Peacemaking: An Adaptive Mediation Model for Young Offenders

by

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Abstract

While significant advances have been made in conflict resolution, mediation still largely employs an outdated perspective toward communication.

Through a critique of mediation procedures, fieldwork among young offenders, actual mediation cases conducted with adults, and a review of aboriginal youth justice initiatives, I argue that a new non-face-to-face mediation model should be considered alongside standard mediation. The purpose is to accommodate the abilities and fears of marginalized people. Using a cross-cultural review of Maori, Japanese, Ojibway, Nuer and Navajo successes with youth justice, I argue that the ideals behind those initiatives can also be achieved in mediation talks with those reluctant to enter the current face-to-face process. I also argue that mediators must become more sensitive to the concerns and needs of participants, particularly young offenders.

I suggest the current face-to-face model be adapted to accommodate causes of resistance to mediation expressed to me by young offenders, and that disputants be given more choice in terms of process. The one-size-fits-all mediation process is not adequate for a diverse population.

Keywords: Aboriginal, conflict resolution, mediation, alternative conflict resolution, mediation, mediation process, peacemaking, cross-cultural critique, shuttle diplomacy, young offenders, youth, open custody, closed custody, secure custody, incarceration, storytelling.

Dedicated to

Jason Pascoe

without whose support
this would not have been possible

and

Albert, Noah, and Oscar Timmins

who will not understand why
their names appear here
until they are older.

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My fieldwork was conducted in increments, and Chris and Andrew continued to support my efforts with more artifacts. In doing so, they made it possible for me to conduct appropriate acts of reciprocity with my subject group. Their generosity in permitting artifacts to be used in my fieldwork also provided kids in jail with a series of adventures that has since entered the oral history at the youth facility. I would also like to thank Dr. Andrew Nelson for his generosity and time spent in critiquing my thesis and providing insightful suggestions on how it could better represent my ideas and those of my subject group.

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Albert was instrumental in helping me see why young offenders usually don't do mediation. Noah helped me understand linguistic variations, new terms, protective stances, and honour that young offenders use to protect their dignity. Noah helped me see that young offenders are a legitimate sub-culture and a network of like-minded people who are a whole lot more complicated and intriguing than media reports suggest.

Oscar helped me understand that young people often create layers of behaviourial mechanisms to protect themselves from further loss and damage to identity. Through Oscar, I was able to recognize temporary survival behaviour and protective mechanisms wrapped around a truly good and valuable person. For their company, counsel, linguistic interpretation, loyalty, and their humour, I will always be grateful.

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Preface

There are many motivations behind this thesis, and some are more personal than others. My first exposure to the potential for a mediator to be a conduit for negotiated dialogue occurred when I was employed by an advertising company in Toronto. I acted as liaison between creative and production art departments because hostilities had escalated to the point where principals in both camps could no longer communicate effectively.

In this case, marginalized people worked in production, while art directors worked in the creative art department. Production artists were somewhat transient, hourly paid, and had no benefits or job security. Art directors treated production people with contempt. Production workers retaliated creatively. Because I had skills anchored in both departments, I became a communication conduit making it unnecessary for either side to meet. Without constant triggers for conflict, hostilities lessened, production increased, errors decreased, and artists in both camps were able to relax. It is the liaison process that continues to interest me.

This thesis is partly the result of informal interaction with my subject group: there are young offenders within my own circle of relationships, and I cherish those boys. I have learned a great deal from them about honour, loyalty, and the protection of a precarious identity. They have developed layers of protection to shield their identity and their dignity from further damage.

Expressions of those protective layers places all my informants within a subculture that is further rejected by mainstream groups. I have seen them hide from normal social contexts that would have been relaxed recreation to less damaged children. I have listened to their stories of the most obnoxious and offensive events, conducted simply to be noticed by *somebody*, even disapproving strangers. One boy told me he always used to punish adults because nobody took good care of him and his siblings when they were little kids.

This much-maligned group of youth constitute a complicated and marginal subculture; yet each young offender involved in my fieldwork was open, cooperative, and courteous to me; they also provided information and advice that surpassed my expectations.

One reason I have pursued mediation is because I wish to use my skills and education to make a contribution in a way that is relevant to more people than myself. As a mediator, I can provide a comfortable link between young offenders and others so that the knowledge of marginalized kids can be shared, if they wish.

Although I have always been interested in social justice issues, the young offenders in my own life helped me choose the direction my thesis would take.

They also showed me that honour, justice, and fairness, rather than legal process and jargon, are important concepts to them. In many of our talks, the kids introduced these topics; the logic they understood to lay behind those concepts impressed me.

Another motivation behind this thesis is that despite claims made by the United Nations that Canada is a more desirable country to live in than any other, Canada incarcerates more children (ages 12 to 18) per capita than any other industrialized nation, more than the United States, France, Germany, England or Spain. The United States has capital punishment but does not incarcerate young offenders at anywhere Canada's rate. Despite an almost constant increase in jailing youths, election platforms from parties of all political persuasions contain promises to get tough(er) on kids.

The first mediation I performed was for divorcing friends who needed to negotiate division of assets but could not productively meet face-to-face. I did not think to push them towards such a meeting: such aggressive communication was not necessary. I simply accepted their position and worked around it. It took time. They set the agenda; I gathered from each elements to be negotiated and placed them into categories. Then I mixed up things inside the categories so that each side could be distracted for a little while from their anger by rearranging those categories properly. I created a category called 'things inherited from the ancestors' and protected it from the bargaining process.

Using anthropological principles I helped each side see that *they* were creating order within the chaos: I was only the conduit for their negotiations. All I provided was the process. The resolution took shape and was finished in three weeks. The mediation process was so closely linked to the dignity of each person in this conflict that I decided to explore how mediation can be made more relevant for more people.

I began to prepare during my fourth undergraduate year in university when I took the mediation course offered by Community Justice Initiatives (C.J.I.), the flagship mediation group in Waterloo Region. During my first year as a grad student, I completed Mediation I and II courses offered by the University of Waterloo and joined C.J.I. as a volunteer mediator. I have since been conducting mediations on my own.

There are few people available to listen to members of my subject group. Most mediators are firmly middle class, as I am now, but I have not always been middle class; I have history in other camps. After talking to many mediators, who are also middle class, my impression is that they do not know what it is not to feel safe. They also seem rigidly opposed to changing the rules to let more peo-

ple into the club.

When I ask mediators what they know about other cultures or the concerns of young offenders, I am always met with blank stares. Anthropology provides me with a cross-cultural and inclusive framework in which to begin. One young offender in jail asked during our introduction if I knew what sweet grass was (I think this was a test). There is sweet grass in my garden. Sweet grass is often used in aboriginal ceremonies, decorative items, and baskets. We started talking about the world from that point of reference.

Introduction

> The politics of fear and hatred are the mechanisms through which we attach moral valuations to social categories. If we hate and fear someone, then they must be bad. The xenophobia collectively felt towards young people, when unpacked, reveals an ideological orientation that associates immorality with marginal social groups, which are identifiable by race, class, and gender. The politics of fear and hatred is, thus, in its basic form, the politics of stratification (Schissel 1998:31).

Mediation is a short-term, task-oriented, participatory intervention process in which disputants voluntarily agree to work with a third party to reach a mutually satisfactory and balanced agreement (Volpe and Bahn 1987:297). In my proposed mediation model, the mediator and participants do not meet face-to-face at the same table. Instead the mediator meets with one side and then the other in different locations, taking negotiated dialogue in document form back in forth between each side in a type of shuttle diplomacy. In this way, each side makes carefully edited statements in a place in which they feel comfortable before their dialogue is carried to the other side by the mediator.

Currently, this type of shuttle diplomacy is done occasionally and informally when all other options are exhausted, but it is not a choice on par with the standardized process or considered normal procedure. I suggest that if young offenders had a choice of mediation style (non- or face-to-face), they would participate in mediation more often and more would agree to peacemaking talks.

My proposed mediation model addresses concerns for safety, unequal power and education, linguistic competence under duress, visual cues of superior resources, and subtle threats (all important features of resistance). I suggest that if these conditions are considered relevant in terms of process, resistance to peacemaking will be reduced. If resistance to a confrontational mediation model results in no communication, then each side in a dispute is denied the opportunity to see the other person as a complex, many-sided and whole creature--not just as perpetual offenders or victims.

Another reason for the development of an adaptive model is to give young offenders a graphic demonstration of the degree to which their actions touch others, both positively and negatively, and to show them that nothing they do is without consequences to others (Ross 1996:20). This type of truth-exchange simply cannot take place unless, in the young offender's view, the communication strategy addresses their primary concerns and causes of resistance which is personal safety and potential damage to their dignity.

The problem

A value is an arbitrary conception of what is *desirable* in human experience (Spradley and McCurdy 1971:379). As in other children, youth that eventually become young offenders are exposed to the arbitrary 'rating system' of their culture. Almost everything learned by the young offender is learned and labeled in terms of its desirability (Spradley and McCurdy 1971:379). The problem,

explained in more depth elsewhere in this section, is related to the application of mediation to this and other marginalized groups.

This is compounded by youths that live 'within' a culture, but do not feel that they are part of the culture or 'of' the culture. An example of marginalized youth who feel this way arose during my fieldwork experience. Three informants referred to the Lutherwood institution where they had been housed the previous year as "Loserwood." Although this may seem obvious, I asked why they called it that. They said "because they have losers there." Although all three were by their own admission well cared for at Lutherwood, had positive relationships with adults there, and were taken on regular outings, their marginal identity was entrenched.

Young offenders are caught between what they can do as individuals and what they are required to do (or not do) as members of a society. Even youth who have committed no crime at all are caught up in a value system that is perpetuated by a conservative press seeking sensational stories that will shock and sell papers. The behaviour of youths has become a media commodity. The dominant presumption is that collective fear becomes highly politicized as it is manipulated either inadvertently or deliberately for political and economic ends (Schissel 1997:103).

Choices made by young offenders are often complicated and reactive; they do not necessarily behave the way they do because they believe their behaviour

is right. They often behave in the way that they do because they see the alternatives as having worse consequences (Kertzer 1988:39). For example, an informant told me he was in a bowling alley with a younger brother who had not taken his ritalin for a couple of days and was causing trouble, "lots of trouble, flipping out and shit, wrecking stuff and yelling, kicking stuff and throwing bowling balls around!" My informant said that when the manager, a really big guy, came over to his brother, he knew his brother was in big trouble, so he just showed the manager his knife so he could get enough time to push his brother out the door. He said his brother was already at the door and the manager had a hold of his brother's arm. A context in which he tried to protect his brother resulted in a weapons charge. Ironically, my informant and the manager both wanted the same thing; they wanted the disruptive boy off the premises.

My informant found it insulting that anybody thought he would really knife anybody. He thinks that grownups should ask what happened before laying charges and that they should ask when there aren't a lot of people around. He also thinks police shouldn't talk to kids like they are too stupid to understand what is happening. This boy said that police know what happens next but kids know what happened first. He wonders why everyone thinks that what happens next is always more important than what happened before, "like to start the whole thing." He had a few seconds to decide what decision would be less harmful to him and/or his brother and decided that he was better able to cope

with what happened next. This boy says mediation is not for him. I suspect that he is accustomed to adults not listening.

Contrary to the intention of the Young Offenders Act, young offenders are rarely extended an opportunity to take responsibility for their offenses in any meaningful way, aside from the more punitive aspects of the legal process. Canada incarcerates more children per capita than any other industrialized nation, including the United States (Schissel 1997:8). Nahlah Ayed, writing in the London Free Press, quotes Justice Minister Anne McLellan: "We incarcerate more young offenders than any other western democracy, and that should be of concern to us" (Ayed 1999:A13). During my fieldwork among young offenders, only one informant had even heard the word 'mediation' despite growing up, committing crimes, moving through the legal process, and being sentenced in the community in which Canadian Victim Offender Reconciliation Programs (V.O.R.P. 1974) originated in Canada. Mediation, as a process, is explained in detail in Chapter One.

Statistics provided by Community Justice Initiatives (1999), the group that implements V.O.R.P. programs, show that in 1996, 39 young offenders were referred to their mediation program, with 25 mediations taking place. In 1997, 31 youths were referred; 13 mediations were performed. In 1998, 32 youths were referred; 15 mediations took place. In the first four months of 1999, 13 youths were referred with 5 mediations being conducted. For the four

years listed, the victim refused V.O.R.P. in 18 cases; in 5 cases the victim could not be located.

During this time, nine cases were considered by V.O.R.P. representatives as inappropriate (figures provided by Community Justice Initiatives, V.O.R.P.[1]). Not all cases are deemed suitable by the John Howard Society and/or V.O.R.P. officials for mediation (see footnote 1). Some resolutions and cases are handled privately through parents, and some charges are considered too serious to be resolved through V.O.R.P. (Maureen Murphy, John Howard Society, personal communication, 18 May 1999). Cases and individuals are appraised for suitability by a social worker[2] at the John Howard Society before being referred to V.O.R.P. Murphy indicated that shoplifting cases are not referred. She cited difficulties with time and effort as the reason. This means that of 115 youths screened as suitable for the V.O.R.P. program in the last four years, only 58, roughly half, actually went to mediation.

This thesis is concerned with the half that did not participate in mediation and those who were not referred.

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1. The official interviewed at the John Howard Society is Maureen Murphy, 519-743-6071, ext. 220.

2. Victim Offender Reconciliation Program, of Community Justice Initiatives of Waterloo Region is at 39 Stirling Avenue North, Kitchener, Ontario N2H 3G4 519-744-6549, e-mail: cji@golden.net. It has been operating since 1974. They provide community mediation services and sexual abuse treatment programs in addition to Victim/Offender Reconciliation Programs (V.O.R.P.) for young offenders.

The research question

My thesis asks how young offenders and their victims can safely express their interpretations and social experiences of the event that connects them so that neither is silenced by process. Mediation is intended to help polarized disputants communicate their concerns in a respectful and equal social environment. Mediation can, in some cases, replace legal process, or it can work alongside legal process. This is covered in depth in Chapter One.

One goal is for both parties to be able to come away from mediation talks with a better understanding of what has happened and why; this is the agenda of most mediations. In this thesis, I explore an alternative context for young offenders to talk to their victims without any further damage to the dignity and identity of either party.

During a recent visit, I asked informants where they thought mediation was most needed. Ironically, they said it is needed between young offenders inside institutions. They said being in lock-up is stressful and sometimes there are a lot of fights. I did not expect their perception of the opponent, or the 'other,' to be other young offenders, however, my informants consistently identify the 'other' as peers.

Another goal of this thesis is to develop a context that is acceptable to young offenders that promotes forgiveness and compassion. The intention is to look at causes of resistance as a solvable set of problems so that participation in

mediation is possible for both victim and young offender at a higher rate than the figures above show.

My research outlines why the mediation process needs to be updated to accommodate more people. It shows how the existing mediation model can be adapted so young offenders can have choice and a clear voice in a safe physical and social environment that will provide them with an important peacemaking accomplishment.

For the purpose of this thesis, I use the terms mediation and peacemaking interchangeably; my informants like and comprehend the word 'peacemaking' better than 'mediation.' To accomplish my goal, I examine why young offenders are not currently participating in mediation even though there is opportunity for them to do so. Understanding causes of resistance to mediation is an important part of this work.

Method

My fieldwork involved participant observation and took place in increments during 1998-1999. My first fieldwork experience occurred with entry level and incarcerated young offenders in classroom environments where I did presentations using archaeological artifacts. I did the same presentations in other classrooms to non-offenders. I asked all classes to write their definition of power and three heroes.

There were two reasons for beginning with this type of inquiry. First, I

needed more exposure to age-grade terminology and attitudes. Secondly, I wanted to become familiar to my subject group and learn their names before pursuing the more intricate part of my fieldwork. I also wanted their consent to participate to be voluntary and acquired over time. I entered two institutions several times with artifacts. I asked more questions. They asked more questions. Our exchanges grew more comfortable. In addition, three former young offenders from my own community were interviewed over the past two years.

I also include data from five mediations performed in the past two years using my proposed non-face-to-face or non-confrontational mediation model. With the exception of one case that involved a 16-year-old boy, these mediations were conducted with adults, all of whom rejected the face-to-face model. These were all non-criminals, acquaintances, and friends of friends who needed conflict resolution quickly, but wished to circumvent legal process for a variety of reasons. Although I have performed six such mediations, consent to use non-identifying information was obtained only from five.

Aboriginal Youth Justice Initiatives

For background on other approaches to peacemaking, I review aboriginal justice initiatives from Maori, Navajo, Ojibway, Nuer, and Japanese communities to learn about alternative approaches to the healing of an angry child. The Maori Resolution Conferencing Program concentrates on social harmony, forgiveness, accountability, and restoration. These concepts are expressed in a supportive

social environment that incorporates community values into discussions of how a young offender got to that place.

Four elements of pre-European Maori society inspired the creation of the Family Group Conferencing approach and are covered in more depth in Chapter Four. Briefly, they are, first, an emphasis on reaching community consensus. Secondly, the desired outcome is reconciliation and a settlement acceptable to all parties, rather than the isolation and punishment of the offender. Thirdly, the concern is not to dispense blame but to examine the wider reasons for the wrong; and fourthly, there is less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony (Olsen, Maxwell, and Morris in MacElrea 1994:36).

These objectives are found among other indigenous societies throughout the world. Family Group Conferencing is also being conducted in the Australian community of Wagga Wagga. One of the reasons this community likes the Maori model is because it tends to soften or prevent stigmatizing or degrading attacks on the identity of the youth (Braithwaite and Mugford in Ross 1996:21). At Wagga Wagga, victims often say that they do not want the youth punished. Instead, they want the young offender to learn something from the event and get their life in order (Ross 1996:22-23).

Traditional American Southwest justice, as well as justice practiced by African Nuer will also be discussed. The Navajo Justice and Harmony Cere-

mony will be discussed as it relates to values that are different from mainstream justice. The Peacemaker Court is a modern medium for expressing elements of Navajo traditional justice. One of the best known anthropological references is the case of the Leopard-Skin Chief as described by anthropologist Evans-Pritchard (1982). Due to lack of courts and tribunals, Evans-Pritchard concluded that this African group did not have a legal system. In contrast with standard mediation format, the Leopard-Skin Chief plays a pivotal role in decision-making. The participants in a mediation conducted by a Leopard-Skin Chief, who normally have the influence and backing of a nearby lineage, are under considerable pressure both to contribute to a solution and end the conflict. In this context, mediation and legal process are indistinguishable.

Ruth Benedict's (1934) work among the Japanese provides historical data for understanding John Haley's (1995) work with Japanese youth decades later. Youth justice in Japan assumes mediation is a normal part of official/offender communication. Achieving social harmony is the key. Forgiveness on both sides is assumed to be possible. There are no separate victim-offender mediation programs in Japan. Those in positions of authority, including police officers, are expected to act as intermediaries.

Ojibway justice addresses the behaviour of the young offender but assumes that the youth is an otherwise good person who is experiencing a difficult transition from childhood to adulthood (Ross 1992, 1996). The assumption is

that healing for all those concerned is not only possible, but a prerequisite for social harmony to be achieved. The Ojibway and Mi'kmaq forgiveness verb tense will be discussed briefly (Ross 1992). Ojibway peacemaking is subtle. Traditionally, Ojibway shun direct confrontation just as they shun hierarchies. Peacemaking is done without the direct face-to-face challenge of current mediation models.

Maori, Ojibway, Navajo, Nuer, and Japanese justice assumes that the youth still has family support and that there is a community of interested people ready to contribute to helping the youth. Most of my informants do not have the support and backing of a lineage who watch over their interests. In Waterloo Region, Thursday is the day set aside for youth matters in court. A disconcerting number of youth appear with duty counsel only. Many parents of young offenders are so fed up with their teenagers that they cannot provide the type of community support assumed in many of the conferencing options. A youth's parents sometimes renege on their promise to take their child back (Goodwin 1999:4):

> A lot of times the family rejects them, when the families have said they will take them back because they don't want the stigma of saying they don't want their child. Then, when the child is released and shows up at the house, they find the doors locked (Cowie, personal communication 1998).

My thesis is concerned with youth who do not have stable family or community interest to provide courage and support. My research explores how an

adaptive mediation model can accommodate young offenders regardless of family or community support, and especially for those with none. My proposed mediation model is not intended for one isolated group; it is intended to provide another choice for any group of how best to deal with conflict.

My thesis asks two questions. How can context encourage young offenders to make reflexive statements that will not be rejected, in a way that is progressive, constructive, and honourable? How can the mediation process help youth construct and edit their own communication so that they take part in their own peacemaking?

My proposed model creates a conversation "marketplace" which hides its own mechanisms and operates in safe places. It addresses elements of resistance, rather than accepting, then ignoring them, and it considers the position of those who feel they have nothing to bring to the table. It considers the position of those intimidated by authority and those whose dignity has been abused, those who do not speak the same language as their opponent, and people who are fearful of police and policing procedures.

Not all young offenders come from safe and predictable democracies (two youth came from military dictatorships to Canada in the past year). My non-face-to-face mediation considers those who are not articulate under duress, which is most young offenders, and young people who assume they will be humiliated by a more violent or seasoned adversary in a face-to-face encounter.

Outline of Chapters

Chapter One examines standardized mediation as a communication framework. Some historical data are presented. For example, since the 1888 Arbitration Act, both labour and management have used mediation as a standard format for negotiating business-related disputes. Similarities and differences between community justice programs and mediation within labour relations are reviewed. Definitions, core features, characteristics, and standard procedures of mediation are covered in Chapter One. This chapter also discusses causes of resistance to mediation as presented in mediation literature. Cross-cultural concerns are introduced, plus a brief history of the development of the Young Offenders' Act.

Chapter Two examines Michel Foucault's notion of power as it relates to the mediation process and youth concern about safety, power imbalances, and intimidation within the mediation context. Foucault's approach supports a resurrection of subjugated knowledges. He suggests that subjugated knowledges are a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated (Foucault 1980:81-82). He also suggests that power is attached to contexts and situations rather than being firmly in the control of, or belonging to, individuals. He views power as working best when its mechanisms are hidden. This thesis proposes a way of resurrecting the subjugated knowledges of young offenders in a way that will benefit them, their vic-

tims, and the adults who direct their lives. Chapter Two also looks at who young offenders are as they are interpreted through statistics provided by Statistics Canada and media portrayals.

Chapter Three outlines my fieldwork experience among young offenders in Waterloo Region. My subjects form three groups, younger youth at the Lutherwood institution, older youth in closed custody at Hope Manor in Petersburg, and three former young offenders interviewed extensively over the past year. My time with each group and individual has resulted in fairly open dialogue and provided me with a better perspective of their concerns. Their participation has been entirely voluntary, and they have been unexpectedly forthcoming in their opinions.

Chapter Four summarizes fieldwork and introduces five non-face-to-face mediations that I performed using my model. This chapter shows how information gathered from informants and clients supports an alternative, adaptive mediation model. Chapter Four explains examples of aboriginal youth justice from a variety of communities. Aboriginal concepts of justice are shown to relate to both native and non-native young offenders. Maori, Nuer, Navajo, Ojibway, and Japanese approaches are covered as they relate to youth justice initiatives.

The conclusion summarizes the main points of the thesis and discusses how Foucault's notion of subjugated knowledges can be applied to mediation.

The conclusion also includes more recent comments from the three informants previously known to me who now live outside the institutionalized setting.

Chapter One

What is Mediation?

Throughout the world, mediation models focus on two primary conditions: a face-to-face communication style and the goal of agreement-making. Elements of healing and forgiveness as components of relationship restoration are usually not a consideration in an agreement-driven mediation model. Mediation, in Western society, operates in response to many factors. One of them deals directly with the discomfort many people feel with becoming bit-players in a legal system that uses language unrelated to many disputants' knowledge base.

Mediation operates alongside a legal system that is populated by strangers and uses precedents and jargon unfamiliar to many litigants. Mediation sometimes takes place within an informal social environment. It may also be a result of mandatory measures taken in civil cases to attempt to clear court backlogs.

Mediation is a process in which a neutral third party, "the mediator," assists the parties to a dispute to negotiate their own resolution to a given situation. Different mediators take different approaches to mediation, but the process is one in which the neutral person provides models of process and communication to help the parties negotiate terms of their understanding of the event and their own resolution. The mediator does not have the power to impose a settlement. This is a process in which the parties retain control over the shape of an acceptable outcome (Volpe and Bahn 1987:297).

Alternative dispute resolution permits disputants to escape from the judicial system, thereby making the decision-making process their own responsibility. The dynamics of adjudication and mediation are different. Adjudication derives power and authority from a hierarchical system. A power figure who is always a stranger (typically the judge) makes decisions for others on the basis of facts which are developed through disputed evidence, and by means of rules of law, that are also contested by the parties (Bluehouse and Zion 1993:328). Decisions based on these competing versions of truth and law are enforced using coercion (the power of the police and threat of prisons) (Bluehouse and Zion 1993:328).[1]

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1. Explanations of Arbitration, Negotiation, and Litigation are included here as alternatives to mediation and court process (Bluehouse and Zion 1993:328).

Arbitration is a process similar to the Court system but it is generally quicker, less formal and conducted in private. A neutral third party "the arbitrator" is hired by the parties and is empowered to resolve a dispute by making an "award". The arbitrator will hear evidence and submissions on behalf of each party and then decide on the appropriate outcome. Arbitrated awards are normally binding unless the parties have elected a form of advisory arbitration. Awards may be enforced by the Courts. Arbitration is very flexible. It may be like a trial, involving formal presentation of evidence and cross examination. In most cases, the parties and the arbitrator adopt a much more summary and expedient approach. In Ontario, arbitration is governed by statute (Bluehouse and Zion 1993:328)..

Negotiation is another formal process by which two or more parties try to reach an agreement. Often, parties have difficulty negotiating directly and will hire lawyers or other professionals to negotiate on their behalf. There are various negotiation models but current interest is in negotiation processes which seek win/win solutions and try to improve relationships. In interest-based negotiation, parties are encouraged to seek workable solutions accommodating the needs and interests of all parties to the negotiation. This may be contrasted with positional negotiation in which one party takes a position on an issue and tries to force the other party to accept that position or something close to it (Bluehouse and Zion 1993:328)..

Litigation is the formal legal process by which cases are resolved through the courts. In the North American legal system this is accomplished by means of the

Negotiation and bargaining involve the parties in a process of discussion which seeks to bring them into voluntary agreement. Adjudication uses the power of the state and its legal system(s) to provide an authoritative conclusion. Arbitration uses a third party to decide, through prior mutual consent, the issues in a dispute (Schellenberg 1996:13). Mediation is a process by which a third party seeks to help persons involved in a dispute come to a mutually satisfactory resolution of their conflict (Schellenberg 1996:182).

Mediation is based on an assumption of essential equality of the disputants. My premise is that in many cases, inequality must be assumed to be a primary concern of participants, and that this possibility, and this reality, especially for marginalized persons, must not be ignored. Instead, working towards neutrality for participants ought to be a goal of the process. A mediator stating that equality exists within the process does not make it so.

Theoretically, if parties are not exactly equal or do not have equal bargaining positions, mediation, or at least mediators, attempt to promote equality and balance as a part of its process. It is a horizontal system that relies on equality, the preservation of continuing relationships, and/or the adjustment of disparate bargaining positions between parties (Bluehouse and Zion 1993:328-

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adversarial system. In Court, an independent Judge presides over a trial in which the litigants, usually represented by lawyers, present evidence and argument to persuade the Court that each litigant's view of the facts and the appropriate law is the right one. Normally the outcome of the litigation process is a judgment in which one party is found to be right and the other wrong (Bluehouse and Zion 1993:328)..

329).

Mediation is a communication framework where certain conditions are enhanced, such as listening, respect, and solidarity of purpose, and certain conditions are excluded, such as legal jargon, competition, and adversarial process. Mediation is a product of the evolution of several approaches to conflict resolution which have developed in many cultures over generations. My preferred definition is:

> Mediation is the intervention into a dispute or negotiation of an acceptable, impartial, and neutral third party who has no authoritative decision-making power, to assist contending parties to voluntarily reach their own mutually acceptable settlement of issues in a dispute. (CDR Associates 1986:1)

Current mediation models concentrate on the mediator as a manager of power relations between disputants. Very little data exist on shifting power relations as the dispute unfolds or keeping power and control in the hands of those courageous enough to try face-to-face mediation. My proposed non-face-to-face mediation model addresses several issues; the most important are power relations and the causes of resistance to mediation.

Westernized mediation process: historical background

Mediation and arbitration are fairly recent innovations in Western communities seeking prompt, more humane, and less expensive alternatives to the courts (Duffy 1991:24). The history of mediation to settle disputes in the United States relates most specifically to its use in the labour movement. Since the

1888 Arbitration Act, both labour and management have routinely appealed to neutral third parties as a method by which grievances, both contractual and disciplinary, can be heard and reasonably settled (Holley and Jennings 1980:intro).

There are noticeable differences between mediation as practised in community justice programs and mediation in labour relations. The primary difference is that in labour mediation, the parties in the dispute, representatives of labour or management, are generally experts: the issues remain similar while members change. Negotiating parties and the neutral third party are usually well versed in the issues, the laws, negotiation strategies, and so forth (Duffy 1991:24). For example, coercion, as seen in labour vs management negotiation, often forces parties in conflict to a conclusion. However, in community mediation, the parties are often unsophisticated about law and negotiation strategies (Duffy 1991:24). In many mediations, parties do not have easy access to legal process because they cannot afford legal fees, or assume they would not be covered by Legal Aid because of recent cutbacks. Sometimes, participants have unequal resources which permits one side to hold out longer. This means that the person with limited resources may feel pressured to accept a solution that benefits their opponent more simply because they cannot afford to negotiate longer. Coercion can be a hidden component of the process, even when all other things may appear equal to the mediator.

Although there are many approaches to defining interpersonal conflict, the one used here considers it to be "tension between two or more social entities (individuals, groups, or larger organizations) which arises from incompatibility of actual or desired responses" (Raven and Kruglanski 1970:70). Most conflicts fall under the heading 'mixed-motive' conflict. As the name implies, these conflicts have a range of solutions beyond the win-lose alternative. In the mixed-motive conflict we have parties faced with alternatives of trying to maximize their own gain versus working for the best collective solution (Worchel and Lundgren 1991:5). In a non-face-to-face mediation model based upon aboriginal justice initiatives, the desired goal is not merely to resolve conflict:

> [E]mphasis must be on finding the fairest possible resolution that leaves neither party feeling that the other has received an unfair advantage. Resolutions that are inequitable set the stage for future conflict that is often of greater intensity than the confrontation at hand. (Worchel and Lundgren 1991:13)

Mediation involves the intervention in a conflict by a neutral third party who assists the conflicting parties in managing or resolving their dispute (Duffy 1991:22). The word 'assist' is important here. Mediators are not supposed to force or coerce settlement. Instead, by facilitating face-to-face discussion, problem solving and the development of alternative solutions, a mediator enables the disputants to arrive at their own agreement as to how the conflict will be resolved (Duffy 1991:22).

Another important difference between the type of mediation used in

communities with individuals and the type based on labour/management relations is that in labour mediation, the involved parties usually represent much larger groups (Duffy 1991:24), who are both absent and dependent upon those parties to negotiate on their behalf. In mediation, at the community level, conflicts usually take place between individuals who represent themselves. Interpersonal conflict, as is often seen in community mediation, tends to be emotionally centred, whereas intergroup conflict, as is more typical of labour mediation, tends to be task-oriented (Duffy 1991:25).

Also, in labour mediation the players may change from time to time. Representatives of labour may change due to election, retirement, or replacement. Management representatives may change due to availability, familiarity with the issues, and management preference. The players may change, but the issues and roles to be played remain similar: the rules don't change. In community-based mediation, the players represent themselves and/or their families and the conflict is connected to the person and the context.

The type of conflict considered in this thesis is not between groups or individuals accustomed to holding or using power. This thesis considers conflict between young offenders and others. My informants consistently interpreted the 'other' to be other young offenders.

Core features of mediation

This section will briefly explain core features, characteristics, and normal media-

tion process as taught in two series of mediation courses I took to prepare for my fieldwork experience. Because this thesis recommends augmenting existing mediation procedures, it is necessary to outline the process currently used. The following description refers to standard mediation practice.

Throughout North America, mediation has certain key or core features: *Mediation is assisted negotiation*. The mediator's role is to facilitate negotiation between parties who have difficulty in resolving a conflict on their own (Schellenberg 1996:182). *The mediator is a neutral third party*. The mediator, usually a stranger to both parties, avoids taking sides in attempting to move the parties toward agreement. *Mediation is voluntary*. Although mediation is sometimes initiated by a court order (and therefore not entirely voluntary in this respect), continuing in mediation is voluntary for the parties, and no agreement is reached that is not mutually accepted. *Disputants retain responsibility for decisions* (Schellenberg 1996:182).

The mediator may guide the negotiations, but responsibility for any decisions of substance always remains in the hands of the disputants. *Mediation is private and confidential*. What goes on in mediation sessions is not expected to be shared with others. Sessions are conducted in a private place, and there is no official record of what is discussed (Schellenberg 1996:182).

Characteristics of mediation

Unlike core features listed previously, the following attributes usually, but not

always, accompany the mediation process. *There are no sanctions for failure to reach an agreement.* If agreements are to be voluntary, it must also be acceptable not to agree. When agreement is not reached, no blame for this is cast upon either party or the mediator (Schellenberg 1996:183). *The process of negotiation is informal.* Disputants use everyday language and informal procedures. There are no formal rules of evidence or procedure. *A written agreement is usually the objective.* To confirm agreement, the mediator tries to get the result in writing. When both parties agree to the same statement of a resolution, their dispute can be considered as concluded (Schellenberg 1996:183). *Litigation is viewed as the ultimate alternative to mediation.* If an agreement cannot be reached through mediation, the parties are free to pursue their case in court. Usually, though, during the period of mediation the parties must suspend any litigation that may be involved. *Clients generally pay for the services of the mediator.* The mediator charges for his or her services, and this charge is usually borne by the parties themselves (Schellenberg 1996:183).

The mediator is a trained professional. The mediator has taken special training to develop the skills suitable for the conduct of mediation (Schellenberg 1996:183). *The mediator facilitates clear communication, and emphasizes mutual problem solving as the objective.* The mediator helps the parties talk to one another clearly about their differences, then guides them to structure the discussion in terms of the problem(s) they must solve together--rather than on who might win

what at the other's expense (Schellenberg 1996:183).[2]

The mediation event: standard procedure

The mediation literature and all mediators with whom I have discussed process assume that the mediator comes to a mediation event with basic information gathered by an intake worker. Efficiency is the explanation for mediators not to gather this information themselves. Some mediators call participants to talk with them about details prior to the actual mediation, but this seems optional.

In my own experience as a volunteer mediator with Community Justice Initiatives in Waterloo Region, the original mediation group in Canada, the process is always the former. An intake worker obtained basic information about participants and the conflict, typed up the information and left it in my file for me to pick up. The phone numbers were included and I had to contact disputants to set up a time to conduct the mediation, but no other contact or conversation was obligatory or expected.

Community Justice Initiatives in Waterloo Region is the pioneer group in Canada: spin-off groups have adopted its procedures. The mediation courses conducted at both Community Justice Initiatives and the University of Waterloo use this framework (Mediation I-II 1998:40). My literature review presents a discipline that assumes the reader is not only familiar with the standard media-

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2. Descriptions of core features and characteristics of mediation are available throughout the literature. I used James A. Schellenberg (1996) as a primary source because his approach was complete and concise, and because he is well known and often quoted throughout the literature.

tion format but has adopted it without question. No alterations in intake procedures are included in either the course or course material.

Community mediation involves the use of a neutral third party to assist the disputants in arriving at a consensually agreed-upon settlement in either a civil or criminal matter. Mediation differs from arbitration and adjudication, in which the hearing officer determines settlement (Duffy 1991:32). Originally based on a labour/management model, the process is used in the community on a voluntary basis between individuals, families, neighbours, and acquaintances.

Research shows that parties in mediation are more satisfied with both the process and the outcome, and often are more compliant with the outcome than those parties who seek justice through the courts (Duffy 1991:32). Despite the proliferation of community mediation programs and high user satisfaction, such programs appear to be under-utilized in comparison to other processes, especially adjudication (Duffy 1991:32).

In several interviews I conducted with mediation course instructors about the feasibility of a non-face-to-face mediation model for those who cannot submit to the standard format, my proposed model was promptly dismissed as impossible. No dialogue on this topic was possible because of mediator resistance. When I asked why such an alternative to the standard process was unlikely to be successful, they consistently said that it would take too much time and the disputants wouldn't be able to reach an agreement if they didn't face each other.

My numerous attempts to enter into dialogue with them on this topic were rejected, although we talked easily about other things.

This thesis questions whether labour mediation techniques are appropriate for community disputes when there already exist rules for decision making that may not be adequately transferable. The next section describes resistance to mediation and standard recommendations from the literature for dealing with obstacles.

Causes of resistance to mediation: popular explanations and recommendations

Resistance is defined as actions by parties, both conscious and unconscious, that forestall, disrupt, and/or impede change designed to alter customary behaviours (Volpe and Bahn 1987:298). While resistance is normally seen as undesirable and inefficient by those attempting to facilitate mediation, close examination of causes of resistance to the mediation process may lead to making the process more accessible to marginal people and those whose cultural background causes them to be uncomfortable with existing procedures. There are other benefits of examining resistance. For example, dealing with resistance satisfactorily can sometimes facilitate resolution, because it serves to slow down the decision-making process.

Resistance is familiar to practitioners in all fields that attempt to introduce new or different ways of doing things (Volpe and Bahn 1987:298). However, unlike long-term intervention processes, such as therapy and other more

established intervention fields, mediation requires that the mediator come to grips with resistance more quickly and directly (Volpe and Bahn 1987:298). Because current mediation processes is agreement-oriented, mediators may not always be aware of the need to be concerned about resistance or have the time to handle it (Volpe and Bahn 1987:298).

Literature on mediation consistently mentions mediator concern over efficiency (Volpe and Bahn 1987:298). An ideal mediation is almost always defined as a single short and successful mediation lasting under three hours with an agreement reached (Volpe and Bahn 1987:298). This was also the primary focus in the mediation courses I have taken in the past two years.

Misinterpreting the mediation process: fear of damage to the identity

It is important to remember that resistance reflects individual disbelief in alternative ways of living. Holding onto familiar ways, the person fears that any other way of dealing with things will be disastrous and shattering to self-esteem (Volpe and Bahn 1987:301). This is especially true for young offenders who are not old enough, nor experienced enough, to understand that there are rewards, as well as risks, to trying new ways of doing old things.

A commonly held belief in mediation circles is that a widespread lack of information about the process has contributed to resistance. Volpe and Bahn (1987:298) suggest that mediation is not readily distinguished from other intervention processes, particularly arbitration. Another cause of resistance focuses

on mediation's relationship to the legal system. Riskin (1982:41) suggests that mediation is seen in most sectors to operate in the shadow of the law and that legal practitioners serve as gatekeepers. This perception of legal practitioners as well as the perception that they have controlling interest in the practice of mediation is expressed by Riskin (1982:43):

> Most lawyers neither understand nor perform mediation nor have a strong interest in doing either. At least three interrelated reasons account for this: the way most lawyers as lawyers look at the world; the economics and structure of contemporary law practice; and the lack of training in mediation for lawyers. (Riskin 1982:43)

Assumption of bias in the role of the mediator

A third possible explanation for resistance to mediation goes to the central premise of the process itself. In the literature, mediation is often characterized as an empowering process through which the mediator empowers the parties, particularly the weaker party (Volpe and Bahn 1987:299). This raises questions about whose side the mediator is on (Colosi 1983:2 in Volpe and Bahn 1987:299). Colosi (in Volpe and Bahn 1987:299) suggests that the temptation for the mediator to use the mediation process to somehow bring equity to the dispute by attempting to modify the balance of power is incredibly strong (1987:299).

As in almost all the literature on mediation, absolute neutrality plus the appearance of neutrality, must be practiced by the mediator at all times. Neutrality in mediation is quite different from neutrality in therapy. The mediator

is not to be on anyone's side. Michel Foucault wrote that "power is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms" (Foucault 1978:86). I argue that considering the position and comfort of marginalized people, particularly young offenders, within a social structure in which power is not equal can be more successful if the mediation process is altered to recognize and accommodate perceptions of power imbalance.

Chastising participants who display resistant behaviours

Volpe and Bahn (1984:301) suggest that mediator recognition of resistant behaviour is important, and offer a few examples and suggestions for mediator response:

> Thus, if a party in a dispute consistently arrives late for sessions, or leaves early, the mediator should quite clearly tell the offending party that, by limiting the time to work on a resolution, he or she is slowing down the process rather than helping it along. If the party offers excuses for the lateness--ascribing it to factors beyond his or her control--the response could be that the process works only when the participants make every effort, including planning to arrive early or giving themselves enough time, so that they do not cut into the time of the session. The discussion focuses on the behavior and its effects, not on its unconscious purposes (Volpe and Bahn 1984:301).

Again, efficiency is so important that the mediator is advised to chastise participants into compliance with the existing schedule. Many mediators interpret resistance to individual mediators as resistance to the process. In other words, many mediators consider resistance to the process, expressed by hostile

rejection of the mediator, to be the same as resistance to the mediator.

Folberg and Taylor (1984:331) point out that sometimes resistance is asserted by one of the participants who announces that he or she "wishes to withdraw from mediation because (a) mediation is not working, or (b) the mediator is biased or incompetent." Folberg and Taylor suggest that this resistance can be dealt with by "legitimizing this announcement before it happens" (1984:331). In the earliest stages, the participants should be told that they have these feelings, that "such a response is natural," and that the appropriate thing to do is to discuss these issues in a private caucus (Folberg and Taylor 1984:331; Volpe and Bahn 1987:302).

Other causes of resistance to mediation relate to interference with the process as the mediation proceeds (Volpe and Bahn 1987:303). Distracting comments by the other side, excessive questioning by the opponent, or claimed difficulty in comprehending are all behaviours that tend to slow down or completely stop the process (Volpe and Bahn 1987:303). Response to such difficulties in face-to-face encounters may be expressed by missed mediation appointments and lateness.

Because resistance to mediation is usually not recognized or appreciated until the mediation is in progress, resistant behaviours, or expressions of resistance can become disruptive to normal agreement-driven agendas. Volpe and Bahn suggest that because mediation tends to be a short-term intervention

process, the mediator often does not have an opportunity to handle resistance in a protracted or delayed manner (1987:303).

My research indicates that, among young offenders, concerns of personal safety were the primary basis of their resistance to mediation (see Chapter Three: Fieldwork).

The pre-mediation interview: problems at the intake stage

A one-size-fits-all mediation model based on labour/management negotiations, which considers the efficient use of time to be of primary importance, does not consider the unique conditions of young offenders. Using a standardized and inflexible model for all participants may be one of the reasons why few young offenders enter the process, even though even an unsuccessful effort would make them appear more responsible at sentencing. In turn, non-usage of the process may also be why few young offenders are offered the process. One probation officer told me that they hardly ever suggest mediation for young offenders because they just don't have the social skills to do mediation.

Of 115 youths screened and recommended for mediation in Waterloo Region since 1996, only half actually participated in mediation (V.O.R.P. figures provided by Community Justice Initiatives, 1999). A mediation process that is universally applied is no longer adequate for a diverse population. Instead, the mediation process ought to be more adaptable to better consider the comfort of participants and to respect diverse communication styles.

From an anthropological perspective, the exclusive use of a process that excludes people who fail to speak English as a first language and considers administrative efficiency to be of greater importance than disputant comfort and power relations needs to be addressed if the same process is to be used with young offenders.

Volpe and Bahn (1987:303-304) have compiled a list of suggestions for mediators when dealing with obvious instances of resistance. Although this information is scattered throughout the literature, Volpe and Bahn provide a condensed version. Although this is a list of suggestions for dealing with resistance, each example also points at what is wrong with the mediation process:

> Since many mediators will not be in a position to conduct their own intake of cases and screen them as they see fit, they may find some of the disputants would not have been chosen to participate in a mediation session. In some instances the disputants are overtly reluctant to participate since they feel that the mediation process was imposed on them ... Some disputants could easily question the mediator's competency or authority. Announcing of credentials and/or experience, establishing rules, providing structure, helping to find alternatives, and modeling might help alleviate this problem. (Volpe and Bahn, 1987:304)

I will deal with each example separately and provide my own concerns for young offenders and others. Because mediation is thought to be a short-term intervention process, the mediator is often seen to lack opportunity to handle resistance in a delayed or postponed way. There are a couple of reasons for this. In the mediation groups I have contacted and researched, and in the two series

of mediation courses I have attended, normal mediation planning structures are similar. An intake person gathers information from potential participants and the conflict is summarized into one or two paragraphs. This information is passed to the person who schedules the mediation. The condensed version of the conflict is passed to the mediator who conducts the mediation. In most cases, the mediator does not meet with participants prior to the mediation, or speaks briefly to each party on the telephone prior to the mediation event.

The process of gathering, condensing information, and passing it along to the mediator is problematic. Clerical support staff often comprise of volunteers or students. For example, in one course I took, a seasoned mediator-instructor spoke to the class about effective communication and the importance of making sure that each party was presenting information clearly and understanding it. As an example, the mediator talked at length at how a particularly difficult mediation progressed slowly due to one party not seeming to 'get it.' It was only then that the mediator realized that one party's understanding of English was so limited that they only understood about thirty percent of what was discussed. They had been struggling face-to-face for a couple of hours when the mediator realized why one party did not understand how the event was being discussed. The mediator related this anecdote to encourage us to listen carefully.

My unwelcome response to this anecdote was to ask why the mediator did not know that English was not well understood by one of the participants

prior to the mediation event. His answer was unsatisfactory. No doubt a power imbalance was created when the mediator and one party communicated easily and openly in their first language while the other party struggled with basic comprehension of a second or third. In courses taken, emphasis was on the face-to-face event, with almost no attention paid to pre-mediation information gathering and interviews. The general attitude towards spending time with participants prior to the mediation event was that it was too time-consuming or thought to be someone else's job.

Mediation and time not spent

Because contemporary mediation is based on labour/management negotiation, a concern for time spent, or rather time well spent, is an underlying concern of all mediators I have encountered. A heightened concern over efficiency and the goal of spending the minimum amount of time with each mediation was a primary concern in my mediation courses. My experience is that mediators are often fastidious about time spent on the actual mediation. One senior mediator in Waterloo Region uses a check list during the mediation to keep the process on track (personal communication). For example, a specific number of minutes was allotted for introduction, for permitting each party to explain their position, for rebuttal, and so on.

In one mediation class where I was a student, I asked the three mediator-instructors present to address cross-cultural problems, for example, what does a

mediator do when participants from different cultures have difficulties understanding each other. All three had difficulty with my question. After a long pause, one actually said that he really didn't do much with people who didn't speak English as a first language. Another said that if they could not communicate in a common language there was no point in attempting a mediation. When I asked how they recruit translators, they said that they didn't use translators because it extended the process and took too much time. The three of them agreed that using translators was inefficient. One said he had tried a mediation with a translator once, but *he* (the mediator) couldn't understand what they were saying so there was 'really no point' in doing the mediation. When I asked how they might approach a mediation with a deaf person, there was no answer. When I asked about mediation with people who are uncomfortable with direct communication, such as aboriginal people, there was no answer.

When I described my non-face-to-face model as an alternative for cases where participant discomfort was high or language provided barriers, the universal response from three instructors was that 'it wouldn't work and would take too much time anyway' (personal communication). When I asked the mediation-instructors how the mediation process is adapted to the special needs of young offenders and teenagers, they said that the same model is used for everyone.

I suggest that pre-mediation interviews are one of the most important parts of the mediation process. I believe that it is both unethical and foolhardy to take a reluctant and ill-prepared person into an unfamiliar process and then pit them against their opponent with the intention of getting an agreement that is both long-lasting, in terms of participants' future relationships, and efficient, with respect to mediator time spent. It is even more unethical to take someone, such as a young offender, who is accustomed to a weaker, less powerful position and has limited knowledge about the world, into a bargaining position where their levels of fear are hidden from the mediator.

Another of Volpe's and Bahn's suggestions deals with subject matter and mediator suitability:

> Mediators should also be aware of the fact that they may not be ready or able to handle certain types of cases due to any number of factors including areas of personal conflict of interest, personal bias, subject matter and complexity of the issues to name a few. (Volpe and Bahn, 1987:304)

It is unrealistic to assume that all mediators are qualified to mediate all the types of conflicts that could possibly arise between individuals and groups. The answer may lie in mediators specializing in types of mediations or in types of mediation processes. The current practice filters reported speech through office staff, and then abridges conflicting versions of the conflict; pre-mediation interviews are often omitted due to concerns with efficiency.

Often the mediator will not recognize potential problems until the event

is underway. Again, my contention that spending time with each party prior to conducting a mediation would alert the mediator to situations for which they may not be a suitable mediator. Or, if the mediator does not realize participants' unsuitability for a particular type of conflict until the face-to-face process has begun, then both parties have already been compromised in their investment in the process. Some participants may get uncomfortably defensive or aggressive. Potential problems should be identified prior to the mediation event; this can best be done in pre-interview conversations with each party.

Mediator responsibility for sending mixed messages

Volpe and Bahn suggest that mediators must be careful not to encourage resistant behaviours:

> Furthermore, mediators should be alert to the possibility that they might contribute to resistant behaviour through their own verbal or nonverbal communication. For example, mediators may not adequately encourage disputants to continue with the process, or may not provide sufficient structure and guidance for the parties to interact with each other. (Volpe and Bahn 1987:304)

It is almost impossible to adequately predict how each party in each mediation will interpret mediator body language, especially when considering the cross-cultural and inter-generational contexts that can be created. The potential of offending a participant with body language and other non-verbal gestures can be reduced by the comfort of familiarity which can be created through establishing a pre-mediation relationship in a physical environment that is comfortable, i.e., safe, for each participant. In such an environment, e.g.,

the person's home or a coffee shop, the mediator becomes open to dialogue that may permit the participant to be candid.

When there is little, or no contact prior to the mediation event, the potential to listen to each party's concerns is lost. In addition, the mediator misses an opportunity to ask culture-sensitive questions. Dialogue that may be inappropriate in a mediation context may be welcome in a preliminary interview session. Volpe and Bahn advise the mediator to be aware of subtle attempts to dominate by either opponent: "[W]hen resistance is indicated by one of the parties, the mediator needs to be alert to the possibility that the nonresistant party is trying to coopt the situation to gain advantage" (Volpe and Bahn 1987:304).

There is some logic to the assumption that in a face-to-face encounter opponents will be tempted to explore more subtle forms of aggression with the intention of gaining leverage. The mediator may not notice the more subliminally intricate body language, even threats, sent from one party to another, while the mediator conducts the mediation according to accepted form. This is especially possible if the mediator comes from a different culture or sub-culture, or even if the mediator is from a different generation or class than a participant. There may be good reason for a formerly cooperative participant suddenly to appear resistant to the mediation process. Threats can have the most innocuous manifestation, such as a middle finger raised for only a few seconds while the

mediator turns her head, a fist clenched for only a moment while the mediator looks for her pen, for the recipient to understand clearly that they are in danger. This is not the type of threat of action that is expressed verbally, but rather the kind of threat of action that is understood to take place elsewhere and later.

Fear as a primary cause of resistance

Both Volpe and Bahn (1987) and Haynes (1985) suggest that, when resistance within the mediation context is detected by the mediator, the mediator might examine why the parties have sought out mediation as an intervention process and perhaps even slow down the mediation process so that all parties might think through why they are there (Volpe and Bahn 1987:304; Haynes 1985:52). Again, a process that is geared towards pragmatic or problem-solving communication and yet fails to consider complications that could cause resistance, such as prior external coercion or general reluctance to seek resolution, would seem to have the wrong focus.

My fieldwork among young offenders indicates that fear of a physical attack occurring quickly, before the mediator can protect the target, is their primary concern. The problems that could result from putting disputants together before they are ready, or at all, have been discussed above. By including passages by Volpe and Bahn (1987) and Haynes (1985), I am trying to illustrate that pre-mediation preparation is currently unusual, or the exception to standard practice, and assumed to be too time-consuming. Pre-mediation con-

sultation is considered to be no more important than an exercise in fact-gathering and mediation scheduling. Pre-mediation interviews are usually not conducted. Therefore, problems that can be detected prior to mediation and considered in the mediation process are simply not considered. Volpe and Bahn (1987), discuss alternative approaches to dealing with resistance:

> Some of the resistance demonstrated by the disputants may be the result of fear of the unknown, lack of knowledge, or even misguided expectations. For the mediator, then, introductory comments and/or a contract are often crucial in setting the stage for the mediation process. Useful information is imparted about expectations, roles, and responsibilities for mediator and disputants that may help to reduce fears (Volpe and Bahn 1987:304).

Fear, as it is experienced by participants, is rarely discussed in mediation literature. Fear, as it is experienced by the young offender, however, is rarely absent in actual cases (see Chapter Three: Fieldwork). Existing mediation models emphasize efficiency and process. In the above passage, Volpe and Bahn (1987) suggest an easy solution to dealing with resistance caused by fear. They imply that if the mediator simply explains the process within introductory comments, possibly augmented by the presentation of a contract, that participants will experience less fear. The mediation can then advance on schedule with the cause of resistance assumed to be resolved.

This approach to fear and resistance is far too simple to apply universally and lacks psychological insight. If the mediator is sure that resistant behaviours are the result of not understanding the process, then explaining how medi-

ation works may be ideal. But, that is only one source of fear. For the person from Central or South America whose concepts of power and process are vastly different from middle class Canadian notions, sitting at a table with an authority figure and their opponent may produce fear that is unrelated to due process. They may have been 'recommended' for mediation, but their interpretation of 'being recommended' for something may engender considerable fear, as well as heighten their lack of appropriate cultural and language background knowledge.

Without prior consultation with the person, the mediator can only guess at what difficulties might contribute to participant discomfort. Consider the young offender who has been shuffled from context to context, numerous group homes, overworked probation officers, overly burdened social workers, and does not have the support of parents or another adult guardian figure (a common condition among young offenders). To the young offender who feels they have nothing to lose, no bargaining power, and limited formal vocabulary, entering into a potentially confrontational process that is unfamiliar and not guaranteed to be of some benefit, raises issues of fear that, while they may originate elsewhere, will be carried into the mediation process.

Mediation and language skills

Volpe and Bahn (1987) also suggest that resistance to mediation may be because "disputants may lack the ability or skills to negotiate adequately on their own behalf. A mediator might want to give information, caucus with the par-

ties, or even make referrals" (Volpe and Bahn 1987:304). One sentence in an article on resistance to mediation is devoted to potential ability of participants to contribute. Young offenders, especially those with a background of parental neglect, are generally linguistically inexperienced in the type of language required to negotiate within this type of context. The mediator is almost always middle class, and the young offender is almost exclusively alone.

Although the process is entirely voluntary (unless the mediation falls under mandatory mediation in civil cases) and there are no sanctions for failure to reach an agreement (Schellenberg 1996:183), young offenders may not have enough information to feel comfortable, and they may not have the courage to ask for information. For example, when a mediator says that participation in the mediation is entirely voluntary, she may assume that contained within that statement is the implication that there are no sanctions against non-participation or failure to reach an agreement. For a young offender, whose world is littered with concepts of crime and punishment, as well as a host of adults who consistently explain that there are consequences to every act committed by the young offender, in the absence of literal facts, consequences of non-compliance may be anticipated in the young offender's imagination.

Volpe and Bahn (1987) suggest in the above passage that if the mediator recognizes resistant-related behaviour in a participant during the mediation process, referrals could be made. This suggestion, as with others discussed in

this chapter, assumes that resistant behaviours are detected within the mediation process and not beforehand in private interviews. Deciding in the middle of a mediation, when the two disputants are facing each other, that one party ought to be referred elsewhere would, no doubt, cause considerable humiliation in front of the opponent. Imagine the distress suffered by the young offender who has the courage to cooperate in a mediation without external support, only to discover that the mediator decides that they are not suitable in some way to contribute to the process. This additional stress would be entirely avoided if assessments that lead to referrals were conducted in private, before a mediation begins, rather than in front of the opponent.

Mediation is hard emotional work. Therefore, a certain level of maturity is required to contend with the face-to-face method. Most young offenders are not adequately mature in social situations to proceed with the traditional model. Many individuals, teenagers in particular, are not confident with their level of social competence or with their ability to express themselves effectively under pressure in the presence of adults. The situation is exaggerated when teenagers are pitted against each other or against adults, especially when an authoritative or powerful adult is across the table from someone who has less self-confidence than their opponent.

According to my informants, as well as advice given in the literature, many mediators suggest that if a problem arises, caucusing, or meeting privately

for a few minutes in another room, is the way to address obstacles. Although I agree that caucusing may be helpful in identifying and discussing problems, I suggest that if enough work were done prior to the event, problems requiring segregation, and the potential discomfort of the participant left alone waiting, would be less likely to surface.

Much of the literature considers the comfort and convenience of mediators as they conduct mediations and fine-tune agreements. Volpe and Bahn (1987) consider the impact of resistance on mediators:

> [S]ome [mediators] would argue that mediation sessions should not be conducted with resistant parties. The reality is that any intervention process activates resistance and, when it is not handled effectively, *it can be a disruptive source of discomfort for mediators* [my emphasis]. Feelings of frustration, sense of failure, hopelessness, anxiety, resentment, loss of energy, insecurity, fatigue can result. For mediators, the key to handling resistance is feeling secure with the mediation process. (Volpe and Bahn 1987:305)

Volpe and Bahn's observation of mediator stress, caused by resistant behaviour in participants, is comparable to stress experienced by participants who are not completely prepared for their mediation or who are resistant for other reasons not obvious to the mediator or the intake worker.

Volpe and Bahn suggest that the answer is to rely entirely on the mediation process. This solution to the many things that can go wrong factors heavily in the literature, in mediation courses, and in conversations I had with mediation-instructors and practicing mediators. In fact, I would propose that rigid reliance upon the standard mediation structure is virtually universal among

mediators. I have spoken to only two mediators who admit they stray from the existing structure if they think it will help disputants resolve the problem. Both mediators (unnamed at their request) said during interviews that if disputants indicate that they wish to find a solution but are unwilling to meet with their opponent, that they, as mediators, will conduct a non-face-to-face mediation. I found no other indication, or examples of, non-face-to-face mediation being used, except as a last resort. Even in these two cases, it was not considered a legitimate process.

There are other reasons why people without power, such as young offenders, resist mediation. Logically, most teenagers, especially young offenders, are simply not mature enough to do the work required of the face-to-face encounters with people who are more knowledgeable and more articulate. Intimidation by the more powerful, even in the presence of a seemingly neutral mediator, is to be expected. Fear of a power imbalance is particularly salient with young offenders, who undoubtedly dread the wrath of their victims, and their victim's families.

Losing face or experiencing humiliation in terms of social competence and language sophistication is especially problematic to young offenders and teenagers. Another potential reason for resistance to mediation is the misconception on the part of either party that an agreement can only be obtained in a win-lose social environment. For individuals concerned about their levels of

articulation and their place in the social hierarchy, face-to-face mediation may represent biased risk-taking. Fear, as a primary component of young offender resistance to mediation, is explored further in Chapter Three which focus' on fieldwork.

Chapter Two

Michel Foucault and Power

In this chapter, I examine Michel Foucault's notion of power as it relates to subjugated knowledges and the mediation process. Several different models of mediation are described in the mediation literature (Menkel-Meadow 1995:-219). My objective is to present enough evidence to support the addition of another type of mediation process, the non-face-to-face mediation model.

Foucault does not separate philosophy from history. To Foucault, history is never simply in retrospect: it is the medium in which life today is conducted. Foucault examines who we are in terms of our knowledge of ourselves, and who we are in terms of the ways we are produced within political processes. Foucault presses for 'a return of knowledge' (Foucault 1980:81). What he means by this phrase is that we have repeatedly encountered an entire thematic to the effect that it is not theory but life that matters, not knowledge but reality, not books but money (Foucault 1980:81). For the purpose of this thesis, a return of knowledge explores hidden change that is encouraged by, and expressed by, disqualified, low-ranking youths. The knowledge which youths in trouble with the law share is local, regional, and is a type of differential knowledge, incapable of unanimity and which owes its force only to the harshness with which it is opposed by everything surrounding it (Foucault 1980:82).

The subject group for this thesis would, no doubt, agree with Foucault

that real life matters more than anything else. My research suggests that resistance to mediation is caused by real life concerns expressed by marginalized young offenders who are uncomfortable with a face-to-face mediation model. Recognizing and addressing causes of resistance expressed by young offenders in Waterloo Region is a primary component of this thesis.

The subject group chosen for my research is routinely passed through the legal system without the opportunity to express themselves comfortably. Although their history is presented in court by counsel, it is not necessarily the young offender's perception of their history that is submitted. My experience with young offenders indicates that much of their identity and their history is buried by bureaucratic processes.

As part of my fieldwork, I interviewed three former young offenders extensively. I asked them about their history. What I was looking for was their concepts of their identity and background in their own words (I told them this). They presented their history in many ways, mostly in anecdotal form, funny stories that began with 'then there was the time when...' More often though, they told of contexts that either made them either angry or illustrated that they had been treated unfairly. They talked about how they 'got back' at authority figures, particularly those who 'dissed' (disrespected) them in some way. Often those figures were generic, such as police officers; sometimes it was the same neighbour who blamed them for small infractions of unknown rules.

They also talked about adults who said the youths were 'bad' and blamed them for problems 'everywhere.' Concepts of unfairness, unsubstantiated blame, parental neglect, and social and material deprivation crept into our talks when I was alone with my young informants. These topics entered into our conversations in increments, in well-placed phrases and complaints, surprisingly often about their lawyers and how they were 'helped' through the system.

The resurrection of subjugated knowledges

The negative was often balanced by seasoned humour. When I asked why they don't tell adults 'about this stuff,' the standard answer was that nobody asks. Foucault describes this as an insurrection of subjugated knowledges. This thesis proposes a way of resurrecting the subjugated knowledges of young offenders in a way that will benefit, them, their victims, and the adults that direct their lives. By subjugated knowledges, Foucault means two things:

> [O]n the one hand, I am referring to the historical contents that have been buried and disguised in a functionalist coherence or formal systematisation . . . Subjugated knowledges are thus those blocs of historical knowledge which were present but disguised . . . and which criticism--which obviously draws on scholarship— has been able to reveal. On the other hand, I believe that by subjugated knowledges one should understand something else ... a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity ... It is through the reappearance of this knowledge, of these local popular knowledges, these disqualified knowledges, that criticism performs its work (Foucault 1980:81-2).

Foucault supports the resuscitation of subjugated knowledges and dis-

cusses them in a philosophical sense, but he is clearly concerned about disqualified forms of knowledge in the real world and how they became disqualified (Foucault 1980:83). Foucault says he seeks historical knowledge of struggles. In particular, he is most concerned with those that have been confined to the margins of knowledge (1980:83). My subject group exists on the margins of society and has limited opportunities to share their knowledges and explain their positions and their sense of justice, even though doing do is frequently required of them.

Throughout his work, Foucault is concerned with how to give proper attention to local, discontinuous, disqualified, illegitimate knowledges (1980:-83). I argue that these adjectives describe the experiences of young offenders. When a young offender is not able to present their knowledge and personal history as it relates to conflict, or because nobody asks, their 'truth' becomes disqualified and their knowledge and truth remains buried. In the case of mediation, my informants tell me that concerns of personal safety and barriers created by the legal system prevent them from engaging in mediation.

My research is primarily concerned with addressing causes of resistance to mediation, even mediation specifically designed to address the dichotomy of victim/offender relationships (Victim Offender Reconciliation Programs). For Foucault, the question of submissive subjection and the political struggles associated with identities constitute important issues. Foucault's conception of dis-

course is indispensable for an understanding of the role of power in the production of knowledge, including *self*-knowledge (McHoul and Grace 1997:57). In the case of my subject group, their concept of power (lack of power) within a context designed to generate knowledge, serves to silence individuals who, if the context was familiar and safe, would have a significant contribution to make. For Foucault, resistance is more effective when it is directed at a 'technique' of power rather than at 'power' in general.

Techniques allow for the exercise of power and the production of knowledge; resistance consists of 'refusing' these techniques (McHoul and Grace 1993:86). In this case, mediation is a 'technique' of truth-sharing. I will show that young offenders in my subject group do not refuse truth-sharing with their victims. Instead, they resist the technique of truth-sharing offered to them in the standard mediation process because it does not address their concerns. Resistance to the truth-sharing technique prevents knowledge from being shared. Foucault maintains that we are subjected to the production of truth through power and we cannot exercise power except through the production of truth (Foucault 1980:93). When applied to young offenders, the production and sharing of truth is not possible unless the subject agrees to enter the context voluntarily and safety is guaranteed.

'Truth' is understood by Foucault as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements

(Foucault 1980:133). Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which to extend it (Foucault 1980:133). Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which to extend it (Foucault 1980:133). Foucault's concept of truth as a circular, inclusive process relates to Aboriginal philosophies in the way they both are concerned with identity and transition. Both identify the production of identity and the contexts that contribute to each person as a fluid, transitional process. The youth is never seen by Foucault as a fixed and static being who is bad because they performed an anti-social act. Not only is the youth considered to be in transition, but the context that produced the youth is seen to have contributed to the event in question. For the purpose of this thesis, I prefer to use an Ojibway concept of 'truth:'

> Culture is not truth; it is a people's best approximation of the true nature of the cosmos. Language articulates cultures. *W'daeb-awae'* is Ojibwa[1] taken to mean, "s/he is right, correct, accurate, truthful."[2] The expression approximates the word for truth in the English language but the expression does more than confirm the speaker's veracity. It is at the same time a philosophical proposition. The phrase conveys that one casts one's words and one's voice only as far as vocabulary and perception will enable and as accurately as one can describe it, given one's command of language and the limi-

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1. Ojibwa is a European name for the people which has, over the centuries, come into common usage. Anishnabeg is the people's name for themselves and translates as "The Good People". Anishnabe is singular (Sivell-Ferri 1997:3).

2. Basil Johnston, "One Generation from Extinction", Native Writers Canadian Writing, Vancouver, University of British Columbia, 1990, p.12.

> tations of language. Assigned to a speaker, it confirmed credibility at the time of fault if the situation changed. Consider that a culture perceiving truth in this way is credible, open; not fixed and rigid (Sivell-Ferri 1997:3).

Foucault suggests that the problem is not changing people's consciousnesses--or what's in their heads--but the political, economic, institutional regimes of the production of truth (Foucault 1980:133). The privacy and informality that surround mediation can also favor mediators' biases (Pinzón 1996:5). This can, in turn, lead to silencing young offenders at a time when it is important for them to share their views.

Proposed: an alternative, adaptive mediation process

Pinzón (1996) suggests that new mediators tend to embrace one of the current mediation theories[3] in the belief that there are no other options (Pinzón

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3. STANDARD MEDIATION APPROACHES: There are four accepted tendencies or 'stories' in mediation, with each emphasizing different sides of mediation practice Pinzón (1996:4). The *Satisfaction Story* is mediation as a tool that promotes the satisfaction of the general interests of the disputing parties by distancing them from adversarial, distributive bargaining schemes. The Satisfaction story encourages win-win type solutions and reduces the expense of dispute settlement and best describes the current theory and practice of mediation (Pinzón 1996:4-5).
The *Transformation Story* stresses that mediation can transform individuals, relationships, and institutions (Pinzón 1996:4-5). The *Social Justice Story* is seen as a way to ease the organization of individuals around common interests and thus encourage the creation of stronger ties and structures in the community. Community organizations that promote mediation can become key pieces in limiting exploitation and abuses that powerless individuals may fall prey to (Pinzón 1996:5).
The *Oppression Story* is perceived as a mediation method sometimes allows the strong to oppress the weak. Two different elements can make mediation accentuate power imbalances between parties: the informality and consensuality of the process, which denies the weak party the right to a system of checks and balances, and the self-posturing "neutrality of the mediator, which gives the mediator an excuse to avoid applying pressure on the stronger party (Pinzón 1996:5-6).

1996:11). This thesis presents support for the development of another mediation option. Using Foucault's concept of situational power, I suggest that another mediation story be considered, the *non-confrontational mediation model*. This model would not locate itself outside of present mediation practice, but alongside, as a complementary option or legitimate, alternative communication strategy. The primary benefactors of a non-face-to-face model are those individuals who are unable to participate in the standard mediation process, particularly those concerned about power imbalances.

It is not my intention to concentrate on diversity within mediation stories or to debate the validity of existing models. In mainstream North American society there is one standard face-to-face mediation process, which will be discussed elsewhere. My objective is to consider Foucault's concept of power as something that is fluid, circular, and attached to situations, rather than to individuals, and to use young offenders concepts of power, as something absent from their lives, as a component in resurrecting their knowledge.

Foucault explains:

> Power must be analyzed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threats; they are always in the position of simultaneously undergoing and exercising this power. In other words, individuals are the vehicles of power, not its points of application (Foucault 1980:98).

Foucault's notion of power suggests an alternative way of understanding and interpreting the development of formal modern mediation. For Foucault, power is never located here or there; it is never in the hands of any individual (Foucault 1992:144). When considering the mediation process, young offenders in my subject groups assume that power is located in the other camp. My mediation model serves to keep the young offender safe while they offer their understanding to the other side. Using Foucault's concepts, my mediation model eliminates further loss of power, therefore, opening a channel for candid discussion.

Foucault's concept of power contrasts that of many legal and social work practitioners who see power as a property that they possess, manage, and allocate. This is why many mediators assume that disputants possess different levels of power in addition to the power assumed to be maintained by the mediator. Because of this, many mediators have written about identifying power held by parties before and during negotiations so that they, the mediator, can decide on the correct course of action (Pinzón 1996:11).

In contrast, Foucault conceives of power as the way in which certain actions can structure the field of possible actions. Within the scope of my thesis, my research suggests that certain actions (eg. a mediation process that is too daunting for the young offender) serves to prevent certain actions (the sharing of ideas, concepts, truth, apology, productive communication, and resolution) from

taking place. Ironically, my young informants equated power with control, sometimes unlimited control of one person over another.

Power as a positive, hidden mechanism

Foucault writes that "power is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms" (Foucault 1978:86). Power can be a negative, forbidding and repressive force, but it can also be the stimulation for bringing forth difficult ideas, opening new sources of knowledge and generating satisfaction (Pinzón 1996:11). Though power is mostly described as a coercive force, its productive potential generates the results sought after by the mediation models: power operating subtly, hiding in the shadows (Pinzón 1996:11). A non-face-to-face mediation model would hide many of the subtle and explicit causes of concern and intimidation.

The most significant feature of Foucault's notion of power is his stress on the productive nature of power's modern exercise. His main aim is to turn a negative conception upside down and attribute the production of concepts, ideas, and the structures of institutions to the circulation and exercise of power in its modern forms (McHoul and Grace 1993:64). For the purpose of this thesis, the institution is the mediation process. The aim is to alter normalized components of the process so that the positive attributes and outcomes of the process can be experienced by more people, particularly young offenders and

victims, not in the same process, but within an alternative, adaptative communication strategy.

I use the term 'victim' in a generic, non-specific sense. This is not to relegate the victim to an unimportant position; because justice and peacemaking is a substantial topic, I have had to keep my focus on young offenders firm. There is another reason for using generalized identifiers for victims: when I asked my informants where they thought there was a real need for mediation, they said that it is stressful being in 'lock-up' and there are lots of fights. They said there is a need for mediation inside the institution among young offenders, more than between young offenders and outsiders. Evidently, they are thinking about present-day conflict. Almost exclusively, informants identified the other party in a dispute as a peer; the combination of peer-alliance and peer-conflict in our talks was consistent regardless of fieldwork setting. They told me that the institutionalized environment is very stressful and that there is much conflict among incarcerated youth. They felt that mediation was needed most within the institution.

Foucault writes that "[W]e must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "abstracts", it "masks", it "conceals". In fact, power produces; it produces reality; it produces domains of objects and rituals of truth (Foucault 1977:194). This depends upon where one is and in what role one's allegiances and interests

will shift (Sawicki 1986:30). For Foucault, resistance is more effective when it is directed at a technique of power rather than at power in general (McHoul and Grace 1993:86). My concern is that the mediation community recognizes and acknowledges aspects of resistance to mediation, but does nothing about it. By applying Foucault's notion of power to an adaptive mediation model which considers causes of resistance to be a workable set of problems, perhaps more young offenders and victims will be able to engage in an 'exchange of truths.'

Chapter Three

The politics of fear: who are young offenders?

> The politics of fear and hatred are the mechanisms through which we attach moral valuations to social categories of people, such as young offenders. If we hate and fear someone, then they must be bad (Schissel 1997:31). The xenophobia collectively felt towards young people reveals ideological orientations that associate immorality with marginal social groups, which are identifiable by race, class, and gender. The politics of fear and hatred is, therefore, in its basic form, the politics of stratification (Schissel 1997:31).

With young offenders, the majority of whom mostly commit acts of mischief for a short period of time in their mid-teenaged years, the group is identified by age, and subdivided by race, class, and gender. In Canada, young offenders are non-adults, ages 12 to 18, who are accused of or charged with crimes which are usually against property.

The Juvenile Delinquents Act was proclaimed in 1908 as one of Canada's first child-focused pieces of legislation. The hallmarks of the Act were the establishment of a "childhood age" (7-16), and of an ethic for applying the law to children. This ethic (called *parens patriae*) essentially gave the judge the power to act in a child's best interest. For example, court decisions were not to be measured against the seriousness of the offense, but against the needs of the young offender (Leschied 1995:37).

A variety of sentences became available under the Act, ranging from absolute discharge to being made a ward of the state (and being placed in training

school) until age 21. The Act's intent was to provide a broad net to capture a wide variety of youth and family problems. The challenge for judges was to create a resolution that responded to the needs and circumstances of the young person (Leschied 1995:37).

In the early 1960s, demands for change to *The Juvenile Delinquents Act* resulted in numerous revisions, royal commissions and research reports. Two major irritants in the *Juvenile Delinquents Act* fueled the development of a new Act. First, there was increasing doubt that needs-based intervention adequately responded to "out-of-control" young offenders. Secondly, unlimited judicial discretion was seen as compromising the rights of young people (Leschied 1995:38.

The Young Offenders Act: historical background

The Young Offenders Act (1984) is based on the premise that youths should be held responsible for their illegal actions. Conservative cries for tougher crime control measures were blended with liberal demands for increased sensitivity (Leschied 1995:38). The original principles[1] of the Young Offenders Act resulted in practical guarantees, including proportional sentences of fixed length ranging from absolute discharge to a maximum length of five years (Leschied

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1. (a) young persons should be held accountable and responsible for their behaviour, though not to the same degree as adults; (b) young persons who commit offenses require supervision, discipline, and control ... Yet, they also have special needs that require guidance and assistance; and (c) young persons have rights and freedoms, including those stated in the Charter of Rights and Freedoms, and (d) young persons should have a special guarantee of their rights and freedoms (Leschied 1995:38).

1995:38). Judges could now order probation or secure or open custody, for specified lengths of time (Leschied 1995:38).

To date, the Young Offenders Act is believed to have greatly enhanced young offender access to lawyers in both youth court and custody. For example, Alan W. Leschied, of the London, Ontario Family Court Clinic, welcomed proposed changes to the Young Offenders Act. "We anticipate that the forthcoming amendments, particularly those directed at rehabilitation, will also greatly enhance youth access to appropriate rehabilitative services within the youth justice system" (Leschied 1995:38).

The introduction of the Young Offenders Act has had a significant impact on the Canadian correctional system (Boe[2] 1995:10). Although the number of 15 to 17-year-olds admitted to Correctional Services of Canada custody was never large (averaging about 80 offenders each year), these youths formed a significant special needs population (Boe 1995:10). A youth is considered to be a young person aged 12 to 17 inclusive, as defined in the 1984 Young Offenders Act (Hung and Lipinski[3] 1995:6). According to Statistics Canada, more than half of all 1992-1993 youth court cases involved 16- or 17-year-olds who account for about 64% of secure custody dispositions handed down annually (Boe

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2. Roger Boe is employed by the Research and Statistics Branch of Correctional Service of Canada.

3. Kwing Hung and Stan Lipinski are Senior Statisticians, Statistics Section of the Department of Justice, Canada.

1995:10).

Each year, almost 1 in 10 youths comes into contact with police for a violation of the Criminal Code (traffic infractions not included) or other federal statutes (such as the Narcotics Control Act and the Food and Drugs Act). This means that since 1986, more than three-quarters of a million youths have been charged by police for Criminal Code and other federal statute offenses (Hung and Lipinski 1995:6). Youth crime is predominantly committed by males. In 1992, 80% of Criminal Code and other federal statute offense charges were laid against male youths. This number has changed little since 1986 (84%), with female youths showing an increase relative to the total number of youths charged with offenses (Hung and Lipinski 1995:6-7). Most youth crimes are not violent. In fact, crimes committed by youths are predominantly property offenses (Hung and Lipinski 1995:6-7).

Slightly more than half (54%) of youth court cases involved first-time offenders (excluding traffic violations). However those youths who did re-offend usually had more than one prior conviction (Hung and Lipinski 1995:8-9). Recidivists do not appear to be brought to court for significantly more serious offenses than first-time offenders but do receive more severe sentences than offenders with no prior convictions or offenses (Hung and Lipinski 1995:9). Statistics indicate that the vast majority of youth offenses remain non-violent and the youth homicide rate has decreased consistently since 1974 (Hung and

Lipinski 1995:9).

Recent trends in young offenders

In many jurisdictions, according to William Winogron, Consulting Psychologist for Open Custody Facilities in Ottawa, public and professional opinions about young offenders is similar. First, young offenders are perceived as uninterested in changing their behaviour in any meaningful or lasting way (Winogron 1995:31). Secondly, young offender punishment, particularly in the community, is perceived as not severe enough to motivate change. Thirdly, young offenders are thought to respond poorly to authority and even worse to psychological intervention (Winogron 1995:31).

Between the years 1992 and 1996, the number of male youths charged by police at the national level gradually decreased (Sinclair and Boe 1998:i) and no increase in female charges (Dell and Boe 1997:i[4]). By offense category for girls, a decrease in property crimes and a slight increase in drug, violent and other offenses has occurred (Dell and Boe 1997:i). For boys, a slight increase in violent crimes and a more dramatic increase in drug offenses is evident. Overall, property crimes decreased significantly and other offenses also decreased (Sinclair and Boe 1998:i).

Girls are not getting involved with crime at a younger age (at the national

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4. Statements and figures in this section are obtained from reports compiled by the Research Branch of Correctional Service Canada. They represent the most current data available.

level): the mean age of fifteen has remained the same between 1991/92 and 1994/95 (Dell and Boe 1997:i). Nor are girls getting more violent. Since 1993, the national rate of violent crime among female youth has remained constant at 44 per 10,000 (Dell and Boe 1997:ii). Since 1993, the Pacific and Prairie regions had an increase in the rate of female youths charged for violent crime while the Ontario, Quebec and Atlantic regions remained constant (Dell and Boe 1997:ii).

At the national level, boys are also not getting involved in crime at a younger age. The mean age of 15.5 has also remained consistent between 1-992/93 and 1994/95, increasing to 16 in 1996/97 (Sinclair and Boe 1998:i). The Uniform Crime Report Survey data suggest that the national rate of violent crime among youth has remained fairly constant at approximately 137 per 10,000 since 1992 (Sinclair and Boe 1998:ii).

The number of male youth transferred to adult court has increased from 1992/93 to 1994/95, the number of boys transferred to adult court more than doubled. From 1991 to 1997, a total of 486 male youths were transferred to adult court. The majority (87%) were 16 years old or older (Sinclair and Boe 1998:iii). The Prairie region has the highest number of transfers, while the Atlantic region has the lowest (Sinclair and Boe 1998:iii). Very few girls have been transferred to adult court. In fact, a total of only eleven girls were transferred between 1991 and 1995 (Dell and Boe 1997:iii).

A popular perception within Canadian population that large portions of young offenders are perpetrators of the most serious forms of violence (Sinclair and Boe 1998:59). This is evident in media coverage afforded to the topic. However, according to Lee and Leonard (1995:1), these accounts "belie the fact ... that the phenomenon of serious youth violence is actually so infrequent that it tends to elude statistical analysis (Lee and Leonard 1995:1). Similarly, the research of Moyer (1996:2) concludes that "even a cursory look at the type of offenses which result in system involvement shows that the vast majority of juvenile criminal behaviour involved is not, by any definition, very serious in nature" (Moyer 1996:2).

The spirit and intention of Canadian legislation

From varying proposals to reintroduce the death penalty for young killers to the implementation of mandatory boot camps for all young offenders, Canadian governments are embarking on a crusade to increase punishment for children, apparently in the hopes of curbing crime (Schissel 1997:9):

> The focal point of this law and order campaign is the Young Offenders Act (YOA). Critics of the Act argue that it is too lenient, that youth are not deterred because of the soft punishments it allots in favour of excessive human rights provisions, and that the Act releases adolescent dangerous offenders into society to become adult offenders (Schissel 1997:9).

Canada's Young Offenders Act is not intended to punish teenagers so severely that they reconsider their actions in a social and legal atmosphere which is based on fear. Instead, the Young Offenders Act uses a progressive and com-

passionate approach. The first goal of the YOA is to deliver services to young offenders that safeguard the public, clients, and staff during custodial placement; to provide control and supervision of youth on probation; to be sensitive to and supportive of victims, enhance victim awareness on the part of young offenders, and ensure long-term protection of society through client rehabilitation (YOA[5] 1997:4).

In his book Blaming Children: Youth Crime, Moral Panics and the Politics of Hate, Bernard Schissel describes the spirit of the Young Offenders Act this way:

> [The Act] attempts to use community-based, non-incarceral alternatives to formal punishment; to provide short-term maximum sentences for even the most dangerous offenders; to minimize labeling through the ensurance of anonymity through publication bans; and to provide that the civil rights of the young offender are met through adequate legal and parental representation in court (Schissel 1997:9).

Fiscal realities have not kept pace with the spirit of the Young Offenders Act; therefore, programs that were designed to replace the formal justice system are poorly realized (Schissel 1997:10). The federal government's inability to support the spirit and intention of the YOA has given right-wing political movements ample fodder for a "we told you so" which has become a "war on young

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5. In this context, "YOA" refers to the Ministry of Community and Social Services publication of Young Offenders Framework 1997-2000: A three-year work planning framework which describes the Young Offenders Act and recommended amendments and responsibilities of the Ministry towards young offenders. I have used "MCSS" because this is a government document describing service directions, policies, and the spectrum of services to young offenders.

offenders" political battle (Schissel 1997:10).

Fear-mongering: the marketing of young offenders

Schissel (1997) uses the term 'folk devil' to describe those who are identified as threats to the moral and physical well-being of society. Importantly, the folk devil is identified by association with a particular, visible social category: they are inherently deviant and presumed to be out of control and in danger of undermining the stability of society (Schissel 1997:30):

> Folk devils are constructed in the context of moral panic and are imbued with stereotypical characteristics that set them apart from normal, law-abiding society, making it easy for average citizens to become embroiled in the alarm over crime and to call for harsh justice. Most media depictions of crime, whether factual or fictional, are about people unlike us--the street person, the drug trafficker, the violent and the amoral (Schissel 1997:30-31).

Schissel contends that media creation of folk devils as a type of 'resident alien' is the primary reason why punishment-based lobbies are so successful. The concept of media-produced folk devils is an expression of xenophobia (Schissel 1997:30-31). Schissel suggests that the news media employ certain strategies to create a particular and partial view of youth crime that is deliberately biased against all youth, but specifically against those who occupy particular marginal socio-economic positions (Schissel 1997:33).

Schissel suggests that media reports tend to remove crime, and therefore young criminals, from their socio-economic context and to recast them in moralistic and emotional frames of reference (Schissel 1997:34). One of the most

blatant techniques the media uses to build and market an image of offensive youths is that of declarations, often endorsed by professional experts, that children are inherently evil and that youth misconduct is the result of uncontrolled natural impulses (Schissel 1997:47).

Media construction of youth crime: youth as dangerous anomalies

Schissel (1997) suggests that when the media write about youth crime and misconduct, they generally attack those who are dis-empowered and marginalized or write in the context of the lives of such people (Schissel 1997:51). In doing so, they help create a value system in opposition to young people who are already socially and economically disadvantaged. In his landmark study entitled Blaming the Victim, William Ryan states that "difference is in itself hampering and maladaptive. The Different Ones are seen as less competent, less skilled, less knowing--in short, less human" (Ryan 1976:10). It is this group of young offenders, those most marginalized by social and economic factors, that my mediation model is designed to help.

The following headlines or text from Canadian publications illustrate the sensational approach the media takes in marketing the average teenager as a potentially murderous monster:

"Dark Side of Teen Culture," *Chatelaine Magazine, 1993*

"Locking up the wild generation," *Alberta Report, 9 May 1994*

"Kids next door could be violent," *Calgary Herald, 11 May 1992:A2*

"Teen Violence: Murder, Mayhem have their Roots in Boredom,"

Calgary Herald, 18 April 1995:A5

"I Am Gavin: How a bright kid with excellent self esteem slaughtered his whole family," *Alberta Report, 6 December 1993*

"We live in a society where very dangerous weapons are available. Most kids are subject to impulse, and that often results in something deadly," *Montreal Gazette, 18 July 1993:C1*

"Kids Who Kill," Maclean's Magazine, 15 August 1994

"Teenagers feel carefree and indestructible. They live in the present," *Globe and Mail, 19 November 1992:A8*
(In Schissel 1997:34-49)

"Angry teens a problem in K-W" (Kitchener-Waterloo), *The Record, 30 April 1999*

"Few clues to mind of accused teen killer," *The Record (Kitchener), 30 April 1999*

"Taber reclaims its school from shooting. Family, friends, students of W.R. Myers pray at spot where 17-year-old died: 'It's not going to be taken over by evil,' " *Globe and Mail, 4 May 1999*

News media contextualizes accounts of youth crime. These youth are presented in a social, economic, and political vacuum as if nothing else is occurring anywhere except kids impulsively turning into murderous monsters committing the most vile of deeds. These are, in fact, abstracted, pseudo-empirical narratives that create a fictional reality (Schissel 1997:73).

The moral panic caused by media depictions of youth crime has been based on the presumptions that youth are evil and out of control, come from certain segments of society, and victimize or are a potential threat to the average

citizen (Schissel 1997:91).

In my view, non-confrontational mediation is a process that serves to contextualize a young person's crime at the personal level. My experience with young offenders indicates that they want to explain what happened. For example, one boy wanted to tell me about the context of each of three charges against him (I have purposely not asked for such detail). In one case, he protected a small kid, a friend who didn't fight, from a larger kid who kept knocking him down. From my informant's perspective, the fight that resulted in charges against him entailed a sense of honour. He indicated that his actions were logical, ethical, and fair. He was sure that he was the only one charged because he was the only one who did not show remorse about the incident to police. N said, "the cops want me to be a better actor. Aw, I don't give a fuck. I don't mind [doing] time for something like that."

I didn't ask these boys about their charges, but similar stories of attempts to do the right and honourable thing resulting in charges, interpreted [through unknown contexts] by police or other adults as immoral or delinquent were often told to me when we were alone.

Although this particular age group, 12-18, is the subject of this thesis, the following section explains the aims and objectives of contemporary mediation process, as well as discusses causes of resistance.

Fieldwork with young offenders: the experiment

My fieldwork took place in Waterloo Region in southern Ontario during 1998 and 1999. I conducted presentations with artifacts in 15 class-rooms in urban, rural, suburban, multi- and mono-cultural, private, and open and closed custody classroom settings. My first fieldwork experiment served to give me a sense of what was normal in the age group I intended to study, ages 12-18, and provided me with a pleasant introduction to my informants. I talked to them about my thesis and obtained student consent to ask two questions. I asked for their personal definitions of power, and to get a sense of their attitudes, I asked them each to list three heroes.

In all, 322 students submitted a total of 966 heroes. With the exception of young offenders, one third of all other entries stated family/extended family members were their heroes. Young offenders verbally stated there were no heroes, but in writing they stated that particular adults working at the facility were their heroes. This discussion was lively in all classrooms and provided me with a foundation on which to base further discussions when I returned with more artifacts and more questions specifically about mediation.

It was during this second attempt that data specific to the thesis were collected. The first group of informants had been in trouble with the law and were considered at risk to re-enter the justice system in the near future. The second group consisted of incarcerated young offenders. The third component of my fieldwork is with three former young offenders who were no longer offi-

cially attached to institutions. Interviews with them took place during 1998-99 when two of them were still on probation.

I did the majority of my fieldwork in two settings; one is a closed and open custody facility just outside the city of Waterloo called Lutherwood that has a five-day program for youths at risk. Although this facility has both closed and open custody capabilities, I conducted fieldwork with youths in the five- day program only. The other facility is called Hope Manor and is located outside the hamlet of Petersburg. This is a jail for young offenders; the facility does not have open custody.

I approached teachers in both youth facilities about doing fieldwork in their classrooms and offered a suitable trade: a hands-on presentation of artifacts from the archaeology program of the University of Western Ontario[6] in exchange for a discussion with young offenders about mediation. I wanted to offer a reciprocal exchange of information with my informants (I did not refer to them as "informants" during my fieldwork for obvious reasons). I did not record the exchanges, and I did not take notes during our encounters. Such activities, I believe, would have prevented free expression of their ideas. Instead, I wrote fieldnotes in the parking lot immediately following our talks.

My plan was to talk about anthropology, explain my thesis, and ask for

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6. My thanks to Chris Nelson, Dr. Andrew Nelson, and Dr. Chris Ellis for their generosity and courage in providing artifacts for me to take into closed and open custody facilities, especially since they knew in advance that the youths were going to be allowed to handle each artifact. My informants also send their thanks.

their help. Rather than telling them that my focus was on youths already in trouble with the law, I referred to my subject group as 'kids in their age group.' I did this for two reasons: because I feel that there are enough references to their behaviour, status, social value, and legal problems without my repeating the negative label of 'young offender,' and because my mediation model is intended for youths in a variety of situations. All institutionalized informants are segregated from the community and their families against their will and I did not want to simply restate the obvious.

I told my young informants that participation was entirely voluntary and that if they didn't want to talk to me, it was fine and that they would still get to handle the artifacts. They needed this confirmed. One boy asked to be anonymous, which gave me the opportunity to explain that everyone was anonymous, although I might use their initials or chosen aliases with quotes, but only with their consent.[7]

Overall, my informants liked the idea of telling a grownup what to do and what their opinion was. They had not helped an adult with a school project

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7. These boys and other informants sometimes confirmed their consent in unusual ways. When I asked for consent to discuss their views with my professors, grad students, and perhaps use their statements in this document, they usually said something like, "sure, sure, I don't care, what the fuck." But when I went into detail about who these people were as individuals and who would read the thesis, they gave their consent more specifically. For example, they said "the teacher that puts her feet on her desk–her for sure. That guy that lives in a barn, yeah, you can tell him. The ones that gave you the stuff (artifacts) you can tell them. The one that goes to Iceland–yeah, that one." I did this as a way of gaining informed consent, rather than just acquire blanket approval.

before and they seemed quite interested. I explained that in anthropology, we are not supposed to 'do' research in secret: if we are studying people, we are required to tell the truth about who we are and what we are doing and why and what is going to happen to the data. They liked "that part" and asked me to repeat "the bit about telling us the truth." In the five-day program, where the youths are slightly younger than in the closed custody facility, one boy asked to be known as Z[ed][8] because he liked the anonymous status. Another boy wanted to be known as 'Hercules.' A few others wanted me to use their real names and seemed disappointed when I said I couldn't.

The Five-Day Program

Because Waterloo Region is the place where victim-offender reconciliation programs (V.O.R.P. 1974) originated in Canada, I thought that the subject of mediation would not be completely unknown in this type of institution. I expected to talk to the youths about what they liked and disliked about the mediation process. I will describe the five-day program fieldwork experiment first.

These informants, ages 11 to 15, are almost all hyperactive and prone to impulsive behaviour,[9] and have short attention spans. Some are violent. The

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8. Because the Young Offenders Act forbids the use of names for those under age eighteen, I will identify my informants by first initial only, and by an additional letter in the case of duplication.

9. Descriptions such as these were provided by teachers and youth workers in the facility who understood that I intended to use this information in my thesis.

teachers had planned to put the two classes together for a longer presentation and to give me the chance to conduct my research at a more leisurely pace. There are usually about nine students in each class with one teacher and one assistant plus support staff in each class. When I arrived, I was told that one third of the students were not available to join the class due to behaviour problems. One student was removed as soon as I arrived, the rest were in detention, or in time-out places. I was left alone with twelve very excited boys.

My previous experience in this class prepared me in terms of communication style; we talked in choppy phrases quickly delivered and received. I simply asked if anybody knew what mediation was. The answer was "no." I provided a simplified definition. No one had heard of mediation. This could mean they were not offered mediation during their experiences with conflict, legal process, or the courts. It may also mean that they did not recall being offered mediation or did not understand what it was, or associated the process with a different context, rather than that they failed to recognize the term. Before I could further implement my plan to explore and explain mediation as a peacemaking system, they suddenly and collectively responded to my definition. One youth, "S" responded this way:

Fuck NO! Like whaddaya do if the guy gives you a shot to the head?

Three informants had already jumped to their feet to conduct a foot-to-head kicking demonstration to show me how fast such an attack could happen. The

other students confirmed both the concern expressed verbally and the accompanying physical action. The kicking motions involved the entire body and were done somewhat comically, high in the air over the heads of sitting informants, but clearly for my benefit and not to harm a peer.

No other student was at risk of being kicked in the head because each informant took care to come close, but not too close. Before I could answer or elaborate on my non-confrontational mediation model, another student, SN, said:

> *Yeah, well what if they conceal [weapons]?*
> *Whaddya do then?*

Four boys came to the front of the room to show me where weapons could be hidden in baggy, layered clothing. P and A wanted me to know:

> *Just in case some guy was loaded down* [with weapons] *sometime.*

The others in the group nodded and a couple held up their arms and pulled on their own seams to illustrate potential hiding places for weapons. Without my speaking another word or asking even one question (at this point, all I had provided was a definition of mediation), another informant (M) said:

> *What if the guy smashes you in the face--*
> *like, what can you [as mediator] do about it?*

The other boys nodded rapidly at this remark and this concern. A few fists were raised into the air in a demonstration of agility and speed. One of the more serious boys (G) said:

Fuck! You gotta tell us where they're doing this shit [mediation] 'cuz I don't want to end up there [in the system]!

They were all quite agitated at this point in our discussion. Although they were still animated in their body language and clearly pleased that I was there and that we were talking, our discussion of face-to-face mediation was interpreted by them as a discussion of a place where their safety was threatened. At this point, I decided to end my fieldwork with the boys in the five-day program.

Why fieldwork in the Five-Day Program ceased

I decided to stop my fieldwork with this group because my informants were verbally and physically distressed. Although they were still animated in their movements and still playing 'tough guy' in jest with each other, they had said enough for me to know that face-to-face mediation would be inappropriate for these informants, and probably impossible. They had also told me, in the clearest linguistic and physical terms, that their biggest concern with a face-to-face situation was personal safety. What was also clear was that they identified 'the other' in such a situation as a peer.

There was another reason for stopping my fieldwork:[10] I felt that if a teacher walked into the room and observed the boys performing a series of mock-aggression/protection stances, such as simulated kicks-to-the-head, arms-

10. Ending my fieldwork does not mean ending contact with my informants. I have been back to visit with them and have taken artifacts for them to examine several times.

over-head, and fists in the air, all in response to information I had provided, that some of them would be removed to detention and would miss out on handling the artifacts.

It would have been wrong for this to happen. If I had created a context in which informant response to my research resulted in punishment and deprivation of any kind, I would not have kept my word to these informants. Reciprocity would not have taken place. I decided not to talk to them any further about mediation and distributed artifacts.

I gathered them around my table so that we were close, so that I could control handling of the items, and so that we could continue talking. As I unwrapped each artifact and talked about its age, origin, and function, their body language became remarkably restrained, and they asked serious and thoughtful questions. They handled each item with two hands, and with such care that I stopped talking and just watched them for a few moments. If I had known how cautious and gentle they would be with the artifacts, I would have brought more items.

Teachers and assistants were not present for this segment of my fieldwork experiment.[11] Because I had conducted preliminary fieldwork among these

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11. Staff at Lutherwood told me that it was "a very bad day" and they were very busy with boys whose behaviour was so inappropriate that they were not permitted in the room for my presentation. Staff to student ratios are low in this institution, but on this day they were exceptionally busy. It was not a problem conducting fieldwork without the presence of the teachers; in fact, their absence may have increased spontaneous and accurate answers. Teacher interference was a problem in my first fieldwork experiment.

students and had interacted well with them, staff were comfortable not being present for my presentation. The absence of other adults may have been a factor in the spontaneity of my informant's responses and the lack of restraint in the physical expression of their answers. They took considerable care to make sure I got the correct message (even approaching me to repeat the point), and there was unanticipated consensus in their response to the definition of mediation. I did not have this experience with incarcerated young offenders at the closed custody facility.

Fieldwork in closed custody

All informants in this environment are awaiting court dates, sentencing, or are serving time. The facility is located in a rural setting in Waterloo Region. The facility is surrounded by tall fences and barbed wire. Staff permitted me to enter and leave by unlocking a sliding, electric gate. Groups of inmates are shepherded in single file from place to place by guards. They are notified when inmates are to be moved from one building to another. Again, there are about nine students in each class, and a guard sits in the class during school hours. There are no teaching assistants.

These students are older than those in the five-day program at Lutherwood. They range from the youngest at 14, to 18. They are physically larger too, with only two students shorter than my own 5'6" height. Their behaviour was more relaxed, less hyperactive, but somewhat menacing, until our discussion

got started. In this environment, I was able to have a sustained conversation with my informants and got considerably farther than the basic definition of mediation. There was one girl in each of two classes. Both girls were at this facility when I visited in December.

I began by talking about anthropology, the sub-disciplines, then on to mediation. I explained that participation was entirely voluntary, that I was gathering data from 'kids in their age group' on conflict resolution, and that if they didn't want to offer information or opinions, it would not affect their handling of the artifacts. As in the five-day program, one boy needed this confirmed. I explained that I would include their comments in my thesis, but would use only initials and not their names. None of my informants had any problems with this format. I offered the definition, and asked if anyone had ever been offered mediation when they were in trouble. Everyone said or indicated no with a headshake.

I described mediation in simpler terms and asked again if anyone had been offered mediation, perhaps by a lawyer or a teacher. The answer again was no. Then one student, "H" said:

> *It isn't fair, like if you steal a car and go for a high speed chase and get caught they make you do jail AND therapy. I knew what I was doing. I'm not mentally ill. I got caught. I knew that could happen. If I was a grownup and I got caught, I would get a big fine or a jail term, but they make me take therapy all the time. Fuck, I hate that shit! Is mediation like therapy?*

Informant "W" also asked if mediation was like therapy or counseling.

This was clearly a concern of all the informants: they didn't know the difference between mediation and therapy. Just saying they were different was insufficient. They were skeptical, so I went into some detail about the differences and, as a group, their body language relaxed again. Conversation with the first group in closed custody went in several directions, but always came back to mediation without much effort.

At the end of our talk, I asked for a headcount of how many could do face-to-face mediation. Three boys said "*they would be fine with the face-to-face kind*" (T and J and D). One informant slept throughout the entire presentation. I then told them about my model and asked the students if they would be okay with the non-face-to-face 'kind,' and the remaining eight nodded, "yes."

It is important to note here that in this class, three boys said they would prefer the standard mediation model; with the exception of one sleeping boy, the remainder said they would 'be okay' with the non-face-to-face model. Not one youth said they would refuse to do mediation. To further confirm this, I repeated this summary and asked them if I was getting this right. They all nodded. I was in a classroom of young offenders who said, collectively and individually, that they would agree to mediation; three agreed they could participate in the standard model, while the remainder said they would be fine with a non-face-to-face process. The sleeping student did not respond. Unlike the younger group, these informants were less concerned about safety, although "Y" asked:

What is the mediator supposed to do if one guy punches the other in the face?

The body language from the others indicated they had wondered the same thing. At this point, I talked about bargaining in good faith. I took this opportunity to talk about the physiological and intellectual impact of unresolved conflict. For example I talked about the sick feeling in the stomach that stays and stays when a conflict is not ended. All informants who were awake at the time nodded energetically. I asked if extended conflict interfered in their learning new things because of the distraction, and all those awake nodded in agreement. There was almost unanimous agreement that unresolved conflict makes people sick and is awful for both sides.

I asked my informants for another example of conflict. Their first example was a fight between two youths in the residence the night before. The second example was the stolen car incident. I suggested that when all the stuff with the police was done, there is still the owner of the car, who is likely a stranger, who had their car stolen and doesn't know why. I said that there is a type of hidden conflict because the person who owns the car and the person who stole it don't know each other, but this event that connects them exists outside of the chase and the police.

I asked what they knew about victims. Informant "T" and "P" both said that nobody talked to them about the victim. "K" said:

I dunno why [no one mentioned the victim]. Nobody talks to us about the

victim, they just talk about us! us! us! and then send us to therapy!

I asked them what they thought I should know about mediation.

After a few seconds, "T" said:

> *Yeah, but not right away [don't do mediation immediately following a fight], like [do it] later, after things have calmed down.*

"P" agreed, "P" said that:

> *doing it [mediation] at the time [of the conflict] or right after was not a good idea.*

The next question was about how they are presently expected to resolve conflict in the institution. For the first time the girl spoke. Her body language revealed her resentment at being in the class and she did not look at me or participate in any other way. In fact, she did not look at me as she answered this question. She said:

> *We're supposed to just <u>deal</u> with it.* (JL).

Others in the group nodded in support of her answer and three repeated the phrase *just deal with it,* with a sardonic shrug to the shoulders. I took the opportunity to get clarification on what this phrase means to these people in this context. I asked if 'deal with it' means accept the situation without complaining or without doing anything about the conflict, like just leave it in your own head. Most informants nodded in agreement of what the phrase meant.

According to my informants, there is no mechanism in place to permit young offenders to resolve conflict inside or external to the institution. There

was a certain sadness in the class at that point. The discussion had taken long enough so I ended the segment on mediation and began distributing artifacts. Again, this group handled each item with the care shown in the five-day program. They kept asking if it was okay to turn an item over to see the bottom. Their questions were unexpectedly thoughtful and candid; some were even philosophical.

Logistical problems with access

The third component of my fieldwork involves interviews with three former young offenders, two being on probation at the time of our conversations. "N" was 16 at the time of the interview. When I asked if "N" had been offered mediation when he had been charged or when he was going to court, he said yes, but nobody told him what it was, so he refused it. When I asked if he said he didn't know what mediation was, he gave me an incredulous look, and said:

> *You don't tell them that you don't know something!*

I asked if it happened with anything else (refusing something because he didn't understand the meaning), and he said it happened with pills. He said he didn't take them when he was in closed custody because nobody told him what they were or what they were for. He takes them now for a medical condition.

I asked "KD" what he knew about the victim in his case; he said:

> *I dunno. I always wondered why nobody talked [to me] about the victim.*

I asked "JM" if he would have been willing to do a mediation if it had been

offered:

> *Maybe not. It probably isn't a good idea. I don't know how mad he is at me. He might want to have another go [fight]. I'd like to tell him I don't do that stuff anymore, but I don't think we should get together any more. Uh huh, sorry, I don't think I can do this [mediation] shit.*

Another young offender "A," age 13/14 at the time of interviewing, said he was not offered mediation at any time during the pre- and post-trial periods, or ever. When I asked if he would have participated voluntarily in something like a mediation process that would allow him to tell the victim certain things, he answered quickly:

> *Yeah, yeah, but the judge said I wasn't to have any contact with the guy, so I can't tell him anything, or else I'll get my ass breached.*[12]

I asked "A" what he would tell the victim if he had had a chance, he responded:

> *[I would have told him] that 'it' [assault] wouldn't happen again and that he [A] doesn't go on his [victim's] street anymore. I mean I don't hate the guy!*

"A" was not reluctant to discuss the consequences of the assault, but was quite uncomfortable about discussing the incident itself. He changed the subject to complaints about court:

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12. The phrase, **get my ass breached,** refers to the consequences of getting caught disobeying court orders or terms of probation. Every young offender knows they risk penalty and inconvenience if they disobey or breach 'terms' provided by the court or probation officer. This is usually detainment in an unfamiliar [boring] place, a holding cell, or secure custody, after a long time at the police station. Not only is detainment boring, but youths are not permitted to smoke, which is usually a primary consideration. Breaching probation or a court order results in major disruption of the youth's life, acts as a deterrent, and can result in time added to the probationary period.

> *That guy in court that was saying things about me [crown attorney] was lying about what I did. I didn't kick the guy in the neck. At least I don't remember anything like that. I don't think I did that. I never did that before. That guy was lying about me.*

"A" returned to the subject of his lawyer, saying that the reason he always "trashed" his lawyer was that:

> *He [the lawyer] swore so much, like he was trying to get me to like him by swearing all the time, like I do. And he kept making me go to court every couple of weeks for nothing, just sitting there and nothing would happen. I guess there was a reason or something for that but I don't know what it was. Probably something about the [Five-Day] program. I dunno. Fuck It!*

In the closed custody situation, almost all informants said they could contribute to some variation of mediation. The boys in the Five-Day Program could not get past their own sense of safety to discuss mediation in any other sense. In fact, safety has been a dominant theme throughout my fieldwork. I continue to meet with the three former young offenders to talk about things unrelated to their behaviour.

Chapter Four

Case histories and aboriginal perspectives on justice

In the last three years I have been the only mediator[1] in six non-face-to-face mediations that would not have taken place if the standard mediation process was the only option. In all cases, participants indicated that they could not, or would not, meet with their opponents: some gave reasons, and some did not explain fully. Safety was obviously a concern in two of six mediations conducted with adults. Damage to dignity and a fear of contributing to escalation of the conflict were likely factors in the remaining cases.

I have obtained consent from participants in five of those mediations to discuss their cases in a non-identifying sense for educational purposes.

CASE ONE: A married couple separated suddenly and under tense conditions. The husband has had a brief fling with a female hitchhiker lasting about two weeks. The wife had no knowledge of this event, and the husband had no intention of leaving his wife. The hitchhiker gave birth prematurely to a three-pound infant. The husband realized, at this point, that the mother was addicted to cocaine. He left his wife to prepare for caring for the infant, and to live with the mother. The married couple needed to divide ordinary household assets but could not meet with each other due to levels of anger. The wife's lawyer recommended mediation. The husband's lawyer encouraged a long court battle. When the husband called me to mediate divisions of assets, his legal bill was $14,000 and nothing had been accomplished. The wife wanted a resolution quickly and without further contact with her husband. After three weeks of back and forth dialogue, assets were divided equally, the house was sold, and

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1. According to the literature and Community Justice Initiatives, the ideal mediation is conducted with two mediators. One is used if a second is not available.

both were satisfied with their assets--all without a single face-to-face meeting.

CASE TWO: Foster parents of a 16-year-old boy request mediation because the boy's swearing had escalated to the point where some words were aimed at the mother. She found this disrespectful and threatening and saw two options: the swearing had to stop or the boy would leave their home. The mother felt a face-to-face meeting would only intensify the boy's swearing and her anger. The parents met me in the driveway where they presented their story. The father felt this situation was not as serious as his wife suggested, but supported her position out of affection. I met with the boy in his bedroom. He was willing to talk to me about the conflict, but 'not to them!' It came as quite a surprise to him that the mother felt threatened by 'only words.' The boy is 6'4"; the mom is 5'1" and weighs about 100 pounds. He wondered why she felt threatened since he respects her so much. He said that when the mother isn't home, the father swears right along with him, so why was it such a big deal? The fact that the mother felt threatened was of great concern to him. He didn't want to leave the family, certainly not because of this. He agreed to apologize to the mom and make sure she knew that he respected her. He also agreed not to tell her that her husband swears with him when they are alone. When I left, they were discussing under what conditions a swear word would be permitted (e.g., accidently cutting one's toes off with the axe or being hit by a truck).

CASE THREE: A blind contractor, who hires transient labour, punched a cement worker in the face over money. The amount of money, or that it is owed, was not in dispute. The labourer and the contractor did not want to meet. No reason was given by the worker. The labourer wanted his money and the contractor wanted the threat of lawsuit to disappear. The contractor says he didn't pay the man because an invoice was not submitted. The worker said that he was promised cash on a certain day and didn't get it, so he went to the contractor's home to complain. He admitted that he might have been drinking beforehand. He would drop the lawsuit if he got his money in cash and some extra for 'extreme bodily harm' to his face. He would not submit an invoice. I suspect that the labourer cannot write well enough to do this, so I offer to submit an invoice for him. At first he agreed to this, then changed his mind: an in-

voice was not be submitted. The contractor agreed to have his accountant make out an invoice for the labourer and adds $200.00 for damage to the face. The worker accepted payment. Neither met.

CASE FOUR: A 21-year-old Mohawk[2] and a former girlfriend, of Spanish descent, had a baby when they were teenagers. The father had not been reliable in his interest in the baby in the past three years, but now wishes to have regular visitation with his daughter. The mother is 23 and is married to a Mennonite who has taken on the role of father. They want the husband to adopt the three-year-old. They are willing to trade adoption for visitation with the stipulation that if the father proves to be unreliable in his relationship with the girl, that visitation will cease. The father and the husband are extremely threatened by each other. The husband thought the father wanted to rekindle a relationship with his wife. The father thought the husband wanted to prevent visitation. Because of this perceived threat to his marriage, and because prior attempts at meeting face-to-face have failed, they want a non-face-to-face process. Neither side can afford lawyers, although each side has been notified of their rights and obligations by legal counsel. So far, they have agreed to 20 points, such as visitation frequency, education, special events, spiritual direction, a college fund, even types of toys, without meeting. Only one point, location of supervised visits, remains in dispute.

CASE FIVE: A family from South Africa need mediation because the parents wish to separate but cannot agree on ethics (there are children), and logistics (resources are limited). Both parents say they cannot do a face-to-face meeting because they can no longer speak to each other without fighting. They fluctuate between separating and staying together in ex-

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2. I mention ethnicities in this case because they are relevant. The mother is of Spanish background and comes from a matrilineal-type family. She was very comfortable with negotiating face-to-face. The two men, one Mennonite and the other Mohawk, simply could not consider this method. This reality left them feeling somewhat cowardly; in fact, the discomfort was strong enough for each to mention it to me privately. Direct confrontation in Mennonite and Mohawk cultures is discouraged, even frowned upon. Although nobody had ever forbidden face-to-face problem solving, both felt reluctance intuitively. I mention their cultural backgrounds because it is relevant in terms of their resistance to face-to-face mediation. Both were pleased to realize that there were underlying cultural reasons for their reluctance to be confrontational.

> treme conflict for the sake of the children. I ask also to represent their children's view in the mediation. Both parents are delighted. The children, ages 5, 8, and 12, tell me that they want their parents to separate now, and that they want to spend equal time with each. They all say that they do not want to go back to South Africa. To protect the needs of the middle child, the oldest and youngest demand that the children stay together in the home. They want their parents living with them on an alternating and equal basis. The parents did not know their children's position. The parents now have a clear mandate from their children to find a way to separate without guilt. The mediation is ongoing with proposals and counter-proposals written by the parents going back and forth.

In each case, subjects made it very clear that they needed a prompt problem-solving mechanism that did not require them to meet with each other. Each person in each case had been under considerable stress for some time and showed signs of exhaustion when talking about the conflict. The father of the three-pound baby lived in such chaos in those days that he simply could not face his wife. His wife did not want to see him either. Although the boy who swears probably could have done a face-to-face mediation, the mother wanted a go-between because she felt the boy no longer listened to her.

Perceived threats between the father and adoptive father of the 3-year-old prevented a face-to-face mediation. The adoptive father said he couldn't trust himself to be constructive if the other party was present. The father had made several appointments with the other party, but had never shown up. All he said was, "I just couldn't" (see footnote two). With the family from South Africa, the conflict had escalated to the point where nobody was listening. Consequently, they were unable to recognize their children's position, and their sup-

port. Although the parents might have done well in a face-to-face mediation, their perception was that they could not negotiate that way.

Threat of violence prevented the blind contractor from meeting with the cement worker. The blind man has 5% vision in one eye--that is all. His fear was that the worker might want to retaliate by punching him in the face, possibly eliminating that 5% vision. The blind contractor could not take that chance. Although the worker showed no sign of wanting physical retaliation, neither wanted to meet each other again.

With unexpected consensus, my informants in the Five-Day Program said that fear of violence and the potential use of concealed weapons are problems in their perception of mediation. In closed custody, many youths were older, less demonstrative of fear as a cause of resistance. I asked their advice on where they thought there was a need for mediation for kids in their age group. The overwhelming response was that mediation is needed inside the institution to improve daily life. When I asked what kind of conflict resolution they thought actually worked, one boy said he heard circles work well. Another thought that circles were only for native youth. The following section provides insight into native approaches to youth justice.

Aboriginal perspectives on youth justice

In this section, I rely heavily on Rupert Ross and his exploration of aboriginal justice. Ross is a Canadian Assistant Crown Attorney who has spent years ex-

ploring Canadian native knowledge, justice, and language. In 1992, Rupert Ross was invited by the director of the Aboriginal Justice Directorate, a newly formed branch of Justice Canada, to explore aboriginal notions of healing with the intention of expressing those concepts to Western justice professionals across Canada (Ross 1996). Ross spent three years in different aboriginal communities where he listened and learned about native justice and healing:

> Probably one of the most serious gaps in the system is the different perception of wrongdoing and how to best treat it. In the non-Indian community, committing a crime seems to mean that the individual is a *bad person* and therefore must be punished....The Indian communities view a wrongdoing as *a misbehaviour which requires teaching or an illness which requires healing.* (Ross 1996:5)

Ross attributes this explanation to a justice proposal prepared in 1989 by the Sandy Lake First Nation, a remote Ojibway-Cree community in northwestern Ontario. Ross writes that, initially, he had heard much about justice-as-healing, but still had doubts on how deep-rooted this approach was in native communities (1996:13). Ross found that teaching and healing are cornerstones of traditional Aboriginal thought.

Ross doesn't mean that traditional responses to dangerous individuals are generous in every case: banishment to the wilderness is, in his view, a viable and regrettable option (1996:14). Ross also doesn't mean that traditional responses cannot contain elements of pain; some teaching is indeed painful and some healing is more difficult than hiding out in jail (1996:14). Some Aboriginal communities focus on punishment and propose sentences that are often more

severe than those of Western courts. Many native leaders and communities feel that the focus must be shifted, involving instead [of punishment] the teaching of all parties, with an eye on the past to understand how things have come to be, and an eye on the future to design measures that show the greatest promise of making it healthier for all concerned (Ross 1996:15).

Ross' research and time spent learning from native leaders and healers is extensive, and published in several general audience books. Although Ross seems overly represented in this section, he is an excellent native justice interpreter and best exemplifies native approaches.

Ojibway 'echo-makers' and concepts of leadership

Distaste of hierarchies is widespread and well-known in aboriginal communities. One of the most striking illustrations of the Aboriginal preference for avoiding hierarchies can be seen in the traditional Ojibway concept of leadership (Ross 1996:57). Leadership is understood to be one of five essential needs for society, along with defense, sustenance, learning, and medicine. A healthy society thus had to have its chiefs, its warriors, its hunters, its teachers, and its healers.

By tradition, each clan was represented by its own emblem, or *dodaem*, which gave rise to the English word "totem" (Ross 1996:57). Of the leadership *dodaem,* represented by birds, there grew to be many clans, including the Crane, Goose, Loon, Hawk, White-headed Eagle, Black-headed Eagle, Seagull. Brant, and Sparrow Hawk clans (Johnston 1984:61). This is Basil Johnston's explana-

tion for why the Ojibway chose the Crane as the pre-eminent symbol of leadership,

> ... when the crane calls, all listen. As the crane calls infrequently and commands attention, so ought a leader exercise his prerogative rarely ... A leader, having no other source of authority except for his force of character and persuasion, did not jeopardize his tenuous authority ... as a speaker, he did not utter his own sentiments, but those of his people. (Johnston 1984:61)

Ojibway leaders are considered "echo-makers" of their community (Johnston 1984:61) and do not impose their own views. This means that concepts of rigid procedures determined by leaders who entirely control process are alien to members of this community. Native views of peacemaking at the individual level constitute an important part of this thesis.

Their approach to youth justice that incorporates these and other cultural values is important in understanding how a new mediation model can assist those from aboriginal communities, as well as those from sub-cultures such as young offenders, discuss aspects of their identity and behaviour without the discomfort of a competitive face-to-face dialogue format.

New Zealand Family Group Conferencing: The Maori approach

In 1989, the government of New Zealand took a radical step with the passage of the *Children, Young Persons and their Families Act.* A new process was created that extended to all young offenders, ages fourteen to sixteen, who were charged with criminal offenses other than the most serious, or purely indictable ones. The primary condition was that the young offenders had to take responsibility for

their crime. Although Family Group Conferencing is based on the teachings of indigenous Maori, their approach to dealing with young criminals was extended to all young offenders regardless of cultural background (Ross 1996:19-20).

This thesis suggests that the Maori approach to youth justice can be adapted to the mediation context in three ways: first, by creating a context that is safe and acceptable to the young offender, the youth is provided with the opportunity to address their behaviour. Secondly, by providing a situation in which the victim and young offender can discuss the conflict, both parties can make an attempt to say what needs to be said. For example, elements of cause and effect, explanation and forgiveness can be discussed without coercion. Thirdly, if the Maori approach to youth justice is adapted to the mediation process, the chances of resolution and restitution are greater, thereby enhancing the lives of both. Four elements of pre-European Maori society inspired the creation of the Family Group Conferencing approach:

> First, the emphasis was on reaching consensus and involving the whole community; second, the desired outcome was reconciliation and a settlement acceptable to all parties, rather than the isolation and punishment of the offender; thirdly, the concern was not to apportion blame but to examine the wider reasons for the wrong...; and fourthly, there was less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony. (Olsen, Maxwell, and Morris in MacElrea 1994:36)

The process involves bringing together the young offender, the family, supporters, the victim and their family and supporters to discuss the event that

is connecting them in a negative and disruptive manner. The purpose is not single-minded. For example, the purpose is not to determine guilt or innocence, right or wrong, or entitlement to damages. One purpose is to bring the young offender's 'personal community' together, regardless of urban or rural setting, to design a 'sentence' that responds properly to the crime (Ross 1996:20). The default built into the process is the implementation of a judge's sentence in a court environment if the Family Conferencing community structure fails to reach an agreement.

Another purpose is to help those associated with the conflict see participants as complex, many-sided and whole persons--not just offenders and victims. Another is to give young offenders a graphic demonstration of the degree to which their actions touch others, both positively and negatively, and to show them that nothing they do is without consequences for others (Ross 1996:20).

Another purpose is to show both victims and offenders and their personal communities that they have the wisdom and power to propose changes in their relationships that are positive and progressive. Within this Maori-based justice system, carefully chosen facilitators are not supposed to control or direct resolution; their role is to help the parties achieve their own consensus (Ross 1996:20-21). The purpose is to understand what went wrong, why the event occurred, and how to implement healing and forgiveness. Punishment is not a factor in the proceedings.

This same purpose could be transferred to the mediation process for young offenders in Canada in two ways. First, the standard mediation model, which is rarely used by young offenders, could stress the objectives of Maori youth justice. My premise is that the objectives could be the primary goals of a non-confrontational mediation model designed to accommodate the primary causes of resistance of young offenders to the existing model. In the first five years of the Family Conferencing Program, 80 percent of cases reached a consensus. New Zealand's Principal Youth Court Judge, Michael J. A. Brown responds:

> The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationship, putting right the wrong and making reparation, instead of concentrating on punishment. The ability of the victim to have input at the family group conference is, or ought to be, one of the most significant virtues of the youth justice procedures. On the basis of our experience to date, we can expect to be amazed at the generosity of spirit of many victims and (to the surprise of many professionals participating) the absence of retributive demands and vindictiveness. (Brown in MacElrae 1994:36)

The New Zealand experiment with implementing components of Maori justice into both native and non-native contexts in both rural and urban settings inspired neighbouring Australia to consider those initiatives. The following section describes the Australian adaptation of the Maori model.

Australia adopts the Maori model of youth justice

Family Group Conferencing, as a pilot project, is also being directed in the Australian community of Wagga Wagga (Ross 1996:21-22). Two Australian crimi-

nologists, John Braithwaite and Stephen Mugford, noticed that the process followed in Family Conferencing tended to prevent stigmatizing or degrading attacks upon the personhood of the offender. Great care was taken to address negative aspects of the act itself, but not the offender as a person. Instead, offenders were shown that people in the community valued and respected them, despite their wrongdoing (Braithwaite and Mugford in Ross 1996:21).

Braithwaite and Mugford's observations of victim response to this process is reflected in comments made by New Zealand's Justice Brown. In Wagga Wagga, a standard question to the victim is: "What do you want out of this meeting here today?" The responses are in sharp contrast to cries for "more punishment" heard on the steps of more conventional courts. Offered empowerment victims commonly say that they do not want the offender punished; they do not want vengeance; they want the young offender to learn from his mistake and get his life in order (Braithwaite and Mugford in Ross 1996:21). Very often they say they want compensation for their loss. Even here, however, it is surprising how often victims waive just claims for compensation out of consideration for the need for an indigent teenager to be unencumbered in making a fresh start (Brown in Ross 1996:22-23).

In an unprecedented development of the original Maori model, police officers are able to become Family Group Conferencing coordinators. As a result of adapting the Maori model to the general population the number of children

admitted to the equivalent of youth custody facilities in New Zealand dropped from 2,712 in 1988 to 923 in 1992/3 (Ross 1996:23). As a further result, half of all young offender custody facilities in New Zealand have been closed (Ross 1996:23). The number of prosecuted cases against young people, ages 17, 18, and 19, has dropped 27 percent over the five years the program has operated (1987 to 1992). Judge MacElrea interprets these figures to mean that the new Youth Court is producing young adults less likely to be prosecuted in adult courts (MacElrea 1994:53).

Ross feels that the rate enjoyed first by the New Zealand model and then by the Australian experiment is unprecedented in the western world. In fact, he feels that the Western world's general determination to "get tougher" instead seems to be moving further away from the goal of creating respectful and peaceful young adults.

In Canada, representatives of the Nishnawbe-Aski Nation communities of Northwestern Ontario have met with Family Group Conferencing coordinators-trainers from New Zealand. Representatives of an Aboriginal child-care agency in northern Manitoba have traveled to New Zealand to discuss the program with facilitators and Justice MacElrea. In September of 1995, Judge MacElrea, among others, attended a conference in Manitoba to share their experiences.

The Navajo Justice and Harmony Ceremony: Peacemaking

The peacemaker's role is related to mediation in many ways. Navajo *naat'aanii*, or

elders use their wisdom to counsel and provide guidance; they encourage parties to talk about their problems, not make decisions for others. They help plan decisions through guidance but they do not make the decision (Ross 1996:26). There are important differences: while mediators are trained to consider the final agreement as a private and primary goal, the peacemaker is required to be active in teaching and promoting traditional values (Ross 1996:26).

The peacemaker is an investigator, a teacher, and a guide. The primary responsibility of a peacemaker is to help each person come to understand that life is relationship, and that a healthy life requires constant effort to provide as much nourishment as possible to every relationship that engages the person (Ross 1996:27). Another comparison of English or Western mediation and Navajo peacemaking is offered by Diane LeResche:

> Peacemaking is generally not as concerned with distributive justice or "rough and wild justice" (revenge, punishment, control, determining who is right) as it is with "sacred justice." Sacred justice is that way of handling disagreements that helps mend relationships and provides solutions. It deals with the underlying causes of the disagreement ... Sacred justice is found when the importance of restoring understanding and balance to relationships has been acknowledged. A peacemaking process tends to be viewed as a "guiding process," a relationship-healing journey to assist people in returning to harmony (LeResche 1993:321-322).

As in other Aboriginal contexts and justice systems, the mediation and peacemaking process is less agreement driven and more relationship nurturing.

The Navajos of the Navajo Nation in Arizona, New Mexico and Utah are

reviving their traditional methods of justice to preserve their own ways and overcome a hundred years of imposed adjudication (Bluehouse and Zion 1993:327). The Navajo Nation has had its own methods of justice for centuries, which indicates that the culture was not conflict-free or entirely harmonious prior to European influence.

In Navajo justice, mediation and peacemaking are related, but not quite the same. The term 'peacemaking' is not quite mediation, in the sense of a completely neutral intermediary who leaves the process wholly in the hands of the parties (Bluehouse and Zion 1993:335). Although peacemaking sounds like a grassroots or folk-label for justice-making, the Navajo Nation Code of Judicial Conduct (1991) recognizes the role and addresses ethical standards for peacemakers, stating that they may be related to the parties by blood or by clan, barring objection (Bluehouse and Zion 1993:334). The tribal court was previously centred primarily on Western justice values, including adversarial processes and punishment.

The use of those values caused problems as two observers, Philmer Bluehouse and James Zion, have illustrated. Bluehouse, himself Navajo, is the coordinator of the recently formed Navajo Peacemaker Court, and Zion is a solicitor to the Courts of the Navajo Nation and integrated by marriage into a Navajo family (Ross 1996:25). Navajo culture approaches justice processes with different values and procedures from those of mainstream society. They are still coping

with a century of imposed law--law that makes individual acts criminal and subject to punishment, rather than emphasizing restoration of harmony with others and the community (Bluehouse and Zion 1993:327; Ross 1996:25).

Bluehouse and Zion summarize the reason for the creation of the Navajo Peacemaker court by the Navajo Nation Judicial Conference in 1982:

> This unique method of court-annexed 'mediation' and 'arbitration,' uses Navajo values and institutions in local communities. Today, it struggles to overcome the effects of adjudication and laws imposed by the U.S. government. The alien Navajo Court of Indian Offenses (1892-1959) and the Bureau of Indian Affairs Law and Order Code ... made Navajos judge each other, using power and force for control. That arrangement is repugnant to Navajo morals. (Bluehouse and Zion 1993:328)

The Navajo Peacemaker Court

The Navajo Peacemaker Court, a system of court-annexed mediation and arbitration, is one of the primary instruments of revival or "going back to the future." However, traditional Navajo "mediation" and "arbitration" are different from general Western methods, and the courts of the Navajo Nation want to avoid new impositions of non-Indian methods (Bluehouse and Zion 1993:327). The Peacemaker Court is a modern vehicle for expressing elements of Navajo justice. The following section will examine the substance and components of Navajo justice.

Navajo courts are leaders among the 170 or more American Tribal courts: they preserve Navajo cultural values to an unusual extent and actively use con-

temporary traditional law (ancient law in a modern setting). That persistence, the product of language, religion, and traditions, motivates conscious judicial initiatives. Their approach reflects customs, usages, and traditions of the Navajo people and their system of justice represent Navajo values in action (Bluehouse and Zion 1993:328). To the Navajo, and all indigenous cultures researched for this thesis, justice is a verb.

Just as in other indigenous contexts, Navajo justice has different goals and methods which are more successful than imposed or imported models (Bluehouse and Zion 1993:328). Although there has been considerable enthusiasm for alternative dispute resolution methods, the Navajo Nation has been cautious (Bluehouse and Zion 1993:328).

The Leopard-Skin Chief and the Nuer

Finding references to mediation in older ethnographies, specifically those in which the role of mediator was a recognized institution either inside or external to official jurisprudence, has yielded few results. My search suggested that conflict between individuals was usually handled either by clan elders or legal process. An older source that is worth including, along with contemporary examples, is E. E. Evans-Pritchard's The Nuer (1940).

During his time among the Nuer, Evans-Pritchard concluded that this group did not have a legal system. This was primarily due to the absence of tribunals and courts, and because there was no established procedure in which a

person could sue for damages, outside force or threat of force (Evans-Pritchard 1982:162).[3] In the absence of what Evans-Pritchard calls legal form, he writes at length about the role of the Leopard-Skin Chief as mediator. The case is a hypothetical event based on the theft of a cow:

> The chief goes first, with several elders of his village, to the plaintiff's homestead, where he is given beer to drink. Later they go, with a deputation from the plaintiff's village, to the defendant's village, and here also the chief may be presented with some beer or a goat. The chief is considered to be neutral and a certain sanctity attaches to his person ... The visiting elders sit with elders of the defendant's village and the chief in one of the byres and talk about the matter in dispute. The owner of the animal gives his view and the man who has stolen it attempts to justify his action. Then the chief, and anybody else who wishes to do so, expresses an opinion on the question .... (Evans-Pritchard 1982:163)

Evans-Pritchard elaborates on the role of the Leopard-Skin Chief as well as describing the origin of the process. Although the Leopard-Skin Chief plays a pivotal role in the final decision, it is the responsibility of disputants to contribute to the process and provide the basis of the decision:

> It was clear from the way in which my informants described the whole procedure that the chief gave his final decision as an opinion couched in persuasive language and not as a judgment delivered with authority. Moreover, whilst the sacredness of the chief and the influence of the elders carry weight, the verdict is only accepted

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3. The Nuer was first published in 1940 with thirteen printings. I use the 1982 edition. Evans-Pritchard's study of the Nuer was undertaken at the request of the Government of the Anglo-Egyptian Sudan. Evans-Pritchard's study was an overview of the Nuer culture and stresses that his descriptions of and procedural data on the role of the Leopard-Skin Chief as mediator are furnished entirely by informants. This is because during his year living among the Nuer, he did not witness any negotiations in which the Leopard-Skin Chief acted as mediator.

> because both parties agree to it. No discussion can be held unless both parties want the dispute settled and are prepared to compromise and submit to arbitration, the chief's role being that of mediator between persons who wish other people to get them out of a difficulty which may lead to violence. The man against whom the decision is pronounced may give way to honour the elders and the chief where he would not give way directly and without their intervention, for he does not lose prestige by accepting their verdict. (Evans-Pritchard 1982:164)

Evans-Pritchard repeats several times that during his fieldwork, he did not personally witness such a mediation event. His informants suggest that this process was used on rare occasions (1982:162, 164). As Evans-Pritchard explores the process behind this type of decision-making, the event takes on further characteristics of mediation:

> For a dispute to be settled in this way not only is it necessary that both parties should want the matter amicably settled, but it is also necessary that they should themselves reach agreement during the discussion. No one can compel either party to accept a decision, and, indeed, a decision cannot be reached unless there is unanimity, since the elders are of both parties to the dispute. They go on talking, therefore, till every one has had his say and a consensus has been reached. (Evans-Pritchard 1982:164)

This description, and other passages by Evans-Pritchard, outline the basic premise behind the core tenets of mediation. The five important elements in a settlement of this kind by direct negotiation through a chief seem to be, (1) the desire of the disputants to settle their dispute, (2) the sanctity of the chief's person and his traditional role of mediator, (3) full and free discussion leading to a high measure of agreement between all present, (4) the feeling that a man can give way to the chief and elders without loss of dignity where he would not have

given way to his opponent, and (5) recognition by the losing party of the justice of the other side's case (Evans-Pritchard 1982:164).

The characteristics outlined by Evans-Pritchard are similar to the key features of modern mediation (see Chapter One). One of the main differences is that in Western culture, the mediator is an adult who is almost always a stranger to both parties, who has trained as a mediator, but has no other persuasive or official status. Among the Nuer, the Leopard-Skin Chief, *kuaar muon*, has a sacred association with the earth *(mun)* which gives him certain ritual powers in relation to it, including the power to bless or curse.

Among the Nuer, this type of bargaining is not entered into lightly and constitutes a type of legal process. Participants are likely to comply with decisions because they have participated in negotiations and because at least two lineages are attached to those decisions, even if they are not physically present at or contributors to the process. Among the Nuer, the mediator is not a stranger, as he or she is in Western contexts. The mediator as stranger, rather than familiar elder or leader or some other trusted adult, may be a factor in resistance, or lack of resistance, in applying mediation to communities where there are no strangers.

Within this context, the Leopard-Skin Chief has extraordinary power at his disposal that he doesn't use. Disputants would, no doubt, be aware of the nature and extent of his power. Authority behind a neutral, yet powerful media-

tor is a factor in both parties' efforts to reach agreement. This pressure is comparable to those in Western society feeling the pressure exerted by alternatives to a negotiated agreement, which in many cases would be accelerated conflict, violence, court action, legal fees, and considerable stress. At this time among the Nuer, the alternatives would also include accelerated conflict, violence, considerable stress, and the wrath of a chief with exceptional power. Alternatives to a negotiated agreement may be the most effective influence in parties reaching an understanding or agreement.

Ruth Benedict's research among the Japanese

In another more revealing anthropological study of negotiation techniques was conducted by Ruth Benedict beginning in 1944 when she was assigned to study Japanese culture by the American government (1954:3). Her intention was to study the everyday attitudes of ordinary Japanese people. The aspect of her research that is relevant to this thesis is the concept of *giri*[4] which is the duty to keep one's reputation unspotted (Benedict 1954:145).

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4. These explanations come from the schematic table of Japanese obligations and their reciprocals included by Ruth Benedict in her ethnography (1954:116). *Giri* These debts are regarded as having to be repaid with mathematical equivalence to the favor received and there are time limits. There are two definitions, one pertaining to the relationship between the individual and the world, and the other pertaining to the self. The term of importance here is *Giri-to-one's-name*, which is one's duty to 'clear' one's reputation of insult or imputation of failure, i.e., the duty of feuding or vendetta. (N.B. This evening of scores is not reckoned as aggression.) *Giri* also includes one's duty to admit no (professional) failure or ignorance. Also included is one's duty to fulfill the Japanese proprieties or custom, e.g., observing all respect behavior, not living above one's station in life, curbing all displays of emotion on inappropriate occasions, etc. (Benedict 1954:116).

Benedict refers to a series of virtues which, to the Japanese at the time of her research, have a sufficient unity because these are the duties which are not repayments on benefits received; they are 'outside the circle of *'on*'[5] (Benedict 1954:145).

The term *'on'* includes those acts which keep one's reputation bright without reference to a specific previous indebtedness to another person. "They *[on]* include therefore maintaining all the miscellaneous etiquette requirements of 'proper station,' showing stoicism in pain and defending one's reputation in profession or craft" (Benedict 1954:145). Benedict notes that the tendency for Western languages to separate the two *(on and giri)* into categories as opposite as gratitude and revenge does not impress the Japanese (1954:146):

> The Japanese do not separate the two into contexts of aggression and non-aggression ... [to him] aggression only begins outside 'the circle of *giri*'; so long as one is maintaining *giri* and clearing one's name of slurs, one is not guilty of aggression. One is evening scores ... A good man must try to get the world back into balance again. (Benedict 1954:146)

Benedict explains that in Japanese culture, the virtue of wiping out stains

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5. *'On'* are obligations that are passively incurred. One 'receives an *on*'; one 'wears an *on*,' i.e., *on* are obligations from the point of view of the passive recipient. Related terms,

Ko on	*On* received from the Emperor.
Oya on	*On* received from parents,
nushi no on	*On* received from one's lord.
Shi no on	*On* received from one's teacher.

On received in all contacts in the course of one's life. Note: all these persons from whom one receives *on* becomes one's *on kin, 'on* man' (Benedict 1954:116).

on one's honour transcends any notion of material profit (Benedict 1954:146). "One was virtuous in proportion as one offered up to 'honor' one's possessions, one's family, and one's own life. This is a part of its very definition and is the basis of the claim that this culture always puts forward that it is a 'spiritual' value" (Benedict 1954:146-147). Benedict suggests that this core value of a concept which is firmly embedded in Japanese culture, exists in direct opposition to competitive and capitalistic values of other nations (1954:147).

Although the following comments are descriptive of Japanese culture at the time that Ruth Benedict did her fieldwork, concerns over loss of dignity described in the following passage could also illustrate the position of young offenders and other marginalized people in their struggle in situations deemed beyond their control,

> This sensitivity is especially conspicuous in situations where one person has lost out to another [Benedict's examples: employment opportunities or competitive exams]. The loser 'wears a shame' for such failures, and, though this shame is in some cases a strong incentive to greater efforts, in many others it is a dangerous depressant.[6] He loses confidence and becomes melancholy or angry or both. His efforts are stymied value. (Benedict 1954:153).

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6. Benedict mentions Japanese psychological tests that showed the positive impact of a competitive social environment on Western children. When the same test was conducted on Japanese children, the tests showed the opposite results. Young men and adults performance deteriorated with competition. Subjects who had made good progress, reduced their mistakes and gained speed when working alone began to make mistakes and were far slower when a competitor was introduced (Benedict 1954:153). No information about how the studies were conducted, for whom, and under what conditions was included within Benedict's text.

Benedict suggests that etiquette of all kinds is organized to prevent loss-of-dignity situations which may call into question one's *giri* to one's face (1954:156). Benedict's research indicates that Japanese avoid occasions in which failure might cause lack of dignity (Benedict1954:157).

In his article, Victim-Offender Mediation: Lessons from the Japanese Experience, John O. Haley (1995) writes that in emphasizing offender correction and restoration to the community, law enforcement authorities in Japan have learned that encouraging confession, remorse, victim compensation, and victim pardon is essential to correcting socially deviant behavior (Haley 1995:233). Haley argues that features inherent in the Japanese model are transferable to both North American and European institutional contexts (Haley 1995:235). Haley states that no industrial democracy has been as successful as Japan in dealing with crime. With the lowest crime rates in all major categories, Japan is demonstrably the most effective industrial state in preventing crime (Haley 1995:236).

Most foreign observers attribute Japan's relative dearth of major crime to a variety of cultural, economic, and institutional factors, such as social cohesion, ethnic homogeneity, family stability, respect for authority, a steady rise in living standards (Haley 1995:236). What appears to be leniency in Japanese jurisprudence is a system where cultural components are used to complement legal process and provide alternatives to incarceration. Police are estimated not to report

up to 40% of all apprehended offenders (Shikita 1982:37). To justify such leniency, Japanese law enforcement officials must be satisfied that the process of self-correction and community control has begun. The offender's acknowledgment of guilt, expression of remorse, and willingness to compensate victims are not sufficient:

> The family and the community must also come forward and accept responsibility to ensure that steps will be taken to prevent future misconduct and to provide some means of control. Even this is not as determinative, however, as the victim's response. The victim's express forgiveness is considered essential to the social reintegration of the offender (Foot 1992:349). It has become standard practice in Japan for offenders, usually through third parties, to offer to compensate victims in return for a formal letter to the police, the prosecutors, or the judge, in which the victim states that he or she has been adequately compensated and has pardoned the offender .... (Haley 1995:240)

As victims become essential participants in the process, out of the necessity for restitution to them and their expressed pardon, they have less to fear, and compensated in the process, they tend to support the discretionary powers that make official restorative measures feasible (Haley 1995:241-242).

In cases where direct negotiation between the wrongdoer and the injured party is difficult or inappropriate, third-party intervention or assistance is an equally normal response (Haley 1995:243). There are no victim-offender mediation programs in Japan. No mediator training agencies exist. Mediation is a normal aspect of daily life. Those in positions of authority or influence are expected to act as go-betweens or intermediaries in the settlement of disputes

(Haley 1995:243). The restorative model and all its essential elements thus fit quite naturally within the Japanese cultural and institutional matrix (Haley 1995:243). I found nothing in my research that suggested that go-betweens require the offender and victim to face each other during the negotiations.

The Ojibway and Mi'kmaq 'forgiveness' verb tense

Both Ojibway and Mi'kmaq cultures have a verb tense that is specifically designed to say, "this event has been concluded to the satisfaction of all" (Ross 1996:188). Ross explains that in English it is called the 'Forgiveness Tense' because it allows people to speak about 'crimes' for the the lessons they contain, while at the same time making it clear that the victims have been appeased and healed, and the 'criminals' restored to full honours in the community, and that the event 'put behind' the community (Ross 1996:188-189).

One aspect of addressing criminal behaviour that is contained within an otherwise good person is that healing, for all concerned, is a primary feature of the process. Within the aboriginal context, it is understood that people must heal themselves. When the healing turns its focus on the relationships between people, only the parties to those relationships can heal them (Ross 1996:189). To aboriginal people, justice processes that do not recognize those realities and make those demands of people are seen as both superficial and misleading (Ross 1996:189).

Cross-cultural approaches to communicating about justice issues and

youth are helpful for many reasons. They help show that there are alternatives to the assumption that there is only one way to deal with crime; for example, perhaps the easiest way is to temporarily isolate a youth from his family and community in the hope that segregation will teach them something positive. Aboriginal approaches focus on cause and effect but without the negativity and humiliation of blaming. Within all the approaches discussed in this section, the youth is seen as a whole person and not as a bad youth who has offended the state. These approaches put a face and a family on both the victim and the offender that is constructive and serves to encourage explanation and compassion. Traditional justice does not permit the offender to practice avoidance strategies.

For the purpose of mediation, these approaches are flexible in terms of process and location. Rather than placing boundaries around the incident and discussing matters pertaining to that event only, aboriginal justice looks at the entire context, including the history of participants as it relates to the situation that followed. They look at context as a primary consideration and as the place where fixing the child or youth begins. This is not possible if the person is seen as an isolated bad person.

Just as aboriginal peacemaking processes and circles work alongside the legal system, I suggest that non-face-to-face mediation instituted to work alongside standard mediation as a regular choice. Location of talks can be flexible in

order to accommodate the comfort and convenience of participants. Subject matter can be determined by participants without the constraints of boundaries placed upon talks by mediators who are concerned about efficiency.

Aboriginal justice doesn't put these kind of constraints on conversation between victims and offenders. Instead, the whole person and their history is important in the process. This priority can be taken into the mediation process where identity, history, past and future relationships can be discussed. Currently, mediators collect information from each side to determine the agenda and do their best to keep everyone on track. It is the flexibility of aboriginal systems, as well as care taken with identity, that will enhance mediation.

Very few young offenders engage in mediation. It is hard for them to explain the history of their conduct on the first try and in proper sequence. The failure of mediation is a failure to realize the logic of young offenders.

Conclusion

Support for an alternative mediation model

Within mediation, the production and exchange of knowledge, and the potential for resolution is controlled, selected, organized, and redistributed according to a number of widely accepted and firmly adhered to procedures.

A mediation process that is not flexible enough to accommodate young offenders acts to subjugate the young offenders' knowledge and experience of the conflict. A process that is not open to the needs of those who are devalued in the arbitrary 'rating system' of their culture is a closed system. In such a system there are too many rules for who gets to make their knowledge known and how that knowledge is presented.

Foucault believes that re-emergence of 'low-ranking' knowledges, these unqualified, even directly disqualified knowledges, is important (1980:82). My fieldwork suggests that these knowledges exist, are valuable, and most important, are available.

Just as Foucault does not separate philosophy from history, my young informants do not separate past danger from future danger. They measure their safety from the middle point. They view the world from within an identity that is already a type of crime scene; most young offenders have not been well cared for by competent adults in stable families;

> Reconstructing identity after the trauma of victimization is an extraordinarily difficult process. The difficulty of this process is

> intensified for children because their sense of self is still developing. The difficulty of this process is also intensified when the sense of self, and the cultural integrity of that self, have been systematically eroded and disparaged. (Sivell-Ferri 1997:119)

With the exception of actual mediation cases described, I believe that all my informants have been exposed to the mechanisms of violence, either as receivers, providers, or observers. They cannot ignore the potential for violence. Mediators should not ignore their concern.

My fieldwork indicates that young offenders closely equate power with violence; they view themselves on the receiving end, which means that when a situation is not familiar, youth view themselves as without power. Suggesting that young offenders, especially the younger ones, enter an unfamiliar physical and social environment that they perceive as dangerous and puts them in a powerless position, provides them with another opportunity to fail at something important.

Once young offenders are withdrawn from their shared social context and placed into a foreign context in which they are asked to communicate with agents from different positions in the social space, their systems of mutually recognizable references disintegrate (Schryer, unpublished manuscript 1999). What young offenders have to say is buried inside these complications and perceptions of potential damage to the self. Non-face-to-face mediation is a way for them safely to explain what happened and why.

Foucault presses for 'a return of knowledge' (Foucault 1980:81), and a re-surrection of subjugated knowledges (1980:81-82). In a sense, he argues for the

same goals as mediation: going back to the event and exchanging knowledge about that time so that each comes away with more information, and ideally, a view of resolution. If young offenders have only one choice of process and choose not to participate, then their knowledge and their contribution is lost.

Just as the European justice system has failed in the past to recognize the culturally different logic of First Nations people (Sivell-Ferri 1997:29), the mediation process has failed to consider what young offenders need to be included. Without a political context insistent upon a voice for the dis-empowered, the social context needed to break and keep on breaking the silence won't be there (Sivell-Ferri 1997:133).

My fieldwork indicates that what young offenders have to say about their crimes is important. Their statements, made to me in safe and familiar environments, indicate that they are, and continue to be, concerned about those events and are capable of making insightful, reflexive, and constructive statements. Often their choices were complicated, logical, honourable, and protective, even though they resulted in charges.

My informants were clearly very concerned about a context in which their safety was not guaranteed. When the younger boys showed me where the 'other' could conceal small weapons, my impression is that they were considering my safety alongside their own: their concern for me and my safety was filtered through concerns for potential damage against their own bodies. The boys in the Five-Day Program

took considerable care to make sure I understood this and that I got the message right, repeating this information to me, eye-to-eye.

Mediation works well for many people if they come from similar backgrounds and if their comfort levels with a competitive, face-to-face bargaining strategy are also similar. It works well for people who are comfortable with their ability to speak clearly under duress, and for those who are not fearful of their safety.

Mediations actually performed with adults provide a similar story: safety was a primary concern in two of five cases. In cases where violence was not a concern, the history of the conflict and the history of participants prevented each side from listening to each other. The information I passed from side to side was similar, but the mediator-as-messenger was, in the end, the most efficient way of listening and negotiating. The foster boy had stopped listening to the parents and did not know the mother felt threatened and disrespected. In that case, the parents assumed that the mediator would conduct talks separately so that the conflict would not be exaggerated.

With the South African family, the parents have lived in conflict so long that their communication took no other form, yet they had to negotiate practical matters. Both assumed a non-face-to-face model was the default. When I suggested the face-to-face style of mediation, they were unnerved by the suggestion. They said they contacted me because they wanted to stop face-to-face discussions.

In the case where an adoption is pending, two young men simply find each

other threatening, although both say that they are not concerned about violence. They are ages 21 and 23. Both are unable, so far, to articulate the logic behind their fearfulness; they just know that it is there. Although the mother of the child is comfortable with standard mediation, this is not possible for the father and husband. Both say they just cannot explain it more than that. One of these men is Mennonite; the other is Mohawk. Both come from cultures that shun confrontation. As a discipline, mediation disregards these concerns.

My fieldwork supports my contention that causes of resistance, particularly with young offenders but also with adults, must be addressed by process. The way in which this can be accomplished is by providing a choice in the form of an alternative adaptive mediation process. From my experience with other mediators, instructors, and from articles published in credible publications, my guess is that mediators traditionally come from middle-class backgrounds. It may be possible that rejection of my model by mediators may be a result of not understanding what it is like to be preoccupied with safety.

The young offender who doesn't know how mediation works, what the framework is, or if the process will make their world worse or better, will be reluctant to take a chance. Taking part in a process conducted by a stranger where the outcome is also unknown, and the enemy is present, logically results in rejection of such a process. This results in subjugating the knowledge(s) of both camps.

Whether or not mediation, in its present form, compromises anyone's safety,

the perception for young offenders is that it does. That is the place where mediation, as a discipline and a communication strategy, must begin to change. Mediation, and mediators, even those who agree to shuttle diplomacy as a last resort, must consider offering to work back and forth between the young offender and the 'other.' Some mediators, at least, need either to specialize in a process that addresses concerns expressed by my informants, or offer a choice of authentic processes. Making such choices available needs to be done without making it look as though the non-face-to-face is a back-door, cowardly approach to taking responsibility for crimes.

What matters most is that young offenders have important things to say, but they cannot be said in the sophisticated, experienced language of those accustomed to power and success. Their statements cannot reach other people unless the social environment is comfortable. Just as it takes a patient ear to listen to those struggling with English through another language base, listening to the subliminal messages of young offenders takes extra time. For example, when "A" and I were visiting together recently, and discussing the artistic merits of the World Wrestling Federation, he said, *I guess I could give the guy my hat (ball cap).* I asked who he was referring to, and he responded, the kid he beat up. That assault occurred when "A" was 12; he is now 15. That incident is still not resolved for this boy. I offered to go to the boy's house and talk to the family on his behalf (I have made this offer before), but "A" said he doesn't know if the kid still lives there and, besides, he doesn't want me to get into trouble with the court (no contact order).

Underneath the many layers of protection manufactured by young offenders to protect a developing and damaged identity, there is often a person who wants to make a series of statements that are positive, both about the event and about the self. I believe that many of the statements made by my informants to me in the short time I did fieldwork with them might have been meaningful to the victim and their families.

This type of reflexive communication can only happen if the young offender has uncomplicated and uncompromising access to a mediation process that accommodates their concerns. Lack of motivation is not the reason young offenders do not engage in mediation: I learned from my informants that if safety is not addressed by process, they have nothing to say.

The potential for self-healing and two-way forgiveness

My premise is that constructive statements, self-healing and two-way forgiveness can occur between young offenders and others if distractions are reduced by modifying the mediation process. If causes of resistance are not only considered relevant, but addressed through process, then more young offenders could fulfill the mandate of the Young Offenders Act by addressing their wrongdoing and making the attempt to resolve the conflict to the satisfaction of both sides. My non-face-to-face mediation model is a peacemaking process which permits a concept, such as the 'forgiveness' verb tense found in Ojibway and Mi'kmaq approaches to justice, to become a reality for reluctant adults and disadvantaged young people.

One of the greatest advantages of my proposed model is that it could begin, or take place entirely, while the youth is incarcerated. Waiting for incarceration to end before the mediation process begins would not be required. This was suggested to me by Ralph Cotter (personal communication), a probation officer in Waterloo Region. He speculated that boredom and time to reflect often acts as a motivator for young offenders.

Within mediation, there are rules for who gets to make their knowledge known. If the rules are changed so that another mediation context is available, then marginalized and fearful people will have more choices about how to enter into dialogue with others. My non-confrontation mediation model addresses the spirit of the Young Offenders Act, causes of resistance, safety, dignity, and the young offender's obligation to consider the position of the victim and explain their behaviour as best they can. When safe and open dialogue is possible, the potential for forgiveness, of the self and of the 'other,' becomes more realistic.

Aboriginal justice teaches us that children and youth teach adults what is wrong and what needs to be changed, not through linguistic competence, but through their behaviour. My informants tell me that if they have choice of process in a safe place, they will 'do peacemaking.'

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