide a progressive alternative to formal state justice, but which presently seems to be co-opted and compromised. Hence, community mediation should not be understood as a mere example of centralized state expansion, but rather as an historically-formed identity within a given power formation.

Despite its value, however, the new informalists' approach is not without flaws. As we have noted in the previous chapter, while Santos (1982), Matthews (1988) and Fitzpatrick (1988) are

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clearly aware of the need to elaborate upon the precise kind of power that operates in mediation contexts, they do not satisfactorily complete the task. Fitzpatrick's failure, for instance, to recognize the clear relevance of a 'pastoral' model power in community justice[12] results in an unnecessarily restricted capacity to evaluate, strategically, the deployment of community mediation in a given context (say British Columbia). Without a detailed analysis of the specific model of power embodied by community mediation, that is, one is unable to provide a comprehensive assessment of its political logic, methods, effects or potential to promote social justice. In turn, this serves as an impediment to the new informalist quest to 'take informal justice seriously', and to evaluate its progressive potential in context. As such, our grid ought to expand the new informalists' project by focusing on the type of government, the regulatory logic and techniques, implicated in community mediation in order to chart a more comprehensive and detailed strategic map of the relations at hand.

RE-DEFINING THE DOMAIN OF INVESTIGATION

In tandem, the previous criticisms point out a definite need to reformulate the nature of the 'problem' under investigation by developing a grid of intelligibility from which a theory about the specific logic of control embodied in community mediation may be constructed. Even so, such a grid must surely take advantage of numerous key insights in the critics' discourse.[13] In particular, it must recognize the significance of viewing community mediation as related to a wider 'mode of regulation' (Baskin, 1988) that attempts to reproduce particular (capitalist) social relations at a given point in history (Hofrichter, 1987). As well, there are a series of political rationalities, logics of governance, by which a given mode of regulation operates (Harrington, 1985; Abel, 1982b) and in the dispute resolution domain, two dominant models of power (logics

of governance) dominate (Santos, 1982). On the one hand, there are formal legal apparatuses of the courts which conform to what Foucault (1980: 92-108) has referred to as the 'law and sovereign' model of power[14] that derives from the Greek *polis* (Held, 1984). This is a visible, centralized, codified form of power which emanates from a sovereign entity and descends hierarchically over legally specified judicial subjects (Fitzpatrick, 1988; Gordon, 1987). On the other hand, there is a less visible, more informal type of power, embodied in such institutions as community mediation, which is directed at living, breathing individuals. This is a model of power that seeks to regulate individual lives continuously, but 'at a distance', by securing the participation of such individuals in their own control, to align their aspirations with the ends sought by a given mode of regulation (Baskin, 1988; Harrington, 1985; Santos, 1982; Fitzpatrick, 1988).

With this in mind, the central 'problem' that emerges for analysis in the present thesis is that of detailing the emergence and nature of the political logic - the power-knowledge relations - embodied in community mediation. It is not simply a matter of assuming that community mediation is distinct from the state (as do the advocates), or that it is but a mere extension of the state (in line with the reductionists). Instead, the problem is to chart a strategic map of the complex power relations implicated in informal justice as it operates in the 'social' domain (the new informalists) in a given context, and to situate these in relation to the more general power of the (state) courts. Such an analysis explicitly tries to conceptualize an 'alternative politics of law' in a given dispute resolution arena, pointing to specific ways in which community mediation programmes might most effectively serve as progressive agents in a quest for social justice.

But what concrete issues must be addressed in order to flesh out details in this grid of intelligibility, and so render it more useful to the specific case of British Columbia? There are at least four substantive questions that require elaboration, and it is to these that the remainder of this thesis will be directed.

1. What important underlying conditions and events have fostered the development of community mediation as a 'social identity' in British Columbia?

2. By what logic of governance, (i.e., political rationality, model of power) does community mediation in British Columbia seek to regulate social actions?

3. How is the 'sovereign-law' model of the courts articulated to the political model of community mediation in British Columbia's dispute resolution arena, and with what effects?

4. What strategic implications may be drawn from question 3 in attempting to develop counter-power strategies, an alternative politics of law, that might maximize community mediation's potential to further social justice in context?

To reiterate what has already been stated in the introduction, the first of these is the subject matter of the next chapter, while the second is examined in chapter 5. The concluding chapter 6 focuses on the latter two questions. However, before attempting to address these issues, the remainder of this chapter will devote itself to 'filling out' the grid of intelligibility somewhat by offering preliminary orientations on how each of the above questions might be approached.

LINES OF DESCENT: COMMUNITY JUSTICE IN BRITISH COLUMBIA

In exploring the underlying conditions that have promoted the emergence of community mediation in British Columbia, we have already pointed to the heuristic value of Foucault's

genealogical analysis. To reiterate, an important advantage of this methodology is its refusal to assume that such an event has a simple point of origin (say the state, or the law); instead, it sees a social identity - such as community mediation - as an 'event' in history with complex 'lines of descent' that has 'emerged' in a given play of domination (Foucault, 1977a). As such, one needs to explore in context the critics' argument that the rise of community mediation is contemporaneous with a wider transformation from competitive to monopoly capitalism[15] -- a shift that has nurtured the development of less rigid, and more flexible, forms of social control to respond to the breaches in the existing social order that local accumulation crises have spawned.[16] Nevertheless, in order to disavow the economism (or functionalism) of the reductionists, without jettisoning their attendant insights, one might regard - as does Fitzpatrick (1988) - community mediation as a "semi-autonomous" social identity that is constitutively related to surrounding "social fields."[17]

This idea is borrowed from Moore's (1978: 55) legal anthropology that sees society as being ordered through complex interactions between 'semi-autonomous fields' (e.g., economy, state, law, etc.). For Moore, a 'social field' is an appropriate unit for social analysis because it is semi-autonomous in the sense that it can,

> "generate rules and coerce or induce compliance to them" (1978: 57).

It is, however, only *semi*-autonomous because,

> "it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own insistence" (1978: 56).

Fitzpatrick warns against interpreting this otherwise useful proposal in an overly pluralist way, suggesting that social fields are *constitutively* related in what he terms an "integral plurality."

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Hence, for him, with specific reference to the field of law,

> "There is a constituent interaction of legal orders and their framing social fields. One side of the interaction cannot be reduced to the other. Nor can both sides be reduced to some third element such as the capitalist mode of production" (1983: 159)

Fitzpatrick therefore rejects "totalizing" postures which do not recognize the autonomous, unembedded, dimensions of specific 'fields', without denying the various possible combinations of mutual interdependence between fields in specific contexts. His 'integral pluralism' therefore asserts that interacting semi-autonomous fields constitute a social whole which "is less than the sum of its parts" (1983: 49). This is to say, the elements of a social structure can never wholly be explained through overarching structures, even though the identity of such elements is integrally related to the latter.

Two important questions arise here for a genealogy of informal justice in British Columbia: first, what do we mean by the 'identity' of community mediation as an event in the province's history; and secondly, how should one conceive of the larger relational 'matrix' from which community mediation has emerged? Responding to the former question, one might regard the emergence of community mediation as an ongoing effect of the interactions between various fields, that is, as,

> "nothing but the space that divides them, the void through which they exchange their threatening gestures and speeches" (Foucault, 1977a: 150).

It is a 'non-space', a 'pure distance', whose identity is relentlessly forged and altered by surrounding forces. Community mediation is, as we have noted, part of a wider impetus towards the creation of a 'social' domain that forges connections between the state and 'civil society'. This formulation preserves the insight that informal justice is not a 'fixed' identity, but a contested one that develops out of antagonisms between fields.

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Turning to the second question, it would seem - from the critics' discourse - that the legal, political and economic 'social fields' are those that impinge most directly on the dispute resolution arena in modern capitalist societies. No doubt, these fields are themselves constitutively related to one another in ways that are contextually identifiable, but for our purposes here it is important only to detail the elements in these fields that have helped to constitute the identity of community mediation in British Columbia (as detailed in Chapter 1). It is also important to bear in mind that though these might be constitutive relations, no one field is ever entirely reducible to any other. Such a characterization reverses the reductionist tendency to rob informalism of its possible autonomy, and hence its capacity for political resistance, or potential to facilitate social transformations. As well, it offers a notion of the complex matrix of interactions within and between social fields that might influence the identity of community mediation. With this in mind, our grid is directed, in the first instance, towards the complex lines of descent that have nurtured the features of community mediation in British Columbia. The next task, however, is to examine more closely the governmental rationality of the space that such lines have forged.

THE GOVERNMENTAL RATIONALITY OF COMMUNITY MEDIATION

In concrete terms, community mediation embodies a political rationality - purported by a number of advocates - that operates in the social network through a discourse that promotes 'community harmony' and criticizes the lower courts for being incapable of resolving (minor) disputes effectively. Advocates point to the 'destructive' effects of this 'crisis' on the very fabric of the community (and by implication social) order, suggesting that 'community mediators' are 'needed' to settle conflicts and 'restore' peace. In its various attempts to create and demarcate fields of

action, community mediation renders certain forms of action both thinkable and practicable. But in the subtleties of its deployment lies a model of power whose logic and techniques have escaped the attention of many researchers. It is important at least to develop the discourse about the governmental form of community mediation in an attempt, modest though it may be, to remedy this oversight.

To grasp the political rationality which community mediation embraces, and by which it seeks to regulate social action, it is necessary to heuristically integrate - into an appropriate 'model' of power - the techniques by which it operates and 'objects' to which it is directed.[18] Therefore, it seems useful to conceive of informal justice as a,

> "practice of government (who can govern; what governing is; what or who is governed) capable of making some form of activity thinkable and practicable both to its practitioners and to those upon whom it was practised" (Gordon, 1991: 3).

More particularly, the analysis is part of a wider attempt to understand,

> "through the operation of what practices of government and by what kind of political reasoning have we been led to recognize our self-identity as members of those somewhat indefinite global entities we call community, society, nation or state?" (Burchell, 1991: 120).

A *prima facia* look at the practices of community mediation suggests that they are quite different from the adversarial procedures of the courts. Stated differently, it would seem that these dispute resolution mechanisms operate according to different models of power. If the courts can be said to reflect a 'sovereign-law' model of power, community mediation exhibits a model of power that is more closely aligned with a certain logic of 'government' that has developed since the Sixteenth Century (Foucault, 1979, 1981, 1982, 1988; Burchell, 1991; Gordon, 1987, 1991). This notion of 'government' is associated with a 'pastoral' model of power that pursues political

strength by integrating singular existences with a composite whole; that is, the welfare of a political whole (e.g., a congregation, a population, a community) is deemed to be directly dependent upon the well-being of each unit (e.g., congregants, individuals) within it (Foucault, 1981). To be sure, this pastoral logic is directly pertinent to community mediation's attempts to sustain 'communities' (the *omnes*) by settling conflicts between disputing 'individuals' (the *singulatim*) - the precise links between these, however, requires substantial elaboration.

If Foucault offers important insights on the various aspects of power that he has examined in the course of his thought, he is decidely less helpful in sorting out the relations between these. For example, one might legitimately ask, how do the 'law and sovereign' (1980) and 'pastoral' models (1981, 1988) of power relate to each other, or to 'discipline' (1977b) and 'confession' (1978)? Foucault offers rather cursory - even contradictory - responses to such questions, as might be gleaned from a not too frequent statement on the matter (1979: 18). Here, he tells us that sovereignty yields successively to governmentality, only to eschew this position (on the very next page!) by asserting that,

> "in reality we have a triangle: sovereignty, discipline and government, which has as its primary target the population and as its essential mechanism apparatuses of security" (1979: 19).

Aside from omitting 'technologies of self' (e.g., confession) that were to become increasingly important in his later works (1988), this statement is confusing because it does not differentiate between *models* and *techniques* of power. That is, a more plausible interpretation would surely distinguish the models of power that entail overarching political rationalities from the techniques which are implicated in the construction of the regulatory 'objects' of such models. Foucault's 'triangle' is therefore a muddling image that does not capture the dual level of analysis implicit

in these various aspects of power.

In order to avoid such confusion, one ought to treat the sovereign-law and pastoral models as commensurate analytical constructs, whilst conceptualizing discipline and confession as important techniques implicated in creating the objects of regulation in different models of power. Therefore, with specific reference to discipline, Foucault tells us that,

> "Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise" (Foucault, 1977b: 170).

And what might this power be of which discipline is a specific technique? No doubt, this depends on context - it may be the "dark side" of a liberal law that presupposes 'individuals' just as it might be, in other circumstances, part of a pastoral power which,

> "By assigning individual places...[makes]...possible the supervision of each individual and the simultaneous work of all" (1977b: 147).

But the central point here is not to make the mistake of elevating discipline beyond its analytical level of abstraction. That is, it would be a mistake of category to compare the law-sovereign model with discipline, which is more closely akin to the spectacle, confession, or other such techniques. After all, disciplinary power, as Foucault has elsewhere noted,

> "does not adequately represent all power relations and all possibilities of power relations. Power is not discipline; discipline is a possible procedure of power" (1984: 380).

Such an interpretation not only has the advantage of affording greater conceptual precision to Foucault's overall project, but also has the added benefit of allowing one to better accommodate certain problems that his approach might expect to face. To begin with, Hunt (forthcoming) has correctly criticized Foucault for accepting a dubious conception of law, and thereby misreading the ongoing importance of the sovereign-law model. As such, Foucault tends to underestimate

the significance of this model for contemporary society, and seems to have done so in order to elevate his studies of disciplinary power (1977b, 1980). But rhetorical strategies aside, by ensconcing discipline as a technique - rather than a model - of power, our proposed interpretation acknowledges the value of Hunt's criticism by re-asserting the importance of the sovereign-law model of power, but it does so without ignoring Foucault's attendant insights on disciplinary techniques. Furthermore, such an interpretation cautions against the tendency of many Foucauldian-inspired approaches (including Fitzpatrick's, 1988) to emphasize discipline to the exclusion of other techniques (e.g., confession) which are also important aspects of contemporary patterns of regulation.

With this exegesis in mind, it is important for the ensuing analysis to elaborate substantively on the pastoral model of power by focussing on the political logic of community mediation in British Columbia, examining the regulatory 'objects' to which it is directed and noting its relation to contextual versions of the sovereign-law model. This endeavour should recognize the importance of such techniques as discipline without overlooking other 'technologies of self' (Foucault, 1988b) by which the pastoral model attempts to secure 'social' order.[19] However, to provide a working conception of power for our grid of intelligibility, and to thereby provide tools for an elaboration of pastoral power, let us refer to one of Foucault's essays in which he presents plausible "methodological precautions" that should be observed in any analysis of power (1980: 96-103).

Power: Foucault's Methodological Precautions

Foucault's approach (especially 1975; 1978; 1980; 1981a; 1982) repudiates a tendency to equate

power with its dominant manifestation at a given point in history (1980: 95).[20] Negatively stated, he suggests that,

> "power is not an institution and not a structure; neither is it a certain strength we are endowed with; it is a name that one attributes to a complex strategical situation in a particular society." (1978: 93).[21]

Or, stated more positively,

> "power isn't localized in the State apparatus and...nothing in society will be changed if the mechanisms of power that function outside, below and alongside the State apparatuses, on a much more minute and everyday level, are not also changed" (Foucault, 1980: 60).

Clearly then, he disavows the reductionist quest to explain mediation as a residual feature of a more embracing state power. Indeed, he says,

> "one cannot confine oneself to analyzing the State apparatus alone if one wants to grasp the mechanisms of power in their detail and complexity" (1980: 72).

With this in mind, Foucault outlines five methodological precautions for the examination of power render possible an explicit examination of those forms of power 'outside', 'below' and 'alongside' the state.

First, Foucault suggests that our analysis be directed at the various ways in which power is exercised in a social network, especially in its less visible manifestations. With specific reference to community mediation, it seems necessary to focus on techniques of power by attending to the numerous subtle methods, calculations and manipulations that are designed to structure the actions of disputants in a direction of 'settlement'. This reflects Foucault's belief that power is the name we attribute to calculated attempts to structure fields of action, such as those designed to decrease hostilities between disputants and to 'restore' order to their 'communities'.[22] In short, power is no more than the diverse attempts to regulate action by "guiding the possibility

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of conduct and putting in order the possible outcome" (1982: 221).[23]

Implicit in this conception is the notion that power can only be exercised over people who are capable of action. That is, it is only exercised over agents,

> "who are faced with a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized" (1984: 221).

Thus power relations operate in fields of possibility, of contestation, such as the social (Laclau and Mouffe, 1985), in which the intransigence of freedom is evident from relentless provocation, resistance and control. While power relations may appear relatively stable over time, they are never written in stone, for they can always be undermined by counter-strategies of struggle.[24] Moreover, in his framework, power is not simply a repressive or negative phenomenon imposed from 'above' a society; on the contrary, it is rooted in matrices of social relations. It is therefore far more 'productive' than 'repressive' for,

> "it traverses and produces things, it induces pleasure, forms knowledge, produces discourse" (1980: 119).

Secondly, we are warned against the temptation to reduce all forms of power to a centralized law and sovereign model.[25] As he puts it,

> "the important thing is not to attempt some kind of deduction of power starting from its centre and aimed at the discovery of the extent to which it permeates into the base, of the degree to which it reproduces itself down to and including the most molecular elements of society" (1980: 99).

Indeed, this is especially relevant to our modern age because,

> "Liberal democratic polities place limits upon direct coercive interventions into individual lives by power of state" (Rose, 1990: 10).

Once again, this reinforces the need to abandon the reductionists' assumption of state centralism and to openly acknowledge that a multiplicity of political rationalities may exist simultaneously

in a given society, and that these can stand in diverse contingent (rather than necessary) relations to one another.[26]

A third, and related, precaution advises an enquirer not to presume the existence of an essential (or universal) entity as an originating source of power (e.g., that state, or a class). Instead, he urges us to recognize that there are a multiplicity of such sources, sections of which may combine historically to form a given political model. Equally however, these may be articulated to produce other political forms that could exist simultaneously with other models. This suggests that one should take heed of the heterogeneity, rather than a presumed homogeneity, of political forms in a given societal context.

Fourthly, power should not be viewed as something which is intrinsically possessed by individuals, or classes of people. "Individuals," Foucault tells us, "are the vehicles of power, not its points of application" (1980: 98). This suggests that there is no absolute, 'natural' form of the subject (e.g., the modern individual), and so power cannot be contingent upon its presumed existence. Instead it 'circulates' through "a net-like organization" whereby individuals (or collections of these) are simultaneously created as subjects and constituted as 'objects' for specific power relations.[27] This takes seriously the view that subjects who are governed are themselves differently produced, depending upon the governmental rationalities involved. That is, for one form of government there are members of a congregation to be led; for another, legally defined subjects who must be ruled; and, for still others, living individuals species whose lives must be cared for. Perhaps too, there are live, emotionally endowed 'disputants' of a community who must be given an 'opportunity' to 'voluntarily' create their own settlements.

By implication then, the 'individual disputant' of community mediation is not a natural, pre-given entity that exists independently of power relations. Therefore, appeals to the voluntarism, liberation and 'empowerment' susposedly obtained from adopting an individual subject position are superfluous for there is a certain obligation to be free if one is to be 'normal' in a liberal-democratic political environment (Rose, 1990: 213). In this sense, the 'individual' is not detached from the state or other political forms[28], but rather is produced by power relations. Indeed, the very possibility of a 'normal individual' is created and sustained by a diverse array of power relations.[29] As Foucault puts it,

> "One has to dispense with the constituent subject, to get rid of the subject itself, that's to say, to arrive at an analysis which can account for the constitution of the subject within a historical framework" (1980: 117).

Indeed, his analysis allows us to sharpen our enquiry by addressing, specifically, the following question: 'what governmental rationality is associated with the various knowledges and techniques of community mediation and how does this produce individual disputants, the resolution of whose conflict places them as 'normal' members of an ordered community?' We must, therefore, pay particular attention to techniques through which 'normality' is encouraged and 'disputants' created in the mediation process. With a better idea of the formation of such individuals, we can specify their relations with the 'objects' of other 'complementary' forms of government (e.g., the judicial subject).

Finally, Foucault proposes that power and knowledge be viewed as intimately associated. That is, power is always present in the formation of knowledge, of truth, just as such knowledge produces a facilitative facade for the exercise of particular power relations. This explicitly accepts that,

"there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations" (Foucault, 1977b: 27)

Thus truth is inextricably articulated to power and, as such, every society has a 'régime of truth', a 'general politics' related to the production of veracity; that is,

"the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true" (Foucault, 1980: 131).

At the omnifarious points where power and knowledge converge, one finds intricate webs of discourse which are scattered throughout the social network. Of particular interest to the ensuing analysis is the discourse through which mediation is deployed, and through which its techniques are deployed and applied. In general, one might refer to this combination as the 'logic', or the political 'rationality', of the mode of governance evinced through processes of mediation.

In sum, these five precautions suggest that when examining the pastoral model of power embodied in community mediation, it is necessary to conceptualize power as: a series of techniques which operate in the context of different - and often related - political strategies; a name given to a broad political context which is not reducible to a centralized 'law and sovereign' model; having multiple sources in diverse locations throughout a social network; producing 'individuals' both as its 'vehicles' and its points of application; and, being inextricably linked to specific fields of knowledge. These, then, should be used as general rules of thumb when explicating the political logic of community mediation.

THE *POLIS* AND PASTORSHIP: GOVERNMENTALIZING THE STATE

In general, the critics argue that informal justice expands the jurisdiction of the formal, coercive state from the 'public' into the 'private' arena. It does this by articulating the state's centralized mechanisms of power to the informal, 'voluntary', decentralized power of 'civil society' through a strategy that may be termed "decentralized unification" (Harrington, 1985). In effect, as noted, this erodes the traditional distinction between state and civil society, and consequently the mutual exclusivity of the kinds of power characterizing these respective spheres.[30] Thus, in Santos' terms,

> "To the extent that the state tries to coopt the sanctioning power inherent in ongoing social relationships, it is explicitly connecting its cosmic power to the chaosmic power, which until now had been outside its reach" (1982: 262).

Community mediation, as one instance of the many processes that articulates 'cosmic' to 'chaosmic' power, effectively extends state control to areas of society that were not previously regulated by the formal state. This is an important insight, but in the absence of a precise explication of the 'chaosmic' model of power its poignancy is blunted, especially when reduced to a charge of 'state expansion'. Perhaps then Foucault correctly suggests that,

> "Maybe what is really important for our modern times, that is for our actuality, is not so much the State-domination of society, but the 'governmentalization' of the state" (1979: 20).[31]

With this in mind, it seems necessary to explore the links between the *political rationality* of community mediation and that of the courts in more detail than is offered by the critics. Hence, by drawing on the previous attempt to elaborate on the 'pastoral model' of power in community mediation, and by comparing it briefly with the 'law and sovereign' model of the courts, it becomes possible to offer a more precise analysis of their links in the context of British

Columbia. In other words, the points of articulation between the formal state legality and community mediation need to be elucidated in some detail to complete a strategic map of the dispute resolution complex. Understanding this logic should help to develop counter-hegemonic engagement strategies in informal justice, for if the constitutive links between these fields can be exposed, and their possible effects noted, then it becomes possible to locate a point 'outside' dominant power arrangements from whence to develop and evaluate the terms of engagement for a strategy designed to exact social justice.

TAKING COMMUNITY MEDIATION SERIOUSLY: STRATEGIC ENGAGEMENT IN A COUNTER-MODERN POLITICAL ENVIRONMENT

As we have noted, one of the paradoxical features of the reductionists' discourse is that despite its pessimistic tenor, it clings to a recurring hope that informalism might lead to a progressive social transformation (Matthews, 1988). The underlying assumption here seems to be that somehow informal justice may provide a more hospitable, fair and socially just means of resolving disputes than might be expected from court adjudication. Indeed, this problem provides an impetus for the new informalists' explorations into the progressive possibilities of community mediation.[32] However, in the absence of an adequate chart of the relational complex at hand - a chasm which our grid is designed to bridge - their notions of political engagement remain vague. Therefore, the concluding task of this thesis will be to try to extract certain strategic insights that might be gained from the preceding analysis. The intention here is to seek possible forms of engaging politically with community mediation that avoid the dangers of compromise and cooptation on the one hand, and the temptation to simple reductionism on the other.

The issue of engaging politically with a technology (i.e., community mediation) that seems to be associated with a 'neo-fordist' (Baskin, 1988), or 'postmodern' (Santos, 1987) mode of regulation, raises a number of issues that have found currency in numerous contemporary debates. In particular, various criticisms have been directed at Foucault's work, attacking its supposed inability to produce an emancipatory form of politics.[33] A uniting theme amongst these various criticisms is that Foucault's anti-essentialism, his propensity to historicize everything, goes too far, leading to a problematic strand of relativism and/or nihilism (Levin, 1989). More specifically, some argue that without an Archimedean point of reference (some absolute notion) outside of given historical contexts, there is no basis from which to ground one's critique (e.g., Habermas, 1986; Walzer, 1986, Taylor, 1986), nor any reason to accept that a future society will be any better than the present (e.g., Soper, 1986; 1990; Dews, 1987; Taylor, 1986). Moreover, against Foucault's anti-humanist stance, some critics contend that without some or other conception of a concrete agent, an absolute 'subject'[34], whose real form is somehow repressed by historical conditions, the very idea of freedom has limited content. A variation on this theme is that if power is so ubiquitous, inescapable even, then why bother to resist? (Soper, 1986). Or, indeed, why should one strive for social justice?

Foucault's response to these criticisms places us squarely in a wider debate between 'modernist' as opposed to 'postmodernist' versions of political change.[35] With specific reference to the political aspects of these debates (Lash, 1990, Smart, 1991, 1992; Agger, 1991; Bauman, 1992), some believe that the project of modernity, though it may have wandered somewhat off course, is ultimately a valid one that needs to be rejuvenated and put back on its founding (liberal or Marxist) track.[36] By contrast, various postmodern theorist place us in a political world without

grand theories, or grand emancipatory projects.[37] Despite his reluctance to be associated with either of these positions, preferring to speak of his work as being "counter-modernity", Foucault's view of politics is clearly sympathetic to the postmodern theories in its rejection of grand-scale emancipatory projects (1984: 39). He too is entirely suspicious of any 'metanarratives' (Lyotard, 1984) that could purportedly ground our critiques of society. Even reason, he argues, should be placed in historical context.[38] His basic response to the above-mentioned critics is that they have characterized modernity incorrectly as an epoch, or some features of an epoch, that has produced universal doctrines grounded in unshakable reason. Instead, Foucault describes modernity as an 'attitude' which is permanently reactivated, and which adopts a critical posture towards the limits of the present. In this sense, what connects us to the Enlightenment's modernity,

> "is not faithfulness to doctrinal elements, but rather the permanent reactivation of an attitude - that is, of a philosophical ethos that could be described as a permanent critique of our historical era" (Foucault, 1984: 42).

With this in mind, Foucault acknowledges that there is no absolute point that can ground our critiques, or ensure the emergence of a better society of the future[39], although he does provide the rudiments of an ethical theory in his later texts.[40] But unlike his critics, Foucault is not troubled that his rejection of universal, moral (or true) precepts will lead to the end of politics (Walzer, 1986). On the contrary, he simply understands politics in a different way. For him, politics involves an ongoing critique of the present limits of our society. We must continuously ask ourselves,

> "How can we exist as rational beings, fortunately committed to practising a rationality that is unfortunately crisscrossed by intrinsic dangers?" (1984: 249).

But this critique cannot be guided by absolute principles; rather it entails an unending search for 'dangers' in present limits in specific contexts. It entails a series of critiques directed at the

present social limits, on an ongoing basis, seeking out the perils imminent in power relations, such as those that have constituted community mediation in British Columbia. There is in this no 'final resting point' to history, but a series of power formations whose dangers need to be continually exposed (Foucault, 1977b).

Yet, on what basis are we to declare danger? As Foucault's critics note, he does not provide a universal basis from which to diagnose social dangers, such as professionalized justice. Indeed, to do so would be to undermine his historicism and anti-essentialism. But this does not preclude the possibility of developing contextually relevant means of assessing social perils and oppression. As Wapner proposes, our "experiential insight" provides an immediate means of doing this (1991: 108): for those who must endure the torment of ongoing conflict, whose resolution is only ever partial and unsatisfactory, there is little need to speak of justice in any abstract sense. These are the private 'troubles' of which Mills (1959) speaks, and their histories point to dangers in existing social relations, the resolutions of which requires transformations that will promote social justice in context.

But does the notion of social justice not itself imply universality? Perhaps, but this universality is of an order different from the totalizing principles that ground the 'professionalised' justice of the courtroom (Cain, 1988). In contrast to the abstract universalism of formal legal principles, social justice is a nominal entity whose content must be worked out in context. That is, as Wickham argues,

> "What are to count as justice in different temporal and spatial locations and what are to count as democracy can only be the outcomes of politics in those locations. ((n.d.): 23)

This implies a pluralization of the very notion of social justice as it seeks to increase its local

relevance, and to take an active part in 'problematizing' the numerous 'subordinations' of specific contexts so that these may become the 'oppressions' that fuel political struggle (Laclau and Mouffe, 1985).

It may also be objected that Foucault's anti-humanist stance does not allow him to rely upon an absolute subject as a means of grounding a social critique. Foucault's critics argue that this prevents him from locating a basis from which to enunciate a definition of freedom (Soper, 1986; Taylor, 1986). In response, Foucault espouses a vision of freedom which is quite unlike the modernist conception. He says,

> "Liberty is a *practice*...The liberty of [people] is never assured by the institutions and laws that are intended to guarantee [it]. This is why almost all of these laws and institutions are quite capable of being turned around. Not because they are ambiguous, but simply because 'liberty' is what must be exercised...I think that it can never be inherent in the structure of things to guarantee the exercise of freedom. The guarantee of freedom is freedom." (1984; 245)

And he responds to those critics who allege that if power is everywhere then there can be no liberty (eg. Soper, 1986), by arguing that freedom is, by definition, endemic to any power relation. That is, without the recalcitrance of freedom to provide some resistance, there can be no attempts to structure social fields of action, and hence no power relations. In other words, "if there are relations of power throughout every social field it is because there is freedom everywhere." (Foucault, 1988c: 12)

Foucault's position in these debates offers one way in which we can begin to conceptualize a politics of 'counter-modernity'.[41] In particular, it suggests a "politics of difference" that is characterised by a number of factors (Sawicki, 1991). First, it emphasises, "moving away from the fixation with authoring new principles and towards procedures attuned to recognizing the

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'boundaries' of a heterogeneous world" (White, 1987/88: 309; Hekman, 1991; Young, 1990). This entails a certain 'listening', a receptivity, to delineations between social identities - and the subordinations they may endure - that emerge out of the power formations of particular social contexts (Laclau and Mouffe, 1985; Nicholson, 1990). Secondly, this politics of difference can potentially avoid problems of either dogmatism, or liberal pluralism, by suggesting that social differences be regarded as resources for struggle, not as threats to be overcome. Such differences allow us to multiply the sites at which power can be resisted, a point that is particularly significant when one considers that power is not centrally located. In addition, as Sawicki states,

"if we redefine our differences, discover new ways of understanding ourselves and each other, then our differences are less likely to be used against us." (1991: 45)

Thirdly, this politics of difference ties in with the politics of identity formation that has characterised the growth of new social movements (Laclau and Mouffe, 1985; White, 1987/88; Kauffman, 1990).

Taking this alternative politics of difference as a point of departure, our analysis of community mediation in British Columbia should formulate a strategy of resistance to the universalizing procedures and principles of professionalised justice (White, 1987/88; Wickham, (n.d.)). The quest here is for a contextually relevant form of justice that listens, is sensitive to the heterogeneity of the contexts in which it operates, and seeks, on the basis of rarefied categorizations of different social identities, to nurture social justice that is contextually decided through ongoing political struggle. Also, in its quest to develop as an effective counter power, as a counter-hegemonic force, a new informalism must surely seek strategic alliances with other opposition groups (e.g., labour, new social movements) so that its terms of engagement can be set outside of formal law and so that it can forge alliances to thwart the fragmentation of

resistance.

CONCLUSION

This chapter has developed a grid of intelligibility out of the strengths of the critics' discourse. In particular, drawing on the new informalists, the 'problem' has been reformulated to elucidate the current deployment of community mediation, not simply as an expansion of state control, but rather as a more contingent governmentalization of the law-sovereign model of the state. Using various insights from the previous chapter, I have argued that community mediation is a mode of regulation which has emerged as an identity in a semi-autonomous political space created by the shifting - but constitutive - relations between various framing social fields (especially, the economy, the state and the law). Moreover, this mode of regulation appears to reflect a particular governmental rationality that embraces a dispersed 'pastoral' model of power through which it exercises control. Community mediation, that is, creates and integrates regulatory objects (e.g., the 'community' and the 'disputing individual') by using disciplinary techniques as well as technologies of self. Finally, the analysis points out how the effects of current forms of mediation in British Columbia might be assessed for their potential to become part of an alternative 'politics of difference' in the dispute resolution domain.

In this way, the exposition has articulated various insights from the new informalists' discourse to a grid of intelligibility, and thereby erected the outer perimeters to contain the discourse of the present thesis. Using the precepts of this grid, the remaining text will endeavour to chart the features of the social landscape under analysis in greater detail. The ensuing 'map' seeks to problematize the 'obvious', to note the contingency in assertions of necessity, and to dispel the

notion that community justice is a 'natural' outcome of a given social complex; rather, the analysis is in many ways an act of refusal that deliberately defies some insidious aspects of conventional wisdom and the oppressive power relations which such common sense fosters.

1. Dreyfus and Rabinow (1982: 120-122) coin the phrase 'grid of intelligibility' in an attempt to clarify Foucault's somewhat vague idea of the *dispositif* (1980: 194). In the present context, the grid will be used to open our discourse without presupposing the primordial existence of either universal and objective laws, or a constituting subject. It is to be seen as a methodological instrument for understanding the social significance of community mediation in British Columbia.

2. See Cohen (1985: 240; 1988) and Matthews (1988).

3. See for instance, Abel (1982b: 270); Baskin (1988: 103); Harrington (1985: 170); Hofrichter (1987: 57-58); Selva and Bohm, (1987: 53); Spitzer, 1982: 187; Santos (1982: 262).

4. This point is rather well canvassed by Fitzpatrick (1988: 180) and Matthews (1988: 15).

5. Contributors to Matthews' (1988) collection reflect this point of view, especially Cain and Fitzpatrick. Cohen (1985; 1988) seems part of this group in that he too seeks to 'take decentralization seriously'.

6. Fitzpatrick offers his "new informalism" (see chapter 1) as a response to the 'rise' and 'reduction' of informalism, in which community justice was initially viewed by advocates as a completely 'self-sufficient' entity, and later reduced by its critics to an instrumental feature of formal power. His position acknowledges that the informal has some identity, but that this identity is constitutively formed by framing social fields (1988: 179-182).

7. Donzelot, to whom these theorists refer, suggests that we conceive of this 'social' domain as,
> "the set of means which allow social life to escape material pressures and politico-moral uncertainties; the entire range of methods which make the members of society relatively safe from the effects of economic fluctuations by providing a certain security" (1979: xxvi).

Elaborating on this, Matthews argues that it includes,
> "a variety of educational, health and welfare policies and which although ultimately regulated by the state, does not derive solely from the state" (1988: 18).

8. Although Santos ambiguously straddles the reductionist and new informalist points of view, he captures the reductionist position rather well in suggesting that with the rise of informalism,
> "The capitalist state is somehow creating civil society as its opposition...We are probably witnessing the development of a secondary civil society (state-produced nonstate areas of social life)" (1982: 262)

9. For some indication of the qualitative differences between forms of regulation see, for instance, Auerbach (1983), Baskin (1988), Harrington (1985), Santos (1982).

10. This connection is discussed in more detail in Rose (1990: 5ff) and Foucault (1979, 1981, 1982).

11. For instance, Hofrichter argues that since hegemony is never determined in advance, the mediation movement is susceptible to challenge:
> "Every moment of domination suggests a space for opposition and liberation, so that we need not be completely bounded in envisioning future directions or the possibility for challenge through extralegal means" (1987: 159).

Baskin argues that if community mediation provides ways in which individual problems can be translated into "collective action" then it could inspire general insurgency (1988: 112). For Abel, a failure in mediation may prompt general despair with the legal system and thus generate resistance in which people would seek "unmediated political confrontation with their adversaries" (1982b, 309). Santos notes that resistance is likely to be most effective here if it is "highly diversified, especially if it is to be a global resistance" (1982: 259). By contrast, Harrington (1985) remains consistent in her pessimism and sees little transformative potential in informal justice.

12. Indeed, as we shall see later in this chapter, Fitzpatrick's analysis of community justice purely in terms of disciplinary techniques of power is problematic because it does not take account of Foucault's important and pertinent texts on the nature of governmentality (1979, 1981, 1982). In these, Foucault presents discipline as a **technique** of power that could be seen as an element of a wider 'pastoral power' (1979, 1982). This is not to deny the importance of disciplinary techniques, but only to allude to the importance of other techniques, and particularly those 'technologies of the self' (e.g., confession) which are also pervasive in mediation (Foucault, 1978; 1988). In as much as the political rationality of community mediation seems concerned with the creation of individuals as both subjects and objects, the rationality of 'pastoral power' seems to offer a more comprehensive way of looking at community mediation. It also allows us to see how the totalizing and individualizing aspects of pastoral power try to match the "aspirations of authorities and the projects of individual lives" (Rose, 1990: 4).

13. Of course, one cannot outline all of these explicitly without losing sight of the central argument, although the critics' influence on the current work is profound.

14. Foucault (e.g., 1980) uses the somewhat cumbersome phrase 'law and sovereign' to designate that model concerned with how a sovereign secures legitimate political rule within a given domain. Although we shall discuss this in more detail in chapter 6, I shall henceforth, for easy use, refer to it as the 'sovereign-law' model.

15. For example, see Selva and Bohm (1987: 44), Baskin (1988), Santos (1982) and Hofrichter (1987).

16. See Offe (1984: 120), Spitzer (1982), Harvey (1991), and Jessop (1990).

17. Stuart Henry demonstrates the value of the concept 'integral pluralism' rather well in his examination of private justice in corporate (1983) and cooperative settings (1985), as does Macaulay (1983) in the realm of 'private governments'.

18. As noted, the new informalists portray community mediation as a vehicle of power that operates in a rather nebulous domain of the 'social.' Community mediation seeks to maintain the distinction between 'state' and 'civil society' whilst ensuring - from a regulatory point of view - that the aims of these domains remain homologous. The 'social', thus conceptualized, does not comprise an absolute, or fixed, domain with an *a priori*, essential existence of its own. On the contrary, it is a 'space' without definite form, forged out of the ongoing shifts between different power-knowledge relations which produce a series of political practices and semi-autonomous identities. Laclau and Mouffe suggest that we,

> "consider the openness of the social as the constitutive ground or 'negative essence' of the existing, and the diverse 'social orders' as precarious and ultimately failed attempts to domesticate the field of differences...There is no sutured space peculiar to 'society', since the social itself has no essence" (1985: 95-96).

19. Such an endeavour is certainly not entirely incongruous with more 'modern' approaches to the constitution of the contemporary 'self' (Giddens, 1991), although certain of the latter's assumptions would certainly come into conflict with it.

20. I use the term 'approach' here intentionally, for Foucault insists that his is not a general theory of power. Rather, it is a much more modest account, a nominal point of departure, that is more implicit than explicit, and which is guided by certain rules of thumb which he adopts as framing guidelines for his specific historical analyses of power relations. His reluctance to offer a fully blown theory stems from his belief that,

> "if one tries to erect a theory of power one will always be obliged to view it as emerging at a given place and time and hence to deduce it, to reconstruct its genesis" (1980: 199).

Consequently, the question that we should ask is not 'what is power?', but rather 'how is power exercised in present forms of community mediation?' and 'what are its effects in these contexts?' (Foucault, 1982: 217).

21. The Nietzschean overtones of this approach are clear, for it connotes the tension within opposing lines of force that constitute the social, and whose unpredictable ruptures change the course of history. It is this image, I believe, which grounds much of Foucault's analysis of power.

22. In this way, power is ubiquitous not because it repressively subsumes everything, but because it emanates from so many different points. It is exercised in the multiple struggles that ignite the social network at diverse points simultaneously.

23. In this sense, power is not exercised directly on individuals, but,
    "upon their actions, on existing actions or on those which may arise in the present or the future" (Foucault, 1982: 220).

24. These struggles can terminate specific relations of force, leaving more unstable situations where opponents (collective or individual) confront each other directly as adversaries in a 'free play of antagonistic reactions' (Foucault, 1982: 225). Situations of confrontation are purportedly different from power relations to the extent that advance calculation and manipulation is absent. In these situations, people merely react **ex post facto** to events. But the aim is always to annihilate the other's means of combat so that more stable mechanisms of power can be put in place.

25. In this respect he feels his portrayal is the "exact opposite" of Hobbes' Leviathan for it concentrates not on the centralized amalgamation of individual subjects as a form of power (sovereignty bolstered by law), but on the other moments of power in diffuse contexts that may or may not be linked to the former model (Foucault, 1980: 97-98).

26. This means that we should take Harrington's observation seriously:
    "State authority is not withdrawing from dispute resolution in periods of informal reform, it is being transformed" (1988: 35).

27. Here, Foucault is clearly impressed by the ambiguity of the 'subject': on the one hand it denotes a certain autonomy (i.e., the subject who exercises power); on the other it connotes subjugation (i.e., subject to control). This ambiguous concept makes it easier to grasp why "the individual which power has constituted is at the same time its vehicle" (Foucault, 1980: 98).

28. As Foucault argues,
    "I don't think that we should consider the 'modern state' as an entity which was developed above individuals, ignoring what they are and even their very existence, but on the contrary as a very sophisticated structure in which individuals can be integrated, under one condition: that this individuality would be shaped in a new form, and submitted to a set of specific patterns" (1982: 214).

29. See Foucault (1978).

30. See Hofrichter (1987: 35) and Santos (1982: 262 at note 15).

31. Or, as Rose puts it,
    "Rather than the state extending its sway throughout society by means of an extension of its control apparatus...we need to think in terms of a 'governmentalization of the state' - a transformation of the rationalities and technologies for the exercise of political rule" (1990: 5)

32. See Fitzpatrick (1988), Cain (1988), Matthews (1988) and Cohen (1985; 1988).

33. See, for example, Levin (1989), Soper (1991; 1986), Dews (1987), Taylor (1986), Walzer (1986), and Habermas (1986).

34. For some this would refer to natural, individual subjects (Taylor, 1986), or the working class (Poulantzas, 1978), or an amalgam of these that comprise given 'agents' (Dews, 1984).

35. Ultimately, it is here that one confronts Flynn's "postmodern dilemma" that requires a choice between,
    "either the ethos of Enlightenment or its universalist doctrine, either a sceptical Nietzschean laugh or a deadly serious neo-Kantian moralism, either the 'privileges' of the poet or the privileging of scientific

knowing, either the afternoon of limited, tactical resistance or the twilight of unlimited control" (1989: 197).

36. For example, Habermas (1984; 1987) and Soper (1991). For more detailed discussions of this position see Angus (1990) and Bernstein (1985).

37. See Wapner (1991: 109), Lash (1990), Smart (1992), Bauman (1992), Wolin (1984/1985), Nicholson (1990), Lyotard (1984), Wellmer (1985), Wickham (1990) and Jameson (1984). In his analysis of the relevance of postmodernity to justice, White (1987/1988: 306-308) suggests four dimensions of this postmodern problematic: it rejects metanarratives; it emphasises the importance of new 'information technologies'; it recognizes a number of new problems associated with the rationalization of society; and, it favours the appearance of new social movements as contemporary agents of resistance (Epstein 1990; Kauffman, 1990; Plotke, 1990; Boggs, 1987). The last two of these problems are particularly relevant to Foucault's work.

38. As Foucault puts it,
      "What reason considers as its necessity or much more what various forms of rationality claim to be their
      necessary existence, has a history which we can determine completely and recover from the tapestry of
      contingency. They rest upon a foundation of human practices and human faces, because they are made they
      can be unmade - of course, assuming we know how they were made" (1989: 252).

39. See Hiley (1984; 1985) for a more detailed analysis of Foucault's specific responses to the second criticism.

40. See Rachjman (1986), Sawicki (1991), Davidson (1986), Hacking (1986) and Foucault (1984).

41. The following discussion draws on Flynn (1989), Wickham (1990), White (1987/88), Sawicki (1990), Nicholson (1990), Wapner (1989), Laclau and Mouffe (1985), Smart (1992), Bauman (1992) and Diamond and Quinby (1988).

CHAPTER 4

A GENEALOGY OF COMMUNITY MEDIATION:

POLITICAL, ECONOMIC AND LEGAL LINES OF DESCENT

The advocates of community mediation describe the emergence of informal justice in British Columbia proximately (see chapter one), offering few details on the surrounding relational complex through which the space for such an event was carved. By contrast, the present chapter focuses on wider 'lines of descent' for a 'genealogy' of community mediation in this province.[1] In so doing the discussion locates mediation as a social identity forged out of its constitutive relations with the economic, political and legal fields. While, as Auerbach (1983) - in another context - notes, current trends in informal justice have a long history, we shall confine the present analysis to more recent events (from the early Nineteen Seventies onwards). Moreover, our grid of intelligibility requires that we proceed with the following methodological precaution: the constitutive relations between fields should be regarded as neither absolute, inevitable nor necessary, but as contingent historical formations which create spaces for the emergence of particular social identities. Such identities are never completely transparent to the dictates of 'rational' analysis, for the very contingency of their emergence implies a permanent possibility of aleatoric and therefore unpredictable transformations.

The end-point of such a genealogical analysis is that social identity which we have referred to as the 'community mediation'. The current landscape of this identity in British Columbia was detailed in Chapter One, and its core features summarized in the conclusion of the chapter. It is this which comprises the 'data' of the following chapter's analysis which traces out the details

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of community mediation's lineage in the province. In particular, as previously argued, such a 'genealogy' should map out pertinent developments in the economic, political and legal fields of the province[2], and explicate connections between community mediation and these fields. The express purpose here is to depict the wider social conditions, the lines of descent, that have favoured the deployment of the core features of community mediation. Table 1.1 provides an outline of the genealogy that is the subject matter of the ensuing chapter.

TABLE 1.1: A GENEALOGY OF COMMUNITY MEDIATION IN BRITISH COLUMBIA

```
I.  ECONOMIC          MONOPOLY           NEO-
    SHIFTS            CAPITAL            CONSERVATISM

                      FLEXIBLE
                      SPECIALIZATION

                                         DOWNSIZING
                                         GOVERNMENT
                      STATE
                      MINIMALISM
                                         PRIVATIZ-
                                         ATION

II. POLITICAL
    TRANSFORMATIONS
                                         NDP:
                                         COMMUNITY
                                         DEVELOPMENT        COMMUNITY
                                                            MEDIATION
                      DECENTRALIZATION                         IN
                                                            BRITISH
                                                            COLUMBIA
                                         SOCREDS:

                                         TECHNOCRATIC
                                         MANAGEMENT

III.  LEGAL           DEINSTITUTIONAL-
      REFORM          IZING DISPUTE
                      RESOLUTION

                      DIVERSION

IV. PRACTICAL
    EXPERIMENTS
                      MEDIATION
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I. ECONOMIC RESTRUCTURING: MONOPOLIZATION, 'NEO-CONSERVATISM' AND FLEXIBILITY

The international economy has been substantially restructured over the last three decades. A period of protracted stagflation followed the post World War II boom so that by the mid-Nineteen Seventies most countries experienced severe economic downturns. This represented a crisis of global proportions that seemed to embody a move away from Fordist to Post-Fordist 'regimes of accumulation' (Lipietz, 1984; Hirsch, 1988; Harvey, 1991).[3] Ratner and McMullan describe the crisis in this way:

> "a severe international stagflation had resulted in a combination of problems - inflation, profit decline, *and* high unemployment - that were not experienced *simultaneously* in any previous period of capitalist development" (1985: 186).

This situation was further exacerbated by increased energy costs following the oil crisis of 1973, coupled with a more general saturation of consumer markets (Marchak, 1984: 26). Indeed, the sheer scale of global economic decline seemed to indicate that this was not simply a problem relating to monetary supply which could be rectified through Keynesian monetarist solutions designed to even out cyclical market swings. Two effects of this protracted crisis were to be of some importance to the development of community mediation in British Columbia.[4] First, it encouraged the monopolization of capital because many smaller capitalists could simply not survive the depressed markets, opening the way for many multinational corporation take-overs. This nurtured greater monopolization by fewer capitalists and, in turn, established a certain 'order' to the 'anarchic' markets of competitive capitalism. One effect of this order was the development of a so-called 'neo-conservative' discourse which characteristically rejected state interventions designed to equalize social relations, or to redistribute wealth. This discourse called

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for an increased 'deregulation' of the economy, 'free-enterprise', 'lower taxes' on capital, the

privatization of Crown corporations, etc. (Magnusson and Walker, 1988:42; Ratner and

McMullan, 1985; Resnick, 1984: 132-138). Secondly, and related to the first development, the

crisis promoted increased flexibility in approaches to, and practices of, capital accumulation

(Hirst and Zeitlin, 1988; Harvey, 1991).[5]

One should not assume the relevance of such developments in advance. Rather, the way that

these do, or do not, intrude on given circumstances needs to be examined in context.[6] In Canada,

with its branch-plant, resource-based economy, this global crisis assumed different guises across

the country (Bothwell, *et. al.*, 1981). In general, however, Canada's Fordism seems to have been

"permeable" in the sense that its export-driven character made it particularly susceptible to

fluctuations in the global economy (Jenson, 1989; 1990; 1991), especially in the resource sectors

of the country (such as in British Columbia).[7] Moreover, Canada's Fordism was organized

around "nation-building" rather than on a compromise between "class-based collective identities"

and,

> "Therefore, when the crisis of fordism appeared, it touched other institutions - federalism
> in the first instance - as the contradictions set in motion by the fordist paradigm played
> themselves out" (Jenson, 1989: 78).

Although we shall return to the problems of federalism in the next section, the overall Fordist

crisis resulted in far greater flexibility as far as federal economic planning was concerned.[8] This

afforded conservative provincial governments an opportunity to begin their "province building",

to undermine universal social programmes and to renegotiate national collective agreements with

Labour (Jenson, 1989: 87).

The trend towards greater monopolization was replicated in British Columbia, a province whose export-orientated resource base ties it closely to the global economy (Resnick, 1987; Marchak, 1984; Carroll and Ratner, 1989: 36).[9] Indeed, as Resnick notes,

"The period since World War II has witnessed some striking transformations in B.C. capitalism. The trends of monopoly capitalism and consolidation characteristic of capitalism internationally were evident in this province, while a good deal of foreign investment, principally American, flowed in alongside Canadian capital" (1985: 34-35).

The agglomeration of both foreign and domestic capital tied British Columbia even more closely to global economic trends, and this resulted - by the end of the Nineteen Seventies - in many corporations based in the United States experiencing intense pressure to withdraw from the province (Carroll and Ratner, 1989: 37).[10]

In an effort to retard such pressures, or at least minimize their effects, the Social Credit Government courted international[11] investment by adopting an economic programme that sealed the province's position as a vanguard for neo-conservatism in Canada (Howlett and Brownsey, 1988; Bennet, 1978). This enthusiastic adoption of neo-conservative thinking has been explained thus:

"In the more resource-based and export oriented provinces such as British Columbia, Saskatchewan and Newfoundland, greater fluctuations in international demand, increasing competition from other exporters, and a weak multiplier effect have undermined the basis for Fordism and increased the appeal of neo-conservative "solutions" to acute economic problems" (Carroll and Ratner, 1987: 36)[12]

As part of this neo-conservative quest for privatization, reduction of regulations ('red-tape'), a balanced budget, a reduction in the size of the state, 'traditional values', etc,, the British Columbian government sought to free up those fiscal resources dedicated to 'unproductive sectors' and to redirect these to develop specific regions to their maximum potential (Bennett, 1978).[13]

In this general discursive ethos, a particular vision of community mediation as a means of resolving disputes outside of the formal state seemed attractive for a number of reasons. First, it appealed to those advocating fiscal frugality because it promised to reduce the enormous resources committed to courts responsible for "minor" cases. Secondly, and related to the previous point, community mediation provided an opportunity to 'privatize' unproductive human services, thereby increasing the quantum of commodification available to private capital (Baskin, 1988). Thirdly, the idea of communities mediating their own disputes could be used as a way of legitimizing a restructuring of the court system's lower echelons.[14] In particular, legitimacy could be mobilized by appealing to a nostalgia for the past and by presenting informalism as a way of recovering a 'lost world' of consensus, traditional values and attachments to community (Cohen, 1985: 116-127). Indeed, this quest to promote 'community' and family values is congruent with that feature of the deployment of mediation in the province which favours mediation directed at family disputes.

The neo-conservative discourse also advocates increased flexibility in planning and developing viable economic regions. Thus, the Social Credit government proposed - in the late 1970s - that,

> "methods of fiscal stimulation should be flexible, easy to implement, easily reversed or self-liquidating, and have low administrative costs" (Bennet, 1978: 33).

and that,

> "Regional development policies, as part of an overall national economic plan, should be designed to ensure that each region achieves its economic potential" (Bennett, 1978: 38).

This quest for regional flexibility provides a favourable climate for the deployment of mediation in at least two ways. On the one hand, it has promoted the dramatic rise of mediation programmes that seek to resolve commercial disputes (e.g., BCICAC, Better Business Bureau,

etc.) because the 'universal' requirements of the formal 'rule of law' is sometimes unable to respond to particular cases with the same degree of flexibility that informal (and confidential) mediation can (Selva and Bohm, 1987).[15] Therefore, while the courts may be obliged to deliver similar decisions in similar sets of circumstances, informal mediation is under no such obligation. On the other hand, community mediation offers the government the flexibility to fund projects on a relatively short-term basis, without facing potential collective labour disruptions should it decide to cancel programmes. Indeed, this advantage probably has much to do with why community mediation projects are typically funded on an annual or bi-annual project grant basis. Moreover, it can limit its financial contributions by limiting wages and benefit payments, and calling on the 'community' to volunteer its services for a 'good cause'.

In sum then, the Post-Fordist economic trends towards monopolization, with its 'neo-conservative' discursive order and flexible approach to 'unproductive services', have produced an environment that has shaped the above-mentioned features of the current identity of community mediation in British Columbia. It is, however, important to bear in mind that these developments in the economic field were coterminous with certain structural transformations in the associated Keynesian 'mode of regulation', the social democratic political field, which had significant effects on the eventual form of community mediation.

II. RESTRUCTURING THE POLITICAL TERRAIN

In Canada, the Nineteen Seventies opened amidst social upheaval and uncertainty which the then Justice Minister, John Turner, characterized as an "age of confrontations" (Turner, 1971). Indeed, the federal government had instituted the War Measures Act in response to the October Crisis

of 1970 in an attempt to control *inter alia* the militant Quebec nationalist organization group, the

FLQ[16]. It seemed to be in the throes of a protracted legitimacy crisis, not unrelated to the

demise of the Fordist paradigm of "nation building" (Jenson, 1989). This crisis had afflicted

many institutions, and nurtured a growing sense of regionalism and "province building" in a

decentralized economic (Bastein, 1981) and political vision of federalism.[17] A dramatic event

in this ongoing saga was the election of the Parti Quèbècois in 15th November, 1976 on an

openly secessionist platform. In light of these, and other, developments, a Task Force on

Canadian Unity was struck to deal with the crisis. It reiterated the severity of the legitimacy crisis

facing federalism in suggesting that,

> "Canadians find themselves in a situation quite unlike any they have faced before - the
> rough-and-ready consensus which once ensured the reasonably effective governing of the
> country is at the point of breaking down" (1979: 16).

For some analysts, this clearly indicated a basic contradiction between the demands of a rigid,

universal and centralized Keynesian Welfare State and the flexibility demanded by Post-Fordist

economic fields.[18] It was a discrepancy that prompted a move away from a central, coercive,

"hegemonic production regime" to a more fragmented "hegemonic despotism" (Carroll, 1990:

402). In the latter, the federal government has come increasingly to rely upon, "a discourse of

regionalism, provincial rights and decentralization" (Jenson, 1989: 89). Drawing on Gramsci,

Carroll (1990) adds that the state's increased reliance upon securing regional hegemony - rather

than simply relying on centralized coercion - has resulted in a quest to win the consent of the

governed through less visible, costly and forceful mechanisms.[19] Community mediation (and

alternative dispute resolution in general) is but one - and probably not a central - element in a

diverse array of techniques by which federal and provincial governments in Canada seek to

secure such consent. Indeed, the informal ways in which mediation sessions try to achieve

settlements between disputing parties may be seen as part of this attempt because they regulate disputants without recourse to overt coercion. The education of consent through mediation is often subtle and operates in the guise of a voluntarism in which disputants are enticed into 'freely' choosing a settlement. But, as noted, the choice of settlement is actively influenced by the mediator, and when consensus is reached, this serves as a complement to the centralized formal legal apparatus.[20]

It is significant that both Federal and various Provincial Governments have come to rely on neo-conservative ideas, deferring to the discursive symbols of 'community' and the 'private' domain in their quest to impart a "new" vision of government. In particular, this vision portrays the government as a champion of its own demise, a collaborator that fights against increasing state control, over-regulation, untoward centralization and promotes individual freedom, innovation and voluntary participation in highly autonomous 'communities'.[21] In British Columbia, two important variations of this theme seem to be particularly salient to the emergence of community mediation, for informal justice was deployed in a political ethos that emphasized: (1) 'state minimalism' (i.e., 'away from the Keynesian Welfare State'); and (2) decentralized, regional 'flexibility' in government (i.e., 'away from the centre' and to the 'community').[22] Such rhetorical symbols were used widely after the Social Credit Party's defeat of the New Democratic Party (NDP) in 1975[23], even though the notion of 'community participation' had developed substantially during the NDP's term of Office.

Yet there is good reason to question these rhetorical images because the practices they support very often contradict their central precepts. To wit, the quest for state minimalism may well have

increased the state's control network (Cohen, 1985) and the privatization of service may not have improved the delivery of service (Callahan and McNiven, 1988). Furthermore, images of decentralization seem to have masked a more insidious centralization of authority (Magnusson, *et al.*, 1984). It seems, therefore, important to examine each of these rhetorical images of government with specific reference to their effects on the eventual identity of community mediation in British Columbia.

II a. AWAY FROM THE KEYNESIAN WELFARE STATE

By the early Nineteen Seventies, various social analysts noted contradictions in the Keynesian model of welfare statism, especially in view of diminishing fiscal reserves and an increasing loss of popular legitimacy.[24] For certain neo-conservative thinkers, however, this crisis signalled the failure of the Welfare State model with its post-World War II accords between capital and labour.[25] Returning to more populist images of minimal state intervention, neo-conservatives spoke of eroding the Welfare state and restricting intervention, regulation or attempts at redistributing wealth. They offered in its place populist images of individuals regulating themselves through 'traditional' morals in their own 'communities' with the guidance of the market's 'invisible hand' (Resnick, 1984: 138; 1987; Leys, 1980). Their concrete programme, therefore, called for 'free enterprise' and "downsizing" the state, especially in 'unproductive' sectors (eg. social services).[26]

The Social Credit government of British Columbia incorporated, in consultation with a right wing 'think-tank' - the Fraser Institute - a similar neo-conservative discourse agenda (Carroll and Ratner, 1987).[27] Indeed, as noted, it had developed a number of policies throughout the Nineteen

Seventies which placed it at the forefront of neo-conservatism in Canada (Carroll and Ratner, 1987; Howlett and Brownsey, 1988). For instance, towards the end of the decade, the Premier of the province, W. R. Bennett, outlined a strategy for the private sector to spearhead an economic recovery, but contended that this would inevitably require a substantial reduction in the size of the state. In his words,

> "In order to achieve the proposed economic strategy the share of the nation's resources dedicated to governments must be reduced" (Bennett, 1978: 26).[28]

Such rhetorical attacks on the size of government were grounded in a shifting terrain of power relations over the last years of W.A.C. Bennett's government. In view of the new demands of monopoly capital, and a decreasing reliance on mass consumption, his government had little to gain from increasing the size of the public sector. However, by the time W.R. Bennett, his son, had led the Social Credit Party to victory in December of 1975, such an increase would have been politically deleterious for it would have increased,

> "the size and strength of the new middle class and the public-sector working class (which were allied to the NDP) and to limit its own fiscal capacity to subsidize capital" (Howlett and Brownsey, 1988: 165).

What was needed, therefore, was a means of maintaining and building the Party's support-base which included large resource-based capital and the traditional service sector middle class dependent on state expenditures.[29] Thus, W.R. Bennett emphasized "free enterprise" to create and sustain a healthy economy. In particular, he legislated a number of changes, including the creation of a short-lived - but quite remarkable - "Ministry of De-Regulation" that was mandated to eradicate excessive government "red-tape" (Howlett and Brownsey, 1988: 158).

After re-election in 1979, the Bennett government continued to develop its 'restraint program'

on government but did not implement this immediately, probably because at that time the

provincial economy was growing at a relatively high rate.[30] However, by the early Nineteen

Eighties, this trend was reversed by a number of factors including the withdrawal of United

States' capital (Howlett and Brownsey, 1988: 173; Resnick, 1987: 10; Marchak, 1986). The

government responded to this directly by slashing social service expenditure to subsidize its

support base in the private sectors of the economy and to attract foreign investment.[31] As one

commentator observed at the time,

> "Increasingly, the state is directed less by elections and parliamentary debate than by the
> perceived imperative to attract larger shares of diminishing world capitalist investment by
> improving the local climate for private investors" (Carroll, 1984: 112).

In a dramatic move, after re-election in 1983, the Bennett government announced a budget of

"restraint", the details of which comprise the subject matter of a good many texts.[32] However,

two aspects of this programme had a profound effect on the eventual formation of community

mediation: downsizing of government; and, the 'privatization' of social services.

II a.(i) DOWNSIZING THE GOVERNMENT

With respect to the former, this budget sought to 'downsize' the public service from

approximately forty seven thousand employees to forty thousand while simultaneously expanding

subsidies and tax credits to large resource-based capital and the service sector middle class.[33]

In effect, this was a direct, if not blatantly confrontational, attack on a group (the so-called 'new

middle class') that was largely aligned with the NDP opposition. It amounted to,

> "a reduction in public sector power and the enhancement of private investment and
> accumulation" (Magnusson, et. al., 1984: 20).[34]

Despite sustained resistance to this package from a broadly-based "solidarity coalition"[35] in a

province not unknown for confrontation (Carrol and Ratner, 1989), the Social Credit government

continued to reduce public expenditure by cut-backs and wage reductions.

The government was clearly positively predisposed towards the reduction of 'unproductive' state agencies, or those that might interfere with the private accumulation of capital. The rhetoric of community mediation was appealing in this context, for it held the promise, *inter alia*, of: downsizing the lowest rungs of the court system by removing the 'minor' cases; morally reinforcing and rebuilding what neo-conservatives saw as a lost sense of 'community'; dealing more effectively with 'private' disputes (e.g., within the family); reducing costs because of its procedural informality and use of volunteers; and, increasing access to the justice system. This truncated vision portrays the benefits of mediation from the government's point of view rather than for the 'communities' it was supposed to serve. And this vision was to affect the deployment of community mediation in British Columbia in various ways.

First, it promoted community mediation as a 'system-based' experiment that was to 'complement' existing forms of dispute resolution. Indeed, when one examines funding patterns, it is clear that the state actively supported mediation models whose aims were congruent with its neo-conservative agenda and which depicted themselves as service delivery agencies that supported the existing justice system.[36] Funding patterns are important here, for it is largely through its control over funds and legitimation that the government has been able to regulate the deployment of mediation. Of course, one could conceive of its resorting to other means if the need ever arose (say if counter-hegemonic models were to emerge[37]), but in the relative absence of these, funding remains a crucial means of control. In this light, one can better understand why financial support is more available to those forms of mediation which support various facets of the neo-

conservative agenda: family mediation; commercial arbitration and mediation; and school-based mediation. That is, since family mediation reinforces the rhetorical quest for traditional values by assuming the importance of resolving family disputes outside the state and in the 'community'[38]. Commercial mediation, by contrast, allow clients to advantage of procedural flexibility in mediation, potentially saving time and money.[39] Mediation is encouraged in the school setting to teach young people how to resolve their conflicts peacefully without resorting to state litigation (interview, 29/01/1991).

Secondly, the Social Credit Government's appeal to state minimalism allows us to understand the emphasis placed on the technocratic, administrative benefits of mediation without due regard for its capacity to, say, transform unequal social structures. In other words, when community mediation is examined as part of a wider trend to downsize the state, one can better understand why advocates praise informalism, not for its potential capacity to enhance social justice in a given context, but rather for the administrative benefits that it promises to yield to an overcrowded court system. In a climate of conservative frugality, social justice is subordinated to the ubiquitous quest to 'balance the budget'. This, perhaps, explains the conspicuous absence of community mediation programmes in the province that are designed to replace the court, or to empower collectivities by attacking the structural dimensions of conflict (Shonholtz, 1984; Abel, 1982a).

Thirdly, this technocratic view explains one of the more curious features of community mediation that was identified in chapter one; namely, the 'success' of specific community mediation programmes is evaluated in narrow, technical terms. To be more precise, the state and other

funders gauge the 'success' of given mediation programmes quantitatively by simply counting the number of cases they have managed and 'resolved'. Since funding is often based on this criterion, community mediation programmes continuously seek to market their services and to broaden their referral networks, thereby increasing the number of people who enter into their networks of control. That is, they entice more people to use their services to avoid low caseloads which may be interpreted as an indication of failure by funding agencies. This produces an identity of mediation whose success is measured not by its capacity to empower people, or to revitalize communities, etc., but by its efficiency in 'settling' cases (Turner and Jobson, 1990). In turn, this encourages programmes to individualize disputes without concern for conflict that may be common to classes of people, and which may have structural roots.[40] This tendency is by no means restricted to community mediation projects, for as Callahan and McNiven note, in British Columbia generally,

> "Within voluntary and for-profit services, there is pressure to serve clients individually in order to maintain sufficient statistics to justify further funds, and government contracts tend to be designed on individual service units" (1988: 31).

No doubt, this also accounts for the intricate statistical records that most programmes keep of not only mediated cases, but also of telephonic enquiries, conciliations and so on.

Finally, one effect of the Social Credit's strategy to fragment the NDP opposition's support-base within the state by reducing the number of public sector employees in the so-called 'new middle class' and rendering them dependent upon state hand-outs in the form of service contracts. In short, the new middle class was placed in a predicament of having to compete with others for state funding within the specific domain of 'human' services. The political expedience to the Social Credit government of such dependence partially accounts for the influx of 'new middle

class' people into all aspects of the emerging community mediation movement -- from 'social expert' mediators to programme administrators. Thus, by retrenching a section of the new middle class through state cut-backs, the Social Credit Government was able to render the new middle class (which mostly supported the NDP) dependent on it for funding through 'human service' contracts. It thereby placed members of this class in a social predicament similar to that of the traditional middle class from which Social Credit had derived its support (Howlett and Brownsey, 1988).

II a.(ii) PRIVATIZING HUMAN SERVICES

Privatizing social services was another dimension of the restraint programme that influenced the identity of community mediation in British Columbia.[41] As Ismael and Vaillancourt note,

> "Privatization of social services has been both heralded and decried as the most significant provincial social policy trend in the eighties" (1988: vii).[42]

In British Columbia, privatization has had the effect of producing public domain requests for services from private agencies through fee-for-service contracts, or grants (sustaining or project-specific).[43] As part of a privatizing trend directed at the lower echelons of the court system, the identity of community mediation has been substantially modified by privatization practices.

For example, within the province's climate of 'restraint', human services are typically funded with narrow terms of reference and grants usually cover only bare essentials. In turn, this requires programme proposals to be very specific about what it is that they intend to do, forcing specialization and leaving little or no room for projects to entertain unauthorized shifts in course should these become necessary. But perhaps this is beside the point, for as Callahan and McNiven suggest,

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"The government's reduction of grants and increasing use of contracts to fund the voluntary sector is in fact a regulatory measure. Contracts are accompanied by more stipulations about the kind and amount of service that must be provided than global and project grants" (1988: 27).

In effect, this places most programmes in a precarious financial position, thwarting any real attempts at long-term planning. Many programme executives are forced to spend a great deal of time drafting funding proposals, fund-raising, or liaising with potential funders. As one programme organizer explained,

> "its almost a burn-out kind of project to keep these organizations funded. It just seems to go from the end of one contract to the next. You know its really hard on the staff...and it takes so much constant effort to keep the service in front of the public..." (interview, 12/09/1991)

Conversely, this allows funding agencies to closely supervise projects and to possess inordinate leverage in the deployment of services. It is, therefore, hardly surprising that funding for community mediation is one of the central means by which its deployment has been, and continues to be, regulated in the province.

Furthermore, since community mediation programmes do not usually receive adequate funding from the government, they are forced to seek funds from multiple sources. This accounts for the disparate funding patterns that we noted as a characteristic feature of community mediation in the province, and also suggests why there is a relentless search for additional monies in the form of fund-raising events, direct user fees, etc..[44] In addition, the privatization of human services seems directly related to an increased use of volunteer labour. As Cohen succinctly points out,

> "The recruitment of volunteers is another rapidly growing form of privatization. Whatever the reasons for this growth - filling service gaps created by budget cuts, the ideology of community involvement, the perception that volunteer are often as effective as paid professional staff - volunteers are to be found in every part of the control system" (1985: 66).

We have already noted the extent to which volunteers participate in community mediation, from

mediators and educators, to society board members, to staff people, to organizers of networks, functions, etc.. What seems particularly insidious about this development is that non-profit organizations, such as many community mediation programmes, have become part of a social control network which is constitutively shaped by government agencies (through control over funding), and which 'fill the gaps' in the social service sphere that state-sector reductions have produced (Butcher, 1985: 2). In tandem, this has resulted in a social environment where voluntary organizations, propriety agencies and self-help groups participate in their own regulation, but the very auspices of this regulation are prescribed and monitored by external funders.[45] In British Columbia, this means that,

> "The voluntary sector has evolved as a broker between the government and its constituents; fiscally mandated by government for the delivery of services, yet politically and financially dependent on government good-will" (Butcher, 1985: 6).

In this sense, one may see volunteers as important agents of control in a more general 'governmentalization' of the state (Rose, 1990), a notion to which we shall return. It is they who help to 'educate' the consent of the governed without recourse to blatant force.

But why, one may ask, is there such erratic and inadequate government funding if community mediation performs a vital hegemonic function? To begin with, it may be an exaggeration to suggest that community mediation is 'vital' to the existing hegemony, although it can (and does) support this. Nevertheless, there seem to be two major reasons for the state's cautious engagement and consequent lack of funding. First, there is little consensus apropos the regulatory efficiency of community mediation, since this has not yet been evaluated in any detail. Secondly, one can surmise that the state is aware of the possibility that by emphasizing the 'community', mediation programmes could spawn the development of anti-state, or counter-hegemonic,

movements (Shonholtz, 1984). In this, one glimpses the fundamental ambiguity of notions about the 'community'; indeed, the very idea of a community is appealing to different sections of the political spectrum for various reasons. With this in mind, let us turn to a more detailed analysis of 'community' control as it has developed and influenced the identity of community mediation in British Columbia.

II b. AWAY FROM THE CENTRE

II b.(i) THE NDP AND DECENTRALIZING POWER

As we have already seen, the trend towards a decentralization of political forces in Canada occurred under the guise of 'regionalism', 'province building' and 'flexibility' (Jenson, 1989; Gibbins, 1982). By the late Nineteen Seventies, the Task Force on Canadian Unity suggested a "fundamental revision of the Canadian constitutional and political structure" (1979: 81) such that the "diversity" among regions be acknowledged in an effort to allow, "all regional communities to flourish" (1979: 125). In particular, the Task Force suggested that provinces,

> "take responsibility for the social and cultural well-being and development of their communities, for the development of their economies and the exploitation of their natural resources, and for property and civil rights" (1979: 85).[46]

The federal Conservatives proposed their own decentralized vision through the image of Canada as a "community of communities" (Bothwell, *et al.*, 1981: 360), an image that has been revived a decade after its enunciation and heralded by one conservative MP as being "15 years ahead of its time".[47]

In British Columbia, decentralization received currency in the Nineteen Seventies, especially after

the NDP were elected to office in 1972. At that time, the notion of 'community development' seemed to be one way of recovering lost legitimacy, for it promised to reunite government and voluntary organization services at a local level.[48] Under these auspices, decentralization promised to enable (empower?) local groups to be more actively involved in political decisions that affected them, and to exert greater control over the allocation of resources. In 1973, Norman Levi, the NDP Minister in charge of the Department of Human Resources, referred to the provision of social services in this way:

> "In the past, centralized decision-making has led to great frustration in the communities and has encouraged professional groups to dominate the field of services to people. We must give this function back to the communities...It is the policy of the government that all defined services to people should be operated at the community level by citizens who are volunteers and professionals, and the government will assist in financing these operations and providing field staff to advise them." (in Clague, *et. al.*, 1984: 38).

In line with this, the government established a series of 'Community Resource Boards' to realize this policy.[49] These Boards comprised elected community residents who decided how to spend funds for non-statutory community services. Whether or not these Boards actually measured up to the envisaged plan is another matter (Clague, **et. al.**, 1984), but the movement towards greater local involvement was clearly in motion.

A contiguous endeavour to increase community participation in the justice arena resulted in the establishment of a Justice Development Commission (JDC) in May 1974. It was headed by the then Deputy Attorney General David Vickers and aimed at providing an "effective" justice system with,

> "more local autonomy, an active community participation in the affairs of social justice in the community, and the formation of a justice system which is coordinated with the police, courts, corrections, legal services and members of the community in an effective system of social justice" (JDC, 1974: 6).

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This Commission comprised a number of specialized divisions[50], each seeking to achieve the aims of increasing 'community' participation. This was a broadly-based attempt to educate consent through 'community' involvement in political processes. The quest for 'community' created the discursive space in which it seemed entirely appropriate for the 'community' to be (re-)involved in the 'mediation' of local disputes. Two of the JDC's specialized divisions were of particular import to the rise of community mediation -- the Justice Councils, and the division dedicated to court reforms. We shall return to the latter in the next section, focusing on the Justice Councils here.

Justice Councils

As part of the JDC's attempt to incorporate community input into the development of justice policies, some sixty-four Justice Councils were established in roughly seven regions of the province over the decade.[51] Not all of these were active at the same time, and the degree to which they functioned as planned varied enormously. Using the 'community development' model referred to above, most Councils were formed with the active assistance of a coordinator from the justice system with the intention of providing an informal,

> "opportunity for people in local communities to come together around justice concerns, to discuss these concerns, share their ideas and be a part of effective change in their community" (Deputy Attorney-General Vickers in Lajeunesse, 1976: 2).[52]

Though never statutorily provided for, these Justice Councils were intended to be an integral part of the planning and operation of the justice system (Cossom and Turner, 1985: 25). In seeking to implement the JDC's goal of 'bringing the community back into justice', to inscribe a greater measure of legitimacy to the justice system, the Justice Councils reflected an emerging 'solution': community integration. The Councils also embodied the central ambiguities of this political

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rationality where 'community participation' was encouraged, but the impetus for this was instigated by the government; i.e., the parameters of participation were imposed through the 'community development' model and deployed through a rhetoric of local empowerment.

Community mediation was a practical offshoot of this political logic and, not surprisingly, reflected its central ambiguity. That is, on the one hand, community mediation is rhetorically committed to the notion that communities should be empowered by encouraging voluntary participation in the resolution of 'community' disputes. On the other hand, however, the very definition of what constitutes a 'community', as well as the procedures of mediation, are endogenously imposed somewhat along the lines of the community development model (and hence the need for public education). In other words, one here glimpses the line of descent for the discrepancy between the rhetoric of local empowerment and the extraneous imposition of specific mediation programmes onto communities.

II b.(ii) THE SOCIAL CREDIT GOVERNMENT'S TECHNOCRATIC IMAGE

If a rhetoric of 'community development' and participation, even if kindled from the 'top down', epitomized the NDP government's approach, the notion of 'community' was to have rather different connotations for the more technocratic, managerial style of the Bennett government (Morsley, *et. al.*, 1983). This technical approach too was to have profound consequences for the eventual identity of community mediation in the province. The Social Credit government appeared to have less tolerance for the possibility of community forces undermining its policies. In line with this, the autonomy of the Justice Development Commission, like the Community Resource Boards, was severely restricted (Clague, *et. al.*, 1984).[53] Moreover, the role of the

Justice Councils was redefined by the new Attorney-General Gardom (1975-1979), who now portrayed them as mere vehicles to educate the community about developments in the justice system and to facilitate the coordination, planning and implementation of justice initiatives.[54] The Councils did not appear to be particularly successful in this management strategy, and were therefore allowed to decay through "active neglect" so that by the mid-Nineteen Eighties these were essentially non-existent (Cossom and Turner, 1985: 49). By this time, of course, community mediation had taken root in the province and now formed part of a battery of 'community' initiatives that could step in to replace these and which were, in part, funded and regulated by the government.

In these developments, one can identify a redefinition of 'community participation' which focuses on its managerial advantages as a form of 'decentralization'. The proffered decentralization of power coincides with the neo-conservative quest to reduce formal government in everyday life, while allowing the state to maintain some control (through funding) over the deployment of new regulation strategies (such as community mediation). In this process, the state sought to make itself invisible while continuing to exert control over local communities in more subtle ways with the help of 'volunteers'. W.R. Bennett's technocratic approach to government, no doubt, recognized the potential political and economic efficiency of this technology, and took advantage of the 'buffer' that volunteers in the community provided against constituents (Morsley, et.al., 1983). Indeed, such purported 'decentralization' afforded the government an opportunity to promote a populist image of being a 'responsive,' non-intrusive government, while simultaneously developing an extremely centralized channel of authority with fewer sections of the Cabinet responsible for a wider range of issues (Magnusson, et. al., 1984: 91).

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In other words, simultaneous with a managerially-inspired 'quest for community' and decentralization, the Bennett government developed highly centralized forms of control in cabinet. It is important to bear in mind, however, that there is no functional contradiction in the ideas of expanding centralized power under the guise of retraction and decentralizing control, because in the decentralization process, there is no requirement to yield the centralization of authority. Thus, as Spitzer argues,

> "If we see centralization of power and decentralization of control as part of a dialectical unity, rather than as separate and antithetical tendencies, we may be better able to explain why so much of the scaling down that characterizes modern social control actually serves an increasingly integrated system of making and implementing control decisions" (1982: 187).[55]

For example, the Social Credit Government restricted the autonomy of various local authorities (eg. school and hospital Boards) and non-government agencies (e.g., the Human Rights Commission), and some of these were even abolished. At the same time, far more cabinet control was located directly in the Premier's Office.[56] In this process, the government had, "been freed of many of the restraints we associate with liberal democracy" (Magnusson, et. al., 1984: 9). This ominous development signalled a reign of technocracy in which political issues are 'managed' through centralized decision-making that short-circuits grassroots consultation (Morsley, et. al., 1983: 165) and assumes that a fundamental consensus exists amongst a homogeneous constituency (Butcher, 1985: 22). This seems to confirm Harvey's more general comments:

> "I also want to insist that flexibility has little or nothing to do with decentralizing either political or economic power and everything to do with maintaining highly centralized control *through decentralizing tactics*" (1991: 73).

Increased centralization, under the guise of decentralization, was to have a number effects on the identity of community mediation. To begin with, the localized (decentralized) appearance of community mediation projects masks more fundamental ways in which they are centrally

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monitored through their funding patterns. That is, since most programmes rely on government for some (and more usually most) of their funding, they too were subjected to the increasingly centralized Cabinet decision-making of the Social Credit Government.[57] Attendant with this comes a host of restrictions that, in effect, regulate the general environment (e.g., the kinds of services that are to be provided, the scope of the programme, how and where it is to operate, etc.) within which community mediation has emerged. In other words, highly centralized bodies of government are able to exert a substantial control over the deployment of mediation, and hence it is not too surprising that mediation should assume a "system-based" identity. Here, the 'community' is defined by the negotiated decisions of a small clique comprising the Inner-Cabinet of government, mediation 'experts', lawyers and programme coordinators. This alliance is clearly articulated in a recent response, by the Attorney General[58], to the report of an appointed Justice Reform Committee (Hughes, 1988):

> "The Ministry of the Attorney General will work with universities, mediation groups, the bar and the bench to promote using and improving existing ADR resources and to expand their availability" (Smith, 1989: 8).

Perhaps it is platitudinous to note the missing element of grassroots input, but this serves to confirm the point being made and to explain a core feature identified in the first chapter above: community mediation is not a local, community initiative, but is deployed under the guise of a decentralization process which serves to mask the centralization of Cabinet authority.

With this in mind, community mediation emerges as one of various mechanisms through which the Social Credit Government attempts to 'educate' consent in the 'outer trenches' of its operation while simultaneously integrating its central forces (Gramsci, 1980). This elucidates, from another point of view, the importance mediation programmes in the province place on

"public education", "public relations" and "marketting." Through such education processes, the state encourages a politics of consensus (Harrington, 1985) by which its policies are portrayed as necessary and inevitable (Abel, 1982a). Community mediation in British Columbia furthers this politics of consensus by assuming that all disputes are amenable to *individual* agreement between parties. In other words, mediation treats disputes individually - ignoring underlying structural conditions that may have fostered similar kinds of conflicts - and assumes that there is some 'common ground' between people from which agreements can be forged.

For example, when confronted with a conflict where sexual harassment in the workplace is involved, community mediation programmes typically focus on the specific actors involved. Here, the parties are brought together to work out - through the technical application of mediation techniques - a settlement that is agreeable to both. The dispute is deemed to have been 'successfully' resolved if the disputants in question are satisfied with the settlement, and agree to abide by the conditions of these; that is, consensus, order and peace have been 'restored' to the 'community'. What is entirely absent from this approach is a more astute recognition of wider structural conditions (such as the inequalities imposed by race, class and gender divisions) that seem to preclude redressing such conflicts in individualistic, or consensual, terms. In other words, ridding a society of conflicts pertaining to sexual harassment in the workplace may indeed require redress of the underlying conditions which have fostered the multitude of individual conflicts in the first place.[59] But the point here is to highlight that the current identity of community mediation fosters a politics of consensus that is congruent with educating the consent of the governed, and seems unconcerned with recognizing wider inequalities between disputants.

The identity of community mediation is shaped in yet a further way by the centralization of government decision-making. In particular, the conspicuously disparate funding patterns that were identified as characteristic of many mediation programmes can best be understood as a descendant of such centralization. That is, when funding decisions are highly centralized it becomes possible to coordinate budgetary planning across government departments to maximize administrative convenience. With this in mind, one can better understand why funding for community mediation is often split between a range of government departments. This is, of course, not meant to exaggerate the coordination of government effort, especially when one is dealing with an initiative (such as community mediation) which is still somewhat 'experimental' in form. What it does indicate, however, is that there is at least some centralized control over informal justice programmes through funding, as is clear form the substantial financial backing that the Cabinet itself approved for the BCICAC (Pitsula, 1987: 27). It also possibly accounts for the preference granted to "system-based" forms of alternative dispute resolution which are overseen by lawyers, or by church groups in the case of VORP, over those organized by 'bleeding-heart liberals' within the new middle class (Interview, 17/09/91). The relatively small grants of the latter indicate the degree to which this is so (Blake, 1984)

III AWAY FROM THE COURTS: DEINSTITUTIONALIZING DISPUTE RESOLUTION

Speaking amidst the social turmoil of the early Nineteen Seventies, the then Minister of Justice, John Turner, declared,

> "We are witnessing today what has been called a 'crisis of legitimacy,' or as some would have it, a 'crisis of authority.' All our institutions - the state, the university, the family, and...the law - are being challenged. The challenge reaches not only the laws but those who make the laws. It strikes at the very legitimacy of the legal order itself..." (1971: 2).

For him, this crisis stemmed from the combined impact of increased conflict in an "age of

confrontation" and an unresponsive, outdated justice system. Such a frank admission from a person of authority within the existing justice system indicates the pervasiveness of the legitimacy crisis facing legal institutions.[60] In an attempt to bring peace to this conflicting society, Turner outlined a vision of law for the 1970s which emphasized the importance of making the legal system responsive and relevant; a quest that would blur distinctions between the formal and the discretionary (Turner, 1971: 5). In this context, the Law Reform Commission of Canada (LRC) was established to ensure ongoing reform within the justice system, and to entrench its relevance to an ever-changing Canadian society (Hastings and Saunders, 1987: 127). Early LRC studies concluded that the court system was in need of substantial revision, a view that was shared by various studies in British Columbia.[61] Most of these endorsed the Justice Minister's pursuit for procedural informality as a means of updating the judicial system[62], a call that surely was not unrelated to structural changes in the political and economic fields.[63]

Quite aside from the proximate influences of the CBA, some judges, lawyers and legal Foundations, the pervasive discourse of legal reform, at both a federal[64] and provincial[65] levels, was an important line of descent for the identity of community mediation in British Columbia. It employed various images to describe the major 'problems' with the courts (thereby accounting for the 'crisis'), and proposed various 'solutions' to these. In general, however, the court system was attacked on the grounds that it could not effectively resolve "minor" community disputes because of: its adversarial procedures; a general unresponsiveness to the community; and, because of an inefficient system of administration.[66] Various practical 'solutions,' reforms, were proposed to develop an effective way of removing 'minor' community disputes from the justice system.

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In British Columbia, at least, this translated into some practical experiments with diversion, and then mediation, confirming the direct links between court reform and community mediation. It is, therefore, not surprising that the rhetoric used to justify the deployment of community mediation (see chapter 1) is closely articulated to the wider discourse of court reform. In order to make such links more explicit, it is important to examine the images of failure (i.e., in terms of process, unresponsiveness and administration) in court reform discourse and its links to the rhetoric through which mediation was implemented.

III a. ADVERSARIAL PROCEDURES IN QUESTION

Various LRC studies identified the courts' adversarial approach as unsuitable for the resolution of certain kinds of disputes (especially, Hogarth, 1974; Becker, 1975). Pointing to research in jurisprudence (e.g., Fuller, 1971) and legal anthropology (e.g., Nader, 1979, 1984; Bohannon, 1957, 1967; Danzig, 1973; Fisher, 1975) that identified mediation as a promising mechanism of dispute resolution for certain cases, the LRC overtly questioned the appositeness of adversarial methods. For example, one LRC report observed that,

> "As research throws more and more light on what actually happens in the name of criminal law, it become clear that the court and correctional processes are not able to deal with many of the cases brought to their doors. The adversary processes of the courts are not able to deal adequately with cases that require mediation or settlement" (1975a: 23).

Cases of the latter kind included 'minor' (civil and criminal) disputes between people with ongoing relationships (e.g., neighbours, family members, colleagues, etc.).[67] The complex emotional dimensions of such relationships was seen to decrease the effectiveness of adversarial, zero-sum, type methods.[68] Thus, various reformers echoed the idea that,

> "dyadic conflict within a context of continuing bilateral relationships represents a unique potential for non-adjudicative dispute resolution" (Becker, 1975: 226).

Alongside attempts at deinstitutionalization in other areas of society (Cohen, 1985; Scull, 1984), this reform effort sought to remove minor disputes from the courts, reserving the latter for more 'serious' disputes (LRC, 1975a: 1).[69] Hogarth (1974) noted that this could be accomplished by decriminalizing acts, with the unwanted danger, however, of leaving problematic behaviour unregulated. As such, the LRC sought,

> "solutions which minimize the involvement of the traditional adversary process and maximize conciliation and problem settlement." (1975a: 1).

In this search for complementary "alternatives" to the adversarial model of the courts - in light of developments in the United States (Danzig, 1973) - conciliation and mediation were identified as promising processes for more effective minor dispute resolution (Solicitor General of Canada, 1978).[70] In Canada, by and large, this government-initiated search for alternatives was limited to models that would complement (rather than undermine) the courts, and which would deal with 'minor' and 'dyadic' conflict (i.e., conflict between individuals).

The restrictions of this discursive approach have influenced the rise of community mediation in British Columbia in a number of ways, most notably, in producing a form of community mediation which is "system based" and which addresses certain perceived inadequacies of adversarial procedures with respect to 'minor' cases. In turn, this has truncated the scope of what is taken to be legitimate inquiry into alternative dispute resolution, and has focused research around the efficacy and importance of informalism for the court system. For instance, advocates emphasize community mediation as an empowering, voluntary and conciliatory process of dispute resolution between individuals that complements to court adjudication -- there is no examination of how informalism might further social justice, nor any hint that this might entail developing a form of mediation that serves as a means of collective resistance to the existing justice system

(e.g., as espoused by Shonholtz, 1984 in the United States). Instead, research into community mediation in British Columbia has become an extension of the reform-orientated discourse of the legal establishment characterised, as we have seen, by an emphasis upon 'system-based', 'complementary' models of mediation that are regulated through 'standards'.

III b. AN UNRESPONSIVE COURT SYSTEM?

"Generally, the Courts show all the signs of a system which has been denied adequate financial support, has failed to keep pace with an ever changing and growing society and has failed to make use of modern methods and technology to adapt to these changes. The result has been the loss of public confidence and respect for the Court process" (Justice Development Commission, Courts division, 1974: vi).

The discourse of legal reform also noted another 'problem' with the justice system: the unresponsive character of its courts. This had fostered a perception of courts as remote, intimidating, confusing, isolating and inhospitable institutions. In short, the courts were in danger of excluding citizen participation and thus compounding their existing legitimacy crisis (LRC, 1975a; 1975b). The 'problem' as legal reformists saw it, was to ensure court responsiveness and relevance to ongoing changes in Canadian society, thereby preserving judicial control over dispute resolution. Two related 'solutions' were consistently promulgated as ways to solve this 'problem': first, reformers advocated that the courts re-establish a base in 'the community'; and, secondly, they appealed to the idea of increasing 'access to justice' by making the courts more accessible and user-friendly to all. Let us examine these in turn, with special consideration for their relevance to the community mediation in British Columbia.

In the Nineteen Seventies, the theme of bringing the 'community' back into the justice system

was a prevalent one. The LRC concluded, for example, that the prevention of crime required a

'community' foundation.[71] In addition, a federal Task Force was established specifically - as

its title suggests - to assess the nature of **Community Involvement in Criminal Justice** (Sauvé,

1977).[72] We have already detailed this theme's prominence in the context of British Columbia

in the development of the JDC and Justice Councils, a point confirmed by the following

statement made by a participant at a Justice Council symposium:

> "'Bringing justice back into the community' is the motto of today" (Justice Council, Capital Region, 1977: 13).

Community mediation, as the name implies, was a direct product of this ethos which encouraged

'community' participation in the justice system.[73] By claiming to 'take disputes back to the

community', advocates saw themselves as very much part of a process that was returning 'justice'

to local communities (Interview, 15/01/1990).

But what seems particularly pertinent here is that despite its recurrence in the literature, the term

'community' is seldom defined by its advocates.[74] This is particularly relevant in light of

Taylor's perceptive observation that the 'organic communities' which spread across the Canadian

landscape in the Pre-war years,

> "have been more or less replaced by much more impersonal, fluid and transitory 'areas of residence'" (1983: 143).

There are perhaps good political reasons for this lack of definition, for as Cohen points out,

> "Almost anything can appear under the heading of 'community' and almost anything can be justified if this prefix is used" (1985: 116)

The power of the concept, 'community', is therefore transparent, for in its extreme ambiguity,

its fluidity, lies the possibility of appealing to a wide spectrum of political thought: from

conservative nostalgia for a golden age without the rootlessness of the modern; to liberal technocratic concerns of how to manage conflict; to more radical ideas of participatory democracy, emotional involvement and empowerment (Cohen, 1985: 119). Stated slightly differently, the more elusive the concept remains, the larger its appeal base is likely to be, and hence, the more legitimacy it can bestow onto the court system. This is an important line of descent for community mediation because it underlies the previously noted observation that the 'community' is not an absolute entity primordial to discursive enunciation; on the contrary, in the context of mediation, it seems to be produced out of the struggles between politicians, lawyers and professionals (experts) when drafting programme proposals (i.e., deciding what target group a 'community' mediation programme should service). With this in mind, one can better understand why 'community' mediation is not autochthonous to organic community life, but rather a system-based 'alternative' that is designed and funded endogenously using a 'community development' model, and whose value must be 'marketed'. It also provides a means of discursively justifying the extensive use of volunteers (i.e., the need to involve the community), without specific appeal to fiscal restraint.

The second series of solutions to the 'problem' of an unresponsive court revolves around providing increased 'access to justice'.[75] If the appeal to community dominated the Nineteen Seventies, the Nineteen Eighties were to complement this with a focus on "access to justice" (ALRI, 1990). The basic idea here was that the justice system should be available to all individuals to permit them to vindicate their rights should the need to do so arise.[76] In British Columbia, the government appointed a Justice Reform Committee to look at ways to improve access to the justice system (Hughes, 1988). Amongst other things, this committee recommended

that one way to accomplish this would be to offer "every encouragement" for,

> "community-based projects which provide alternatives to the court system for claims involving small amounts of money and appropriate issues" (Hughes, 1988: 194)[77]

This shift from 'community' to 'access' is indicative of the Social Credit Government's managerial approach, for it translates concerns about the quality of community justice into mere technical requirements of access: improved access is better justice. In this general climate, community mediation emerged as another technical means of increasing access to the justice system, specifically for minor cases that delay and congest an 'overburdened' court system. In turn, such language served to reinforce the identity of community mediation as a system-based, technical alternative designed to complement the courts by increasing access to 'justice'. Once again, a prominent feature of community mediation is highlighted: there is little concern in this equation for how mediation might really enhance a community, or how it might offer a fair and equitable social form of justice, but only an ethically disinterested analysis of its technical merits (cost, efficiency, etc.) for the justice system.

III c. ADMINISTRATIVE INEFFICIENCY

A final aspect of the court's crisis was identified as the problem of an inefficiently administered system, unable to cope with the sheer volume of cases in the 'age of confrontation'. The central axiom here is that an inefficiently administered justice alongside burgeoning caseloads translates into an overloaded system which operates poorly and lowers the quality of justice. Like the previous 'problems', this has proved to be a chronic one that continues to appear in contemporary analyses.[78] As one prominent lawyer recently noted,

> "We are all too familiar with the problems springing from delay, costliness, inaccessibility, and an over-burdened court system" (Blair, 1988: 3).[79]

In British Columbia, an early statement by the Court division of the Justice Development Commission itemized the main administrative problems with the court system, and many of these have defied rectification in view of their reappearance in the Justice Reform Committee's Report (Hughes, 1988). In particular, the following problems were noted:

> "Unreasonable delays in both criminal and civil proceedings
> Unnecessary costs in criminal and civil proceedings
> Procedural complexity, particularly in civil proceedings
> Outmoded methods and procedures for court administration
> The lack of adequate and appropriate court facilities
> Insufficient numbers of properly trained court personnel
> Inhumane lockup and remand facilities
> Improper use of police officers in the administration of
> courts
> The lack of statistical information and information systems."
> (Justice Development Commission, (Courts Division), 1974: vi).

This definition of the 'problem' opens up further areas for court reform. One such solution was community mediation, for it promised to reduce the court's case-load, and thus dispense with the problems of delay, cost, procedural complexity, outmoded methods, and the lack of facilities. At this point, one can identify the remarkable congruence between the legal reformer's discourse and the rhetoric through which community mediation was deployed. The latter, as we have noted, promised that mediation would be a cost-efficient, time-efficient, humane (voluntary), and flexible process that could be conducted anywhere in the community using trained mediators. Clearly then, the problem of administration in the discourse of legal reform is a significant line of descent for community mediation, for the latter's rhetorical discourse is clearly articulated to the former. Moreover, this concern with administrative efficiency also seems to underlie the continued quest to measure the success of community mediation programmes purely in technocratic terms of case-resolution statistics. It also reiterates the system-based nature of community mediation in which the latter is placed in the direct service of the justice system.

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In sum then, these three 'problems', through which the reformer's discourse characterized the 'crisis' of the courts, were important components that helped to shape the eventual identity of community mediation in British Columbia, particularly with respect to the rhetorical symbols through which the latter was deployed. But the reformers also proposed 'solutions' to these 'problems' in the form of practical experiments, and these were also to have an impact on the actual models of community mediation programmes that developed. Two of these experiments were of particular practical significance in British Columbia: diversion and the JDC's Small Claim's Mediation Project.

IV PRACTICAL EXPERIMENTS: DIVERSION AND SMALL CLAIMS' MEDIATION

We have already noted the LRC's reluctance to decriminalize "socially problematic" behaviour (LRC, 1975: 1). A more acceptable strategy emerged out of its search for 'alternatives', one that had already gained momentum in the United States; namely, 'diversion'. Diversion was seen to offer,

> "an alternative less formal than the court system which has the potential to reduce the backlog, provide compensation to the victims or the community, and present a mechanism to establish community support for the many people in conflict with the law, while protecting the rights of the offender" (Solicitor General, Canada, 1977: 10).

By diverting 'minor' offenses from the criminal justice system, so the reasoning goes, one could 'return' perpetrators of "socially unacceptable behaviour" back to the 'community' where volunteers would attempt to re-integrate offenders. This was an attractive alternative that promised to attend to the 'problems' of legal process (it was an informal, hospitable form of dispute resolution that would rebuild communities), unresponsiveness (it would return justice to the community) and administrative inefficiency (it promised to take away minor cases that 'clogged up' the court system). Thus, especially if controlled by the government, diversion

seemed promising in respect of its ability to deal with the crisis.

The leap from diversion to mediation, especially VORP, is not a large one. Indeed, in his analysis

for the LRC, Hogarth explicitly noted the congruity between diversion and mediation, and

between both of these and the courts.[80] In light of this, it seems correct to suggest that,

> "In Canada during the mid-seventies the diversion movement gave impetus to the
> development of mediation programs. The diversion movement attempted to find
> alternatives to the court system and mediation was an approach spawned by this
> movement" (Perry, *et al.*, 1987: 1).[81]

Indeed, diversion opened a practical space for the emergence of community mediation

programmes, and helped to create an environment in which members of the new middle class

who had been retrenched (often as a result of government cut-backs) could carve employment

opportunities for themselves by submitting mediation (rather than diversion) programme proposals

to the government for funding (Perry, *et al.*, 1987: 7). The symbolic and practical effect of

diversion, therefore, was to offer a precedent - an important line of descent - from which

advocates of mediation could take cues in deploying their own programmes.

A further practical impetus for the rise of community mediation was the highly praised 'success'

of an experimental mediation project. In the summer of 1975 (15th May to 30 August), the JDC

ran a Summer Pilot Project in tandem with the Small Claims Court to assess the effectiveness

of mediation in dealing with the "justifiable criticisms" of this Court. The evaluation of this

report suggested that:

> "The mediation service was a 'success' in that it offers an alternative to the formal trial
> process that is faster and less complex. Litigants like the option of a mediation
> appointment and perceived a voluntary settlement as a just result" (JDC, 1976: 46).

Moreover, the JDC praised the inexpensiveness of the mediation process, pointing to a $39

332.00 budget surplus for the project. No doubt, this signalled the acceptance of community mediation as a concept within the legal establishment, and pointed to its impending expansion over the next decade.

CONCLUSION

In their various ways, these complex lines of descent have converged to produce the present identity of community mediation in British Columbia. Transformations in the economy have affected the province by favouring the monopolization of capital and the formation of a neo-conservative discourse, supporting a conception of community mediation that: sought to 'return' minor disputes to the 'community'; focuses on disputes that undermine the integrity of a 'community' and its units (e.g., family disputes); and, privatises dispute resolution. Moreover, the flexibility required by Post-Fordist economies reinforces the *ad hoc* funding practices and non-standardized, informal procedures of community mediation. Political transformations in the province, by contrast, have affected the identity of community mediation through trends towards: state minimalization which encourages a 'system-based' form of community mediation that operates outside the state and that focuses on constructing consensus managed by volunteer 'social expert' mediators from the new middle class; privatization, which encourages a dependence on funding sources and requires user fees and the assistance of volunteer; and, the decentralization of government wherein the NDP fostered ideas of increasing community control, yet imposed a 'community development' model of mediation, whilst the Social Credit government used mediation to manage consensus and centralize its control under the guise of decentralization. The emphasis on 'community' also helped to fragment the 'social' basis of the welfare state, and to dismantle aspects of this system. The criticisms of the court system, as well

as the ways in which community mediation sought to alleviate the purported legal 'crises', helped to fashion a social identity concerned with: a politics of consensus; eradicating conflict from 'communities' by establishing a 'complementary' form of dispute resolution; professionalism; technocratic ways of increasing access to justice; and, evaluations of success according to the number of cases successfully mediated. Finally, practical experiments in alternative forms of dispute resolution served as exemplars for future models, and defined areas in society in which community mediation could be located.

Despite separating these lines of descent for heuristic purposes here, one ought to realize that in social context they exist in complex relation to each other and to community mediation. Our broad sketch of the influences on the identity of community mediation in British Columbia may not detail all the intricacies of these relations - especially between the different lines of descent - but it does demarcate the boundaries of an emerging social control site with a particular political rationality. The task which now faces us is to analyze this political rationality in greater detail in order to understand the model of power and the regulatory processes reflected by the emerging community justice movement. A precise understanding of such a mode of governance is crucial to developing effective strategies by which to take community mediation seriously, and direct its identity towards the enhancement of social justice.

END NOTES FOR CHAPTER 4

1. This genealogical method derives from Foucault's (1977) arguments that an enquiry should not seek a simple point of 'origin', a source, but rather seek out complex lines of 'descent' that seem related to the 'emergence' of an event in history.

2. The limitations imposed by such focus may mislead some to suspect a functionalist logic at work in the argument. However, this concern is spurious since the genealogy is but a conjunctural, historical analysis which does not assume that identities are necessarily functional (Foucault, 1977). Instead, it holds a much more modest view of the articulation between events in which the existence of particular events is seen to do no more than provide certain conditions which make the emergence of others possible.

3. See also Resnick (1987: 4-5) in relation to British Columbia. 'Fordism' refers to 'regime of accumulation' and an associated 'mode of regulation' (Lipietz, 1984; Aglietta, 1979) and revolves around, "the link between the systems of mass production and mass consumption, the role of Keynesianism and the welfare state in underwriting long-term growth and profitability, and the integration of trade unions on an industrial and later national-corporatist basis, in the management of the post-war Fordist economy" (Rustin, 1989: 56, see also Hirsch, 1988: 47). By contrast, the emerging so-called Post-Fordism is rather more difficult to characterize, although it is usually associated with 'post-modern flexibility' or 'flexible accumulation', etc. (Harvey, 1991; Jessop, 1990). There are, however, some theorists who feel this entire paradigm is rather too stereotypical and needs to be more contextualized (Hirst and Zeitlin, 1991: 47).

4. Without endorsing the functionalist precepts of Selva and Bohm's argument, and taking their argument out of context, it seems correct to suggest that,

> "The experiment with informalism in the administration of justice coincided with a general transformation in the political economy from the stage of competitive capitalism to the stage of late monopoly capitalism" (1987: 43).

5. There is some confusion over the concept of 'flexibility', but for our purposes here, Harvey (1991: 70-73) offers a rather succinct and plausible definition. He suggests that there are four main areas where such flexibility has been visibly encouraged: in the labour process; in labour markets; geographical mobility; and, in the privatization of unproductive services. The latter is of particular import to the present thesis. Also, there is a distinct continuity between notions of Post-Fordism, Neo-Fordism and Post-Modernity in the sense that they connote the 'flexibility' of contemporary life; however, the previous two terms are charactistically articulated to Marxist discourses which is not the case with the latter (see Smart, 1991).

6. For example, the relevance of such developments for community forms of social control has been examined in the specific context of the United States by a variety of authors (Scull, 1984; Spitzer, 1982; Santos, 1982; Cohen, 1985; Selva and Bohm, 1987; Hofrichter, 1987; Baskin, 1988, etc.).

7. In view of this permeability, the effects of Canada's Keynesian policies were rather limited, being overshadowed by global market trends (Carroll, 1990: 405).

8. However, because of its permeability, Canada - at a federal level in any case - did not develop a "vicious" form of neo-conservatism of the kind that emerged in Britain and the United States in the 1970s and early 1980s (Jenson, 1989: 87). However, by the late 1970s Joe Clarke's Conservatives had developed their own version of 'neo-conservatism' which favoured deregulation, privatization, reduced government spending, etc. (Bothwell, et. al., 1981: 360). But it would be misleading to compare this version with the rather more biting measures adopted by conservatives in Britain and, later, in the United States. Both of these developments had the effect of undermining the universality of Fordist plans, and promoted an openness to regional development, "flexibility", province building and so on. This was to become important in the attempt to restructure the legal field which had for so long been universalizing in its thrust.

9. One rather graphic indication of this is that by 1975 only ten large forestry companies had extracted 58.6% of the allowable, committed cut of the whole forestry industry (Resnick, 1985: 35-36).

10. This occurred despite British Columbia's relatively high growth rate - due to an increased demand for coal, lumber and gas in the United States and Japan - in the latter half of the Seventies (Resnick, 1987: 10).

11. Increasingly, too, it turned its attention to the Pacific Rim (Resnick, 1985).

12. That the extremely conservative 'thinktank', the Fraser Institute, should have been head-quartered British Columbia is perhaps not entirely coincidental.

13. As Harvey perceptively points out,
> "Proponents claim that deregulation and/or privatization, coupled with a reduction in state support for institutions ... that might act as barriers to change, permit a much more adaptable deployment of capital from one sector to another and liberate entrepreneurial and innovative energies from their so-called chains" (1991: 71).

14. In preliminary conversations with a retired prosecutor (now in private practice in British Columbia), the lowest levels of the justice system were described as a "zoo" because of the sheer volume of cases that had to be attended to on a daily basis. Inevitably, the spirit - if not the letter - of procedural law, he suggested, was difficult to adhere to in such circumstances and this failure could certainly threaten a system that rests on the formal 'rule of law' for its legitimacy.

15. In addition, the rhetoric of a speedy and cost-efficient means of resolving disputes is appealing to corporations that do not want projects delayed by protracted and expensive litigation.

16. The acronym FLQ stands for Front de Liberation du Quebec. For more details on this group and its activities, see Bothwell et. al (1981).

17. For a more detailed discussion of this, see Jenson (1989), Carroll (1990) and Canada, The Task Force on Canadian Unity (1979).

18. See, for example, Jenson (1989), Carroll and Ratner (1989), Carroll (1990) and Myles (1989).

19. In particular, as Gramsci (1980: 259) argues, it is necessary to "educate" consent, which means that modern forms of government face this essential question:
> "How will educative pressure be applied to single individuals so as to obtain their consent and collaboration, turning necessity and coercion into 'freedom'?" (1980: 242).

20. As we have seen this point is made rather precisely by, inter alia, Santos (1982), Cohen (1985), and Fitzpatrick (1988).

21. For example, Canada, The Task Force on Canadian Unity (1978), Bothwell et al. (1981), Bennett (1978), Magnussen et al. (1984), and Resnick (1987; 1984).

22. The phrases in parentheses here are modifications of Cohen's perceptive analysis of this issue (1985: 31).

23. In British Columbia, the neo-conservative Social Credit Party has ruled the province since 1952, excluding an interregnum from 1972 to 1975 when the New Democratic Party, with its social democratic policies, was elected to office (Howlett and Brownsey, 1988). W.A.C. Bennett was Premier of the province from 1952 until the NDP's D. Barrett took over the Office in 1972. Thereafter, Bennett's son, W.R. Bennett, was elected as Premier and held this position until 1988 when W. Van der Zalm was elected as leader of the province.

24. O' Connor (1973), Offe (1984), Habermas (1976), Santos (1982) and Hofrichter (1987).

25. See Carroll and Ratner, 1989; Resnick, 1984: 133.

26. The latter would entail the privatization of services while the former required de-regulation and the fostering of 'community' regulation (Butcher, 1985).

27. It is interesting to note the parallels between federal and provincial developments in the Nineteen Seventies. At the beginning of the decade, despite economic crisis, state expenditure was not reduced. On the contrary, after an 'explosion of federal spending, the federal deficit re-emerged (and grew) towards the middle of the decade (Bothwell, et. al., 1981: 430-436) while in British Columbia, the New Democratic Party continued to expand state services in line with its social democratic policies (Howlett and Brownsey, 1988). However, at the end of the decade conservative politics dominated both levels of governments and one finds a recurring theme to 'balance the deficit'. Federally, this translated into the implementation of "harsh cuts, restrictions and eligibility" in social expenditure (Torczyner, 1987: 275) and an increasing shift of social service responsibilities onto the provinces (Johnson, 1988). Whilst the federal version of neo-conservatism was not quite as "vicious" as in Britain or the United States (Jenson, 1989), the situation was - as we shall see - quite different in the context of British Columbia.

28. He went further to propose that all governments (federal and provincial) restrain their spending patterns to one percentage point below the growth rate of the economy for a minimum period of 3 years (1978: 27).

29. This was so because during the seventies,
> "large capital had largely eliminated independent small capital from the resource sector and had made small capital and the traditional middle class dependent either on public sector spending or associated private sector spending" (Howlett and Brownsey, 1988: 153-154

30. Indeed, as Resnick notes,
> "the B.C. economy during the second half of the 1970s experienced high rates of growth as compared to central and eastern Canada, fuelled by such factors as strong external demand for B.C. coal, lumber, and gas in the U.S. and Japan and by high immigration into B.C. from other parts of Canada" (1987: 10).

31. See, for instance, Howlett and Brownsey (1988), Marchak (1984), Carroll and Ratner (1989) and Resnick (1987: 10-11).

32. For example, the following works analyze different aspects of the programme and its impact on different segments of society: Magnusson, et. al. (1984); British Columbia Government Union (1985); Butcher (1985); Carroll and Ratner (1989); Resnick (1984, 1985, 1987); and, Howlett and Brownsey (1988).

33. Aside from direct cut-backs (in people and wages), downsizing the public sector was also accomplished through, inter alia: cancelling non-statutory services (e.g., adolescent outreach programmes); restricting entitlement; contracting out existing services; reducing subsidies of existing programmes; user fees; redefinitions of jurisdiction; etc. (see Callahan and McNiven, 1988).

34. See Howlett and Brownsey (1988: 159) and Magnusson, et. al. (1984: 200) for more detailed discussions of this point. Also, Marchak (1984: 30) discusses the manner in which these sector are further subsidized through, for example, increased funding for private schools and management schools.

35. See Carroll (1984) for a more detailed analysis of this "solidarity coalition."

36. This is especially so in the case of the BCICAC which received by far the most government financial support. Its mediation component is explicitly run by lawyers and is designed to expedite commercial disputes that might otherwise be delayed in the court system. The symbiosis between the courts and mediation is frequently heralded as a core virtue of the programme (interview, 05/09/1991). In addition, it is perhaps revealing that none of the interviewees of this study - all of whom are (or were) involved with programmes that receive some state funding - contested the claim that community mediation should be anything more than a complement to the existing judicial system.

37. For example, the looming First Nation's contests over legal sovereignty may well be faced with more coercive state forces.

38. A particularly contentious issue here is the case of family violence (Lerman, 1984).

39. For instance, the provincial government sought to make the market environment as favourable as possible to developing of Vancouver an international commercial and financial centre (Pitsula, 1987: 27). As part of this programme, it established the British Columbia International Commercial Arbitration Centre in a mere seven months after Attorney General, Brian Smith, received Cabinet approval in September, 1985. While, this Centre focuses on arbitration, it does offer various mediation services (e.g., commercial and environmental mediation). Moreover, while mediation is advertised in some of the literature that is handed out by the small claims court when filing a Writ, these courts have recently been restructured to take advantage of mediation procedures internally; indeed, all small claims court judges were sent on mediation courses when the new format was introduced (Interviews: 29/01/1991, 30/05/1991 and 05/09/1991).

40. Indeed, Callahan and McNiven suggest that in general,
    "The provision of specific services to an established number of individuals has replaced most group and community approaches" (1988: 31).

41. For a useful overview of the scope of such privatization in British Columbia, see Callahan and McNiven (1988).

42. This trend is not unrelated to federal politics, but here politicians have preferred to use terms like "deficit reduction" or "expenditure restraint". Regardless of terminology, however, Johnson correctly notes that in the 1970s and 1980s, the policies of both the liberal and conservative governments,
    "are largely responsible for creating financial and economic circumstances that are encouraging the privatization of social services" (1988: 213).

43. Initially, in British Columbia, despite the rhetoric of restraint, only some minor services were privatized (e.g., catering in correctional centres). More significant privatization initiatives were planned by the Social Credit government (Callahan and McNiven, 1988: 35).

44. Typically, user fees are calculated on a sliding scale in which payment is calculated on the basis of personal income.

45. In some cases, those contracted are required to pass police checks as a measure of government 'quality control'! (Callahan and McNiven, 1988: 27).

46. The concept of provincial autonomy had already been defended in the Tremblay Commission's report of 1956 (Bastein, 1981: 19) which also offers a detailed outline of fiscal decentralization in Canada.

47. **Globe and Mail**, 11th and 13th April, 1991. Interestingly, in a recent radio interview, one of the architects of this vision, Joe Clarke, emphasized that this project was never designed to erode federalism or the centralization of political forces. For him, decentralization and central coordination are not necessarily incompatible (Interview on **Morningside**, Canadian Broadcasting Corporation (AM), 26th September, 1991).

48. This was not unrelated to developments in the United States where the success of the Community Relations Services' community development models had been touted as extremely efficient in quelling riots (Salem, 1985; Walker, 1980).

49. Clague, et. al. (1984) provide a detailed examination of the emergence and ultimate decline of these Boards in British Columbia.

50. Namely, Police, Delivery of Legal Services, Coordinated Law Enforcement Unit, Planning and Research, Information Systems, Training and Education, Corrections, Pre-Trial Services, and of particular import here, Justice Councils and Courts (JDC, 1974a).

51. See Cossom and Turner (1985: 78-79). These authors provide a useful overview of the rise and fall of these councils, while Lajeunesse (1976) offers an evaluation of their development.

52. As well, these Justice Councils were intended to,
   "provide opportunities for citizens to participate in the planning and operation of justice services,"
and to,
   "stimulate communication and a fostering of change within the justice field for improving local and regional levels of justice" (Justice Development Commission, 1974b: 2).

53. Indeed, by 1977 the focus of the JDC was shifted such that it became a mere administrative agency, as its new name - the Justice Coordination Branch - suggests (Cossom and Turner, 1985: 25).

54. See Cossom and Turner (1985: 48-50) and British Columbia Ministry of the Attorney-General (1979).

55. In another context, Matthews (1989) notes how the British government makes a distinction between the **provision** of justice as opposed to the **administration** of services. The former endorses the centralization of power because it grants the state the sole authority to sanction the provision of services. However, the actual administration of such provisions is then contracted out to various private services. For more on this, see Pavlich (1990: 118).

56. Indeed, as Callahan and McNiven argue,
   "Treasury Board, inner cabinet and non-elected officials in the Premier's Office have taken charge of major financial decisions, partly because of distrust of the service ministries' ability to do so" (1988: 28).

57. Funding for community mediation programmes within the government is typically granted by the Offices of the Attorney General or Solicitor General.

58. At this time, Brian Smith.

59. This is, of course, not unrelated to the broader managerial approach of government which encourages a form of mediation that equates "success" in mediation with the number of individual disputes 'settled'.

60. See also Hogarth (1974: 37), Blair (1988: 3) and Emond (1988).

61. For example, in the Nineteen Seventies, the Canadian Bar Association's local branch (Cossom and Turner, 1985: 3) and, the Department of the Attorney-General (Justice Development Commission, 1974b), called for substantial revisions and improvement to the existing court system. The Law Reform Commission of British Columbia also suggested certain statutory reforms to the courts and the more recent Justice Reform Committee's Report made many recommendations of how to reform the courts, including the need to develop alternative methods of dispute resolution (Hughes, 1988).

62. Interestingly, in the early part of this century, Pound had already observed a tendency for societies to fluctuate between practising law according to strict rules and seeking greater discretion in legal procedure (1922: 54).

63. Selva and Bohm are surely too absolutist in suggesting that,
   "For the state to intervene in the economy on behalf of capital, the dictates of formal legalism, with its emphasis on generality and consistency, had to be contravened" (Selva and Bohm, 1987: 44).
Nevertheless, if one replaces the necessary quality ('had to') to this assessment with a more modest conjunctural, contextual and contingent assessment of struggles in British Columbia, it seems quite plausible to suggest (context-specific) structural homologies of this kind between the economic and legal fields.

64. For example, see LRC (1975a), Hogarth (1974) and Becker (1975).

65. See, for example, Hughes (1988), Alberta Law Reform Institute (1990), and Zuber (1987). In British Columbia, a previous Attorney General of the province, Brian Smith, stated this explicitly: "The reform of law is an ongoing process" (1989: 27)

66. Indeed, this is explicit in British Columbia's Justice Reform Committee's mandate to recommend how the justice system of British Columbia could be made, "more accessible, understandable, relevant and efficient" (1989: 3).

67. See, for example, Becker (1975: 218).

68. Indeed, some saw these as potentially increasing conflict by adding post-settlement hostility over and above existing hostilities (Hogarth, 1974: 55-59).

69. As one LRC report noted,
> "Too many forms of socially problematic behaviour have been absorbed by the criminal law in recent history and this trend needs to be reversed" (1975a: 1).

70. There was considerable federal-provincial cooperation in reforms targeted at developing non-adversarial 'alternatives', and indeed the Federal Solicitor General funded an experimental Community Diversion Centre in Victoria which opened in 1974 (Solicitor General, 1981: 60).

71. That is,
> "Crime prevention, whether in its primary form of preventing criminal acts from occurring, in its secondary form of minimizing and repairing harm, or in its tertiary form of reintegrating the offender, demands a community base" (LRC, 1975b: 55).

72. One of its recommendations was that all levels of government actively encourage and promote citizen participation in the justice system (1977: 151). It also recommended,
> "That all major government proposals for legislative change ... in the criminal justice field should be examined by citizens and interested citizen organizations, through the use of community consultations and/or public policy papers" (1977: 159-160).

73. Experiments on diversion were in large measure also part of the search for a 'community response' to minor disputes (Solicitor General, 1977: 10).

74. One exception is Sauvé's Task Force Report which defines 'community groups' as groups which are, "likely not incorporated and are not under government control" (1977: 37).

75. It is important to note that the notion of community is still present in these solutions; it is just that the emphasis is shifted to the idea of increasing access to justice. For example, one Attorney General of British Columbia notes that,
> "The pursuit of justice is a shared responsibility between the justice system, communities and individuals" (Smith, 1989: 2).

76. This is no doubt related to a wider reform movement in the United States which saw the importance of engendering new 'waves' of reform to allow the legal system to progress - see Cappelletti and Garth (1981), Johnson (1981) and Friedman (1981).

77. The Attorney General response was this:
> "Existing ADR programmes will be evaluated to determine their suitability for expansion. The Ministry of Attorney General will work with universities, mediation groups, the bar and the bench to promote using and improving existing ADR resources and to expand their availability" (Smith, 1989: 8)

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78. For example, Zuber (1987), Hughes (1988), and ALRI (1990).

79. See also Emond (1988: 9) and Estey (1988: 280) on cost, and Blair (1988: 5) and Medycky (1988) on delay.

80. In particular, Hogarth suggested that,
> "Mediation or voluntary arbitration would be explored in all cases of crimes committed within continuing relationships, while diversion would be primarily used in cases of crimes without direct victims, such as drug offenses" (1974: 83).

81. Horrocks (1982: 327-328) offers a similar assessment.

CHAPTER 5

CREATING SOCIAL COHESION:

GOVERNING 'COMMUNITIES' AND 'INDIVIDUAL DISPUTANTS'

Having outlined a complex background to the rise of community mediation in British Columbia, we should now concentrate on the event itself, on the contingent political rationale behind the knowledge and practices that characterize its deployment. This chapter sketches out a model of power through which mediation seems to exercise its particular brand of control; namely, 'pastorship'. Such an endeavour adheres to Foucault's methodological precaution that power and knowledge relations imply each other directly, and that, therefore, the 'truth' of mediation indicates an associated formation of power relations.[1] It also assumes that the deployment of any political strategy is supported by accompanying discursive visions (e.g., the divine order, the nature of things, community empowerment, etc.[2]), which are themselves privileged over others by attendant power relations. The intention here is to make explicit the largely implicit governmental rationality of community mediation's deployment, and turns specifically to the grounds for its specialized knowledge and techniques.

Unlike the formal court system, community mediation locates itself in 'social' arenas designed to 'restore' peace to 'communities.' As such, one might say that it operates through a 'governmentality', or a logic of government (Foucault, 1979; 1981; 1982; 1988b). In brief, community mediation may be viewed as a continuation of a complex logic of control that since the Sixteenth Century has entailed a 'governmentalization' of the state (Foucault, 1989; Rose, 1990). These processes of government, diverse though they may be, have developed a political

logic that ties the strength of the whole to the welfare of its singular components. As a 'pastoral'

form of power which has developed alongside - and is articulated to - the 'sovereign-law' model

of the formal state, community mediation is implicated in the political 'problem' of attempting

to reconcile the singular existences of each individual with the strength of all. A pastoral

rationality is, therefore, one of integration, of unity through dispersion, of integrating *omnes et*

singulatim (all and each).[3]

Such a pastoral logic is evident in community mediation's attempt to reconcile the vicissitudes

of live, disputing individuals with the vision of quiet, peaceful and conflict-free communities. Its

rhetoric points to a rationale by which the modern liberal state seeks to achieve social cohesion

and security, not through haphazard spectacles of visible power, but through a governance of the

'social'. Here, resorting to naked force is by default only, the first line of defense being a

calculated structuring of fields in which action occurs. It may be useful, for purposes of

comparison, to commence our analysis of this pastoral model of power with a brief look at its

past applications before focusing on the ways in which community mediation has appropriated

its logic. To accomplish the latter task, I shall: outline the subjects and objects problematized for

government; show how these are integrated in a governmental logic; and, detail the specific

knowledge and techniques of mediation that derive from this logic.

THE PASTORAL MODEL OF POWER: HISTORICAL OUTLINE

Traces of pastoral conceptions of power are evident in Greek philosophy, but its presence is

much more pronounced in early Christian texts (Foucault, 1982). Organized around the central

institution of the church, Christianity had ascribed local leadership to 'pastors' who were unlike

magistrates, or landrosts, in that their mission entailed taking an active interest in the individual lives of all their congregants.[4] Foucault (1981) evokes the image of a shepherd leading a flock to connote the quality of such pastoral leadership: it requires knowledge of specific individuals to function effectively. That is, power-knowledge of this kind does not simply offer gross assessments of the flock's condition, but offers instead, details about the state of each sheep. As Foucault argues, pastoral power,

> "involves a power which individualizes by attributing, in an essential paradox, as much value to a single lamb as to an entire flock" (1981b, 239)

Like a shepherd, then, the pastor must attend to the needs of the 'flock' by counselling the seekers, calming the disquieted, resolving conflicts between antagonists, admonishing the wayward, caring for the sick, helping the poor, and so on. The condition of the congregation, like that of the flock, is directly related to the well-being of *individual* existences within it: the collective welfare is inferred from the plight of constituent members. Such leadership is clearly quite different from the 'sovereign-law' model which aims at preserving authority over a principality by imposing supreme laws over an amorphous citizenry. The effective pastor, by contrast, secures the welfare of a congregation by actively attending to singular, individual needs on a continuous and extensive basis. In this sense, as one commentator puts it, pastoral power,

> "accords an absolute priority to the exhaustive and individualized guidance of singular existences" (Gordon, 1987: 297).

With this in mind, Foucault (1982: 214-215) identifies four characteristic components of pastorship in ecclesiastical settings. First, the purported aim of pastoral power is to procure the salvation of individual congregants in the here-after. Secondly, the pastor exercises power as an oblate who, in solemn contrast to the all-imposing sovereign, may be required to make sacrifices

for the benefit of the whole. Indeed, this ablative aspect of pastorship is a self-effacing one which requires an element of altruism from the leader. Thirdly, pastoral power is a type of power that is directed at the whole congregation through an ongoing focus on individual lives. As such, it exercises power continuously, extending directly into personal lives. Finally, Foucault argues that,

> "this form of power cannot be exercised without knowing the inside of people's minds, without exploring their souls, without making them reveal their innermost secrets. It implies a knowledge of the conscience and an ability to direct it" (1982: 214)

This model of power has - alongside more general secularizing trends in the history of Western society - undergone a number of significant revisions. The most conspicuous of these must surely be its expansion outside of church settings. As Foucault (1979: 5, 14; 1981; 1982) observes, in the Sixteenth Century a revival of Stoicism promulgated this model of power as a plausible response to a certain 'problem of government,' expressed in an emerging discourse that considered the state as an entity, *sui generis*, with its own logic.[5] This theme was further extended in Seventeenth and Eighteenth Century Cameralist thinking in its quest for a 'science of police' that was to inform the project of developing a 'police state' (Pasquino, 1978).[6] In both discourses, the formulation of the state as an independent entity facilitated the task of determining what would be required to enhance its 'strength'. As a result, the aim of the art of governing was,

> "not to reinforce the power of the prince. Its aim is to reinforce the state itself" (Foucault, 1988b: 150).

This quest to strengthen the state was viewed as a means of resisting the havoc unknown contingencies wreaked on states (e.g., famine, epidemics, accidents, etc.).[7] As it steadily unmoored pastorship from its ecclesiastical roots, the 'art of government' transformed the pastoral model in a number of ways.[8] To begin with, pastoral power no longer aimed at attaining eschatological salvation for believers, but rather at achieving 'salvation' for individual lives in

the here and now. Also, as the definition of 'salvation' became synonymous with 'welfare,' pastoral power sought to procure wealth, health, security and protection against natural forces. Moreover, the model spread throughout the social network, and in the place of church-based pastors, its power was exercised by a host of local authorities. These 'new' leaders derived legitimacy not from religious (or even natural) laws, but from the policy frameworks of the diverse institutional contexts to which they were attached (e.g., 'doctors' from the policies of hospitals, 'psychiatrists' from psychiatric hospitals, etc.).

A major rupture in these discourses of government occurred in the Eighteenth Century when the concept of the 'population' became thematic (Burchell, 1991). Prior to this, political models tended to use sovereignty, or the family, as exemplars of how to govern people. But the rise of the concept of 'populations' brought with it a new paradigm which, as Foucault notes (1979: 17), rivalled that of sovereignty and subordinated the family to a mere unit of the population (1979: 17). In short, the emergence of 'the population' signalled a discursive event through which,

> "the problem of government finally came to be thought, reflected and calculated outside
> of the juridical framework of sovereignty" (1979: 16).

The accumulation of 'knowledge' around this discursive exemplar promoted political technologies associated with the notion of governing 'populations' and prompted the collection of demographic information. Here, the pursuit of 'knowledge' centred on the health, wealth, longevity, geography, climate, military might, etc. of given populations - a type of knowledge that was supposed to facilitate the efficient administration of policies designed to strengthen the state.[9] Effective government seemed now to require precise, concrete and measurable information to enable rulers to develop appropriate policies, and forms of administration, hence the rise of empirical 'human sciences'.[10]

The upshot of these events was the establishment of the 'population' as a discursive 'object', a fixed entity with its own attributes, towards which various techniques of government could be directed. At the same time, however, the way in which this population was formulated - namely, as a collection of singular, live, 'individuals' - also identified *individuals* as objects of government (Foucault, 1978, 1981). In effect, as Pasquino points out, this introduced notions of both,

> "population and individuals, where previously, in the old social structure, there were only groups, *stande*, orders and estates inviolable - at least by right - in their eternal hierarchy" (1978: 50).

Quite literally, this meant that the techniques of pastoral power were (and still are) directed at vital, living beings, in all their complexity (not least of all their sexuality), and hence Foucault's term "bio-power" (1978).

The problematization of individuals and populations as objects for the exercise of power appropriates the Christian image of the sheep in a flock, where live individuals replace the sheep and images of a population, the flock. Furthermore, with the emergence of bio-power, the Aristotlean conception of people as beings that are capable of political action was turned upside down -- now it is politics that places human life in question.[11] In other words, the deployment of bio-power occurs in a discursive field where the preservation, or destruction, of populations becomes a matter of political choice. As such, the strength of the population is determined by the degree to which a government is capable of providing the 'salvation', the well-being, of its composite 'individuals'.[12] In this context, the aim of government is to secure the welfare of the population, its health, wealth, longevity, by knowing and dealing with the individual lives.[13] Indeed, by the Nineteenth Century, pastoral power in its 'totalizing' moment was directed at

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populations, and in its 'individualizing' aspect to the conduct of individual lives (Foucault, 1978; 1981; 1982).

The aim of contemporary governmental rationality still centres around versions of these 'objects'. Indeed, as Foucault notes, the aim of modern government is precisely,

> "to develop those elements constitutive of individuals' lives in such a way that their development also fosters that of the strength of state" (1981: 252).[14]

But how is this integration achieved? Although Foucault does not sufficiently address this, he does point - in another context - to a single concept which has developed with the rise of the human sciences and which serves as a point of intersection between each and all: the 'normal'. There are, that is, various forms of 'normalizing' knowledge and techniques, located in an interstice between the one and the many, which align 'normal' individual subjects with wider norms that strengthen the state (Giddens, 1991). Through such shifting processes of normalization, the aspirations of individuals are shaped in conformity with wider political objectives.

At this point, let us turn from our excursus into Foucault's work to focus more specifically on how it can illuminate the political logic of community mediation in British Columbia. We need here to explore the governmental rationality, associated with the discourse and techniques of community mediation, that attempts to individualize conflict. That is, what sort of political logic lies behind community mediation's attempt to expunge conflict between individual disputants, and to 'normalize' their relationship so that they can return to the 'community' in peace.

COMMUNITY MEDIATION AND PASTORAL POWER

This pastoral model has been inscribed in the very fabric of such contemporary power networks as community mediation. Quite aside from the direct links between some mediation programmes and the church in British Columbia (e.g., the Mennonite Church's VORP programmes), most programmes evince both pastoral aims and methods of leadership. For example, a central aim of community mediation is, as we have seen, to "assist the parties to come to a realistic, mutually satisfactory agreement."[15] But behind this lies an assumption that community mediation can achieve lasting settlements by allowing individuals to "maintain control over the outcome of their disputes." [16] The idea is to 'empower' individuals in an effort to dissipate tensions among community members and thus 'restore' peace and order to the community. In short, one may say that the aim of community mediation is to rebuild the community, to reinforce its integrity through peace and order, by effectively resolving disputes between individuals. Like the pastoral model, the goal is to secure the welfare of the whole (the community) by attending to the well-being of singular lives (individual disputants).

Community mediation also sanctions a type of leadership that bears more than a passing resemblance to the oblate of Christian pastorship. Like the altruistic, care-giving pastor, mediators - as we have seen - were described as people who "really feel the need to help people" (interview, 11/01/1990). Moreover, most social expert mediators are volunteers and this usually means that they must make the personal 'sacrifices' of paying for their training out of pocket, and conducting mediations with no remuneration, all for the good of the 'community'. Furthermore, if pastorship requires constant attention to the spiritual 'needs' of congregants, mediation explicitly attends to the emotions and feelings of disputants. Indeed, one of the

promulgated features of the process is articulated as follows:

> "Mediation allows parties to be heard, acknowledged and have their concerns addressed."
> (Advertising pamphlet of Westcoast Mediation Services)

That is, the mediator must listen to disputants, recognize their claims, and acknowledge their emotions, in a forum that directs communicative action towards agreement. As one mediator put it,

> "There is a lot of verbal reward in mediation, a recognition of what was just said must have been really, really difficult to say and we recognize how difficult it was and appreciate that they were able to share that with other people present" (interview, 11/01/1990).

Of course, however, such reward presupposes that disputants will 'reveal' their 'consciences', their thoughts, for without such active input the mediator (like the pastor) cannot 'guide' their perceptions. This in turn implies the importance of confessional techniques through which 'authorities', or trained 'experts,' can guide the self-identities of parties in conflict.

The pastoral rationale behind community mediation is further corroborated by the very 'objects' it targets to govern, as well as by the ways it seeks their integration in order to strengthen ('complement') the modern legal system. Like other versions of the pastoral model, community mediation embraces both totalizing and individualizing moments: on the one hand, it directs itself to the 'community'; on the other, it targets individual disputants. Furthermore, it tries to integrate these 'objects' by producing non-disputing individuals who will 'restore' peace to battered communities. By resolving conflict, it 'complements' the formal legal apparatus and - in its limited way - helps to strengthen the integrity of the liberal state. Of course, this is not to say that its 'objects' are fixed, *a priori*; on the contrary, the very processes by which mediation targets and selects its regulatory objects are directly involved in their very constitution. This takes

seriously the view that the objects of a given mode of regulation do not exist in any primordial sense: their identities are inextricably tied to the political logic of the regulatory modes which 'identify' (read: create) them as discrete entities of control. In defining (and securing the participation of) its regulatory objects, a mode of governance is directly implicated in the formation and maintenance of that which it seeks to regulate.

For example, by defining a 'community' as an entity with specific features, informal justice helps to produce and sustain a vision of its object. In many cases, the 'object' may exist as a moment in surrounding discourses (e.g., community planning), but specific modes of regulation are likely to colonize such moments as elements in their own discourses and may support, oppose, or simply ignore others. Similarly, the 'individual,' though a well-entrenched identity in liberal democratic polities, is recast slightly in the process of community mediation. That is, when a case is screened by case workers during the initiating call to assess its suitability for mediation, individual subjects are implicitly measured against intake criteria (e.g., is this person sufficiently motivated to settle the dispute?, etc.) and this commences the process of 'adding' an identity of 'minor disputant' to that of the liberally defined 'individual'. To be sure, as things now stand, the identity imparted through community mediation in British Columbia tends to reinforce the liberal conception, but the main point here is that community mediation is,

> "a critical arena in which a particular kind of individual can be produced..." (Baskin, 1988: 110).

This implies that,

> "The individual is...not the *vis-a-vis* of power; it is...one of its prime effects." (Foucault, 1980: 98)

As such, the 'individual' disputant found in community mediation is constitutively related to the

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political rationality from which s/he is enunciated.[17] With this in mind, it is important to consider both the totalizing and individualizing regulatory 'objects' of community mediation - the 'community' and the disputing individual - in more detail.

IMAGES OF THE 'COMMUNITY'

The previous chapter has outlined various destructuring impetuses in the economic, political and legal fields that favoured the (re-) creation of the concept 'community' as a central unit of governance (Cohen, 1985). It is important to bear in mind that by constructing 'disputants' as members of a community, informal justice attempts to render sections of society governable (Burchell, 1991: 145). As Cohen points out, in reference to the 'rhetorical quest for community',

> "It would be difficult to exaggerate how this ideology - or, more accurately, this single word - has come to dominate Western crime-control discourse in the last few decades" (1985: 116).

In British Columbia, the rise of the 'community' as a discrete, discursive entity of importance to the resolution of disputes has opened up a 'space' within which conflict between individuals may be settled outside of the courts. There are a number of ways in which the truths of this 'community' (what it is, what it ought to be, etc.), and the importance of mediation in it, are declared. For instance, local 'experts' often appeal to a growing academic discourse on mediation in Canada and the United States in a bid to give greater credence to their enunciations.[18] (Indeed, the Justice Institute Library contains an impressive collection of international and national materials - books, journals, magazines and video recordings - on conflict resolution to which students of mediation are referred.) Such enunciations find voice in specially orchestrated forums, social fields, ranging from conferences, seminars and symposia to public education programmes. In each of these different settings certain people are cast as 'experts' of community mediation,

serving as agents who declare the 'truth' about 'the community' and how to resolve disputes within it.[19]

It is important, however, to emphasize that advocates are still very much in the process of delineating the 'community' as a regulatory object in the informal dispute resolution arena.[20] The most visible evidence for this can be found in two previously noted features of informal justice in the province: the lack of demand from the 'community' for mediation services; and, the relentless public relations exercises that programme representatives engage in. Both of these betray the 'experimental' quality of this mode of control, which has yet to institutionalize its *modus operandi* and has yet to achieve hegemony with respect to the identity of its regulatory objects. Nevertheless, advocates of community mediation have commenced the process of implicating the community as an object of control within the informal justice domain, and have enunciated various 'truths' about its purported nature.

Yet what sorts of attributes have they ascribed to this 'community'? Despite their prevalent use of the term, advocates seldom define it explicitly[21], but do implicitly identify a number of core attributes. For instance, the CBA's Task Force alludes to a certain 'connection' between individual disputants and their communities that could be, "geographical, social, family, religious or other similar type of relationship" (1989: 42). This implies a conception - endorsed by many social expert mediators - of the 'community' as a physical and metaphysical 'space' within the social domain that has not yet been colonized by the state (hence the above reference to church and family 'or other similar type of relationship'). And this, I think, captures a core assumption of the discourse; namely, the 'community' is a warm, gentle, humane refuge, an escape from the

cold, alienating impositions of the state's court system. For some, this connotes a "profound nostalgia" for a Golden Age in which communities resolved their disputes endogenously (Cohen, 1985: 117-119), whereas for others it is a convenient way of masking their more cynical manipulations to secure employment in an economic environment where jobs are scarce.

Either way, the imagery is deeply engrained in the human sciences' symbolic use of the 'community' as a way of gaining a respite from estrangement, disorganization and homelessness - the negative outcomes of mass urbanization, industrialization, capitalism and the formation of the state.[22] Such iconography is transposed somewhat in mediation contexts, but its general point is preserved -- the 'community' is sketched as a hospitable, familiar and 'informal' arena in which individual disputants may be empowered by resolving their conflicts 'voluntarily', outside of the state's tutelage. After all, we are told, since mediation is voluntary and does not 'impose' settlement, it requires that free individuals choose an agreement, "something they can both live with" (interview, 11/01/1990). Here, being 'free' in the community implies a marked discontinuity with the tutelage of state imposition (i.e., being free from state control). Similarly, the heightened differentiation between court adjudication and mediation, which we encountered in the first chapter, is clearly symbolic of the attempt to ascribe to the 'community' the quality of being a non-imposing domain of freedom, of being "total comfort zone," for participants (*op. cit.*).

This image credits the community with a spontaneity that advocates portray as the basis of specifically democratic states. Many mediators see themselves as agents for social change, and see mediation as a "life skill" that is crucial for revitalizing democratic co-existence in the

community (interviews, 12/09/1991, 15/01/1990). For them, if democracies are to take heed of the 'people', they must return to the 'community' to listen to its needs. Notwithstanding the imputation of *a priori* 'needs', this exemplar is an important one for it situates the 'community' in a social interstice between the democratic state and the individuals whom this purportedly 'represents'. As such, the community is seen as a viable point of intersection for the mutual gathering of information: the state from individuals and *vice versa* (Butcher, 1985). This logic was clearly behind the initial formation of justice councils in British Columbia, even if it was susceptible to reversal under the hands of the Social Credit government such that justice councils were used to 'educate' the community (Cossom and Turner, 1985). In any case, what is significant here is that the 'community' is heralded as an object of governance that is capable of providing useful political information and of effectively disseminating central decisions. Or, to return to Gramscian parlance, the community is believed to provide an important contemporary site for struggles to educate 'the consent of the governed'.

A further implicit attribute in the advocates' discourse concerns their perception of a 'normal' community; that is, an organized domain of consensus that is conflict-free and which develops spontaneously when individuals interact in the absence of state intervention (Shonholtz, 1978, 1984, 1988-89). Conflict is viewed as abnormal, unhealthy and destructive -- as something that must be healed because it threatens the very stability and solidarity of 'spontaneous' social cohesion. It creates distances and destroys the harmonious communality that secures lasting social order. As such, the 'restorative' aspects of community justice are emphasized so as to help disputants,

> "better understand each other (i.e. developing communication skills) and work towards healing some of the damage done (e.g., mostly things said or done)." (personal

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correspondence with a programme organizer, 19/06/1990).

This focus on healing the 'damage done' is explicable when one considers that the integrity of a community is said to be dependent upon its ability to deal effectively with conflict, and to expunge tensions quickly and efficiently (Sander, 1980). Therefore, an important part of 'governing' a community entails neutralizing minor disputes as soon as they arise. Since mediation is inexpensive (mediators are volunteers), informal (not slowed down by 'red-tape') and able to secure lasting settlements, it is promulgated as a viable 'alternative' to the courts.[23] Mediation is offered as a 'solution' which maximizes voluntary individual participation in the community without dwelling on questions of cause, blame, guilt, or innocence (Harrington, 1985; Abel, 1982b).

This discourse on the nature of the 'community' presents a field of knowledge that licences particular political (governmental) practices. In particular, it sanctions a managerial, administrative functionalism that equates techniques to remove conflict from communities with the constitution of social cohesion. Here, the notion of dispute resolution is separated from discourses of justice, prudence or ethics and is tied to administrative discourses that seek the most efficient technical responses to the 'problem' of 'community conflict'.[24] As such, the overriding aim is merely to settle individual cases quickly, inexpensively and with minimum recurrence. This emphasis on administrative efficiency is reinforced by the position of funders who determine the 'success' of particular programmes purely on the basis of a head-count of the cases resolved. As one interviewee described,

"funders say, 'Okay, how many cases have you done?' And they will base their funding on how successful that list looks...its easier to count heads" (interview, 12/09/1991).

Clearly in such an ethos, questions of the etiology of conflict (e.g., wider inequalities deriving

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from race, class and gender) are subordinated, or silenced.

In these various ways, community mediation advocates attempt to create the 'community' as a regulatory object, as a structured field of action within which to regulate individuals who are involved in 'minor' conflicts. It is interesting to note that their emphasis on this object is quite consistent with the view of Canadian society as comprising a 'community of communities'. Also, their focus on the community is congruent with the previously referred to trend where the (Fordist) Keynesian Welfare State, and its 'social' domain, is being transformed (Burchell, 1991). In the more fragmented Post-Fordist (postmodern?) conception implicit in the advocates' discourse, cohesion is sought by removing conflict from specific communities and by linking these peaceful communities into an interlocking 'social order'. This clear fragmentation of the "social" domain into communities is highly significant, because it indicates the degree to which community mediation is implicated in Post-Fordist revisions of Keynesianism (Callahan and McNiven, 1988). However, this is not to say that the social domain, or Keynesian social security measures, have been entirely obliterated. Rather, the social domain is increasingly becoming part of a reconstituted arena which is fragmented through various processes: the 'return' to community; 'privatization'; 'deregulation'; 'decentralization'; 'deinstitutionalization'; and, 'informalization'. In short, through these developments, the 'social' has been splintered into smaller units of community in an effort to secure a particular kind of social cohesion in the modern age; that is, a type of cohesion that renders individuals politically docile but increases their economic utility (Foucault, 1977b).

Having thus indicated how the totalizing object of community mediation's control is developed,

it is important now to turn to the particular, differentiated entities which are said to comprise this. In its individualizing dimension, the pastoral model of community justice is chiefly directed at 'individuals' within the 'community' (or neighbourhood) who are involved in ongoing relations and have a 'minor' dispute; namely, 'disputants'.[25] The case-screening criteria (see chapter one), to determine whether particular disputes are suitable for mediation, further specifies who will be considered 'disputants' for mediation.[26]

'INDIVIDUAL' DISPUTANTS IN THE COMMUNITY

The disparate processes of community mediation which target specifically minor 'disputants', and channel them through a mediation process, are all implicated in creating the subjective forms of individualization that the advocates assume to be intrinsic to human subjects. In particular, the advocates' discourse presumes that disputants are free agents who - for the most part - live harmoniously with their neighbours in a community, but who need informal justice to assist them to settle disagreements amicably should they arise. One might also see this as an attempt to restructure potentially disruptive behaviour by guiding disputants' actions into fields of mediation expertise.[27] In these fields, disputants are obliged to accept the rules of mediation, to agree with its compulsion to act as reasonable, free, individual subjects who creatively try to reach settlement. They are required to be the "voluntary participants" who "negotiate an informed settlement to issues in a dispute" (Mediation Development Association of British Columbia, 1990: 3). Indeed, as was noted, in the first stage of a mediation, a (usually signed) commitment to abide by the rules of the session is obtained from all participants. In my observations of various role plays, mediators were told to be "firm", and even "aggressive", in encouraging and soliciting active responses from all parties. These are then subjected to the mediator's gaze (through

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reframing, positive or negative reinforcement, etc.), and in the process, mediation creates individual 'disputants' who, through this identity, comprise both the objects and subjects of this process.

But the identity of 'disputant' is created within the context of specifiable power-knowledge relations. We have already alluded (chapter one) to the emerging discourse on mediation that provides the foundation of the developing 'expertise' and the advocates' claims to 'professionalism'. To reiterate, such 'knowledge' portrays mediation as a non-imposing and voluntarily chosen process of resolving disputes in the community, one that permits disputants to develop their own settlements. It specifies criteria to determine when mediation is an appropriate dispute resolution response, and details a four-stage model that offers practical (i.e., 'how to...') guidelines on ways to achieve effective mediation (Burdine, 1990). Stated differently, this knowledge isolates diverse, and often subtle, methods by which mediators can structure a field of action within which disputants are obliged (if they are to continue as part of the process) to 'negotiate' mutually agreeable settlements.

There are a number of political techniques associated with the attempt to create *individual* disputants, and to deal with 'community' conflicts on an individual basis. In particular, this process of individualization occurs in two main ways. First, as Fitzpatrick (1988) notes, there are disciplinary techniques which target the human body as an object of regulation. These techniques individualize disputes by situating 'individual disputants' in fields of action where they confront each other as community members with 'minor' differences that could be resolved by appealing to an assumed common ground between them. The mediation session orientates people as

disputants, making them directly visible to the mediator's 'gaze'. Mediation, from this point of view, is an 'examination' in which individual bodies are spatially organized to make them highly visible to hierarchical observation and, subsequently, for normalizing judgement (Foucault, 1977b: 170-194).

Secondly, mediation employs various practices through which the 'subjectivity' of the disputants is regulated. These practices may be termed 'technologies of the self' (Foucault, 1988b), since they are directed at re-shaping the very self-identity of individual disputants from being 'selves' in conflict to 'normal' peaceful subjects. In the context of mediation, techniques of 'confession' are central to enjoining 'disputants' to speak the truth about themselves and their conflicts, to reveal their 'selves' and submit these to the guiding, 'caring,' concern of a delegated authority figure - the mediator (Foucault, 1981). With this in mind, let us now turn to an examination of both 'discipline' and 'confession' as they operate in the context of community mediation.

DISCIPLINE

With the marked demographic shifts of the Eighteenth Century, the rise of capitalism and the political ascendence of the bourgeois class, new forms of regulation began to appear. Foucault (1977b) describes how one such form, discipline, spread from its initiating institutions (eg., the army) to numerous other social contexts (eg., the hospital, the prison). Discipline constitutes a "political anatomy" of detail directed at singular bodies and concerned with structuring minute degrees of comportment. This emphasis on behavioral detail operates by separating bodies into component parts so that precise movements, small acts, can be specified. Implicit here is the

'knowledge' that the body is 'docile' and its capacities may be improved or transformed (through training), used, subjected and controlled (Foucault, 1977b: 136). In short,

> "Discipline 'makes' individuals; it is a specific technique of power that regards individuals both as objects and as instruments of its exercise." (Foucault, 1977b: 170).

In other words, discipline singles out 'individuals' as the objects of regulation, and in so doing plays an important role in producing these as control objects. Therefore, behind the enunciations of the 'true nature' and essence of the individual subject, lies an array of disciplinary techniques that operate continuously to forge its various social identities. They mark the body out in naked singularity, train it to be a signifier, and inscribe freedom and reason as its very essence. This was indeed a new scale of power that sought to produce useful individuals by developing capacities and aptitudes (for workers, markets) required by capitalist production and accumulation, while at the same time neutralizing resistance by encouraging political docility.[28] But such power does not simply repress 'innate subjectivity'; rather, it seeks to produce particular types of subjects implicitly in order to avoid provoking direct political attacks.

This bespeaks at least two major political rationales. First, through discipline, the logic of economics - i.e., of how to produce with maximum efficiency - is imported into the political realm (hence 'political economy'). This entails not only reducing associated fiscal costs, but also exercising power as discretely as possible in order to minimize direct resistance and maximize regulatory efficiency. Hence, discipline operates as a continuous, unobtrusive, far-reaching and intense means of structuring action that colonizes existing political forms. Secondly, discipline is directed at the ephemeral and indefinite domain of 'non-conformity' through which it structures potential forms of resistance. Inversely, this is to say, discipline operates through a logic of

'normalization' where non-conformity is created, defined, scaled and classified. This allows individuals in a social body to be placed in and around a 'normal' distribution. Here, norms operate not as universal, formal principles (e.g., as a 'law'), but rather as more supple, informal averages that are able to change with modifications to the scaling, classification and distribution out of which they emerge.

In his analysis, Foucault (1977b: 170-194) identifies three main sorts of practices or techniques associated with discipline: hierarchical observation (surveillance); normalizing judgement; and, a combination of these in the form of the now ubiquitous 'examination' (e.g., the medical, psychiatric, judicial, etc.). The first of these tries to organize physical fields of action in such a way as to orientate bodies through space as 'individuals' who are highly visible to "hierarchical observation". This is a technique which articulates visibility and power by organizing physical space to serve as a 'means of general visibility,' allowing a 'disciplinary gaze' to direct itself to 'subjects' of control. By focusing this gaze specifically and exactly, it is possible to render aspects of these subjects highly visible, and to regulates these through normalizing judgement. Such practices place bodies in fields of action which maximize their potential to come under the scrutinizing and watchful 'gaze' of a delegated authority figure, such as the expert, the guard, etc.. Bentham's 'panopticon' architectural plan for prisons offers an exemplar for the kind of techniques that operate here.[29] The efficiency of this mode of power lies in its invisibility to those who fall within its gaze, because its 'objects' never quite know when they are actually being watched. This nurtures a perception of continual surveillance and, in turn, encourages 'self-surveillance' within individuals. That is, since the expert's gaze is invisible to subjected individuals, they do not know when (or how) it will alight on their actions.

Community mediation increases the sum of existing hierarchical observation sites by situating 'disputants' in fields of action that make them highly visible to the hierarchical 'gaze' of sanctioned 'experts' (mediators). This amounts to an intensification of governmental regulation over the social domain, for now mediation problematizes 'minor' disputes in the community and targets actions that often - in effect - escape judicial or governmental control. How loudly one snores, how verociously one's dog barks, how teenagers relate to their parents, or how friends interact with one another are portrayed as potential threats to an assumed 'community order,' and hence as valid sites of control. Whether these are actually real threats to the order is highly questionable; regardless though, community mediation does extend panoptic practices to a more fragmented social domain, and could increase self-surveillance therein.[30]

Secondly, in community justice, there are a number of disciplinary practices that serve to evaluate the actions of those in its field and to subject them to "normalizing judgement". Such judgement sets up an entire system of rewards and punishments (outside of legality) whereby a vast array of comportment is encouraged to approximate a norm. It judges behaviour comparatively and situates behaviours within a scaled distribution around a norm.[31] This process concentrates on the details of actions, encouraging normality by rewarding conformity and punishing non-conformity. Mediators offer a variety of rewards in mediation sessions, ranging from verbal affirmations, encouragements and praise to body language signals. Moreover, for some participants, there is reward enough in having one's point of view acknowledged and listened to. This is reflected in one client's response to what he regarded as the most favourable aspect of mediation:

> "I got to say what was on my mind...I got to air my views to the mediators" (interview, 30/05/1990).

Similarly, mediators are able to use verbal cues and body language to 'punish' non-conformity. A non-conforming disputant may be interrupted with this statement: "This is now the third time you have violated the rules we set up at the beginning of the process - I'm afraid we cannot continue it you persist in doing so!" A trainer at one role play suggested that the effect of the statement could be enhanced by making stern eye contact with the offender and by speaking in a deep voice. As this trainer suggested, "When you get direct, the sugar coating falls away and this is your power as a mediator" (observation, 04/04/1991).[32]

The aim of this micro-system of punishments and rewards is not to repress actions on the basis of universal codes, but rather to evaluate behaviour against floating statistical averages that constitute 'norms' at given times and places. At root then, mediation entails a dual process here: one that seeks to negotiate norms pertinent to the case at hand; and, another that evaluates specific actions in relation to these.

With respect to the former, mediators try to establish 'common ground' between disputants through actively intervening with techniques such as questions, probes, reframing, 'brainstorming sessions', re-focusing discussions, redirecting issues, concretizing general assertions, private caucusing with disputants and so on. In effect, this emphasis on the common ground between disputants serves to establish 'norms' around a given dispute. At a role play session, the training mediator noted that, "as a mediator you have tremendous power" which could be used to some effect to elicit "norms" (observation, 15/04/1991). At all times, however, mediators are required to solicit agreement from disputants, thereby preserving the appearance of voluntary consensus in the process.[33] As such, mediation sessions require 'disputants' to transpose their previous

actions into a spoken format with the active intervention of mediators who ensure that a normative negotiation can occur within definite limits to avoid the possibility of developing iconoclastic norms.

For example, in one custody and separation mediation session, one women suggested that she should have a 'break' from her children for a few months - the head mediator simply ignored the suggestion and continued the discussion as though it had not been articulated. In informal conversations after the session, the mediator noted that the mother was in a 'bad way emotionally', and that she could not have meant what she had said. Without speculating on the apparent operation of gender stereotypes here, what is clear is the degree to which the normative framework of a mediation session is controlled by the mediators to ensure that it does not depart from wider 'community' norms. This is not an isolated case, for indeed all cases I have observed developed normative frameworks that were definitely not autonomous, or substantially different, from wider societal norms. On the contrary, the process of mediation performs the more specific task of selecting, from a diverse array of wider 'community' norms, those that appear most salient to the cases at hand. Indeed, mediators play a crucial role in selecting 'relevant' norms by shaping the 'agenda' that sets the stage for the resolution of disputes: disputants' respective transpositions are clarified, summarized and reframed by the mediator(s) into statements pertaining to the 'dispute' (Burdine, 1990: 21-22).[34] This reframing, or transposition, of what the dispute is 'actually' about also isolates which of the respective disputants' actions need to be modified if the parties are to settle their differences and 'normalize' their relationship.

Having thus established the 'norms' of the process, mediators then evaluate - using a micro

system of rewards and punishments - the actions of the respective disputants against the emerging normative framework. This is particularly evident in the final stage of the mediation process where participants are encouraged to resolve their disputes. In deciding what criteria are suitable for a fair agreement, and what specific action each 'disputant' needs to perform in order to achieve this, the mediator effectively helps to classify their actions around the norms they have generated. Here, disputants are implicitly evaluated against wider norms of a consensual, harmonious relationships in a peaceful community - in short, they are 'normalized'.

The third mechanism Foucault isolates as crucial to the functioning of discipline is the "examination." This combines the two previous techniques by creating a "normalizing gaze" that collects information about specific individuals and ranks them in relation to a norm. For instance, in the medical examination, or the psychiatric interview, or the mediation session, individuals are located in a field of visibility and become 'objects' (patients, cases, clients, etc.) through procedures of objectification (creating files, dossiers, tape recordings, or detailing agreements). In mediation sessions, the individual is defined as a 'disputant' (or 'client') and the dispute is developed into a 'case'. In so doing, discipline, power and knowledge intersect so that one finds,

> "the subjection of those who are perceived as objects and the objectification of those who are subjected" (Foucault, 1977b: 184).

Here power prowls continuously, preserving its invisibility by maximizing the visibility of those subject to its control.[35]

In community mediation, the examination takes the form of many practices that bring individual 'disputants' into a field of action - the mediation session - which renders them, as subjects of a dispute, highly 'visible' to the normalizing gaze of trained mediators. With the initial contact, the

case-screening procedures that determine which 'cases' are suitable for mediation, comes an entire battery of techniques that identify disputants as 'objects' for regulation. A case file is opened, and situates the disputants into a 'network of writing' which documents the date of initial contact with the Centre, who initiated the case, the nature of their dispute, steps taken to resolve the dispute and the outcome traced (Foucault, 1977b: 189). This documentation is then further transformed into statistical averages which serve as indicators of the 'success' of the programme to outside funders.

At the mediation session itself, 'disputants' are spatially located in fields of action which encourage them to express themselves and to avoid the appearance of power imbalances between them. Typically, they are seated in separated chairs (to reinforce individuality perhaps) around a table -- usually in a 'conference style' room with such aids as a large easel, clip-boards, charts, notepads, etc.. Many mediators adhere to the advice of the manual:

> "The setting should be as peaceful and private as possible and chairs should all be similar in height. If a table is used, it should avoid setting up power positions, such as one party having the head of the table or being placed in an adversarial position to the other. Round tables obviously avoid this problem" (Burdine, 1990: 15).

Although this varies from session to session, those that I observed did make explicit attempts to create settings that were conducive to fostering dialogue between disputants. In all these observations, great care was taken to ensure that I was seated in such a way as to underline my observer status (e.g., in the corner of the room, or on a raised platform at the rear of a room, etc.) to avoid the possibility of my interfering with the mediation.

In addition, a common theme in what seem to be diverse seating patterns of those mediation sessions observed was that, in most cases, mediators tended to favour sitting in such a way as

to 'block off' the doorway. When informally questioned on this, various mediators suggested that it was an intentional attempt to limit perceptions of 'escape', and to keep parties 'focused' on matters *in* the room. This is not insignificant, for it reinforces a closure that defines the physical and symbolic limits of the field of action which mediation seeks to regulate: those actions pertaining to a specific dispute. There are rules for entry and participation in this field, as articulated by mediators at the introduction to the session and referred to throughout the session. These rules, together with the organization of physical space at mediation sessions, serve to render 'disputants' highly visible to the mediator's normalizing gaze. This gaze - especially in the absence of its 'sugar coat' - is used to encourage conformity to 'normal' behaviour, and to diffuse - neutralize - tense, acrimonious exchanges.

The disciplinary gaze finds expression in a number of ways in the process of mediation, but in general, is closely associated with an intricate system of rewards (e.g., acknowledgement, praise, support, positive gestures, etc.) and punishments (e.g., eye contact, the use of brief, specific commands). Many of these are extremely subtle. For example, one of the means of 'normalizing' relationships between disputants is to ensure that they communicate directly with one another, rather than through the mediator. To achieve this interaction, mediators may simply instruct disputants to direct their discourse to one another, and insist that the parties address each other by name. Where disputants fail to do so, mediators may prompt them, or point to the other party through hand gestures and eye motions. However, should this fail, mediators may break eye contact altogether with the speaker and simply look at the 'listening' disputant, offering no supportive gestures until the speaker conforms to 'normal' interaction with the other disputant. Failing this, the mediator may interrupt the speaker to translate third party references (he or she)

into the first person (John, Jane). Such normalizing gestures are remarkably effective at prompting (even hostile) disputants to recreate the appearance of a 'normal' interaction between them. Another example of the mediator's normalizing gaze in the mediation sessions is particularly evident from cases where there are heated and angry exchanges between disputants. Here, the mediator's gaze is often sufficient for neutralization if directed in a particular way. For example, Burdine suggests that when people become angry, one way to avoid dealing with them is to, "Normalize the feeling if not the behaviour" (1990: 40). This may be accomplished, for example, by statements like: 'I understand that you are angry about the whole issue, with good cause, but if we are to resolve this dispute we have to avoid such screaming at each other.' Such interventions serve to diffuse the 'disruption' and, if successful, allows the mediator to maintain control over the situation.

In tandem, these disciplinary practices identify people as individual 'disputants' and attempt to restructure their relations through procedures of normalization. The aim is to 'restore' peaceful relations between disputants by neutralizing their disputes - to further the crusade of expunging conflict from the 'community'. Community mediation sessions extend the points at which individual lives become accessible to authority-figures and could - if successful - expand 'normality' to greater numbers in the population, thereby helping to preserve a given order. But we should recall that if discipline operates on the body, there are also a variety of techniques that help individuals to 'create' themselves as particular subjects in the confines of mediation sessions. That is, there are also various processes whereby, "a human being turns him- or herself into a subject" (Foucault, 1982: 203). One such technique that operates alongside discipline in mediation is confession. Discipline and confession interact in mediation sessions to enjoin highly

visible individuals to speak out, and to present a definition of the 'self' for public assessment.

CONFESSION

The subjective 'self' is a core element in contemporary liberal democracies. Yet, as Rose

succinctly notes,

> "The regulatory apparatus of the modern state is not something imposed from outside
> upon individuals who have remained essentially untouched by it. Incorporating, shaping,
> channelling, and enhancing subjectivity have been intrinsic to the operations of
> government" (1990: 213).

Subjective moulding of this kind is not simply accomplished through the tentacles of an *external*

but omniscient (Orwellian) state apparatus; rather, it is achieved through a complex deployment

of heterogeneous 'technologies of self'.[36] These technologies are found in diverse locations

throughout the social network, and indeed, community mediation houses a number of techniques

that seek to produce a particular (normal) 'self-identity'. That is, it provides a forum in which

'disputants' are encouraged to enunciate specific conceptions of themselves in relation to a given

conflict.

To be sure, this is not a voluntary quest: it is a precondition for participation in the mediation

process. Disputants are therefore obliged to contribute actively and to be, "committed to working

together to resolve the conflict" (Burdine, 1990: 6). They are required to enunciate various

definitions of 'themselves', their 'needs', their perceptions of fairness and their conception of an

acceptable resolution. They are required to be the 'authors' of the dispute settling process.

Mediators, for their part, are encouraged to "dig for more information" when it is not

forthcoming, and to sift through it for 'relevance' when it is (Observation, 04/04/1991). In

addition, the mediator scrutinizes the disputants' 'interests', fears, emotions and hidden assumptions, and either tries to neutralize those that appear obstructive to achieving settlement, or reinforces those self-identities that are likely to increase the chances of resolution.

In this way, disputants expose their 'motivations' and 'needs' to the guiding influence of a mediator in confidential (private) settings that have (public) consequences for the wider 'community'. In particular, the norms established in the mediation sessions typically reflect wider 'community norms', and one of the tasks of the mediator is to try to align disputants' motivations with the overarching norm of peace. The precise practices in mediation which attempt to do this resemble a form of control whose lines of descent are closely tied to the Pastoral model of power, namely the confession.

This becomes especially clear when one considers the similarities between mediation and confession. Hepworth and Turner (1982: 6-7), propose three central criteria for defining confession: there is a confessor who confides fully about his or her transgressions to an authority; one can locate a discourse which details the reasons for its practices; and, it entails a private act of speaking out that has public consequences. Community mediation satisfies all three criteria rather nicely. But the similarities do not end here, for mediation, like confession, is a 'confidential' practice which,

> "lies at the sensitive intersection between the interior freedom of individual conscience and the exterior requirements of public order" (Hepworth and Turner, 1982: 15).

Therefore, the political technologies of self in mediation are genealogically related to pastoral practices of confession that sought - through an act of charity - to reconcile sinful individuals with a sinless community. To return to the pastoral metaphor, this was an act of grace which

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guided the passage of wayward sheep back into the wholesome flock. Confession, unlike excommunication, is an ameliorative, restitutive, or remedial set of practices which provide a passage for the faithful, with their momentary lapses of faith, to return to the congregation. Of course, there are many differences between the confessions of disputants to mediators and those of congregants to pastors, yet the sorts of practices involved in both are similar.

But in order to understand the kinds of practices at issue here, let us point to the specific form that confession took in 1215. In that year, the Lutheran Council codified the Sacrament of Penance that effectively restricted the practice of compurgation (by which acquittals of a charge were secured through the positive testimony of credible witnesses[37]). Instead, this code called upon individuals to vouch for themselves in annual confessions and, as such, to enunciate a subjective 'self' that could be scrutinized by authorities (Rose, 1990: 219). This political technology expanded outside of the church with the rise of capitalism and the dramatic growth of the 'individual' (and disciplinary practices). It was particularly concerned with the inscription of 'freedom' and 'subjectivity' onto this 'individual'.[38] Indeed, one may say that

> "The truthful confession was inscribed in the heart of procedures of individualization by power" (Foucault, 1978: 58/59).

By the Nineteenth Century, it was a core technique in a wide range of institutions; the medical examination, the psychiatric interview, the juridical inquisition. This trend has continued, and indeed,

> "The obligation to confess is now relayed through so many different points, is so deeply ingrained in us, that we no longer perceive it as a power that constrains us; on the contrary it seems to us that truth, lodged in our most secret nature, 'demands' only to surface..." (Foucault, 1978: 60).

Of course, the technique has undergone modifications and adaptations: the identities of the

confessors are multiple; the knowledge surrounding confession are different; and, the social identities of those to whom confessions are made have changed (physicians, psychiatrists, social scientists, mediators). But the technique of exposing one's self for public scrutiny, judgement and guidance, to ameliorate a departure from the faith (or norms) of the community, remains fundamentally intact.

In the case of community mediation, techniques of confession seek to reintegrate wayward disputants into the peaceful communities by guiding the very 'free' selves, the subjectivities, that have 'chosen' to participate in the process.[39] As with pastoral confessions, the self is obliged to speak out, to confide fully, to reveal his or her true identity, for the mediator to offer guidance and encouragement along the path that returns disputants to peaceful, 'normal' co-existence.[40] The more comfort this guidance offers to the disputants, the more likely they are to embrace its normality (Rose, 1990: 220). The implicit vision of disputants as confessors here is one of 'free', 'equal', 'reasonable' subjects who are motivated to speak out and resolve their disputes. Indeed one of the central tenets of the process is that, "all pertinent information will be shared" (Burdine, 1990: 17). This obligation to speak out in mediation is partially established at the outset when a dispute is assessed, against certain criteria (norms), for suitability. In particular, Burdine (1990: 5-6) suggests that the most suitable cases are those where disputants are involved in ongoing relations (i.e., they come into more or less frequent contact even if they do not want to), they have explored other alternatives, are voluntary participants and are motivated to reach an agreement. Each of these criteria increases the likelihood that disputants will be motivated to settle the dispute, to speak to each other about the conflict. In turn, this increases the probability that they will agree to follow the rules of mediation, one of which is to speak out about the

dispute (confess). In other words, disputants are 'free' to express (confess, define) themselves - within the parameters articulated in the (implicit and explicit) rules of mediation - as subjects, to enunciate concepts of self in relation to the dispute.

In parenthesis, the converse also holds: mediation cannot work if any of the 'disputants' refuse to speak out. For example, in an observation of a Chicago programme, a poor women of colour had come into conflict with her landlord. Clearly intimidated by the process of mediation, her only response was to verbally castigate the landlord for an apparent breach of contract. When told by the mediator that her outbursts contravened the spirit of mediation, she retreated into almost complete silence, offering dismissive gestures. Her's was surely an act of refusal, of resistance, and certainly highlighted the degree to which the entire process of mediation requires the *active* confessions of its participants. Indeed, without such participation, the mediation - to use the words of the mediator involved - "was flat" and hampered by uncomfortable silences. The obligation to confess appears, therefore, crucial to the operation of effective mediation.

With this in mind, the advocates' discourse requires the mediator - a "neutral third party" - to 'help' disputants develop a mutually acceptable resolution of their conflict. An important assumption here is that disputes have a certain latency in which their 'real nature' cannot be ascertained without comprehensive information, without all sides of the dispute being told and interpreted. That is, the dispute is presumed to be multifaceted, and more complex than any one presentation. Moreover, it is the mediator who must accurately interpret, summarize or reframe the dispute with an eye to establishing a 'common ground' that is acceptable to disputants and from which a settlement plan can be constructed. This is significant for confession cannot occur

without the presence of someone,

> "...who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile" (1978: 61/62)

Consequently, the mediator emerges as a pivotal agent in the confessional practices of mediation. Her or his exegesis re-presents the disputants as particular kinds of selves (subjects), and in so doing, details what sorts of modifications are required of their self-identities to enable conformity to peaceful co-existence. In this light, mediation emphasizes that it is unconcerned with apportioning guilt or blame. It is, instead, concerned with trying to work out a settlement, and as such requires that disputants be 'open' to entertain possibilities which they may not have previously considered. For instance, they are required to understand, and repeat, the point of view articulated by the person with whom they are in conflict. As well, mediators use the technique of probing disputants for more information, and ask them to 'brainstorm' about possible ways of resolving the dispute. All of these practices encourage disputants to be more flexible and to experiment with altered self-identities that are less likely to provoke future conflict.

The mediation discourse further licences the use of particular political techniques to guide confessions, public expressions of the self, in a way that increases the probability of settlement. For example, the tools of refocussing, reframing and seeking common ground are devices that actively guide the enunciations of self offered by disputants. Moreover, Burdine advises mediators that,

> "You may also have to interject in order to keep a speaker from wandering too far afield, such as the detailing of a lengthy past history, or lengthy anecdotes. Remind the speaker of the purposes of the opening statement and refocus them on the last relevant statement they made" (1990: 20).

This theme was reiterated by a trainer in a role play session who advised trainee mediators not to use "blaming language" but always to remember that: "You are driving the car - take them [the disputants] where you want to go" (observation, 04/04/1991).

Burdine offers numerous other techniques for 'guiding the process' (1990: 24), but in each case the so-called 'neutral' mediator directs the format of the confession and thereby guides the ensuing enunciation of self-identities.[41] In light of this, the mediator is surely less "neutral" than might appear at first blush. This is not to say that s/he necessarily sides with one of the disputant (although this does, no doubt, happen[42]), but rather that the mediator has already taken the side of 'consensual community order' in facilitating a process that is designed to 'restore' peace and harmony to the community. This bias eclipses the potentially positive effects of conflict (Abel, 1981) by focusing mediation almost entirely on settlement. It only allows disputants to entertain criteria of fairness or justice within the extremely limited context of deciding what a "fair agreement" is (Burdine, 1990: 45); namely, one that conforms to community norms. The possibility of fairness outside of agreement, outside of community norms, is not considered because it lies outside of the articulations of this discourse.

The above discussion provides a somewhat brief glimpse of various ways in which people are guided into particular forms of subjectivity through the mediation process. Considered as a form of pastoral power, confession in the diverse local contexts of mediation arms approved agents with a regulatory technique that not only helps to guide the intimate process of the individual defining him or herself as a subject, but also provides detailed information about the kinds of conflicts that transpire at a local level. Such information is important for the technocratic,

administrative mode of regulation of which community mediation is a part and which justifies its expansion.[43]

THE GOVERNMENTAL RATIONALITY OF COMMUNITY MEDIATION: INTEGRATING 'COMMUNITY' AND 'INDIVIDUAL DISPUTANTS'

With the previous analysis in mind, the governmental rationality of community mediation in British Columbia becomes somewhat more transparent. One sees how the deployment of community mediation, its discourse and its practices, reflect a governmental logic that is both totalizing and individualizing.[44] We have examined the various kinds of practices involved in the creation of its regulatory objects: the 'community'; and, individual, free, subjective, disputants. This is a logic that seeks to restore collective peace by individualizing and neutralizing conflict through a process of mediation (Peachy, 1989b). Yet this betrays the profoundly pastoral nature of its political rationality, for it thereby seeks to integrate the concerns of the many (the community) with those of each (the individual): *omnes et singulatim*.[45]

This coincides rather precisely with Foucault's observation that,

> "I think the main characteristic of our political rationality is the fact that this integration of the individuals in a community or in a totality results from a constant correlation between an increasing individualization and the reinforcement of this totality" (Foucault, 1988b: 161-162).

It also isolates the nub of a governmental logic that attempts to integrate the personal aspirations of each individual member with the goals of authorities. In British Columbia, one can point to community mediation as one of the ways in which the government attempts to secure its neo-conservative community order, its community of communities, by establishing in each individual the personal goal of consensually 'getting along' with all others, and to learn appropriate conflict

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resolution skills (hence its support for school-based mediation, conflict resolution programmes, and so on). But how is the logical integration of the one and the many accomplished practically? The key is processes of normalization; by defining the 'normal' disputant as one who has a range of choices open to him or her, it becomes possible to construe the domain in which that person operates as a domain of freedom, (i.e. the 'community') outside of the state. Mediation integrates its objects around a common theme of 'normality' by enunciating 'the normal community' as a necessarily harmonious one, and construing the 'normal' relationship between individuals as a 'non-disputing,' peaceful one.[46]

In more general terms, community mediation programmes are encouraged to adopt this vision of normality through various techniques of inclusion and exclusion. For instance, state-agencies grant or withhold funding, networks open or close their doors, and organizations seek alliances or confrontations. Through such procedures, community mediation programmes are encouraged to endorse a conservative view of mediation, and are prompted to forge homologies between normal (non-disputing) individuals and normal (peaceful) communities. The governmental logic here is one of creating a politically docile realm of normality that perpetuates, rather than undermines, the existing *status quo* (Fitzpatrick, 1988: 190). It sees strength in ordered, harmonious, consensual, communities that are integrated with 'free individuals' who resolve their disputes 'within' the community, and without recourse to the state's court system. Here, community mediation emerges as a pastoral power that integrates 'communities' and 'individuals' by expunging 'minor conflict' and aligning the personal aspirations of subjects (i.e., not to be disputants) with the wider goal of a non-rebellious 'community of communities'. It creates its objects and unites them through processes of normalization, and simultaneously entrenches the

norm of agreement, harmony and consensus[47]. It defines 'normality' as a state in which 'minor disputes', when they arise, may be 'settled' through mediation - the symbolic image projected is that contemporary society may contain resolvable minor disputes, but no irresolvable "major" disputes. The existing normative order thus appears as being fundamentally intact.

CONCLUSION

This chapter has identified the governmental logic of community mediation as a pastoral one directed at governing individual 'disputants' in 'communities'. As we have noted, the process of mediation creates the 'objects' of its regulation in various ways and with different effects. Our discussion has paid particular attention to the ways in which mediation produces individual disputants through the techniques of discipline and confession. It has also looked at how normalizing processes aim at integrating these regulatory objects through images of the 'normal' community (i.e., one free of conflict) and the 'normal' (i.e., non-disputing) individual. Moreover, we noted the manner in which advocates of community mediation view the integrity of communities as being dependent upon the well-being of the individual members who constitute it. In this one sees a decidedly pastoral political logic that articulates each with all.

Having thus detailed the governmental rationality of community mediation, a further question arises: how does this rationality relate to other political rationalities (e.g., the state's law), and what are its effects? We have noted one effect, namely that community mediation fragments the social domain by locating informal justice in the 'community'. Moreover, by reconciling individual 'subjectivity' with local community norms, which themselves form part of a community of communities (a social order), one begins to see an emerging picture: the

reconciliation of disputants and communities has the potential - as with previous forms of governmentality - to help further the strength of the state. In particular, when the pastorship of community mediation is deployed as a 'system-based', complementary alternative to the legal system (e.g., in British Columbia), it often serves to reinforce the strength and integrity of the liberal state and its legal system. This is by no means a necessary or inevitable effect, and for that reason it is necessary to detail - in a specific historical context - the relationship between the pastoral power of community mediation and the sovereign-law model of power associated with the court system of the modern liberal state. Charting the auspices of this relationship is crucial for developing an adequately informed strategy by which to engage current community mediation practices in struggles for social justice.

END NOTES FOR CHAPTER 5

1. See, for instance, Foucault (1977b: 27) and (1980: 131ff).

2. Political arrangements of the past have appealed to diverse images: to justice, happiness, divine and natural laws (e.g., St. Thomas, Aristotle, Hobbes); to practical rules for a Prince on how to govern properly (Machiavelli); or, to the 'welfare' of populations (see Foucault, 1979).

3. This theme enunciates a mode of governance that is different from the law and sovereign model of power (Foucault, 1978; 1980) and which takes as its exemplar the notion of 'pastoral care' (rather than 'sovereign rule'). Here, singular existences (of each) enter into political calculations regarding the collective (of all) by equating the strength of the latter with the well-being (welfare) of the former.

4. Church registers bear witness to the details of individual lives that were deemed of relevance to pastorship (Hepworth and Turner, 1982).

5. In pursuit of the 'reason of state', the discourse assumes that the state was,
   "governed according to rational principles which are intrinsic to it and which cannot be derived solely from natural or divine laws or the principles of wisdom and prudence; the State, like Nature, has its own proper rationality, even if this is of a different sort" (1979: 14).

6. Here the term 'police' is used in a far broader sense than is customary in common parlance today, being closer to what we speak of as 'policy'. In any case, these are etymologically related (see Gordon, 1991).

7. See Foucault (1979).

8. Indeed, he suggests that the model now operates in numerous institutions, including, the family, psychiatry, medicine (Foucault, 1982: 214), and perhaps even informal justice (Foucault, 1988a: 168).

9. Hence the rise of various discourses, including demography, statistics (i.e., a description of state) and later criminology, psychiatry and sociology. See Foucault (1979: 16) and Hacking (1991).

10. Especially important here was the rise of 'political economy' which, in effect, commenced the movement away from the previous 'art of government' to what we now commonly refer to as 'political science' (Foucault, 1979: 18).

11. As he puts it, here
    "modern man is an animal whose politics places his existence as a living being in question" (1978: 143).
In this sense, bio-power,
    "brought life and its mechanisms into the realm of explicit calculations and made power-knowledge an agent of transformation of human life" (1978: 143).
This reversal has certain effects, including on the sovereign's unequivocal right to extinguish the lives of subjects. Indeed, the strength of pastorship lies in its capacity to preserve, nourish and sustain life within a population. Yet, there are occasions where taking the life of a subject may be deemed necessary, but this is now rationalized in different terms:
    "One might say that the ancient right to take a life or let live was replaced by a power to foster life or disallow it to the point of death" (Foucault, 1978: 138).

12. The 'social security' of the welfare state is clearly at the back of Foucault's mind here, for he tells us that the government of populations occurs through the "technical apparatuses of security" (1979: 20). This was a line of thinking he developed in lectures on the liberal appropriations of pastoral power where the theme of individual liberty - as we shall see in the last chapter -is closely tied to notions of security (Gordon, 1991; Burchell, 1991). In any case, one can identify the rise of the welfare state, with its apparatuses of social security, to a climate where the pastoral theme was expanding beyond populations into the 'social' (with knowledge such as sociology) and where

the administration of 'individuals' through 'care' was embraced.

13. See Foucault (1979: 17). Here, the population's strength is valued over say a concern for how a sovereign might maintain rule over citizens as was the case with Machiavelli, or from whence the sovereign's legitimacy could be traced (e.g., Hobbes).

14. As a Nineteen Century example of this, Foucault (1978) points to the dramatic growth of discourses on sex in which the sexualized individual body was integrated with the life of the 'species'. Thus, as Dreyfus and Rabinow put it,

> "Sex became the construction through which power linked the vitality of the body together with that of the species" (1982: 140).

Furthermore, the shift from a 'symbolics of blood' to a 'biological' version of sex, with its relation to individuals and the species, gave rise to modern versions of racism. Foucault (1978) sees this connection through sex as an insidious expansion of an administrative network that posed in the form of greater sexual freedom.

15. Westcoast Mediation advertisement/pamphlet.

16. op. cit..

17. This takes seriously the realization that governors may identify governed individuals as members of a congregation to be served, as judicial subjects with legal rights, as mere resources for exploitation, as live individuals of populations that must be managed, etc.. (Burchell, 1991: 120).

18. For example, Landau, et al. (1987), CBA (1989), ALRI (1990), Shonholtz (1978, 1984, 1987), Wahrhaftig (1982) and Sander (1977).

19. In the course of my research there were two large conferences that focused on aspects of community mediation in Vancouver: one on family mediation and the other a CBA annual meeting whose central theme was alternative dispute resolution (CBA, 1989).

20. No doubt, the Federal Government's image of Canadian society as a 'community of communities' helped advocates of mediation in their bid to redress minor conflicts within the context of local 'communities'.

21. This absence betrays a realization that conceptual ambiguity can - in some cases - mean broadened political appeal (see previous chapter and Cohen, 1985: 116).

22. See O'Hagan (1988), Cohen (1985) and Young (1990).

23. For example, see Burdine (1990), Landau, et al. (1987), Peachy et. al. (1983), and Folberg and Taylor (1984).

24. This echoes Harrington's (1985) and Hofrichter's (1982) observations on the technocratic dimensions of mediation, where politics is reduced to simple 'blind necessity' (Abel, 1982b).

25. This realization, of course, echoes the point made by many of the critics, including Abel (1982b), Harrington (1985), Santos (1982) and Baskin (1988), that informal justice trivializes (hence the disputes are considered "minor" (see Sander (1982), Danzig (1973) and Tomasic and Feeley (1982: 60-77)), neutralizes, and most important for our argument here, **individualizes** conflict within communities. These should not, however, be seen as different, for very often individualization involves the trivialization and neutralization of such conflict.

26. As noted previously, community mediation elicits the participation of (i.e., directs itself at) these disputants by "marketing" itself as an informal, voluntary, non-coercive, alternative to the courts, and by 'educating' 'individuals' in a 'community' about the claimed advantages of its processes. In the absence of success through such appeals, however, many programmes resort to more coercive 'referrals' from formal justice agencies to secure higher caseloads (Tomasic, 1982: 229). Moreover, from my observations of the mediation process, particularly when dealing

with commercial and minor criminal disputes, it appears that the threat of having to take unresolved conflicts back to courts is used as a means of securing participation.

27. Abel suggests that this tends to have the effect of informal justice being,

"directed toward the economically, socially and politically oppressed...[and is]...preoccupied with the poor, members of ethnic minorities, and women" (1982b: 274).

My own observations in British Columbia, though insufficient to make confident statements to the contrary, at least initially suggest that we treat Abel's assertion with caution. Indeed, what has struck me in the course of research is the extent to which rather less oppressed members of society (e.g., corporate business people) are attracted to mediation. This, however, is not to undermine Abel's more profound point that mediation, in effect, currently serves to perpetuate the stratified and inequable status quo of capitalist societies.

28. In this way,

"discipline produces subjected bodies, 'docile' bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience)" (Foucault, 1977: 138).

29. See Foucault (1977b: 195-228).

30. I say 'potentially' here, for to suggest otherwise in British Columbia would be to over-exaggerate its current importance as a control mechanism. Nevertheless, in so far as it seems poised for substantial expansion, this possible threat must be taken seriously.

31. Here Foucault is clearly attempting to distinguish between the political rationales behind law and discipline (Foucault, 1977: 222 ff). As we shall see, Hunt (forthcoming) correctly disputes this radical separation, in recognition of the shifting norms which affect routine applications and interpretations of legal codes. However, one might here point to a difference in as much as discipline, by definition, operates without the presence of explicitly stated codes. Stated thus, we need not deny the 'normative' component of law, while still clinging to the notion that discipline operates in the absence of formulated codes. Perhaps, too, it is this absence which makes discipline more flexible than law, and hence its attraction to a Post-Fordist ethos of flexibility (Selva and Bohm, 1987).

32. It is perhaps pertinent to note here an insightful study by Silbey and Merry (1986) which examines four strategies used by mediators to mobilize power in mediation sessions in an attempt to achieve settlement. In particular, these authors refer to the ways in which mediators present themselves, how they control what is said at a session mediation, how they regulate the process of mediation and, finally, to various means of soliciting norms and commitments from disputing parties. See also Sloan (1992) for his interpretation of the kinds of 'power' available to mediators.

33. This is mainly achieved verbally through asking questions - derived from my observations - of the following kind: "are you, [Joan], comfortable with that?"; "[Brian], do you agree that..."; "how does what I have just said sit with both of you?"; "we've agreed that the main issue is...have we not?"; etc..

34. For example, if the dispute revolves around, say, a neighbour accusing another of stealing his or her garden hose, the mediator would reframe this into a positive and neutral statement. For example, the latter might suggest, "It seems that you Sally, and you Mike, wish to re-establish trust in your interactions as neighbours" rather than the more direct suggestion that these 'disputants' are here to establish whether one stole the hose or not. This no doubt requires a certain alertness, for the mediator must absorb the information quickly and then reframe it in such a way that it increases the chances of later settlement (for further examples, see Burdine, 1990: 21).

35. Here Foucault makes an interesting observation (1977: 193). No longer do we find an 'ascending individualization' of Feudalism where high social profiles are reserved for the 'great' individuals, the heroes, the heroines, the nobility and to those closest to central power. Now there is a 'descending' individualism where those who are most subject to power are well known: the dossiers, the records, the files, the agreements, the judgements and the data banks contribute to the creation of their identities. And it is this information which serves as the

foundation for social scientific attempts to determine the essence of the social.

36. Foucault (1984: 352-257; 1986 - see Davidson (1986) for an overview) constructs various categories in order to explore this through the notion of 'ethics' (ethical substance, mode of subjection, self-forming activity) and through the idea of how subjects are produced through 'technologies of the self' (Foucault, 1988a, 1978). It is mainly to the latter that we shall direct our analysis here.

37. See Foucault (1978: 58).

38. See, for instance, Hepworth and Turner (1982: 11) for a more extended analysis of the confession and subjectivity. Foucault (1978, 1982, 1988b), Burchell (1991) and Rose (1990: 220-228), however, make the more explicit link between individual, subjective freedom and the confessional practices within liberalism that produce this. It is both the irony and strength of these practices that they should present their product as a 'natural' or 'essential' one.

39. This is most clearly the case with VORP programmes, where 'offenders' are given an opportunity to pay restitution to victims - partially by coming 'clean', apologizing, facing responsibilities, etc.. It is, however, also evident from other forms of mediation where the compulsion to speak out about a dispute (to tell one's side of the story) is part of the process of negotiating a self-identity that will allow settlement of a dispute and can be accommodated within a 'peaceful' community.

40. No doubt, too, the need to have detailed information is important for discipline for it permits one to set up dispute-specific 'distributions' to which the 'normalizing' gaze can be directed.

41. This is particularly pertinent to the last two stages where the issues set up in the agenda of the second stage are explored and a means of resolution developed.

42. Indeed, there appears to be rather general consensus amongst the mediators interviewed that the most difficult mediations to conduct are those where their sympathies lay with one of the parties. For this reason, many favoured co-mediation so that they could cede the mediation to another mediator in the interests of preserving 'neutrality'.

43. It is important to realize that we have here focused on the *techniques* of mediation, rather than on the subject identities that these produce. This is a critical distinction because even though Foucault's work is extraordinarily insightful on political techniques, his work has been rather less successful in elucidating the ways in which wider patterns of social inequality replicate themselves through these techniques in micro-contexts. As indicated, the kinds of subject identities produced through the notion of 'disputant' often reflect the gross inequities between dominant subject identities of capitalist societies (notably, gender, race and class). Indeed, the very technique of confession is an important way in which wider (unequal) norms may be perpetuated and people encouraged to assume identities commensurate with these.

44. In community mediation, as the critics have noted, the degree of conflict within a community is seen to depend upon the success of regulating individuals in such a way as to avoid disputes between them. The assumption here is that conflicts in a community can be explained through individual factors (e.g., failures in communication, intransigence, etc.) rather than through wider contradictions in capitalism generally (Abel, 1982a; 1982b; Baskin, 1988; Santos, 1982). In this sense, conflict is individualized and this affords the opportunity of describing disputing individuals as problematic, or in need of assistance to restore them to a normal, non-disputing condition.

45. No doubt, as we shall see, the state plays an important role in creating the concerns of the many, the 'community'.

46. This derives from Fitzpatrick's (1988) insightful observation that informal justice is a normalizing mode of regulation.

47. Harrington (1985) and Abel (1982b) offer warnings that informal justice comprises an insidious means of promoting 'consensus politics'. The need for such politics is important for, as Abel (1982b: 285) observes, whereas conflict may have served to reinforce social norms in homogenous societies, it tends to undermine the normative order of heterogeneous societies.

CHAPTER 6

INTERSECTING POLITICAL RATIONALITIES:

'GOVERNMENT AT A DISTANCE' AND RESISTANCE STRATEGIES

In its search for an appropriate grid of intelligibility through which to view community mediation, this thesis has so far noted certain problems with both the advocates' and the critics' conceptions of community mediation. It has argued that community mediation is best understood as part of a wider series of processes through which liberal state regulation has increasingly been 'governmentalized'. The genealogy of its deployment in British Columbia reveals complex lines of descent that have nurtured an implicit political logic. To complete the task specified in our grid, however, it is necessary to explore the relation between community mediation and state-authorized forms of dispute resolution - the 'law' - as an important antecedent to thinking about an alternative politics of law. There are two distinct political logics at issue here: the state's 'sovereign-law' model of power and the pastoral model of community mediation.[1]

To the extent that these respective models are articulated at a given time and place, through 'synoptic' practices at particular points in a society, one might speak of them as forming an amalgamated mode of regulation. But the amalgamation is never fixed, determined, or static, especially when dealing with 'experimental' and somewhat tangential control forms - such as community mediation currently is. To hypostatize this tenuous amalgam as a completed 'expansion' is to exaggerate, if not obfuscate, the relation at hand. No doubt, when the political forms are successfully articulated, they do increase the quantum of control sites and potentially enhance the state's *capacity* to regulate people's action. Nevertheless, when dealing with pastoral

forms of power, the outcome of such control is rendered considerably less predictable because it entails governing people 'at a distance' through more flexible procedures of the kind found in informal justice.

Such indeterminacy must surely militate against the pessimism embedded in reductionist fears of monolithic state expansion, for it suggests, at least, that the spread of an alienating, 'professionalised,' court-room justice throughout the dispute resolution arena is never a *fait accompli*. There is always room for rupture and dislocation, making it possible to alter synoptic practices that hold particular articulations intact.[2] Here, the indeterminacy of the social realm becomes apparent, and if one is to develop strategies to resist synoptic practices that reinforce liberal (professionalised) justice, it is essential to understand what is being articulated, and how, as well as to what political end. To be sure, in the alternative dispute resolution arena of British Columbian society, the sovereign-law and pastoral models of power are articulated in complex ways through various synoptic practices. Since community mediation has been deployed as a 'system-based, complementary alternative' to litigation in British Columbia, it is *ipso facto* linked to the legal system. This link is, moreover, a constitutive one which articulates the sovereign-law model of power within formal legality and the pastoral model of informal justice. The ensuing association has the effect of not only maintaining *law*, but also of preserving *order* in the social domain. However, to comprehend the political importance of the nexus between law and community mediation in the dispute resolution arena, and to thereby think of ways to 'take community mediation seriously', it is necessary to detail the rationality of the legal model of power, before exploring the nature and effects of their constitutive alliances.

THE 'SOVEREIGN-LAW' MODEL

Many critics of community mediation have correctly identified a cleavage between two models of power in the dispute resolution arena: on the one hand, there is a visible, centralized political form of a sovereign (liberal democratic) Parliament exercising control over subjects through law; on the other, there are more ramified, diffuse, capillary-like pastoral practices of informal justice that employ 'norms' (rather than laws), and are directed at live individuals in a community.[3] Since we have already detailed the latter model in the previous chapter, let us focus on the former, the sovereign-law model, bearing in mind that we are here dealing with the rationality of political practices that have assumed various forms at different times and places.

Furthermore, to reiterate, let us recall that some of Foucault's texts (notably 1977b; 1978; 1980) have misjudged the significance of contemporary versions of the sovereign-law model, especially with respect to the dispute resolution terrain. In particular, in his attempt to play up the importance of disciplinary forms of power, he has - as Hunt (forthcoming) correctly points out - seriously misconstrued the nature of law, its contemporary significance in society and, hence, paid insufficient attention to conjunctural patterns of 'combination' and 'recombination' between law and other models of power.[4] In so far as Fitzpatrick (1988) endorses Foucault's position in these texts, he too accepts a dubious conception of formal legal apparatuses, even though he does pay considerably more attention to the relations between the 'law' and the 'discipline' of informal justice. However, his attempt is plagued by a consistent failure to examine the respective political models, the rationalities and practices, of which the courts and mediation are a part.[5] In an attempt to redress this oversight, let us examine a contemporary version of the 'sovereign-law' model, liberal democracy[6], which has profoundly influenced the dispute resolution field of

British Columbia and indeed may even be said to have a hegemonic grip over it.

The roots of the 'sovereign-law' model lie - *inter alia* - in: the ancient Greek *polis*; Roman society's notion of the *patria potestas* which gave a father absolute power over the lives of slaves and children; religious regimes where power was formally ensconced in the church hierarchy; the various forms of Monarchical consolidation; and, the modern state with its parliamentary and professional officials.[7] In each case, there is some conception of sovereignty, of an entity that claims a legitimate right to exercise power over a specified domain (be it geographical, social, or political). The political logic of modern versions of this model refer to Hobbes's (1968) conception of the "Leviathan", where power is thought to be concentrated in the hands of a centralized authority, a sovereign, who stands at the pinnacle of a hierarchical formation and wields power over citizens below through law (Held, 1987). Power, in this model, is presented as an instrument of constraint, of repression, which demands - or forbids - legally specified actions (rights and duties) of those who are governed. Whilst coercion is fundamental to this model, it is not exclusively coercive (any more than, say, the pastoral model is one entirely based on consent). Rather, there are various degrees and combinations of coercion and consent in all models of power[8]; indeed, as Weber (1980) suggests, the authority of a sovereign requires at least an element of legitimacy if it is to survive, and this suggests a degree of consent on the part of those that are governed.[9]

In the context of liberal democracies, such as the one found in British Columbia, the sovereign (Parliament) claims legitimacy by pointing to the democratic procedures through which it was elected.[10] The underlying (liberal) assumption here is that 'individuals' are 'naturally' free and

rational, and hence capable of electing 'representatives' to govern them. When this logic is transposed to the dispute resolution domain, it takes the following form: in view of the freedom of individuals in liberal democracies, disputes are bound to arise (between citizens, citizens and the state, etc.) and these should be resolved in formal courtroom settings where appointed judges impartially apply laws enacted by a democratic Parliament to given situations. This suggests a dual form to liberal legality: on the one hand, it claims to be *universal* in the sense of appealing to one (democratically produced) set of laws that are equally applicable to all citizens; on the other, it relies on individual judges to interpret and evaluate *particular* sets of circumstances.

One can discern at least four important differences between modern versions of the 'sovereign-law' and 'pastoral' models of power as they pertain to community mediation. To begin with, the 'objects' they seek to govern are different in that the pastoral model is directed at live 'disputants' whereas law targets juridically constituted citizens. Secondly, the sovereign-law model evokes classical criminological visions of judicially constraining free and rational citizens. By contrast, the pastoral model is more closely aligned with the positivist, medical model of the therapeutic state in that it seeks to preserve, nourish and sustain life within peaceful communities.[11] This difference centres around regulation achieved through the legal organization of judicial subjects versus a calculated management and administration of individuals in communities.[12] Thirdly, and related to the previous point, the form of sanctions in each case is different; one measures behaviour against the universal 'law' of a sovereign whereas the other places behaviour within a scaled distribution of contextual 'norms'. While the former punishes illegal acts to prevent future offenses, the latter tries to rehabilitate 'abnormal' individuals to bring them back into the realm of the 'normal' (Pfohl, 1985). Finally, while the sovereign's

hierarchies seek to concentrate power, they also make its exercise visible. Indeed, ritualist spectacles are crucial to this model's ability to reaffirm control and secure the confidence of the governed. By contrast, the pastoral model exercises power as silently and invisibly as possible, recognizing that its invasive form is,

> "tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms" (Foucault, 1978: 86).

If these differences alert us to the discontinuities in the respective models, they also provide a framework from which to understand articulations between them. In particular, community mediation in British Columbia, as we have seen, has been deployed as a 'system-based', 'complementary alternative' to litigation, designed to resolve 'minor' disputes. It is, therefore, closely connected to the legal system which - to reiterate the *leitmotif* of this chapter - is best elucidated by focusing on how the respective political models beneath the courts and community mediation are articulated in the dispute resolution practices of the province.

CONVERGING POLITICAL RATIONALITIES: 'SYSTEM-BASED' INFORMAL JUSTICE

To say - as do the advocates - that community mediation is a 'system-based' and 'complementary alternative' is to connote many different features of its deployment within society. In particular, it suggests: subservience and deference to the legal 'system'; a different form of dispute resolution that is both useful and acceptable to the court system ('complementary'); and an alternative form of dispute resolution that is limited by its attachments to the legal domain. In each case, however, the legal system is integrally involved in constituting the very identity of community mediation, both limiting its expansion and promoting specific knowledges and

practices. Equally, however, community mediation, by its very presence in the dispute resolution arena, also transforms - even if in a more limited manner - the nature of the legal field in various ways. Thus, to recall Fitzpatrick's (1983; 1988) 'integral pluralism' of the legal field, the respective identities of law and community mediation are mutually constitutive. Taking his advice, it may well be instructive to explore informal justice by examining "the mutual constitution of law and the informal" (Fitzpatrick, 1988: 190). In the context of the present analysis, let us examine the articulation between their respective political models by first focusing on how law is constitutively related to community mediation and then *vice versa*.

LAW AND COMMUNITY MEDIATION

Although formal processes of law shape the identity of community mediation in a fairly direct and visible way, such as with the statutory provisions of the *Divorce Act* of 1985, there are various other less direct - and probably more profound - ways in which it constitutes elements of community mediation. The pressures to constitute an informal justice domain are no doubt related to contradictions that liberal forms of legality seem to be facing in a Post-Fordist era. One can identify at least two such pressures.[13]

First, Fitzpatrick (1988) correctly suggests that in order to maintain its hegemonic dominance in the legal field, and thus to perpetuate a stable "liberal social ordering", the legal system must secure *both* 'law' and 'order'. But in an ethos of prevailing liberal democratic values, this cannot be achieved through constant recourse to naked force without undermining the very discourse through which liberal legality seeks legitimacy (Dean, 1991). Yet modern capitalist societies are grounded in "coercive authority" and, as such, its social stability cannot be entirely achieved

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through the rule of law. That is, the legal system has come to rely on other forms of control to secure 'order' because,

> "Liberal legality would prove too delicate for a society founded on coercive authority, were not this authority embedded indistinguishably through discipline in the domain of the normal, of the unremarkable" (Fitzpatrick, 1988: 190).

To rephrase this somewhat, one might say the sovereign-law model of liberal legality is sustained in modern capitalist societies by ensuring that it is integrally articulated to pastoral models of power which seek to 'embed' its authority in the taken-for-grantedness of everyday life, in the 'normality' of the 'private' domain, in the 'freedom' of the 'community'. Community mediation is one of many pastoral political forms that has arisen in a Post-Fordist regulatory environment to secure 'community' order.

What is at stake here is an articulation which goes to the very heart of liberal political thought; namely, the link between security and liberty (Burchell, 1991; Gordon, 1991). Indeed, already in the late Eighteenth Century, liberal economists had developed an opposition between 'civil society' and the state (the private and the public) to limit the state's sphere and to declare an autonomous realm of individual economic action.[14] The creation of a realm of private 'freedom', beyond the jurisdiction of the state, may have sought to limit the influence of the contemporaneous states, but it certainly did not limit the sphere of governmental regulation. On the contrary, as Gordon astutely observes,

> "Adam Ferguson's notion of civil society can be read...as being concerned with the task of inventing a wider political framework than that of the juridical society of contract, capable of encompassing individual economic agency within a governable order" (1991: 37).

As such, developing a private domain of 'freedom', of liberty, was an important aspect of an emerging form of government which employed informal control mechanisms in its attempt to

achieve 'security' and social order without relying on the brute force of the public spectacle (Foucault, 1977). Thus the sovereign-law model of power limits its own exercise, and defers to a less predictable, but less visible (and more efficient) pastoral power, the task of creating norms that complement its own laws. In this sense, one might view the impetus to create a domain of freedom - the 'community' - where individuals (disputants) are 'free' to select informal mediation to settle their disputes, as an attempt to secure a normative 'order' alongside the formal apparatuses of law.[15]

Looking at the specific case of British Columbia, there is a governmental logic in the Post-Fordist quest for 'decentralization', 'privatization', 'deregulation', the 'community', etc.. The positive affirmation of the 'private' realm here is not simply a 'ruse' that masks covert state (sovereign-law) expansion; rather, it is an affirmation of the utilitarian expedience of employing 'informal', pastoral, political techniques that are flexible, efficient, invisible and not subject to visible ethical controls. What is particularly striking in this province is the extent to which formal legality has circumscribed the deployment of community mediation. This is apparent from a number of reports[16] in which the complementarity between the two models is specified, and from the deference that actors involved in mediation bestow on the law. One would perhaps expect this of lawyers who are also part of the mediation establishment. However, in all the interviews conducted for this research, and in the local literature of advocates, there is little disagreement that mediation should address only 'minor' disputes, and that the final means of appeal on any of these disputes must be the formal legal system. Indeed, many mediators use this as a thinly veiled threat for 'recalcitrant' disputants (Tomasic, 1982). Moreover, the kinds of mediation projects that the Attorney General, the CBA, or the Law Foundation of British Columbia select

to fund, indicates a prior recognition of the 'proper' identity of community mediation. In tandem, these different factors point to the formal legal system's ability to secure a certain hegemonic dominance in the dispute resolution field and to prescribe, in some detail, the jurisdiction of the informal.

In sum, then, the integrity of the province's liberal sovereign-law model is related to its success at developing and sustaining a 'complementary' pastoral domain of freedom. Indeed, this liberal order has come to rely more and more on the invisibility (and therefore efficiency) of pastoral power, and perhaps this accounts for the growing importance of community mediation in British Columbia and for the formal law's deep involvement in carving out the 'general space' in which informal justice operates (Fitzpatrick, 1988: 191). It also explains why community mediation is expanding, yet why "it is not growing from the bottom-up at this stage" (interview, 26/09/1990).

However, the law is not simply a negative mechanism of restraint on the natural, 'unbounded freedom' of the individual subject, as liberal conceptions may insist. This takes us to the second way in which law is constitutively related to the pastoral practices of mediation. Liberal legality presumes the primordial existence of free, rational, individuals - the bearers of its rights, duties and freedoms. This implies that such individuals exist 'naturally', and merely require political structures to vindicate that natural form.[17] In other words, the liberal version of the sovereign-law model is predicated upon the existence of 'free individuals' and either operates to constrain their unlimited freedom in the interests of community rights, or as a means of enforcing rights, duties, obligations, etc. (Turner, 1971). In this sense, law requires free subjects to whom its legal decrees can be directed.

Yet as we have argued previously, this 'individual' is neither 'natural', nor 'fixed', nor absolute. Indeed, as Marx pointed out, the modern 'individual' is not the 'starting point of history', but rather something which is "socially determined" (1973: 83-85). To the extent that the pastoral model of power is directly implicated in the creation of modern individuals which stand before the judge[18], and to the extent that liberal legality relies on the primordial existence of such individuals, the law is constitutively related to multifarious pastoral institutions. The 'unbounded freedom' of such individuals, to which the law directs itself, is in turn created by pastoral techniques of power - this is the "dark side" of law that secures order through a political logic of normalization.[19]

Despite a notable absence of detailed enquiries into this particular link, some authors have researched the importance of techniques that create individuality for various other aspects of liberal order.[20] In a similar way, community mediation's pastoral power seeks to (re-) create the 'normal' individuals of liberal legality (even if its present impact on the whole of society is rather less dramatic than the others mentioned). In British Columbia, this link is most apparent in the legal establishment's conception of mediation as something methodologically different from adversarial litigation, but as essentially contiguous in respect of its aims (i.e. dispute settlement) and ability to increase 'access to justice' (Hughes, 1988; Smith, 1989). The implication here is that community mediation, as an effective, informal means of conflict resolution, is able to increase the locations at which individuals can vindicate their 'natural' rights. Informalism is capable of doing this because it claims to be more accessible than the courts in a number of ways: linguistic; geographic; procedural; administrative; financial; and temporal. Yet, in order to increase access to justice in this sense, community mediation cannot but serve as a judicial

appendage, and herein lies another explicit point of articulation between the political models.[21]

In addition, through statutory, financial, rhetorical and personal (e.g., the importance of lawyers) controls over the informal domain, the law is able to promote a community mediation identity that treats disputes individually, and attends to the individual 'needs' of disputants. In so doing, the pastoral mechanisms of community mediation are colonized to reinforce the 'normal' individual upon which liberal legality rests.

In short, the law helps to constitute the present identity of community mediation in British Columbia because of its quest to: create a domain of 'freedom' in the 'community' in which disputes may be resolved 'outside the law'; and, reinforces the normal individual upon which it is based. This implies that the experiment of community mediation is not simply a response to the courts' administrative failures. Instead, it is part of the law's ongoing quest for reform in which it continuously seeks articulations with other models of power in an effort to maintain hegemony in the dispute resolution arena. Although the law's effect on community mediation is clearly profound in the province, there are some perhaps less consummate ways in which community mediation influences the contemporary identity of liberal legality.

COMMUNITY MEDIATION AND THE LAW

When considering community mediation's impact on the identity of liberal legality, one might begin with its location in the 'social' domain (Matthews, 1988: 19). According to the advocates, informal justice supports the legal edifice by seeking to remove the 'minor' cases clogging up the court system. To the extent that community mediation actually does do this, it is involved in a process of re-configuring the lowest rungs of the court system.[22] That is, the informal domain

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offers the courts a way of dealing with the multiplicity of 'minor' disputes whose dense presence

threatens the administrative and symbolic efficiency of the liberal judiciary. By trivializing such

disputes as 'minor', and providing alternative - informal - forums that emphasize voluntarism,

settlement and individual participation, the liberal order simultaneously neutralizes conflict and

encourages normative behaviours required by law. In the specific case of British Columbia,

community justice reinforces the structure of law by neutralizing conflicts in two related ways:

first, it helps to 'disaggregate' collective challenges to the legal system by individualizing

disputes and seeking settlements that support the legal system; and, secondly, it employs subtle

and flexible procedures that 'trivialize' conflicts that might otherwise threaten the integrity of

law.[23]

In this process, however, community justice helps to reconcile contradictions between the claims

of law as a universally accessible means of vindicating all individual's 'rights' equally, and the

rather different story of its application at local levels.[24] Indeed, as advocates of community

mediation point out, such access is especially restricted in local contexts for those without

sufficient financial means, technical know-how, time, etc. (Hughes, 1988). In so far as

community mediation tries to redress this problem of access, it alters the identity of law in a

direction of greater 'responsiveness to the community' and increased 'access' to dispute

resolution mechanisms. As such, it bolsters conventional adversarial techniques by ascribing an

openness to the legal system. No doubt, this reconstituted identity is closely associated with a

quest to deregulate state agencies, to do away with bureaucratic 'red-tape,' and to deal with

legitimacy crises facing the court system. But it also renders aspects of the legal system far more

flexible than is possible under the rule of law - something that seems increasingly demanded by

Post-Fordist modes of regulation (Baskin, 1988; Selva and Bohm, 1987).

Community justice also transforms the identity of law - to some extent - by underscoring an important feature of the liberal sovereign-law model; namely, the appearance of judicial independence from the state. The latter is essential for the preservation of 'legal neutrality', and to uphold liberal jurisprudential claims of law as a fair, impartial and independent mechanism that resolves disputes in society according to universal conditions of justice. Crucial to such a definition is the presence of a 'gap' between the state and the law.[25] By counterpoising itself to both formal law (i.e., as an 'alternative' form of dispute resolution) and the state (i.e., as operating in 'the community'), community mediation establishes a symbolic distance between these and sets itself apart from them. This supplements the multiple political processes that seek to annul the appearance of an immediate connection between the state and law, by placing the 'community' as a mediating space between these. Moreover, by claiming an ability to resolve only minor disputes, informal justice reinforces the authority of the law by relinquishing more serious (important?) disputes to the courts.

THE SYMBIOSES OF MUTUAL CONSTITUTION: STATE, LAW AND ORDER

So far, the analysis has pointed to various significant articulations between the political models endemic to law and community justice. Their political rationalities and tactics coincide, intersect and also cleave in a number of different ways, giving rise - through their diverse associations and disjunctions -to a 'governmentalization' of the state. But, what precisely is the relationship between the formal state and community mediation? In chapter three we examined the British Columbian state's integral involvement in the deployment of community mediation. Moreover,

Fitzpatrick's 'integral pluralism' concept offers an astute means of formulating this theoretically: the state and community mediation, like the state and law, or community mediation and the law, are constitutively related to one another. This is to say, these fields are, to a greater or lesser extent, directly implicated in each other's identities, being constituted in diverse ways by their various inter-relations. This means that a shift in the articulations between any of the fields is likely to have ramifications that affect the identities of those involved. So, for example, if the state were to withdraw all its funding for community mediation programmes (in response, perhaps, to pressures from the economic field), the ensuing character of community mediation in the province is likely to change, because certain political practices sustaining its identity will have shifted. In turn, the state's identity will have been altered to some extent, as would other related fields (say the law).

However, there are two points to bear in mind here. First, the relations between fields are not reciprocal because the state's impact on the identity of community mediation has clearly been far greater than the other way around. Secondly, even though fields may be constitutively related to one another, no field is ever completely 'sutured' (Laclau and Mouffe, 1985). On the contrary, there are always (greater or lesser) areas of autonomy in social fields, providing the bases of historical contingency. Thus, whilst constituted almost entirely by the state and legal fields, community mediation does harbour certain autonomous aspects. There is an "unembedded" dimension to community justice, and therefore at least a potential capacity to offer some resistance to the strictures of formal legality. However, to reiterate, there is currently a notable absence of such resistance, perhaps indicating the success of state strategies to deflect opposition.

Notwithstanding such considerations, the state, law and community mediation in British

Columbia's are unilaterally related in a bid to secure social cohesion and stability (Donzelot,

1991). Their relations converge in the dual aims of achieving both *law* and *order* in the social

domain and implicates,

> "the tricky adjustment between political power wielded over legal subjects and pastoral
> power wielded over live individuals" (Foucault, 1981: 235).

This adjustment involves a series of alliances between the state, law and community mediation

that seek to achieve mass obedience by aligning the aspirations of conflicting individuals with

the state's wider objectives of order (Rose, 1990; Millar and Rose, 1990). This entails a far-

reaching integration of: the sovereign-law with the pastoral model of power; laws with norms;

the aims of authorities and subjects; and, judicial rights of citizens with normal individual lives

of community members.[26]

The alliances between the legal, state and informal justice fields are sustained by multiple,

unstable, 'synoptic' practices that produce strategic 'envelopes' between fields.[27] For example,

in British Columbia, the legal establishment colonizes aspects of community mediation through:

funding practices; legal experts who enunciate the form of community mediation (Pitsula, 1987;

Pirie, 1987; CBA, 1989); the formation of joint associations (e.g., the B.C. Mediation

Development Association); statutory provisions; and judicial encouragement in certain areas

(e.g., family mediation) and prohibition in others (e.g., more 'serious' criminal offenses).

Similarly, as we have seen, the state seeks to preserve an appearance that is quite distinct from

the 'social' domain and thus employs indirect forms of association with community mediation.[28]

For instance, the state uses its control over programme funding as a central synoptic practice to

perpetuate its hierarchical alliance (Callahan and McNiven, 1988).

Through such associations between the models of power of state and law on the one hand, and community mediation on the other, it is possible to see how the modern liberal state has been governmentalized. In its quest for social cohesion, the state does not simply rely on the legalization of citizen's rights and duties, but has also colonized, aided and abetted - over hundreds of years - numerous political technologies designed to normalize individual thinking and action. Community mediation is one such technology in which laws and norms intersect in complex combinations, sometimes through the legalization of norms, but also in a normalization of laws.[29] The links between laws and norms, between judicial litigants and normal disputants, seeks to (re-)constitute an harmonious relational complex, a societal domain without conflict, called the 'community'. To the extent that governmental rationalities, tactics and synoptic practices combine to constitute such a 'community', it becomes possible to formulate mediation practices as a way of expunging conflict to preserve the integrity of the social domain.

THE REGULATORY EFFECTS OF GOVERNMENTALIZATION

The conjunctural links between different political rationalities and practices harbour their own synoptic rationality - a rationality whose level of abstraction is commensurate with that of a 'mode of regulation' at a given place and time. In concrete terms, the governmentalization of the British Columbian state translates into what might be termed *government at a distance*.[30] That is, government at a distance is a terminal effect of the conjunction between the sovereign-law and pastoral models of power in the dispute resolution arena. While there are numerous aspects to such governance, let us here focus on four of its main consequences.

First, the articulations between the two models of power transform the ways in which actions are

regulated in the social domain. The governmentalization of the state, in other words, has produced a heterogenous collection of practices, over and above the judiciary, that, "have woven the ever tightening web which constitutes the social" (Pasquino, 1978: 52). Whilst this web may entail aspects of legality, it is also much more than this. As Rose succinctly observes,

> "Rather than being rigidly tied into publicly espoused forms of conduct imposed through legislation or coercive intervention into personal conduct, a range of possible standards of conduct, forms of life, type of 'lifestyle' are on offer, bounded by law only at the margins" (1990: 226-227).[31]

With such pastoral techniques as 'lifestyles', the state can - potentially at least - intensify its control over social life by operating in a domain of 'freedom' where injunctions are far less visible than legal codes. For example, in the very process of assuming the identity of a 'disputant', participants in community mediation are said to have freely chosen this form of dispute resolution. But there is an extreme irony in freely choosing one's mode of regulation, of being 'granted' by a state the freedom to choose one's own chains. Accepting this freedom, and participating in the institutions which bear its name, comes at the considerable cost of imposing on oneself a regulatory enclosure whose normative decrees are enunciated in the shadows of a ubiquitous disciplinary gaze and an obligation to confess. In short, this amounts to no less than a conjunction of a peculiar version of liberty - much like the 'voluntarism' of community mediation - and security, to preserve the integrity of the liberal state.

Secondly, and related to the above point, government at a distance involves control forms that are less visible than public judicial decrees. In its pastoral moments, it structures social fields that are calculated to promote desired forms of action. The ideal here is a completely controlled social domain that renders actions rationally calculable, that eliminates the unpredictable through continuous management. This ideal lends itself to a technocratic, managerial, administrative,

human science discourse that seeks to engineer the 'consent' of those that it governs (Harrington, 1982, 1985; Hofrichter 1982; Gramsci, 1980). Central to this is the notion of planning which works from the premise that there is an intrinsic logic to the social domain, and that probable actions within specific fields of this domain can be calculated. For instance, community mediation is deployed as a way of securing consensus, harmony and peace in communities. Programmes are *planned*, and later evaluated, on the basis of calculations designed to measure its effectiveness at resolving 'minor' disputes. Here the aim is to develop a social field that can neutralize potentially disruptive community conflicts quickly, cost-efficiently and permanently - there is little place for the grassroots input of those to whom programmes are directed. In this sense, government at a distance governs its objects by creating and structuring fields of action on the basis of prior calculation or planning, and continued evaluation, wherein specified 'social problems' (e.g., conflict) - problems that threaten to undermine social solidarity - are designated for administrative solution.

Thirdly, as the phrase 'government at a distance' implies, calculations and decisions taken in one social context are not translated into actions in other contexts through hierarchical bureaucracies. For example, as we have seen, there is no formally constituted bureaucracy to convey central cabinet decisions to actions in particular mediation sessions. Rather, there is a complex assemblage of networks - state authorities, funders, associations, programme coordinators, volunteers, mediators and experts - through which this is (or is not) achieved. Such networks do not reflect a clear and simple chain of command that links decisions in one place to actions at another. Rather, as Millar and Rose put it,

> "This involves alliances formed not only because one agent is dependent upon another for
> funds, legitimacy, or some other resource which can be used for persuasion or

compulsion, but also because one actor comes to convince another that their problems or goals are intrinsically linked, that their interests are consonant, that each can solve their difficulties or achieve their ends by joining forces or working along the same lines" (1990: 10).

In other words, the articulation of the two models of power results in a more intricate set of relays than found in the codified, hierarchical accountability of state bureaucracies. This is not to deny the considerable discretion of certain bureaucrats, but only to highlight that community mediation is part of a different means of relaying political calculations and decisions to local contexts. Here, the process of authorization is less well-defined, and appears as an amorphous conjunction of various agents. Critical amongst these are the volunteers who, if persuaded that they share interests with the state, are likely to translate decisions to local contexts with some efficiency. This is so because volunteers who carry out political decisions often make these decisions appear as freely elected courses of action, or as caring, altruistic gestures adopted by concerned community members. In government at a distance then, the efficiency of power is directly proportional to its capacity to deny its own format.

Fourthly, government at a distance does not operate as a form of Orwellian totalitarianism in which the state becomes a ubiquitous leviathan controlling one's every move. Rather, this type of regulation colonizes the body, invades the individual's psyche, and recovers through these a means of governance requiring minimal intervention. Indeed, the government of disputants in a community is one example of the various political technologies of modern liberalism seeking to bring,

> "the varied ambitions of political, scientific, philanthropic, and professional authorities into alignment with the models and aspirations of individuals, with the selves that each of us want to be" (Rose, 1990: 213).

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In other words, the conjunction of the sovereign-law and pastoral models of power does not merely produce a totalitarian state that controls one's every move; instead, the pastoral model produces a power that is endogenous to the very constitution of the modern subject. As such, the governmental rationality of our age does not so much constrain individual, subjective beings, as it constitutes these beings. Therefore, it is necessary to consider our historically-specific forms of subjectivity not as a necessary basis of liberation, but as an inevitable source of constraint.

TAKING COMMUNITY MEDIATION SERIOUSLY: STRATEGIC IMPLICATIONS

By focusing on this 'government at a distance' as it operates through community mediation in British Columbia, we can better understand the immanent dangers of the characteristic features of mediation. We can better see the problems they pose for a 'non-professionalised', informal, alternative to the existing justice system. The practical attempt to divorce community justice from professionalised justice, to develop an alternative, involves no less than the disarticulation of the two political models at points where their articulation favours, nurtures or sustains professionalised justice. In other words, such unhinging implies resistance to aspects of the current deployment of community mediation as a 'complementary' alternative to formal justice.

Yet, the problem for developing effective strategies of resistance, particularly in a situation where power is exercised subtly, is two-fold. First, it requires us to conceptualize what resistance entails in the realm of informal justice; since power here is not visible, resistance to it must not ignore the 'invisible'. The notion of resistance remains rather obscure in Foucault's work, but other theorists have extrapolated more feasible accounts of what it might entail (eg. Fitzpatrick, 1988; Sawicki, 1991). Secondly, we need to address the practical question of 'what strategically is to

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be done?'. In response to this, I shall examine each of the four regulatory effects outlined above, with an eye to elucidating possible strategies to thwart aspects of the current deployment of community mediation in British Columbia that sanction, rather than reverse, professionalised justice.

CONCEPTUALIZING RESISTANCE: THE CASE OF COMMUNITY JUSTICE

For Foucault, resistance is simultaneously in and outside of power (1978; 1982; 1988c). That is, for a power relation to exist, there must be resistance (1982: 219-222). As he puts it,

> "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power" (Foucault, 1978: 95).

As we have seen, he repudiates his critics (eg. Soper, 1986; Taylor, 1986) who suggest that if power is endemic to all forms of social being then there can be no escape from its clutches. For him, the social field is an indeterminate domain that may be structured by power relations, but it harbours various possibilities of both domination and resistance.[32] To suggest that there is no escape from power relations, as though it were possible to reach outside of the "iron cage", is - for Foucault - to misunderstand the "strictly relational character of power relationships" (1978: 95). Since power is endemic to social being, there is no powerless void beyond the limits of the present; there is only the possibility of different power relations which may not entail the subjugations and oppressions of the present (Hiley, 1984). His is therefore a more Hegelian view in which power exists only where there is resistance: without the intransigence provided by situations where people are faced with different possible modes of action - the freedom to comport themselves in different ways - power cannot be exercised (Sawicki, 1991: 25). As such, power does not obliterate resistance, but rather depends on antagonism for its very being. Indeed, in those situations where opposing forces seek to eradicate one another completely, there may

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be relations of confrontation or violence, but not power (Foucault, 1981: 253; 1982).

A number of theorists, especially feminist writers, have developed Foucault's fragmentary observations on resistance into a more useful framework for concrete struggles that are of value to the present question (eg., Sawicki, 1991; Diamond and Quinby 1988; also Rajchman, 1986; Flynn, 1989). However, in the specific context of informal justice, Fitzpatrick (1988) develops Foucault's "theoretically unelaborated" notion in his quest to 'take informalism seriously' and to assess its capacity to combat the dominance of 'professionalised' state justice. His account outlines various issues that are important to consider when developing a "counter power" out of community justice. To begin with, in successfully engaging with power, at the very point of opposition, a counter power simultaneously modifies the power relation it opposes and is altered by that relation. In other words, resistance is not simply a residual, or negative, aspect of power, but rather the very process of engagement transforms both power and counter power. In this sense, as Fitzpatrick puts it,

> "An act of resistance entails, even if sometimes implicitly, some positive project of power which engages with and seeks, at least in part, to reverse or modify the power it opposes" (1988: 185).

One implication is that if resistance is to be planned and organized around a precise strategy, it need not simply comprise fragmentary, or isolated, acts of recalcitrance. It could, that is, emerge as a positive counter power to effectively contest the dominant power. An organized, opposing power might, if successful, transform the process of engagement with a dominant power in such a way as to alter intersecting patterns of domination.

However, there are a number of problems that confront those who prepare to engage with

dominant powers. The first concern sceptics of this tactic are likely to raise is that of cooptation: what is to prevent agents from being coopted through engagement? This is an especially pertinent problem when one is dealing with an area of the social network, such as the legal arena, where dominant patterns of power have a hegemonic grip over the field. Recognizing the significance of this point, Fitzpatrick reinterprets Foucault's insight that resistance is simultaneously inside and outside power to provide more content to 'power-counter power' engagements. When engaging with dominant powers, resistance strategies are both *included* and *excluded* by the dominant power. In diverse contexts of resistance, the dominant power partially *includes* its opposition and alters its own form somewhat. It embraces a counter power by "disaggregating", or fragmenting it, and then by appropriating fragments which suit its own aims. One astute interviewee confirms this idea by pointing out that the liberal state's typical response to an 'experiment' (such as diversion, or mediation) in the legal field is to,

> "absorb and neutralize it. And that's the effective liberal way of dealing with innovation...you adopt it, you take it under your bosom, you adapt it and neutralize it..." (interview, 21/01/1991).

In British Columbia, although the legal establishment may have adopted the idea of community mediation, it has adapted some of its basic tenets. For instance, from informal justice's emphasis on individual empowerment it has recovered the importance of 'increasing access to justice', thereby neutralizing the potentially disruptive features of the experiment.

At the same time, however, a dominant power may *exclude* a counter power by denying the latter's existence, or significance, or both. In the community mediation arena, such exclusion is evident from the manner in which everyday, common conflicts are trivialized and treated as 'minor' disputes. In so excluding legitimate conflict from its midst, and transposing it to the

informal justice, the legal establishment denies the source of a possible counter power. By both including and excluding potential counter powers surrounding the community mediation movement in British Columbia, the legal system is able to fragment, reappropriate, deny and 'contain' resistance in manageable units (e.g., the community, the disputing family, the individual, etc.).

On the basis of these observations, Fitzpatrick offers two cautionary notes for a possible resistance strategy. On the one hand, one cannot assess the importance of a counter power empirically, because its very existence may be systematically denied. Thus, one ought not to reject too quickly various alternatives to professionalised justice, even if - and maybe especially if - they are ridiculed and dismissed by the existing legal system. Indeed, the latter actions may well signal the importance of an emerging counter power because they suggest that the legal system has - at least nominally - recognized the potential threat of the counter power. This becomes especially clear when one considers that a counter power is likely to draw much fire from dominant power relations if its presence threatens such relations.

In any case, the immediate task for an alternative politics of the informal is to seek out subjugated knowledges, those trapped in the shackles of silence, and to provide forums in which the textures of silence that surround subordinated groups may become articulated as 'oppression', to clarify what 'social justice' ought to mean in a given context. That is, such a politics needs to resurrect the implicit knowledges that belie immediate disputes, the knowledges that articulate, say, what it is to live in a society that can place one in the fetters of a miserably poor existence. Social justice, in such instances, should not to privilege the claims of the dominant over the

dominated; indeed, mediation ought to provide a means of conveying subordinated knowledges - perhaps in collective public forums - that could develop into wider political strategies of resistance designed to dislocate the forces that trap people in oppressive environments. In other words, an informal 'social' justice should attempt to recover subjugated knowledges and use these as points of departure for contesting the current identity of community justice. By trying to expose the invisible methods of power in mediation, this thesis is, in effect, chiselling away at the silent tyranny of pastoral power in post-industrial societies.

On the other hand, Fitzpatrick is pessimistic about the possibility of attaining significant social changes through political technologies sanctioned by dominant powers. More concretely, he has serious doubts about the efficacy of adopting current legal definitions of what informalism is, since this implies a tacit acceptance of the authority of law.[33] He warns,

> "The effectiveness of a counter power that becomes engaged with law cannot be assured in law. It can only be assured if the terms of engagement are adequately set and supported from outside law" (1988: 195).

In this sense, an effective counter power, a politics of informal justice, must not be sought from within the shadows cast by informal and formal justice (Gregory, 1987; Smart, 1989). Such a politics must be recovered from the voiceless resistance that the dominant patterns of power have fragmented, pillaged, or banished to silence. It is here, he tells us that we must seek to recover a domain in which,

> "the vitality of alternative traditions and the relative absence of disciplinary power have restricted the ability of the state law to present an adequate synopsis of power and society" (Fitzpatrick, 1988: 196).

I interpret this as a call for unity amongst the oppressed, perhaps through a broad coalition between unincorporated 'new social movements' (Plotke, 1990, Kauffman, 1990, Epstein, 1990).

This conceptualization of resistance allows us to begin the difficult task of developing an alternative politics of law, and to redefine progressive engagement with the community mediation movement of British Columbia. The basis of any such engagement must be to resist articulations between the two models of power in the informal domain that promote professionalised justice whilst promoting strategies that nurture social justice in context. To this end, it is important to examine each of the four ways in which community mediation governs 'at a distance' in British Columbia to see what concrete practices require reversal if one is to resist the liberal, professionalised form of justice.

REFUSING PROFESSIONALISED JUSTICE:

TOWARDS AN ALTERNATIVE POLITICS OF LAW

a) LIBERTY AND SECURITY

As noted, at the heart of liberal 'government at a distance' is the conjunction of liberty and security where domains of 'freedom' are closely associated with the security of the state. This has a number of important ramifications when considering political technologies, such as community mediation, which purport to operate in a domain of liberty; i.e., the community. In its current form, community mediation does not resist the state's law-sovereign model, as its voluntaristic rhetoric might imply; on the contrary, there is a complementary, continuous and mutually constitutive relation between the courts and informal justice, and their underlying political models. The paradox of simultaneously claiming to be an 'alternative' and yet be 'system-based' reflects the close articulation between the 'freedom' created by pastoral power and the hegemony of the law-sovereign forms of power. A closer look at this paradox reveals some important dimensions to community justice.

For instance, community mediation is 'system-based' not only because its margins are bounded by formal legality (e.g., through statutes, traditions and funding patterns), but also because it is internally colonized by system-orientated lawyers who practice mediation. Yet, it is also 'system-based' in that it's goal is to preserve the *status quo* by expunging conflict from 'society', thereby preserving the 'order' within which law may function. With this in mind, mediation may be an 'alternative', but not because it is empowering, or especially voluntary; rather, it is different because it employs an alternate model of power. This is to say, the purported voluntarism and empowerment that informalism affords to its participants cannot be divorced from the security requirements of the modern liberal state. The freedom ascribed to community mediation by its advocates, while possibly appealing to those who face the daunting prospect of litigation, is itself a potential form of subjugation. The very process of creating 'free', 'individual' disputants through pastoral techniques of power in mediation is, in other words, not a form of resistance to professionalised justice. The significant opposition in such a pluralized, post-modern, legal environment is not between law and community mediation, but rather between the 'professionalised' justice of the liberal 'system' and the 'social' justice of a system that has yet to emerge.[34]

An alternative politics of law here need not replicate the confrontation between post-modern legal theory's quest for local, small-scale resistance (e.g, O'Hagan, 1988; Unger, 1983) and the traditional left's quest for large-scale political change (Hunt, 1990: 533; Dews, 1987). On the contrary, given the articulations between pastoral and sovereign-law models, a politics of resistance must include aspects of both forms of resistance. As Gramsci suggests (1980:235), struggles against contemporary social forms must occur in the outer "trenches" as well as against

centralized state apparatuses. This requires us to place in question the 'freedom' community mediation offers to its 'disputants' and the consensus-orientated community it holds as an ideal. We must also rescind the prevailing tendencies within the community justice movement towards the implementation of extraneous 'standards,' or mediator certifications, that are not developed by those to whom mediation is targetted. This amounts to a dangerous professionalism of community justice that inscribes the concerns of professional justice into the very heart of the community justice movement, allowing the sovereign-law model to include, coopt and reorganize fragments of informal justice for its own purposes (Santos, 1982).

The difficult task for those pursuing social justice here is to uncouple community justice from its extreme dependence on the state and law, to separate liberty from security. This includes developing local strategies to thwart practices in particular programmes that weld freedom to the state's wider quest for order. At the same time, it is important to develop support practices outside of the state, in wider opposition groups, to reconstitute the present forms of engagement between community mediation programmes and the state/law. This would involve such fundamental reversals as: rearranging present funding practices that encourage programmes to follow the dictates of state agencies, or legal foundations, rather than to nurture social justice; developing ways to assess the value of specific programmes that de-emphasize administrative or technocratic criteria and emphasize contributions to social justice; revoking the exclusive use of lawyers or social 'experts' as mediators and loosening their grip on local 'networks'; and, resisting practices that portray lawyers and social 'scientists' as a unified body (i.e., fragmenting this constructed unity may be important to oppose the hegemony of a 'complementary' informal justice).

b) <u>CALCULATED SOCIAL FIELDS</u>

Community mediation is part of a wider attempt to structure social fields of action that 'restore' consensus amongst 'disputants' and to expunge conflicts from the community. Deploying such mediation programmes involves planning and calculation to set up fields in which agents can educate consent, and neutralize potentially disruptive disputes. This process provides support for the *status quo*, without due regard for the wider inequities and oppressions that might have generated conflict in the first place. Impeding this aspect of community mediation, requires directing counter powers at: the rhetorical justifications for the current deployment of mediation; and, the specific procedures that neutralize legitimate conflict.

Turning to the first - the rhetorical justifications - one could refer to the various insights of the ideology critics discussed in chapter two. In British Columbia, as noted, one of the main rationalizations for the deployment of community mediation centres on its capacity to redress the administrative failures of the court system. A counter power must surely focus on the inadequacies of the discourse on administrative, technical planning and refocus attention on the kind of justice community mediation imparts. This is to say, a counter power should jettison technocratic justifications along the lines of community mediation being implemented to streamline the court system, or increase 'access to justice', turning to the more fundamental discourse of what social justice might mean in context, and whether or not community mediation is capable of promoting this. In practical terms, this also requires a complete reversal of the growing concerns about 'standards', certification, as well as the flood of 'experts' into the field. Moreover, it demands that the criteria used to evaluate the 'success' of specific mediation programmes do not take the administrative, technocratic form of calculating caseloads and

resolution rates.

Secondly, procedures of community mediation that neutralize conflict by individualizing disputes should be altered. The individualization process not only obfuscates structural conflicts, but it also inhibits the formation of solidarity coalitions amongst people involved in structurally generated conflict (e.g., conflicts pertaining to race, class or gender). By fragmenting conflict, community mediation, in its current form, does not encourage a search for structural lines of dissent that given disputes may indicate.[35] A counter power must relocate community mediation in social forums which afford participants the opportunity of diagnosing the nature, scope and dimensions of given conflicts before developing effective responses to them. Here, conflict should not be seen as intrinsically destructive; it could also be an important way of locating and communicating contradictions, inequities and injustices in the social domain (Abel, 1981). In other words, the task of community mediation should not be to extinguish conflict in its proximate manifestation between 'individuals', but to uncover the scope of such conflict and to understand the broad social identities it implies. It should attend to these in forums designed to bring conflicts to the forefront of the political theatre in a manner quite unlike the artificial, expert-controlled environments of present mediation sessions.

c) GOVERNMENT THROUGH RELAY

Another important issue to consider when developing a counter power concerns the realization that pastoral power is most effective when it is not visible. Community mediation is relayed through almost inscrutable networks, assemblies of coalitions and opposing forces, where - as one interviewee put it - the importance of "reputation" is central.[36] Although beyond the scope of the

present study, it is essential to trace the relays, the collusion and cleavages that characterize the paths of governance here if one is to formulate effective counter strategies. We have, however, pointed to a cleavage between lawyers and social 'experts' as mediators, which - as noted - may profitably serve as a means of fragmenting the hegemony of a relay pattern that subordinates community justice to formal legality. But there is also the more positive task of recovering subjugated knowledges, vital alternative practices, through which to constitute an alternative set of power relays. This would involve recovering the autonomous dimensions of resistance hidden in the shadows that dominant powers have created.

In practice, a counter power must surely oppose the advocates' fascination with "marketing" community mediation, with educating the 'community' about their vision of informalism. Indeed, social justice requires the exact opposite: community mediation must become part of a range of democratic practices through which people are able to formulate social identities that best capture the particular oppressions they must face on a daily basis. That is, it may learn from the post-modern quest for a 'politics of difference' that permits nuances between oppressed groups to emerge (Sawicki, 1991; Di Steffano, 1990; Yeatman, 1990; Young, 1990; Flynn, 1988). At the same time, this need not preclude associations between groups; on the contrary, to be effective, an alternative community justice movement should form synoptic alliances with new social movements that are congruent with its aims. A broadly-based coalition of counter-forces that does not coalesce on the specific contents of their various forms of subordination, but on a common aim of recasting oppressive power formations, is likely to be far more effective at shaking hegemonies than solitary groups working in isolation. In the difficult processes of developing alliances between these social movements, in the multiple procedures by which synoptic practices are formed, the silences of subjugated knowledges can begin to give clearer expression to the

nature and scope of oppression in given contexts, and thereby provide a practical glimpse of what social justice may mean in context. In the combination of local practices that would comprise a politics of difference, and synoptic alliances between new social movements, an alternative politics of law that is both local and general appears. It is moreover, a politics of law whose terms of engagement with state law are set outside of the formal justice system, in the vital alternative traditions of new social movements.

d) SUBJECTIVE ASPIRATION

If government at a distance colonizes subjective aspiration, a counter power must attempt to subvert the means of colonization. In particular, this requires the development of oppositional strategies targeted at the regulatory objects of community mediation - 'disputants' and 'the community'. Indeed, not only is it necessary to refuse these regulatory 'objects', but also to thwart the normalizations which align them. With respect to the former, this means that we must be extremely cautious of the 'quest for community', in both its nostalgic conservative form (Cohen, 1985), or in its more liberal guise of 'halting' state totalitarianism (Unger, 1983; O'Hagan, 1988). We must realize that notions of community - whatever their formats - situate people in regulatory environments, and therefore the establishment of 'community' is not a release from power (as the suggestion that they are domains of freedom might imply). To the extent that appeals to community encourage political complacency, and limit the critiques directed at finding oppressive structures in power relations which sustain them, specific modes of governance are able to avoid direct scrutiny. Moreover, as Young points out,

> "The ideal of community presumes subjects can understand one another as they understand themselves. It thus denies the difference between subjects. The desire for community relies on the same desire for social wholeness and identification that underlies racism and ethnic chauvinism on the one hand and political sectarianism on the other"

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(1990: 302).

Even if one were to allege that Young overstates her case here, she does make the central point that notions of community are susceptible to the extreme danger of forging artificial social unities which can have disastrous consequences (e.g., racism).

Furthermore, since pastoral power attempts to integrate 'subjective' aspiration with the wider aims of authorities, the quest for social justice is unlikely to be furthered by a search for the 'true' subjectivity ascribed (imparted?) to normal 'disputants'. Perhaps, what is more significant here is a refusal of the subjective identities produced by pastoral power. This would take seriously the understanding that the state, via articulations between the sovereign-law and pastoral power, has produced a complex panopticon that encourages political docility. The efficiency of such governance lies in its capacity not only to conquer the observable, but also to settle upon the invisible, to dictate from the shadows of the discursive facades it erects. Its success lies in an ability to produce obedient subjects, selves, whose cognition is geared towards particular forms of production, lifestyles that reproduce the social order, and human aspirations that reinforce the political aims of the dominant (Baskin, 1988; Rose, 1990; Miller and Rose, 1990)

A counter power cannot therefore direct itself exclusively to the centralized, sovereign-law model of power (Gramsci, 1980). On the contrary, it requires us to takes seriously the political significance of acts that refuse dominant patterns of subjectivity (Foucault, 1989: 257ff.). It entails problematizing the consensual lifestyles that entice 'disputants' to adopt particular self-identities, and to reject the enervated 'freedom' associated with the 'choice' these provide. Such acts of refusal, as difficult as they might be, require us to question the ways in which we

constitute ourselves as 'selves'. In community mediation, one ought to question the disciplinary constitution of individuality, to rescind the dubious confessions that 'disputants' are obliged to make, to reject the calculated normalizing judgments of the mediator, and to resist processes that steer conflicts into quick individual settlements at the expense of more general, or politically more astute, resolutions. This requires specific analyses of the means by which mediation creates subjectivities that perpetuate wider inequities. Of particular importance here is the need to explore the ways in which gender, race, class, age, sexual orientation, etc., are perpetuated in the kinds of 'normal' subjects that mediation produces.[37]

Opposing the normalization processes that integrate subjective aspirations with wider objects of the state involves deconstructing the 'consensus politics' of community mediation. It is necessary to problematize the assumption that there is necessarily 'common ground' between 'disputants' who share a 'community', realizing that there are enormous differences between people. Instead of assuming normative consensus, and unity, and thereby ignoring structural incongruities, community mediation should seek out contradictions that bear directly on given conflicts. There is usually, for instance, far less common ground between a wealthy, white, male landlord and a single mother of colour on welfare, than current forms of mediation would have the observer believe. It is important to grasp the qualitative social distances between actors, and not simply to refuse them by decree. In sum, a counter power of community justice that rejects the objects of 'community', and 'disputant', and resists the normalization which seeks to integrate these, must locate itself in an alternative politics which 'listens' to differences between people, but forges strategic alliances with other new social movements to redress social injustices on scale (White, 1987/88).

CONCLUSION

By way of review, as is customary in conclusions, this thesis began its narration with characteristic patterns of discourse favoured by advocates, and then critics, of community mediation. Continuing this dialogue in the directions opened by the new informalists, it articulates its grid of intelligibility to the strengths of various moments of existing discourse in order to pursue another line of argument. In particular, the thesis offers a genealogy of community mediation in British Columbia and describes the pastoral model of power before highlighting certain links between this and the sovereign-law model of the liberal state's legal forms. In so doing, the analysis conceptualizes the regulatory effects of community mediation as an articulation of political logics that amounts to a governmentalization of the state. Here, the aspirations of individual 'disputants' are coupled with the requirements of a normal 'community' as part of the state's larger quest for social cohesion.

In British Columbia, the respective political logics of informal justice and state law were shown to be linked, constitutively, in a series of alliances which have the effect of regulating social action through a certain 'government at a distance'. Core features of such government at a distance were extracted and used to formulate a strategy of engagement with community mediation. In brief, this strategy seeks to develop counter-powers that take the effects of government at a distance seriously by problematizing aspects of community mediation which promote professionalised justice. We saw that by forging alliances with other social movements, community mediation could begin to establish an alternative politics of law which is sensitive to social differences without falling prey to nihilistic arbitrariness, and can thereby begin the

difficult task of diagnosing and pursuing the kind of social justice identified in the introduction and elaborated upon in chapter three.

By way of its achievements, the preceding analysis has ventured into at least two relatively unchartered areas of research. First, it has offered a *critical* analysis of community mediation in British Columbia - which has relevance for Canada more generally - by pointing to the complexity of the Post-Fordist regulatory environment in which informal justice thrives. Secondly, it elaborates upon the critics' discourse by integrating certain Foucauldian insights and thereby reformulating the 'problem' to focus on the regulatory logic of community justice. At the same time, by acknowledging the constitutive relations between social fields implicated in Post-Fordist modes of regulation, it has corrected Foucault's mistaken underestimation of the law-sovereign model's continued importance in contemporary patterns of control.

Moreover, by identifying a pastoral model of power in the knowledge and practices of community justice, this thesis casts a different light on critical analyses of informal justice in other countries (especially the United States and Britain). Indeed, it may even indicate that although the erosion of a pure Keynesian Welfare State model is clear enough (to wit, the fragmentation of the 'social' domain into 'communities'), developments such as community justice provide evidence that the pastoral model of power is penetrating further reaches of relational networks. Moreover, it does so through a particular articulation of pastoral and law-sovereign models, producing a different logic of regulation, a 'government at a distance'. Such governance provides different opportunities and barriers for any attempt to resist community mediation practices that entrench professionalised patterns of regulating the dispute resolution

arena. There are, for instance, opportunities presented through the indirectness of the control lines, but equally barriers - such as cooptation - are present in liberal, informalist rhetoric. Such observations ought to be incorporated into any prospective strategies.

Finally, in substantive terms, community justice as it is currently deployed in British Columbia as a 'complementary', system-based form of dispute resolution has been shown to be - despite, or perhaps because of, the claims of its defenders - neither voluntary, empowering nor even an 'alternative'. At best, it is a compromised attempt to redress what are certainly legitimate problems with the formal justice system; at worst, it comprises a manipulated social field that promises to resolve disputes, but which is radically limited by its acquiescence, or subservience, to the hegemony of liberal legality over the dispute resolution arena. In short, community mediation's promise to liberate litigants from the inhospitable procedures of the courtroom has so far turned out to be an empty one. Community disputes are still individualized and trivialized in processes that are obsessed with neutralizing conflicts by 'settling' individual cases - hence the clients criticisms (chapter 1) of the process. Furthermore, it is only a pyrrhic victory to have reached agreement on a given set of circumstances in the knowledge that the wider structures - which nurture the conditions for such conflicts to emerge in the first place - remain fundamentally intact.[38] One can only speculate on the possible form of a more effective community justice, but it would certainly be one that does not individualize disputes and that is part of a wider oppositional strategy targeted at disarticulating the present alignment between the law-sovereign and pastoral models of power in the dispute resolution arena. To be veritably empowering, community mediation would have to undergo a complete restructuring in which it turns its back on regulatory practices that: individualize disputes; ignore social distances between

people in 'communities'; professionalize mediation proceedings; and, emphasize technocratic measures of 'success' (such as a head count of cases 'settled'). It would have to think outside of the dominant liberal frameworks to develop forums that use conflict as a vehicle for communicating what is all too often silenced by contextual power-knowledge relations. But this is an issue which requires its own detailed elaboration, a task for which the preceding analysis could fruitfully serve as a theoretical foundation. It now awaits prospective enquiries to respond to, and elaborate upon, the various questions it has raised.

There comes a point in any argument where an author must end the process of writing, allowing a thesis to settle between its opening title, a final period and the interpretations of its readers. But such finality is entirely spurious and, indeed, it would be pretentious, if not arrogant, to suggest that I have reached absolute conclusions here. If at all successful, what has been offered in the preceding pages is no more than a conversational bridge between the discourses of my time and those that are yet to come, negotiating but one small bend in the ongoing flow of human thought. And it is here that I turn my spade, peering into the abyss of alternate dispute resolution practices which have yet to take form. To venture further into the mists of silence, the abandoned caverns of subjugated knowledge, would be to go beyond the task set for this thesis, beyond the evidence I have sifted through. The precise details of the social identities of those who must endure the webs of subordination in British Columbia's dispute resolution domain must, in other words, be recovered from further investigation. There is simply no assurance that future endeavours will nurture social justice, but reflecting on the limits of our time is surely an important step in any attempt to modify the rigid professionalism which today poses as 'justice'.

END NOTES FOR CHAPTER 6

1. I have elected to use the term 'sovereign-law' rather than Foucault's (or rather Foucault's translators') more cumbersome 'law and sovereign' phrase, not only for stylistic reasons, but also because - unlike some passages in Foucault - I do not wish to underplay its importance in the context of contemporary Canada. Indeed, there is much merit in the thought of Mandel (1989), Carol Smart (1989) and Hunt (forthcoming), who underscore - in various ways - its contemporary significance.

2. See Laclau and Mouffe (1985) for an extended discussion of the open form of the social domain.

3. Recall, most explicitly, Santos' (1982: 261) "cosmic" versus "chaotic" power distinction. However, a distinction of this kind is implicit in Harrington's unification through decentralization (1985: 64), Baskin's (1988) Post-Fordism (which inculcates aspects of Fordism with more dispersed forms of regulation), and Hofrichter's (1987) distinction between coercive (legal) and hegemonic forms of control. The distinction is also rather well entrenched in Spitzer's (1982) analysis of formal as opposed to informal mechanisms of control. What is absent from these is a systematic way of analyzing the informal, the chaotic, independently from the more formal, or cosmic, means of control.

4. Carol Smart (1989) also notes the importance of law in modern societies and uses Foucault's work to explore the relation between law and the "psy" disciplines. Moreover, Foucault himself seems to have recognized a lapse in his previous writings when examining the governmentality issue (1979; 1981). Here he argues that we should consider "sovereignty-discipline-government" as a triangle which exists simultaneously in our society (1979: 19; and 1982). This position is closer to the kind of analysis offered in this thesis, although I would argue that the distinction between government and discipline is better subsumed under the rubric of 'pastoral power', for this brings into prominence the inextricable connection between **governance** directed at live individuals, and **discipline** as that which produces such individuals.

5. That is, as noted, discipline is an important element in a wider pastoral model of power, whilst law is part of a 'law and sovereign' model.

6. For more detailed accounts of the nature of modern liberal democracies, see Macpherson (1987), Held (1987), Manning (1976) and Dean (1991).

7. For example, the Greek polis sought to regulate the lives of citizens through the sovereign rule of an assembly of selected citizens (Held, 1987). In the Roman family, the *patria postestas* granted the father of the family an absolute right to take the life of his children and slaves: just as he gave them 'life' so could he remove it. (Foucault, 1978: 135). By contrast, the rise of Christendom shifted such authority from the wisdom of the father to the 'earthly representatives' of God. As Held puts it,

> "The Christian world view transformed the rationale of political action from that of the *polis* to a theological framework" (1987: 37).

Interpretations of 'God's will' were articulated with secular systems of power, and were closely entwined with religious dogma until the Reformation (Held, 1987: 36-41). Here, Calvin and Luther's teachings were damaging to the sovereign authority of religious dogma because they embraced a conception of people as 'individuals', 'alone' in front of God. They even approved of independent secular political activities in areas that did not infringe upon religious practice. In so doing they had made way for important shifts in the reason of sovereignty, and the rise of the modern state directed at individual citizens.

8. See Hunt (forthcoming) for a view of how consent operates in law, and Tomasic (1982) for an overview of coercion in community mediation.

9. It is important to recall that this is a model, a Weberian 'ideal type' as it were, and as such is an abstraction that may be replicated in specific contexts in different ways (Weber, 1978; 1980).

10. No doubt, federal-provincial elaborations of this model are also significant in Canada, and pertinent to alternative dispute resolution trends, but this is a massive topic in and of itself that awaits further elaboration.

11. See Taylor, Walton and Young (1973) and Pfohl (1985) for extended analyses of these two positions in criminological theory.

12. See Donzelot (1983; 1991), Foucault (1977), Burchell (1991) and Gordon (1991).

13. In parenthesis, it is important to note, however, that our focus here is on a contemporary liberal version of the sovereign-law model as it exists in British Columbia, realizing that this is only one aspect of a far wider formal legal system which, no doubt, uses numerous pastoral techniques within its very confines. But this issue - how pastoral power operates in the very processes of formal law (e.g., prosecutorial and judicial discretion) - is beyond the scope of the present analysis (Hunt, forthcoming).

14. This theme is extremely well canvassed in articles by Burchell (1991) and Gordon (1991). Keane (1988a; 1988b) and Bobbio (1989) offer extended descriptions of the rise of the concept of 'civil society'. But it is well to bear in mind that 'civil society',
> "was a quasi-political concept, opposed to the administrative power of the states at that time, in order to bring victory to a certain liberalism" (Foucault, 1988a: 167).

15. As noted, the formation of that form of 'community' as a regulatory object for informal justice is part of a Post-Fordist fragmentation of the 'social'. The social realm was developed as an absolute entity towards the end of the Eighteenth Century. See Foucault (1989, especially 261) and Donzelot (1979, 1991) for more on this.

16. For example, CBA (1989), Hughes (1988), Pirie (1987), Pitsula (1987) and Smith (1989).

17. This is graphically reflected in Rousseau's adage: "Man is born free, and is everywhere in chains" (1974: 8). See also Capelletti and Garth (1981).

18. See Foucault (1977; 1978; 1980; 1982) for various accounts of the individual subject as an effect, and an instrument, of modern political arrangements.

19. This point clearly derives from Foucault's observation that the organization of modern liberal parliamentary and judicial frameworks relied upon the tandem formation of (unequal) disciplinary (we might suggest pastoral) mechanisms. In his parlance,
> "the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines." (1977: 222).

See also, Fitzpatrick (1988: 190).

20. For example, related studies include: Smart's (1989) extremely insightful analysis of the constitutive impact of law on the "psy-disciplines"; Donzelot (1983) on the family; Hacking (1991: 181-182) on statistics; Defert (1991: 213-215) on insurance; and Dean (1991) on the constitution of poverty.

21. That is, the flexibility of the pastoral model is seen here as a way of resolving problems of access to overloaded courts, as masses scramble to vindicate their rights through the formal, litigious processes of the courts (Blair, 1988; Emond, 1988).

22. Various commentators have pointed out, however, that there is much reason to believe that informal justice actually 'widens the control network' because it deals with cases that the court system would have rejected, or dealt with informally anyway (e.g., Cohen, 1985; Tomasic, 1982; Abel, 1982a, 1982b; Harrington, 1985; Hofrichter, 1987).

23. This point derives from insightful observations by Fitzpatrick, (1988: 193), Santos (1982) and Baskin (1988), each of which seems to underscore (in their various ways) the importance of these with respect to the relationship between community mediation and the law.

24. This point echoes Fitzpatrick's (1988) contention that informal justice comes between the 'synoptic', universalizing, dimensions of law and its 'syncretic' application in local contexts. However, in British Columbia at least, to make this general statement would be to overstate the case because community mediation is rather more specifically implicated in the liberal problem of increasing 'access to justice' (Hughes, 1988; Smith 1989).

25. Interestingly, Donzelot (1991) suggests that it was the looming absence of a gap between the welfare state and the social domain that produced a severe crisis in the former, for without sufficient distance between these, the state was in danger of becoming synonymous with 'society'. As the welfare state increasingly managed society's destiny through direct administration, it could no longer claim to be a watchdog of 'society's interests,' or a regulator of a 'free' social domain.

26. As Foucault puts it,
    "Modern society, then, from the nineteenth century to our day, has been characterized on the one hand, by a legislation, a discourse, an organization based on public right, whose articulation is the social body and the delegative status of each citizen; and on the other hand, by a closely linked grid of disciplinary coercions whose purpose is in fact to assure the cohesion of this same social body" (1980: 106).

27. I have borrowed the term 'synoptic' from Fitzpatrick (1988) and used it to denote those political practices that operate across local contexts and social fields. The term 'envelope' comes from Foucault's (1978: 100) attempt to forge an intrinsic link between local tactics and wider strategies.

28. I attended one meeting of a regional network and was intrigued to observe the 'quiet presence' of a member of the attorney general's office. The representative listened earnestly, and seemed genuinely interested in nurturing mediation, but offered little by way of overt support (financially or conversationally). His was, I suspect, a tacit - but detached - approval of the process.

29. For instance, when considering divorce or separations, there are various laws governing what can come out of a mediation session (e.g., people may not agree to abide by norms that are illegal). Conversely, observations of a family lawyer who practices mediation reveal the degree to which the 'norms of the community' influence her ways of interpreting statutes. See also Smart (1989) for an in-depth analysis of this issue.

30. I have borrowed this term from Miller and Rose (1990: 9), and use many of their insights - somewhat out of context - in what follows. As will become apparent, the discussion also relies heavily on Rose (1990) which, in turn, refers extensively to Foucault (especially, 1979, 1981b; 1982, 1984).

31. This affirms the idea that with the development of neo-conservatism,
    "the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses...whose functions are for the most part regulatory" (Foucault, 1978: 144).
Clearly, the community mediation movement should be seen as one of the apparatuses that regulates through the use of the norm. This normalization provides far greater flexibility and discretion than a formal rule of law can provide.

32. Indeed, he denies that there is,
    "a primary and fundamental principle of power which dominates society down to the smallest detail" (1982: 224).
Instead, he describes power as being ubiquitous, not because it represses everything, but rather because it is present everywhere. Thus the social field is a theatre in which numerous, unstable and diverse power relations face the ongoing possibility of subversion through resistance. See Sawicki (1991: 24-28) for a useful discussion of this.

33. Cohen suggests this is a fundamentally irreconcilable paradox in that one cannot affirm the value of statist criminal law and decentralization within a single framework. That is, he suggests,

"To be realistic about law and order must mean to be unrealistic (that is, imaginative) about the possibilities of order without law. To take decentralization seriously means that you must be an abolitionist" (1988: 228). While not all will agree with the anarchistic overtones of Cohen's thesis, it does allude to the realization that an 'alternative' cannot 'complement' formal justice in the way that some adherents propose (e.g., Danzig, 1973).

34. For more on the difficulties of post-modern politics of law, see Hunt (1990), Santos (1990), and Fitzpatrick (1988) and for an overview of legal pluralism see, Merry (1988).

35. In this respect, it may be instructive for community mediation advocates to learn from labour mediation, and even environmental mediation, where groups - rather than individuals - are brought as parties to a dispute.

36. Interview (17/09/1991). Indeed, early on in my research I came to understand that in this domain, reputation was an important means of securing an established position in the network. I also observed the difficulties that confronted a new member into one of the regional networks, and the defensive postures that were adopted by those who felt threatened by her presence. The point here is that networks, and one's position within them, is crucial for being a successful member of the mediation community. Harrington (1985) came to a similar conclusion in her study.

37. In observing a series of family mediation sessions, I perceived various ways in which normal roles were ascribed to people on the basis of their gender, and 'cultural background', etc.. For example, one could see the effect of patriarchally ascribed roles in the mediation session itself in various ways, not least of all with respect to the heterosexist assumptions of the mediators (e.g., the 'husband' was asked if he was 'seeing' anybody else "...another woman, perhaps?"). Also, this was rather graphically reflected in the fact that the chief mediator (who was a women) addressed most of her questions to the husband - especially those pertaining to household finances. However, on matters pertaining to custody, she directed her questions to mainly to the wife. In addition, the mediator kept referring to the women's 'cultural background' (e.g., "is it the same in your culture?"), even though raising this issue made the women feel uncomfortable. Through such instances, the degree to which wider 'community' norms pervade mediation sessions becomes clear.

38. I was interested to note that - perhaps vindicating some aspects of the present thesis - at least one advocate (Mica, 1992) has recently expressed some serious doubts about the value of individualizing disputes without addressing the 'social' background against which such conflict is silhouetted.

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APPENDIX I

(Note: the formating below is not the same as in the original questionnaire where a mainframe printer was used)

MEDIATING COMMUNITY DISPUTES:
THE REGULATORY LOGIC OF GOVERNMENT THROUGH PASTORAL POWER

Researcher:
George Pavlich   Tel: (604) 731-7674
(or Professor R. S. Ratner)
Department of Anthropology and Sociology
University of British Columbia
Vancouver, B.C.

I am a Ph.D candidate in the sociology department at the University of British Columbia investigating why mediation has become popular in contemporary society. Understanding this will allow us to clarify the goals of alternate forms of dispute resolution (such as mediation). This is especially important in Canada because we have only recently moved towards alternate models of settling disputes. Your opinions will be invaluable to my research since you have experienced mediation first-hand. I would be most grateful if you took about 20-25 minutes to fill out the following questionnaire. I intend using your opinions for my Ph.D thesis. When completed, please return it in the attached self-addressed, postage paid, envelope.

Of course, you are under no obligation whatsoever to complete the questionnaire, and you may omit any questions you do not wish to answer. A completed questionnaire will be taken as an indication of consent to participate in this study. Please note that this questionnaire is entirely anonymous: DO NOT WRITE YOUR NAME ANYWHERE ON THE FORM, OR ON THE ENVELOPE. In this way, your identity will remain undisclosed.

INTRODUCTION: BACKGROUND INFORMATION

Please complete the following personal details:
Sex: Male [ ]   or   Female [ ]
Age: under 20 [ ]
        21 to 30 [ ]
        31 to 40 [ ]
        41 to 50 [ ]
        51 to 60 [ ]
        61 to 70 [ ]
        over 70 [ ]

Cultural Background: _____

Occupation: _____

QUESTIONNAIRE

SECTION 1: THE NATURE OF YOUR DISPUTE

1.1 Who did your dispute involve? (*NO NAMES*, eg., my spouse, my neighbour, the local store manager, etc.)

_____

1.2 Briefly, what was the dispute about?_____

_____
_____

1.3 Had you heard of mediation as a way of resolving disputes prior to this dispute?
(*please check*:)   Yes [ ]   No[ ]

1.4 How did you hear about mediation? _____

_____

1.5 What prompted you to try mediation as a way of resolving this dispute?

_____
_____

1.6 What, if any, other ways did you try to resolve this dispute?

_____

SECTION 2: THE MEDIATION SESSION

2.1 Who first applied to the mediation centre to settle your dispute? (*NO NAMES*, eg., I did, or my neighbour, etc.).

_____

2.2 When you knew that your dispute was going to mediation, what did you
expect to achieve from the session?

_____
_____

2.3(a) Was the actual experience of the mediation session different from what you had expected?
(*please check*:) Yes [ ]   No [ ]   To some extent [ ]

2.3(b) Why do you say this?_____

_____
_____

2.4(a) Did you feel comfortable enough at the session to speak freely?
(Please check *one* of the following:)

Definitely yes[ ]   To a large extent[ ]   Not really[ ]
      definitely no[ ]

2.4(b) What, in particular, made you feel this way?_____

_____

2.5 Do you think your side of the dispute was adequately
    represented at the session?

_____

2.6 Was the other person's point of view adequately represented
    at the session?

_____

2.7 How much did the mediation session cost you? $_____

2.8 In your opinion, was this cost reasonable? _____

_____

SECTION 3: THE MEDIATOR

3.1 Did you feel intimidated by the mediator?
    (Please check one of the following:)
Not at all   [ ]   A little bit [ ] Quite a bit [ ]
Very much so [ ]

3.2 In your opinion, was the mediator impartial?
(*please check*:)   Yes [ ]   No [ ]   Can't say [ ]

3.3 How did you like the way the mediator approached your
     session/s?

_____

3.4(a) Did the mediator help you to see specific aspects of your
       dispute more clearly?
  (*please check*:) Yes [ ]   No [ ]   I'm not sure [ ]

3.4(b) Why do you say this?_____

SECTION 4: RESOLUTION?

4.1(a) Was your dispute adequately resolved in this mediation
       session?

  (*please check*:)   Yes [ ]   No [ ]   I'm not sure [ ]

4.1(b) Please explain:

_____

4.2(a) If you reached an agreement in the session, do you intend
to carry out the conditions contained in it?

(*please check*:)   Yes [ ]   No [ ]   Partially [ ]

4.2(b) Why? _____

_____

_____

4.3(a) Would you recommend mediation to others?
(*please check*:)   Yes [ ]   No[ ]   I'm not sure[ ]

4.3(b) Why? _____

_____

4.4 Is there anything else you would like to add? _____

_____

Please check to see that you have not unintentionally omitted any
questions, and return the questionnaire in the self-addressed,
postage-paid envelope.

Thank you for completing this questionnaire.