The Lawfulness-Lawlessness Continuum: Interpersonal Dynamics in Conflict Resolution Processes

by

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Abstract

The ways in which citizens behave, interact, and plan for the future have cumulative significance for the nature and future of society. This project proposes an analytical device (the lawfulness and lawlessness continuum) to describe the types of behaviours and decision-making that individuals use when participating in adjudication, mediation, and other conflict resolution processes. Lawfulness is a dynamic that is cyclical, orderly, and restrained. I suggest that it can be used to analyze the types of interactions between citizens that are associated with law and adjudication. Lawlessness is a dynamic that is emergent, adaptive, and responsive; it may manifest more often in moments between individuals who are using mediation to resolve their conflicts. Interactions between citizens are likely to involve a combination of lawfulness and lawlessness, along the continuum that lies between them. This analytical model offers a lens through which these nuances of citizen interactions can be analyzed.

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Chapter One: Introduction

The ways in which citizens behave, interact, and decide for the future has implications for their relationships, communities, and society. The conflict resolution processes and ideologies that are used by citizens also facilitate particular modes of behaviour, encounters, and decision-making that can likewise shape the present and future of those individuals, as well as human collectives in the aggregate. The following thesis explores the base nature of two conflict resolution methods, mediation and adjudication, and proposes an analytical device to show how each has a propensity to produce certain behaviours and interactions among their participants. As I will discuss, these different contexts inspire particular modes of behaviour, which can then can determine the participants' perceived possibilities for the future; in other words, mediation and adjudication in spirit may affect the way in which parties in conflict interact and choose options for the future. The dominant approach used in a society for conflict resolution can likewise affect both the way in which citizens engage with one another, as well as the way in which the future is determined by those in conflict.

One example of the possible variations in citizen behaviour is whether they use their own generated approaches for coming to a resolution (using a bottom-up approach), or apply wider existing guidelines and procedures to address their dispute (invoking a top-down approach). This is a theme that runs throughout the following paper. On the one hand, there is the Hobbesian understanding of society, wherein law and state hold a monopoly on the governance and decision-making of the collective; this is in part to avoid the reemergence of the state of nature, which Hobbes portrays as being a violent and

chaotic world.[1] As such, there is little legitimacy allowed for citizen-driven conflict resolution and mobilization. On the other hand, there is the Lockean interpretation of society, which suggests that a state of nature (wherein citizens interact without the direct influence of the state) can exist *within* a formal society and state.[2] Likewise, citizens can engage with one another and address disputes within multiple contexts and processes. I subscribe to the Lockean description of society because it aligns with the legal pluralism described by Merry: in which different conflict resolution approaches and ideologies embody different realities within one society.[3] From this perspective, I contend that it matters which dispute resolution is being used, and with what affect on the encounters between citizens and the decisions being made for their relationships. In addition, a change in the dominant conflict resolution practices of a society can affect both the way that citizens can behave, interact, and resolve conflicts, and subsequently, the nature and future of a society.

In Canada, for instance, there has been a gradual shift in the past three decades towards the use of mediation and alternative dispute resolution (ADR) practices to address disputes that might otherwise be resolved in court proceedings. With these changes come a myriad of interpretations about the nature and significance of mediation and ADR, as well as its relationship with and impact on adjudication and law. Many of these interpretations operate on multiple levels: there are the different explanations of the con-

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1 Jerold Auerbach, *Justice Without Law* (New York: Oxford University Press, 1983) vii and 3.

2 A. John Simmons, "Locke's State of Nature," (1989) 17(3) Political Theory 451.

3 Neil Sargent, "Is There Any Justice in Alternative Justice?" in *Law, Regulation, and Governance*, edited by Michael Mac Neil, Neil Sargent, and Peter Swan (Toronto: Oxford University Press, 2002) 217.

flict resolution practices, ideologies, and normative influences; there are the varying preferences and critiques of one practice over the other; and finally, I argue that there are underlying impressions and interpretations of the nature of each conflict resolution approach. More precisely, I suggest that there is an under-acknowledged dimension to the discussions around the differences, overlaps, and impacts of mediation and adjudication. The dimension in question is that of the actual, moment to moment influence of each practice on the encounters of citizens. It is the types of behaviours, perceptions, norms, and decision-making approaches that emerge within each conflict resolution practice. The theories of symbolic interactionism and encounters explore the same dimension of interpersonal moments, from a sociological perspective.

How does participation in mediation or adjudication, as well as ADR and law, influence the interactions and resolutions among individuals? What type of behaviour and outcomes are facilitated within an ADR process, compared with that of a legal process? In addition, how do the increasing overlaps between the two approaches (such as lawyers who are trained as mediators) impact the way in which participants interact with one another, and the processes? In this thesis, I propose a analytical device to identify and analyze the nature of mediation and adjudication, and how they each can facilitate unique behaviours, choices, and norms to emerge among participants. Said model is the main contribution of my project: the lawful-lawless continuum. This tool offers two concepts, lawfulness and lawlessness, to describe the base interpersonal dynamics that can often emerge within mediation and adjudication. Lawfulness is a mode of behaviour and a framework for thinking that operates under the influence of the past to frame the present

and determine the future. I use the idea of a closed system--wherein the inputs into the framework are cycled through the existing system in order to become outputs that reflect nature of the system--to show the dynamic of lawfulness.

By providing a systems-level description, I can illustrate how lawfulness (and lawlessness, as well) causes the different factors in an encounter between citizens are affected by the given context and process. I draw correlations between the particular normative approach of adjudication/law and the dynamic of lawfulness between participants in the legal system. Lawfulness can produce consistency, reliability, and predictability when its norms shapes interactions and processes. Lawlessness, on the other hand, is a mode of behaviour and framework for thinking that operates in a different fashion; rather than having the past strongly influence the present and future, its normative presence prompts behaviour and decision-making that are open-ended, adaptive, and emergent. I use the notion of a complex adaptive system--wherein the elements and inputs in a system are unfixed and fluid, shaping output that may be novel and unprecedented--to describe the basic dynamic of lawlessness. The principles and ideology of mediation are suggested to have a propensity towards lawless interactions, which can produce creativity, transformation, and renewal.

In order to show the nuances of my analytical device, I first describe lawfulness, lawlessness, adjudication/law, and mediation/ADR, as ideal types. Once those apparent opposites have been expounded, I move to dissolve them and reveal their inherent connections. Similarly, I explain each concept in relation to the conflict resolution approach that is more likely to form a given dynamic (namely, lawfulness and adjudication, and

lawlessness and mediation). However, I go on to discuss the many ways in which each conflict resolution practice can encompass both dynamics in different circumstances. My intention with this three-step approach is to unfold the concepts of lawfulness and lawlessness within the context of similar approaches and systems--whether they be the corresponding practice, ideology, or system concept. In other words, it is a choice made to ensure that the model is explained clearly, systematically, and intelligibly for the reader. As I have stated, lawfulness and lawlessness are not intrinsically linked to one conflict resolution practice or the other, nor are they separate from one another; they are dynamics and frameworks that interact continually in intuitive and interesting ways, depending on the situation in which they are invoked. Likewise, the behaviours, interactions, and decisions that individuals make most often emerge from a combination of lawful and lawless dynamics, with one force sometimes operating more strongly than the other. This is made especially relevant by the fact that many conflicts are resolved using a combination of adjudication and mediation, therefore invoking a mixture of lawful and lawless moments.

The inspiration to develop the lawful-lawless continuum tool comes out of an interest in how the increasing use of mediation in countries like Canada might affect law, adjudication, and legal systems. As a proponent of mediation and ADR, I am curious about how such practices relate and differ from legal processes and ideologies. I am also cognizant of the fact that neither approach is necessarily better or worse than the other, in terms of effectiveness. This interest inspired me to think carefully about some of the more nuanced differences and similarities between the two practices. As much has been done at the level of the structural, procedural, and ideological qualities of mediation and adjudi-

cation, I chose to consider how they are unique in terms of the interpersonal, immediate interactions between participants of each process. It is at this level that the idea of lawlessness in mediation emerged; there seems to be an inherent characteristic of that ADR process that produces intuitive, creative, and unprecedented behaviours and thinking in its participants.

After having developed said loose correlation between lawlessness and mediation, it became clear that the present thesis also needed a lens to describe the behaviours, norms, and interactions encouraged by adjudication and law. Lawfulness thus emerged from being a brief aside into a full counterpart concept. The goal of this project is to develop and explore the dimensions of the lawful-lawless continuum as a method to understanding what exactly can occur between citizens as they participate in mediation and/or adjudication. With the proposed analytical device being offered, one can consider the different kinds of behaviours, perceptions, and decisions that are being made in any given conflict resolution process. It allows for a new approach to analyzing the natures of mediation and adjudication/law, as well as another dimension for academics to explore when making claims about the use of one approach over the other. I also suggest that lawfulness and lawlessness can be used in other projects to describe any number of other processes, systems, contexts, and interactions, though remain focused on conflict resolution for the purposes of this project.

As noted, the present thesis follows a structured process to unfold the concepts of lawfulness, lawlessness, and their relationship with one another and with conflict resolution practices. Chapter Two defines law/adjudication and mediation/ADR as both prac-

tices, institutions, and ideologies; it also offers some of the common explanations and critiques of each approach, and gives an overview of two concepts (the shadow of law and juridification) as parallel models to my own. In Chapter Three, I explain my arguments and methodology for the project. The notion of a moment or encounter--which is the level of analysis for the project--is also explained, followed by an overview of my arguments surrounding lawfulness, lawlessness, and their relationship. I use Weber's notion of ideal types to convey a sense of the core nature of each approach and dynamic. Chapter Four delves into the topic of adjudication, law, and lawfulness, as well as the behaviour, norms, dynamic, and system that found each relevant component. Similarly, Chapter Five explores mediation, ADR, and lawlessness, with the use of improvisation and complex adaptive systems to explain the reasoning behind their connections.

Chapter Six sheds the ideal type, binary approach to discuss the deep and nuanced relationship between lawfulness-lawlessness, and mediation/ADR-adjudication/law. It references arbitration as an example of a process that invokes an interesting combination of lawful and lawless behaviours and frameworks. Finally, Chapter Seven revisits the concepts of the shadow of the law and juridification to explain how lawfulness and lawlessness contribute a similar but distinctive model of analysis for the tension between law/adjudication and mediation/ADR. After discussing some of the implications and insights of the project, it moves to suggest possible avenues for future studies using the analytical model of lawfulness and lawlessness.

Chapter Two: Definitions and Analyses on Law and Mediation

The following chapter begins by explaining the concepts and practices of adjudication/law and mediation/ADR, and continues by highlighting some of the critiques of each approach. Thereafter, I explain the two concepts of the shadow of law and juridification, in order to contextualize the area of analysis that is being developed in this project. My intention in this section is to reveal how there is latitude for a different model to analyze the behaviours, norms, and decision-making practices that citizens may often use in the context of adjudication and mediation. I use the terms mediation and alternative dispute resolution (ADR) to encompass many different forms of popular justice and out-of-court settlements; the academics upon which I draw examine different forms of ADR, but provide insights for the wider body of literature, as well. Mediation as a term also captures both the practice and the philosophy of this and other ADR processes. Similarly, I refer to adjudication and law as two facets of one concept. For the purposes of the project, adjudication is the visible praxis and application of the more abstract and intangible concepts of law and the legal system.

Law: Consistency and Predictability

To begin, it is necessary to define law, as it pertains to adjudication. As a concept, law can encompass a number of different purposes and elements. Laws themselves can be informal norms that have been formalized into an official rule, and/or they can be solutions to social or moral problems that society needed to address as a whole. The law and processes of the legal system can also be used to intervene in conflicts between citizens,

groups, and society.[4] Law in this discussion is not restricted to statutes, constitutions, or other human-made documents. It is not simply the legal system, adjudication, or the different components and mechanisms that form such an institution. Law as an ideology is understood to occupy more space and time through normative forces than simply the physical or literal evidence of its existence in human collectives. Piper explains how the concept of law can elicit images of law, whether that be a stop sign or action that is taken against the law. She also notes how integral actors are in forming a full account of law; law's presence and influence depends on the activity of many different individuals and groups to sustain and enforce it.[5] Based on this overview, I suggest that law can be analyzed from a multiplicity of perspectives, and that an additional lens that considers citizen interactions associated with adjudication and legal norms may add to the understanding and analysis of the topic. First, it is necessary to explore some of the finer details of adjudication, as it relates to law.

As Auerbach explains, "predictability, stability, and coherence" are essential qualities of the law.[6] The qualities of predictability and stability allow law to engage with its subjects, its society, and its future, as that consistency may ensure widespread understanding, adherence, and legitimacy of the law. The characteristic of coherence ensures that law is not only an internally cogent force, but also that it is perceived as a robust entity in general. These can manifest in the types of legal norms that emerge from a given

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4 See Richard Abel, *The Law and Society Reader* (New York UP: New York, 1995) 4; Emile Durkheim, *The Division of Labour in Society* (Free Press of Glencoe: New York, 1964) 19; and Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh University Press: Edinburgh, 1999) 86-8.

5 Tina Piper, "The Improvisational Flavour of Law, the Legal Taste of Improvisation," (2010) 6(1) Critical Studies in Improvisation 1.

6 Auerbach, *supra* note 1 at 142.

legal system. The three features of consistency in law are also apparent within the adjudication process. In requiring judges to justify their decisions based on existing legislature and past precedent, rulings tend to be structured around prevailing frameworks rather than haphazard principles. Justice can therefore be delivered with some certainty of predictability and impartiality.

At another level, lawyers represent the parties, and help to translate their interests and opinions into legally relevant values and principles. In doing so, lawyers enable parties to anticipate the likely process and outcome of the adjudication, and to prepare their positions in such a way that success is possible. The three qualities identified by Auerbach therefore reflect the capacity for adjudication to be accessible and fair to the citizens and groups who use it to resolve conflicts. These characteristics do not preclude the possibility of societal or legal change and transformation to occur in the system, either. I suggest that the change made possible within common law and adjudication occurs in a unique fashion: it emerges gradually through the appropriate legal proceedings, in reference to past cases, relevant principles, and legal norms. Thus, while the change itself may be transformative for citizens and society, it often emerges gradually in a predictable, stable, and coherent manner. A simple example of this tendency is a court proceeding that ultimately produces a precedent-breaking decision, but only after going through the necessary procedures and reasoning expected in adjudication.

The criticisms of law and legal systems are useful to the present discussion because they help to outline the parameters of adjudication, and the perceived relationship it shares with mediation. For instance, some suggest that adjudication's norms of consisten-

cy and coherence can be detrimental. They may cause the conflict resolution practice to resist and sometimes subsume that which is not already encompassed and ordered by legal norms and processes.[7] Adjudication can thus be considered coercive because it operates using a top-down mentality, applying legal principles and norms onto cases and parties that are brought to its attention. It may also be contrasted with bottom-up, citizen-driven practices that appear to favour consent and flexibility. Shonholtz offers two additional critiques of adjudication. He explains how the legal process of conflict resolution can only be initiated if there is a clear legal dimension to the matter. Disputes that are serious but non-legal and personal in nature are not designated as relevant or significant to the wider human collective. Disputes that are designated as legally relevant are then translated into legal terms and frameworks. Adjudication as an approach can therefore hold the power to legitimize certain issues, and exclude others.

Another area of weakness suggested by Shonholtz is adjudication's intention of securing and delivering equality for all. By prioritizing equal treatment and consistent outcomes, the legal system may fail to account for diverse individuals and factors, and therefore, may fail to deliver *equitable* results.[8] Equitable results may better take into account the individual, subjective dimensions of the conflict and parties. Similarly, adjudication is criticized for forming adversarial relations between citizens seeking to resolve conflict.[9] It is argued that the process may not be capable of addressing the individual nu-

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7 Sally Engle Merry and Neal Milner, "Introduction," in Sally Engle Merry et al, eds., *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States,* (Michigan: The University of Michigan Press, 1995) at 6-7.

8 Raymond Shonholtz, “Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program," *supra* note 7 at 203.

9 Auerbach, *supra* note 1 at 3.

ances and needs of people who are in dispute, which may include the desire for healing in themselves and in their relationships. Thus, the legal norms of consistency, predictability, and coherence in adjudication can be interpreted as an barrier to a more personalized, conciliatory, and emotion-based approach to conflict resolution.

Having outlined some common definitions and critiques of adjudication, I argue that there is a different way to describe aspects of legal dispute resolution. I suggest that many of the criticisms of the practice are rooted in the seemingly fixed and self-contained nature (the ideal type, lawfulness) of adjudication and law. Likewise, I propose that one can analyze adjudication with a different focus: that of the interactions between citizens who engage with the process, whether directly or through the influence of legal norms. In doing so, one can identify and explore a type of moment common to adjudication that is neither coercive *or* life-giving, but capable of both, depending on the circumstances. The following segment likewise defines mediation, and identifies its distinguishing characteristics. It seeks to reveal the underlying nature of mediation (the ideal type, lawlessness), that which is also capable of doing good, bad, and anything else in between. Conceptually, the nature of the former--lawfulness--is not at odds with the nature associated with the latter, lawlessness. They are, in fact, in a fluid, temporal relationship. This explanation of ADR therefore leads into three existing accounts of the relationship between adjudication and mediation.

Mediation: Openness and Transformation

Mediation is an alternative avenue for the resolution of interpersonal, intergroup, and legal disputes or conflicts. It involves an impartial third party, the mediator, who

guides the parties in conflict through a process of dialogue, insight, and self-awareness. The mediation process is designed to allow participants to explore their conflict, share experiences, seek insights, and pursue reconciliation.[10] It can be used to resolve conflicts ranging from the interpersonal to the international stage. As a relatively efficient, cost-effective approach to conflict resolution, it is sometimes presented as an alternative to adjudication.[11] As an ideology, mediation prioritizes "flexibility, informality, and consensuality."[12] It tries to be responsive to the varying dynamics of the conflict and process. It does not require that the details of the dispute or interests of the participants be presented in a formal language or manner. While the process is facilitated with the hope of conflict resolution, it accounts for the fact that a clean and straightforward ending to a conflict is not always possible or desirable.[13]

The consent of the participants to participate in and proceed with mediation is an integral component of the process. Mediation theory teaches that the self-determination of parties is one of the most important principles guiding the process.[14] The emphasis on consent and self-determination is reflected in the distribution of authority in mediation; mediation situates power predominantly within the participants, rather than within the

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10 Kenneth R. Melchin and Cheryl A. Picard, *Transforming Conflict Through Insight* (Toronto: Toronto University Press, 2008) 76.

11 Bishop et al., *The Art and Science of Mediation* (Toronto: Emond Montgomery Publications, 2004) 135.

12 Robert Bush and Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: John Wiley and Sons, 2005) 9.

13 See Calvin Smith, "Facilitating 'Perspectival Reciprocity' in Mediation: Some Reflections on a Failed Case," (2000) 23 Human Studies 4.

14 Penny Brooker, "An Investigation of Evaluative and Facilitative Approaches to Construction Mediation," (2007) 25(3) *Structural Survey* 222.

mediator or other parties. It can also produce an additional dynamic between participants in the process. This particular form of interaction is 'private ordering,' in which private citizens self-govern and resolve issues using social norms and informal conventions.[15] Similarly, mediation attempts to be individual-driven. The role of the mediator is to animate the process of mediation impartially; he or she is not meant to comment on or direct matters that pertain to the specific content of the conflict. Thus, any variety of norms, interpretations, and outcomes may be possible within mediation. They may include, but are not limited to, legal norms and approaches.

When the process of mediation is animated properly and the parties are receptive emotionally, a powerful moment of change can take place during mediation. This moment forms the core of the open-ended system and the concept of lawlessness that I will develop in a later section of the paper. Two approaches to mediation provide descriptions of said moment, within the context of the process. Insight Mediation describes mediation as a learning process through which participants can discover insights about themselves, the other, the conflict, and the relationship. Those insights may help the parties to shift the nature of their relationship and situation from one clouded by misperceptions and darkness to one shaped by curiosity and awareness.[16] With such learning, the individuals can be well-equipped to find creative solutions and management techniques for the future. Transformative mediation also focuses on a type of paradigm shift unique to mediation. Bush and Folger explore the notion of conflict transformation, as it is achieved through a

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15 Robert Ellickson, *Order Without Justice: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991) 5.

16 Melchin and Picard, *supra* note 10 at 54.

renewed sense of empowerment felt within the parties and a mutual recognition of the personhood of one another.[17] That foundational change in the relationship can allow the participants in mediation to discuss the future in a hopeful and productive light. If the participants come to the point where they are ready to discuss options for the future of their relationship or situation, they are encouraged to identify and consider as many creative choices as possible before deciding on the plan that will carry them forward.

Mediation is not a perfect process or ideology. For instance, it is criticized for its promises of a neutral mediator. As noted, a central aspect of mediation is the idea that the mediator only animates the process, and does not address or contribute to the content of the conflict itself. However, the role of mediator possesses an authority and power of which the mediator must be cognizant; the assumption that he or she is always neutral does not account for the fact that he or she can have much influence over the process and content, whether intentionally or inadvertently.[18] Mediation is also criticized for being inconsistent and unfair in the justice it delivers for participants. For instance, a feminist critique argues that mediation disadvantages female parties (especially mothers) because its informal and unaccountable process allows male parties to dominate and skew the decision-making process.[19]

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17 Bush and Folger, *supra* note 12 at 22 and 13.

18 See Linda Mulcahy, “The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?” (2001), 10(4) Social and Legal Studies 505-527; see also Janet Rifkin, Jonathan Millen, and Sara Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991), 9(2) Mediation Quarterly 151-164.

19 See Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012), 24 Canadian Journal of Women and Law 207-239; see also Elizabeth Pickett, "Familial Ideology, Family Law and Mediation: Law Casts More Than A 'Shadow'" (1991), 3(1) The Journal of Human Justice 27-45.

More broadly, the personalized, individualized approach in mediation can mean that disadvantaged demographics may not only participate in the selection of unjust, biased outcomes, but also that their particular social justice issues will not be addressed in the public sphere (the 'privatization of conflict' critique).[20] Using different lines of reasoning, Fiss and Fitzpatrick each argue that law and adjudication encompass a much more appropriate and effective approach for addressing conflicts than ADR; the latter cannot recreate the consistency, authority, or justice that is perceived as possible through the former.[21] Likewise, they argue against the expansion of the use of mediation in society. Nader also critiques the institutionalization of ADR, as well as the overall popular justice movement. She problematizes the distinction often made between mediation institutions and the legal system by pointing to the commonalities and connections shared between them: both can be highly centralized, formalized, hierarchical, and controlling.[22] From her perspective, claims that suggest ADR is a distinctive, citizen-driven practice that emancipates communities from the coercion and power of the state are inaccurate; its essence can be easily manipulated and populated by the state-just like adjudication and law.

Finding Commonalities in Analysis: Juridification and The Shadow of Law

In this project, the practice and philosophy of mediation and ADR is seen as different from, but complementary to, adjudication and law. I argue that the core of mediation as an ideal type is an open and flexible force, whereas the basis of adjudication as

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20 Robert Bush and Joseph Folger, "Mediation and Social Justice: Risks and Opportunities" (2012), 27 Ohio State Journal on Dispute Resolution 5.

21 See Owen Fiss, “Against Settlement,” (1984) 93 Yale LJ 1073-1090; and Peter Fitzpatrick, “The Impossibility of Popular Justice,” *supra* note 7 at 472 and 457.

22 Laura Nader, “When is Popular Justice Popular?” *supra* note 8 at 435 and 447.

such is a linear and predictable one. The analytical device I develop in this project helps to analyze mediation and adjudication at this level, and describe how these underlying dynamics might affect citizen behaviour and decision-making. I argue that the two practices, ideologies, and ideal types cannot be viewed as a dichotomy, nor as a unity; they must instead be understood as models that interact and relate to one another within the zone of time and space. As noted previously, both mediation and adjudication/law are used separately and jointly to resolve conflicts; the approaches of mediation and adjudication are therefore forever in tension with one another, thus offering an important and engaging focus for research. There are two existing conceptual frameworks that seek to describe and analyze the relationship between the conflict resolution methods in question: juridification and the shadow of law. As I will explain, each device explores the same focus and tension that my own analytical tool aims to outline, but using different approaches.

> The theory of juridification can be defined in the following ways:
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> > First, [it] is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects.[23]

As indicated, the concept of juridification describes and critiques the way in which the power of law and its components may spread gradually into non-formal, non-legal con-

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[23] Lars Blichner and Anders Molander, "What is Juridification?" (2005) 14 Centre for European Studies 5.

texts. Indeed, both law and adjudication have been interpreted as an apparatus of coercion, as opposed to a process of consent.[24] However, the reason that juridification is relevant to this project is not due to its critical lens towards the legal system, adjudication, or law. It is relevant in that it offers a way to analyze the presence and dynamic of law in society. To extrapolate some of the points made in that quote, juridification is a term that describes a particular movement that legal norms, practices, concepts, and forces may create as they operate in society. It also has a counterpart concept, dejuridification. Dejuridification is the process by which the presence and influence of law's mechanisms are destabilized through the use of citizen and community-driven ones.[25] In simplistic terms, it tries to shift the influence and control held by law and state in society from a top-down to a bottom-up locale. The concepts of juridification and dejuridification show the same tension that my analytical model attempts to account for; they can be used to analyze the differences and connections between law/adjudication/state and mediation/ADR/citizens. More significantly, they can be used to show a continuum between the dynamic and forces of each approach at the macro level.

The above definition of juridification also notes that law in its different forms can have impacts at various different levels of society; this is of interest to the present project because it acknowledges the significance of law and adjudication in micro-level, interpersonal interactions between citizens. The concept, the shadow of law, also contributes to that micro focus of analysis. The 'shadow of law' comes from Mnookin and Kornhauser's research on the instance of bargaining for agreements outside of divorce proceedings. The

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24 Sargent, *supra* note 3 at 208.

25 Blichner and Molander, *supra* note 11 at 5.

shadow refers to the influence that legal norms have on the nature and outcomes of out-of-court bargaining; it suggests that such norms and principles cause the bargaining to take on legal tones and content, even though it occurs within informal interactions outside of court.[26] Like juridification, the shadow conveys an image of movement and tension coming from the force of law, adjudication, and legal norms. It therefore also implies that there is a zone wherein the shadow does not fall, and wherein there may be a different force, practice, or set of norms shaping the interactions and negotiations of citizens. The tension therefore lies in the furthest reaches of the shadow, where--metaphorically speaking--the light tries to outpace the dark. I intend to offer an analytical tool to consider the same point of tension, the same focus of discussion, and the same level of micro/interpersonal analysis. However, this project contributes a different perspective to add to the discussion of adjudication/law and mediation/ADR.

The proposed analytical device that I present in the following sections engages with Jacob's work on the shadow of law. He sees the shadow of law as a compelling explanation for what occurs during mediation and out-of-court settlements, but questions whether it reflects the actual behaviours within such interactions. Based on his study of divorce mediations and child custody disputes, Jacob finds that many took place and were resolved "with little awareness or concern about law."[27] My conception describes how it is possible that moments without the apparent or dominant influence of law or legal norms can emerge within mediation, and the degrees to which law is present and absent

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[26] Robert H. Mnookin and Louis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale LJ 950. See also Brian Ray, "Extending the Shadow of the Law" (2009), 3 Utah Law Review 797-843.

[27] Herbert Jacob, “The Elusive Shadow of the Law” (1992), 26(3) Law and Society Review 585.

within said practices. Jacob's version of the shadow of law metaphor resonates with the idea that law has a gradated level of influence and presence throughout society, and that its reach can sometimes fade away (as does a shadow) in certain contexts. By this, I mean that the shadow of law suggests a continuum of the presence and absence of law. The behaviours and decision-making beyond law and adjudication are therefore relevant to understanding the nature of interactions between citizens that occur outside that shadow. There may be different norms, interpretations, factors, and outcomes in that other zone.

As I have outlined above, juridification and the shadow of law point to an important tension between adjudication/law and mediation/ADR. However, they seem to presuppose that the former approach is dominant over the latter, in terms of its normative influence at both macro and micro levels. The lawful-lawless continuum to be explained in the next chapter is a device to analyze the types of behaviours, interactions, and norms that citizens engage in different forms of conflict resolution approaches. Unlike juridification and the shadow of law, it conveys how the tension may be held firmly from both sides, rather than driven solely by the side of law, adjudication, and legal norms. It also suggests that mediation and ADR can form a different macro-level dynamic and micro-level mode of behaviour than that of the legal approach. Chapter Three explains this contribution to the discussion in more depth.

Chapter Three: The Lawful-Lawless Continuum

The present project offers an analytical tool for mediation and adjudication that captures the ideal form that underlies and characterizes each entity. My arguments on the nature of adjudication, mediation, and their relationship stem from an interest in the unique phenomenon of transformation and insight within mediation, and how that specific moment might be described within a world seemingly structured by law. Likewise, my comments in this chapter begin within the framework of adjudication, then move to the topic of mediation. The two concepts that constitute my analytical model are lawfulness, and lawlessness: each are forms that emerge within interactions between individuals. I suggest that lawfulness is more likely to form in moments shaped by adjudication and law, and lawlessness is more possible in encounters during mediation and ADR. Both concepts are best expounded within a discussion surrounding their respective contexts. The methodology and research that corresponds with each element are intertwined within the arguments themselves. However, it is necessary to note that my discussion surrounding law, adjudication, and lawful moments, as well as mediation and lawless interactions, uses Weber's concept of ideal types to artificially distinguish between the two sets of elements in question.

Weber examines certain concepts, like his modes of social action, as so-called ideal types.[28] By this, it means that he identifies key features and dynamics of a concept, and distills them to the point that it becomes an archetype for the actual subject being discussed. As Aronovitch explains, "what Weber seeks to capture is the essence or underly-

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[28] See Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Routledge, 2001), 149 and 194.

ing tendency of certain persons or practices, elements that may not be visible or prominent in the majority of cases."[29] Similarly, I explore law/adjudication/lawfulness and mediation/ADR/lawlessness as ideal and somewhat opposing types--rather than as the practices and ideologies that actually operate and interact fluidly in an ever-changing society. This is a choice made for explanatory purposes, so that the concepts are clear for the reader before they are nuanced again. My ultimate goal is to reveal these two counterparts of lawfulness and lawlessness (and their corresponding conflict resolution practices) as being in tension with one another--a tension that requires continual negotiating and balancing. They are likewise a part of the legal pluralism identified by Merry in her discussions surrounding the different degrees of ADR, informal justice, and its relationship with adjudication/law.[30]

A Moment: Individuals and Elements Within An Encounter

The particular focus of the lawful-lawless analytical tool (rather than the societal level focus of juridification) is that of a moment. A moment emerges out of a particular medley of personalities, behaviours, activities, and circumstances, as they converge in an encounter between individuals. For my purposes, I use the terms moment, zone, interaction, and encounter interchangeably, as each concept refers to the specific intervention point relevant to the analytical tool of lawful-lawless encounters.[31] The theory of symbolic interactionism is of particular relevance to this discussion of moments. While this theo-

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29 Hilliard Aronovitch, "Interpreting Weber's Ideal-Types" (2012), 42(3) Philosophy of the Social Sciences 360.

30 See Sargent, *supra* note 3 at 217.

31 For example, see Lon Fuller, "Law and Human Interaction" (1977), 47(3-4) Sociological Inquiry 62-3; Vasileios Pantazis, "The "Encounter" as an "Event of Truth" in Education" (2012), 62(6) Educational Theory 641- 657; Fraser, Mariam. "Event." (2006). 23(2-3) Theory, Culture, and Society. 129-132.

ry is different in terms of its area of interest and approach, it nevertheless considers a similar area for analysis: that of the makeup of interpersonal interactions between individuals.

Symbolic interactionism theory proposes that there are different factors and obligations operating implicitly in interactions that can then form patterns in human encounters.[32] It theories emerge from a partially sociological perspective. In other words, it offers an analytical lens to examine person-to-person encounters, as well as the more macro-level significance of the aggregate behaviours of citizens. My analytical device similarly attempts to avoid so-called situationalism, or the overlooking of contextual and normative influences in individual encounters; it adopts the view that a moment "is penetrated by macro environments that reach across time and space, [and thus it] is not an entirely local production."[33] There is therefore importance given to the bottom-up, top-down influences of factors like norms, contexts, and experiences on the nature of interpersonal encounters.

Some of the micro-level details of the concept of moment, encounter, zone, and interaction will be outlined here. Goffman (the main theorist associated with symbolic interactionism theory) notes that unique temporal and spatial zones are formed between individuals when certain types of elements between them interact.[34] These elements might be the nature of the individuals' relationship (as explained above), the personalities

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[32] Paul Colomy and J. David Brown, "Goffman and Interactional Citizenship" (1996), 39(3) Sociological Perspectives 371.

[33] Colomy and Brown, *supra* note 32 at 375; Alex Dennis, "Symbolic Interactionism and Ethnomethodology" (2011), 34(3) Symbolic Interaction 349.

[34] Colomy and Brown, *supra* note 32 at 373.

of the persons involved, the perceptions of past/present/future, or the reasons for which they are interacting. Other elements that might be present in the moment are more transient, like the individuals' moods, time constraints, or environment. The context and setting of the encounter can radically shift the nature of the moment, as well. More broadly, there are the elements of the social, political, organizational context in which the people are interacting. This includes factors like the norms and rules that guide the behaviour and interactions of citizens, and the status and power held by the citizens who are engaging with one another. If the citizens are in conflict, it also includes the process and approach that they have chosen to resolve and/or address the issue.

The organization of elements that are present and in force during an encounter between individuals will vary depending on the elements that are more dominant than others. By this, I mean that certain elements will influence the nature of the moment to a greater degree than other elements, depending on the circumstances. For instance, an encounter between a citizen and a police officer is likely to be shaped predominantly by the fact of the latter's role as a public law enforcer. The citizen may feel inclined to restrain his or her behaviour or personality when in conversation with the officer. He or she may also be more conscious of the laws that govern his or her behaviour, and whether or not he or she has abided by them recently. The moment shared between the citizens and police officer might therefore have a particular quality to it: one that is perhaps strained, tense, and perfunctory. Binder and Scharf describe different phases of encounter between a citizen and law enforcer, as well as how those moments can lead to an interaction of police violence against the citizen. They show how the nature of the roles and personali-

ties of these two types of individuals can influence how their encounter may proceed.[35]

There is a spacial dimension to a given interaction (including the elements of geographical location and immediate surroundings);[36] it is for this reason that I also use 'zone' to refer to the focus of discussion. The notion of a zone captures both the contextual and temporal complexity and nuance of a moment. In the case of the police officer and citizen, their interaction would be highly different in the context of a protest in front of government buildings, compared to that of a restaurant where the officer and citizen are having lunch with their respective colleagues. The setting of a protest would likely form between the officer and citizen an encounter that revolves around the professional responsibilities of one, and the democratic rights of the other. A moment shared by them would be rather fixed in the engagement of law enforcer and legal subject. Conversely, the setting of a restaurant would form a less distinctive encounter, wherein the officer and citizen would likely behave in a manner closer to their individual personalities, rather than their political identities. An encounter between them at a restaurant might be more fluid and relaxed than at a protest.

To summarize, a moment or encounter is constituted in a given time and space by the elements present due to the individuals, factors, and context involved. The theory of symbolic interactionism also notes that encounters between individuals are cumulative, and that *en masse*, they may influence the nature and dynamic of a society. Likewise, the elements that influence the encounters of individuals most strongly must be identified,

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35 Arnold Binder and Peter Scharf, "The Violent Police-Citizen Encounter" (1980), 452 The Police and Violence 116-7.

36 See Dennis, *supra* note 34 at 349.

studied, and depending on the circumstances, critiqued. In this project, I am interested in the extent to which the elements in an encounter are fixed or fluid. I offer an analytical device that suggests that different conflict resolution approaches possess qualities that then shape moments to be either ordered or responsive. More specifically, the ideal type of adjudication may produce encounters that are more linear and cyclical, whereas the ideal type of mediation may form interactions that are more emergent and adaptive.

The two kinds of moments above align with my concepts of lawfulness and lawlessness. They also constitute the closed and open systems that I use to describe lawful and lawless zones. Finally, they ultimately reflect the tension and discussion that the shadow of law and juridification consider from a different framework and dimension. With the increase of lawful or lawless moments, a new dynamic of citizen behaviour and decision-making can emerge. Using the analytical device of lawfulness, the core characteristics of law and adjudication will now be explained.

Law and Predictability

Beyond the formal institutions of the legal system and adjudication, I posit that there is a shape and force that emerges in association with law. This shape is lawfulness, a term (and ideal type) that I use to refer to the way in which parts of a temporal zone are organized. A lawful moment is one in which its elements have been ordered, structured, and fixed by the agents that form it. Likewise, lawfulness is a type of shape or aggregate that is designed for predictability. Unlike juridification, lawfulness is not used to describe an inherently coercive force, but instead, a mode, framework, or normative dynamic with particular characteristics. Lawfulness manifests itself within interactions, depending on

the nature and context of the given moment. Leading from this, I suggest that an important characteristic of this concept is its relationship with the past. Like adjudication in the common law system, lawfulness is constituted by past precedents; its present and immanent future are likewise fixed by a particular normative formation of the past. I use the concept of a closed system to explain how a moment and encounter of lawfulness can be relatively fixed and self-contained. A closed system receives external information, but through a process of feedback cycles back through its own system, instead of being immediately changed by it.[37] Lawfulness and adjudication can order interactions for those subjected to them in a similar fashion.

I propose that there are four elements present in adjudication that are productive of lawfulness. Three of these elements have been identified by Hart. His work suggests that adjudication (as an aspect of the legal system) is formed by three components: legal rules, actors, and processes. The rules are the substantive laws of a society, as well as unwritten frameworks like the rule of law. They can also be the legal norms that emerge from the legal system and influence citizen behaviours. These rules and norms tend to be narrow and specific in scope, in that they relate predominantly to legal matters; they also may not necessarily allow for the use of other, non-legal norms or activities. The actors are the officials who perform the work of the system by creating, interpreting, and applying the rules and laws. They range from judges to lawyers, and from law enforcers to law-abiding citizens. The processes are encapsulated within the formal operations of

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[37] Marguerite Schneider and Mark Somers (2006), "Organizations as Complex Adaptive Systems: Implications of Complexity Theory for Leadership Research," 17 The Leadership Quarterly 353-4.

lawmaking and conflict resolution.[38] Any of the three elements of adjudication can be present in a moment; for example, there might be the presence of a formal legal actor, the discussion of a law, or the anticipation of an upcoming legal process. The fourth element that I contribute is the type of moment, behaviour, and decision-making that is produced by citizens wherever adjudication or law is present. Each element (the rules, actors, processes and behaviours of adjudication) reflects the overall character of the legal conflict resolution practice, which I have already described as being consistent, predictable, coherent, and ordered. This character, in turn, is also associable with lawfulness.

I suggest that these four elements of adjudication can shape encounters with lawfulness; they do so in their movement of translating conflicts, facts, and individuals into legally relevant matter. Thus, interactions that are associated with adjudication may follow the same lawful dynamic, that incorporates the existing facts, actors, and issues into specific, linear frameworks. These arguments about lawfulness and adjudication will be explained in more depth in Chapter Four. The works of Bourdieu, Fuller, and Felstiner, Abel and Sarat provide a basis for discussion around the form, operation, and effect of the practice of adjudication on the interactions shared by citizens.

Mediation and Open-Endedness

In contrast to lawful zones, I argue that the ideal type of lawless moments are by nature unordered, organic, and ever-changing. The future is open-ended in lawless moments because it is not predetermined by the past, or a past-determined present. A lawless moment is therefore not structured, but emergent. I suggest that mediation has a unique

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38 H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012) 94-100.

capacity to inspire an encounter that is similarly unstructured and lawless. The principle (or rule) of self-determination and the open-ended process that characterize mediation push participants to interact and discern without the constraints of past precedence, external influence/control, or relational impediments. In other words, mediation can produce lawless, open-ended moments and interactions between citizens. I unpack this description of ADR in the following paragraphs.

The same three elements from Hart's theory of adjudication are present also in mediation; there are mediation-specific rules, actors, and processes. However, the nature and normative force of these elements is different; it is based in the spontaneity, adaptability, and subjectivity of mediation and ADR. The rules for mediation concern the process of resolution, but not the content of the conflict. They are thus not necessarily substantive in nature. In addition, they do not presuppose or require the use of any given set of rules or norms in order to process the given dispute. Similarly, the mediation actor, the mediator, facilitates the unfolding of the conflict and resolution, but is not meant to address the details of the dispute. The parties usually represent themselves in mediation, thereby participating as unique, multidimensional actors. The ADR process allows for different types of conflicts to pass through it, and permits a range of issues (including the parties' emotions and subjective experiences) to be legitimate topics for discussion and resolution. The presence of the four elements of mediation together likewise facilitates distinctive interactions, behaviours, and outcomes between participants. When one or more of these elements are engaged in a moment, I suggest that the encounter can partially or entirely reflect the ideal type of lawlessness.

As a practice and ideology, mediation can also help parties to achieve transformation or insight that fundamentally shifts the relationship and conflict to a new, unfamiliar, and *lawless* zone. Likewise, their future may no longer be determined by the past; the future may be released from a fixed understanding of the past, and the parties may foresee multiple possibilities for the future. I argue that such a moment is lawless. To describe the character of lawless moments as ideal types themselves, I use the idea of an open system, and more specifically, the theory of a complex adaptive system (CAS). Such a model allows me to demonstrate how elements like figments of the past and personalities of the individuals would act and interact within a lawless moment. The literature on CAS provides a framework and authority that will help to ensure that my conceptualization of lawlessness and lawfulness does not become overly abstract; it will not only give a loose shape to the concept, but will also enable me to contrast the open and closed qualities of lawless and lawful encounters. On the basis of CAS, I posit that mediation and ADR allow lawlessness to emerge into an otherwise predominantly lawful society.

If mediation as an ideal type is a vessel for lawlessness, the instance of lawlessness within society may rise as the practice becomes more and more widespread. The instance of lawfulness, as it is associated with adjudication and law, may therefore decrease--with what consequences, it remains to be seen. For the present study, it is important to note that the ultimate goal of my project is not to contrast, but to connect two parts of one whole. The third aspect of this analytical device describes the tension between the two apparent opposites of mediation/lawlessness/open systems and law/lawfulness/closed systems. I put forward the argument that each ideal type falls on either end of a continu-

um, between structure and an absence of structure.

Lawful-Lawless Continuum

Each encounter between members of a society moves along the continuum as the circumstances, factors, and dynamics of the subject(s) in question shift. There can therefore be a moment that is not lawful, and yet not entirely lawless, either. A change in the situation may move the interaction closer to one end or the other, though perhaps only incrementally. I describe how certain types of relations and conditions can qualitatively shift the nature of the moment along the continuum of lawlessness and lawfulness. A very simplistic account for this idea can offered through a mathematical explanation.

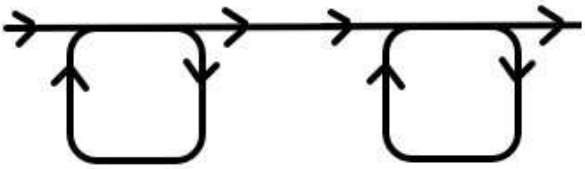
If three of four elements of adjudication are engaged in a moment (for example, a lawyer is present, a legal issue is pressing, and an adjudication is ongoing), the encounter is likely to be more lawful, linear, and past-focused. This is due to the legal norms that underpin the movement of each of those elements. However, if one or more of these elements is removed, the nature of the moment will be less characterized by lawfulness. If three of four elements of mediation are engaged, a different type of zone is created: a lawless, adaptive, and responsive one. Should one of the elements be removed, or a lawful element be introduced, the nature of the moment would move away from the lawless end of the spectrum. It is necessary to recall that I speak of *encounters* between individuals; thus, I describe how an interaction can have myriad different elements, in different forms, affecting it. For instance, the presence of an uncle at a family dinner who is a lawyer might shift the moments and encounters to being more lawful, but it would not override the informal (and potentially lawless) tone of the gathering. That interaction

would fall somewhere in the midst of the continuum, and might shift around, based on the other variables in the moment and at the dinner.

The adjudication-arbitration-mediation spectrum follows the same flow of elements. Each is capable of lawful and lawless moments, and often encompasses a nuanced combination of both. That said, I suggest that adjudication has more of a capacity for lawfulness, arbitration has more of a tendency for a combination of both dynamics, and mediation has a propensity towards lawlessness. I use arbitration as an ideal type to describe this relationship, as the nature of arbitration inspires an encounter between individuals that can be lawful, with lawless aspects. Other conflict resolution approaches like Collaborative Law and evaluative mediation are similarly oriented along the continuum. It is also notable that many disputes go through different approaches at different stages of the same conflict (for instance, from mediation to adjudication within one conflict).

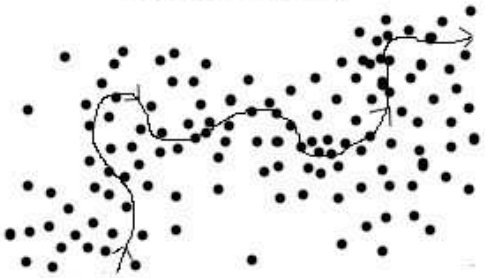
From moment to moment, the amount of order and flexibility within the elements of an interaction between citizens can shift, thereby moving it closer to one end of the lawful-lawless continuum to the other. The spectrum of adjudication and mediation can facilitate this type of shift, in terms of how individuals interact with one another. These observations engage with the same tension noted by the concepts of the shadow of the law, and the process of juridification, but in a different manner and tone; movement along the lawful-lawless continuum at the dimension of moments does so along the same range of the shadow and of juridification. The following sections on the ideal types of lawfulness, lawlessness, and their relationship will offer more depth regarding these matters.

Lawfulness



-Linear, Cyclical, Fixed
-References Past to Determine Future
-Based on Closed Systems, Associated with Adjudication and Law

Lawlessness



-Emergent, Responsive
-Multiple Futures are Possible
-Based on CAS, Associated with Mediation and ADR

Chapter Four: Lawfulness in Adjudication and Law

In this chapter, lawfulness is explained in relation to certain qualities of adjudication and law. It is also framed with the notion of a closed system, to ground my description of the concept in pre-existing literature. Again, I develop these different aspects of lawfulness and law as though they are components of a distinctive, ideal type; towards the end of this thesis, I will disestablish said false binary of lawfulness/adjudication/law and lawlessness/mediation/ADR to reveal the tension that exists between them, in reality. Lawfulness can be defined loosely as a moment between individuals that is linear, cyclical, and past-focused; adjudication as an ideal type forms lawful interactions. While there are different perspectives on the basic nature of adjudication, I suggest that its form is also inherently cyclical, ordered, and lawful. The reader will recall that this aligns with the three facets of adjudication noted previously: those of predictability, stability, and coherence. It also reflects the nature of the four features of adjudication to which Hart contributed: the legal rules, actors, processes, and behaviours. I suggest that the presence of these adjudication-related elements in a particular encounter regarding a conflict between individuals can cause that moment to be lawful.

The predictability and ordered nature of lawfulness as a framework for interaction seems desirable to humans. Western cultures, in particular, tend to formalize and organize the elements of our lives and societies in such a way that random variables are minimized and undesired. This is indicated in the high levels of uncertainty avoidance observed in cross-cultural psychological studies; we prefer to mitigate the effects of uncertainty by

ordering that which we can control.[39] I suggest that this coping mechanism produces a inclination torwards lawfulness. One might argue that adjudication and law are larger manifestations of our desire to avoid uncertainty and manage randomness in society; such matters are best considered with a thorough explanation of lawfulness, as the emergence of lawfulness in time captures these tendencies and their implications. As the following section will explain, the translation of common elements and matters into legal ones is a significant aspect of lawfulness as it relates to law and adjudication.

Lawfulness in Adjudication and Law

There are three pertinent explanations of adjudication that reflect the form and nature of lawfulness. One is at the broader, legal system level, and the other two focus on the adjudication level. Bourdieu's analysis of the legal system leads him into an explanation of law's form. More specifically, he writes about the normative power that law maintains within society, and where that power garners its strength. There are several components to his theory. Law requires a certain degree of trust and adherence from its subjects in order to have authority and the ability to govern them. Herein lies the necessity for law to appear legitimate and steadfast, rather than questionable and untenable; for citizens to uphold the law, the law must appear to be worthy of their faith and respect. Adjudication requires the same perception, in order to be considered a viable and just conflict resolution process.

Likewise, Bourdieu suggests that law possesses its power via a particular form or 'power of form' (a form that I would in turn call lawfulness). In the words of Terdiman

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[39] Richard M. Sorrentino et al., "Uncertainty Orientation and Affective Experiences: Individual Differences Within and Across Cultures" (2008), 39(2) Journal of Cross-Cultural Psychology 129.

and Bourdieu, "[t]his power inheres in the law's constitutive tendency to formalize and to codify everything which enters its field of vision."[40] Similarly, within adjudication, there can be an internal logic, organization, and culture that may limits interactions to a framework of certain possible behaviours and outcomes.[41] Even that which is not officially ordered by law or adjudication may be organized in relation to it, or exists in anticipation of being managed by it. The past, in the form of precedents or codification, is central to the constitution of a present law that is definitive, as well; it gives law substance, authority, and direction. Certainly, adjudication changes and responds to new factors, but in the singular moment constituted by the process, there is only stasis. Bourdieu notes the cyclical nature of past precedents. He explains how they tie "the present continuously to the past [... so that] the future will resemble what has gone before."[42] For Bourdieu, there is an endlessness within law that is difficult to disrupt, barring a major change or upheaval in the society in which it operates. Valverde also suggests that common law is linear, total, and complete; that it "accumulates, but it never passes; at an instant, it represents a totality."[43] They likewise observe the existence of a particular form underpinning adjudication, which possesses the same linear and orderly form that my notion of lawfulness takes.

Fuller provides a second description of the nature and quality of adjudication, in relation to law. Here also emerges the same cyclical, lawful kind of patterning that Bour-

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40 Richard Terdiman and Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987), 38 The Hastings LJ 809.

41 *Ibid* at 816.

42 *Ibid* at 845.

43 Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009), 18(2) Social and Legal Studies 1640.

dieu, myself, and others observe in broader matters related to adjudication and law. The form that Fuller identifies in adjudication centres around rationality. From his perspective, this legal process addresses particular types of interpersonal and social problems: those that cannot be resolved solely using laypeople's strength of conflict resolution and negotiation. More precisely, he suggests that adjudication is best used when there is an issue or dispute that requires a high degree of reason and objectivity. The method of adjudication is likewise to create a zone in which disputing parties must explain their positions and demands in the most rational and well-evidenced manner possible, often through the use of lawyers. Their arguments are then analyzed and assessed by legal officials like judges to determine the most rational and logical resolution, and to apply it with authority and finality.[44] Rationality therefore forms the basis and standard for both behaviour, engagement, and thinking in the process of adjudication.

Reason is, in theory, objective and certain; a rational argument is, in principle, correct and unquestionable. In adjudication, that which is not sufficiently rational may not be deemed legitimate. Thus, the emotional dimension of conflict might not be considered legitimate. Emotions are instinctive and unaccountable. They can also cause humans to speak, act, and operate irrationally--a mode of behaviour that is not appropriate nor credible during an adjudication. I suggest that the rationality expected in law sets standards not only for the presentation of perspectives, but also for behaviour and emotions. This has a practical component: the less variation and unpredictability that can be secured, the more effective and consistent adjudication can be. Fuller explains how adjudication func-

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[44] Carrie Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR" (2000), 16(1) Ohio State Journal on Dispute Resolution 20.

tions based on a singular tension between the adversarial positions of parties. The judge suspends the two perspectives on either side up until the moment that a reasoned judgement can be given, in order to prevent rushed, erroneous decisions. However, this artificial binary means that a more complex or 'polycentric' task cannot be processed effectively within adjudication; such a task creates too many points of tension to manage and suspend with rational argumentation and decision-making.[45]

Fuller's observations on the centrality of reason in adjudication relate to lawfulness because of the form that is mirrored in both concepts. Lawfulness has similar qualities as those of rationality and adjudication, but describes a more fundamental matter: the nature of a moment, and the spirit of an encounter. I argue that the way in which adjudication and rationality can order and homogenize the elements that they encounter (namely parties, arguments, procedures, and judgements) manifests and/or indicates the presence of lawfulness. It is for this reason that the engagement of the legal system and its four components in an interaction between individuals creates a lawful interaction between them. Adjudication, especially, creates moments that cause the participants to behave and interact in lawful ways.

The third perspective that confirms the existence of lawfulness and its relationship to adjudication is similar to that of Fuller, but uses language even more suited to this legal process in question. Felstiner, Abel, and Sarat provide a description of the process through which informal conflicts become formal legal disputes. There are four dimensions of this so-called transformation of a dispute. First, a wrongful deed committed by

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45 Lon Fuller and Kenneth I. Winston, "The Forms and Limits of Adjudication" (1978), 92(2) Harvard Law Review 383 and 395.

another party against oneself is 'named,' or perceived as being inappropriate and unjust. Second, that harmful experience can become a grievance, or a case of 'blaming' the party that committed the act. Third, the issue can be 'claimed,' wherein the wronged party seeks reparations for the damage or harm that was done by the other party.

Finally, a dispute emerges when the request from the claim is disputed or rejected. At that stage, a formal dispute resolution process may be sought by the parties. In these latter stages of a dispute, the options available are limited due to the "institutional patterns" found in the processes that parties use to resolve their conflict; each process, whether it is adjudication, mediation, arbitration, or otherwise, brings with it a different set of norms, rules, and avenues.[46] With regards to adjudication, the authors discuss the way in which lawyers participate in further transforming a conflict into a legal matter. They note that lawyers tend to have a significant amount of power over the types of needs, priorities, and approaches the parties take as they try to resolve the dispute.[47] Likewise, this theory of 'Naming, Blaming, Claiming, and Disputing' demonstrates that personal conflicts can be translated into matters that are removed from the initial act and parties themselves.

Conflicts can become systematized, formalized, and controlled, especially if adjudication is the method used for resolution. Felstiner, Abel, and Sarat also narrate a process that manifests lawfulness; at each point leading up to and following after the formation of a dispute, lawfulness is likely to emerge. Lawfulness is correlated with the

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46 William Felstiner, Richard L. Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-1), 15(3-4) Law & Society Review 635-6 and 642.

47 *Ibid* at 646.

transformation of a conflict into a dispute because the latter requires a degree of ordering and structuring to exist. Therefore, each moment that a conflict is further transformed involves lawfulness, or an ordering of the elements in the interaction. This is similar to juridification, but speaks to a different aspect of the altered nature of conflict-turned-dispute. The process described in the article in question also shows how lawfulness, disputes, and adjudication narrow the range of possible options and behaviours available; litigation can produce a lawful moment and resolution, in the sense that the interactions and ruling can be precise, authoritative, and restricted. As the article notes, individuals cannot adapt adjudication to their own needs or interests; adjudication is not designed to be personalized for each party that it is presented with.[48]

Based on the work of Bourdieu, Fuller, and Felstiner, Abel, and Sarat, I suggest that adjudication tends to create lawful encounters, and lawful trajectories. Each perspective outlines ways in which adjudication as a process and as an aspect of law can translate general conflicts, facts, and elements into legally relevant matter. The four elements of adjudication (the rules, actors, processes, and behaviours) make normative claims on the future through their emphasis on the past and tendency for legal translation. I thus describe it as a process that can create lawful encounters between citizens.

Lawful Moments and Behaviour

The second last area for discussion regarding lawfulness and adjudication is the type of encounter that is facilitated in such contexts. In a lawful moment, individuals experience and perceive a predetermined or limited amount of options, due to the past shap-

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48 *Ibid* at 633.

ing the possibilities for an unknown future. The elements that are present in the moment are ordered by those parameters of the past, the characteristics of the individuals, and/or the nature of the situation (influenced, for instance, by the presence of one or more of the elements related by the legal system). The behaviour and interactions in a lawful encounter between parties are likely to be predictable and restrained.

One way of describing a moment shaped by lawfulness is that the concept of an interactional expectancy. When one action or arrangement between individuals is repeated to the point that it becomes meaningful and anticipated by those who find themselves in the same situation later on, a pattern is formed. More specifically, an interactional expectancy is formed; a pattern for behaviour is established, and expected.[49] A situation and interaction between two people that involves said interactional expectancy or custom may be shaped by lawfulness because the engagement is being determined by the past. If a customary behaviour is expected in one moment, but not delivered in the next, the latter moment may be more so founded in lawlessness than lawfulness. As noted above, a lawful moment does not preclude the possibility for change, activity, or spontaneity, but allows for it in a very gradual, linear way. A lawful encounter is static and complete; in a wholly lawful moment, everything is ordered and accounted for. Every element is translated and arranged into a form that is compatible with the overall order of the moment. It is for this reason that the process of translation in adjudication discussed above is relevant to my notion of lawfulness. Adjudication's focus on stability, consistency, rationality, and predictability means that the behaviours, decision-making, and outcomes of parties will

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49 Fuller, *supra* note 41 at 62-3.

likely follow the specific framework of law, rather than incorporate frameworks with other norms, processes, or emphases.

For example, in the case of a couple who are getting a divorce, there may be several factors that cause moments between them to be lawful. There could be the pain and distrust from the broken marriage, the anticipation of a particular outcome in the divorce proceedings, the concern about saying something that could impede their ability to secure their interests, and/or the individuals who may often be present in the times that the couple interact (such as their lawyers). The spacial and geographic context can affect the nature of the moments shared by the two individuals, as well; this may be particularly true if they meet in a lawyer's office, a courtroom, or even at the door of their home when one spouse picks up their children for a visit. The framework for behaviour and decision-making in these circumstances may be informed by legal, lawful norms; the elements shared between the individuals may be ordered by the closeness of adjudication, and the specificity of law. In other words, the two people may begin internally to translate some of their conflict and relationship into the legal terms of adjudication, and the linear dynamic of lawfulness.

With these different dimensions at play, the couple may find that the moments between them feel limited in terms of fluidity of interaction, openness towards one another, or flexibility in terms of their future. The moments between them might therefore be lawful, in the sense that the zone between the individuals and their relationship may seem to fall into a linear and inflexible path towards the future. In order to further expound this understanding of lawfulness as an analytical tool for adjudication, the imagery of a closed

system will now be explained and integrated.

Lawfulness as A Closed System

Complete lawfulness is best described as a closed system, operating in a linear fashion. In other words, a lawful moment subsumes new elements or input into an existing framework through a process of translation/transformation, and then continues to operate into the future, as it has in the past.[50] It cycles and recycles its own order and contents in a perpetual motion, incorporating new matters into itself without having its own consistency be compromised. Rather than operating out of a mode of chaos and unpredictability, lawfulness establishes and seeks order and consistency; hence, a lawful moment orders that which it is faced with, rather than randomizes it. The elements of adjudication can create a similar dynamic.

For example, consider the following situation. A divorcing couple meets with one another and their lawyers. The divorce and court proceedings are underway. The myriad elements present between the two individuals are held in a moment of stasis; the individuals behave solely in an adversarial way, the conflict festers without resolution, and the lawyers negotiate using common legal terms and trajectories. A lawful, ordered interaction is formed. Likewise, a new element or piece of information that emerges in that instance will be incorporated into the existing framework. If it becomes apparent that one of the spouses has a new boyfriend, that information may not alter the existing order, but instead might be translated and integrated into the immediate lawfulness of the interaction. The adversarial behaviour, the continuing conflict, and the legalization process may

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50 Schneider and Somers, *supra* note 38 at 353-4.

all be reinforced and perpetuated by the new element that emerged; the order and stasis that existed prior to the new information would consume the 'boyfriend' information and recycle it into the closed system that had already been formed. The new element would therefore become a part of the lawfulness of the encounter.

It is also possible that a new piece of information could break the lawful moment, and create a different type of zone or interaction. In other words, a new input could change the moment or system, and create an entirely new form and output. As explained at the beginning of the chapter, a lawful moment is absolute and ordered only within that temporal zone; it captures a specific set of elements in its structure, but does not necessarily do so permanently. There can also be a radical shift out of lawfulness and normative order into a moment that is non-structured and unprecedented. For instance, the news of a boyfriend for one of the spouses might shift the moment between parties and lawyers to an entirely new type of moment, framed by any given norm, wherein the interactions, dynamics, and decisions are unanticipated. Accordingly, I theorize that there is a counterpart concept to lawfulness: that of lawlessness.

Unlike lawfulness, lawlessness is not fixed, ordered, or linear. Instead, it is responsive, spontaneous, and emergent. The next chapter will describe lawlessness, its relation to mediation, its impact on behaviour, and its core, elementary nature. The focus will be on the ideal type of lawlessness, like this chapter focused on the ideal type of lawfulness. This is intended to provide the most amount of clarity and distinctiveness between the two concepts. However, there is a forthcoming section on the nature of the relationship and interplay between lawfulness and lawlessness that discusses the nuances be-

tween lawful and lawless moments. The chapter on lawlessness will establish the necessary framework to then analyze the relationship--and the implications--of this conceptualization of time in adjudication and mediation.

Chapter Five: Lawlessness in Mediation and ADR

Mediation can create lawlessness. More precisely, mediation and ADR can facilitate the emergence of lawless moments and encounters, in which complexity and spontaneity reign over structure and predictability. The present chapter explores several aspects of lawlessness, with regards to the moments that can emerge within mediation. I introduce the notion of improvisation, and explore how this mode of behaviour can emerge in the conditions created by successful mediation processes. I then offer the model of complex adaptive systems to explain my understanding of transformation, mediation, and lawlessness. In order to frame this discussion around lawlessness, I first give an explanation of the concept that I put forward. It is important to note again that this section describes lawlessness as an ideal type within a false binary, but that it is in fact in a fluid relationship with lawfulness.

I suggest that lawless encounters are unique in that the elements that are present within them are not entirely fixed, predetermined, predictable, or governed. In other words, the actors and facets that are engaged within a lawless moment interact freely in whatever way is intuitive to them, without the constraints of particular guidelines or political agendas. This is not to suggest that the zone of lawlessness is anarchical or chaotic. I posit that there can be order in lawlessness, order that emerges from the consistency in which the elements within the moments engage and disengage with one another, respond to differences and similarities, and other such instinctive behaviours. However, it is a different instance of order than lawfulness; it is more temporary and organic in the way that it is manifested. This understanding of the non-anarchical nature of lawlessness is sup-

ported by Locke's views on the state of nature. Locke counters Hobbes' suggestion that such a zone would inevitably be violent, disorderly, and difficult. Instead, he argues that the state of nature might actually be capable of some degree of harmony, organization, and peace, depending on the circumstances.[51]

Locke suggests that there can be pockets of spaces and relations even within civilized societies that exist without the governance, intervention, or influence of existing political and legal structures. He argues that these encounters can be orderly, fair, and functional, even without the application of legal norms.[52] This reflects Merry's understanding of legal pluralism; her work suggests that there can be both lawful and lawless encounters in the same social context, existing in unique and interesting ways.[53] This also aligns with my understanding of lawless moments. These moments of lawlessness can find their order and equity in the practice and permutations of social or 'folk' norms: the standards for behaviour, engagement, and justice that are organically formed and informally enforced through members of a given collective.[54] Folk norms and their practice may have commonalities with law and its legal systems in terms of content and ideology. Otherwise, they are distinct; this is particularly true in the way that folk norms rely on all members to uphold them informally, whereas law traditionally relies on formal (potentially lawful) structures to uphold it.

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51 Simmons, *supra* note 2 at 451.

52 *Ibid* at 451.

53 Sally Engle Merry, "Legal Pluralism" (1988), 22(5) Law and Society Review 873.

54 Jacob, *supra* note 27 at 567.

Lawlessness and Mediation

I present a explanation of lawlessness within the context of mediation. There are three aspects of mediation that make it optimal for the emergence of lawlessness. The first aspect concerns the actors involved in mediation, and how their relationship is framed. More specifically, the first aspect is the importance of self-determination of participants in mediation. Self-determination refers to the capacity of parties in mediation to be able to enter, participate, and deliberate within the process as individuals with agency and choice. It ensures meaningful interactions and resolutions in mediation by prioritizing the participants' ability and comfortability to be authentic in the experience. Both the mediator and the parties are involved in respecting and upholding this central value of mediation.[55]

In several ways, self-determination is the key to moments of lawlessness in ADR. It may also be linked in part with the underlying purpose of dejuridification (which theoretically seeks to empower citizens, so that they might reclaim society from the grasps of law and state). It reflects a norm that allows citizens to be more influential than other, larger forces. The observance of the principle of self-determination by the mediator means that the desires and decisions of the participants are given legitimacy and significance--regardless of their content. In other words, a mediation animated according to the principle of self-determination can facilitate encounters and resolutions that are organic, unconstrained, non-codified, and not solely lawful or legal in nature. Interactions in this context and framework can likewise produce the aforementioned 'private ordering' or or-

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55 Brooker, *supra* note 14 at 222.

dering from below, rather than ordering from above. While I continue to describe this concept as an ideal type, Jacob's study does suggest that it is possible that citizens can negotiate and interact without a clear sense or use of law. Just as with Locke's understanding of the state of nature, Jacob hints at the possibility that there can be lawless, outside-of-law encounters that are not destructive or violent (as per Hobbes), but productive and orderly in some fashion. The norms being engaged in such interactions may be more likely to be folk or informal norms that originate from the populace, rather than the state or legal system.

The predictability and objectivity of interactions and outcomes produced in adjudication can be held in contrast to the relative spontaneity and subjectivity of interactions and agreements born of mediation. Fuller discusses this in terms of the way that participants in mediation are released from the "encumbrances of rules."[56] Although mediation has identifiable rules and norms like adjudication, its rules and standards have a different tone. For instance, emotions--which may not be relevant or appropriate in adjudication--are allowed for and encouraged in mediation, as they often shape the hopes and behaviours of individuals and their choices. With flexible, individualized rules and expectations in mediation, participants can act and choose based on how they feel; the rationality and rules of law and adjudication do not determine or constrain them. I therefore identify emotion-based behaviour and self-determination as important facets of ADR. In sum, I suggest the following statement: that lawless moments can emerge when participants in mediation are empowered to determine for *themselves* the content and outcome of the

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56 Menkel-Meadow, *supra* note 45 at 15.

process, using the language, approach, and process that *they* choose. It is in those encounters that a certain ordering from below can occur.

The second aspect of mediation that can produce lawless encounters is the stage in the process called 'finding options' or 'brainstorming.' This point in the mediation process asks participants to orient themselves away from past hurts, to future considerations. Parties are asked to put forward any and all possible options they can think of to move forward in their situation or relationship. The mediator helps to ensure that the individuals feel comfortable to offer whatever ideas they have, even if the option seems difficult, unconventional, or complicated; the philosophy underlying 'finding options' is that a wide variety of possibilities must be available in order to produce a resolution or agreement that addresses the core interests and needs of all parties.[57] Once there have been sufficient options identified, the parties sort through them and decide which one(s) are most appropriate and realistic for their given circumstances. I argue that the moment framed by the 'finding options' stage has the capacity to be lawless because it is not restricted by anything other than the subjective ideas and standards of the participants. It encourages the individuals to think beyond past experiences, other people, and existing standards. It orients them forward into a future where there are multiple possibilities available to them. It also allows for the influence of norms beyond legal ones; while legal norms may be influential, they may not be the only ones in effect. In conjunction with the principle of self-determination and focus on emotions, the brainstorming stage can produce a flexible, subjective, and lawless moment between the participants.

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57 Bishop et al., *supra* note 11 at 181-4.

The likelihood that participants of mediation form a lawless zone can be increased if they experience a transformative or insight-based shift in their relationship, during the mediation. This can occur if both participants experience a shift in their perception of the other person, relationship, circumstances, or options. A transformation means that the past is no longer as relevant or determinate for the present or future. In fact, moments of transformation and insight can be likened to the process of boiling water. Water needs a certain amount of moving molecules and heat before it will boil. Similarly, transformation and insight require a particular degree of fluidity, energy, and spontaneity in the relations between parties if such a shift is to occur during a mediation. The emphasis on self-determination, personalized outcomes, and empathy in mediation creates the conditions necessary for transcendence beyond the conflict and pain of the parties.

Once the water is boiling and the transformation is underway, the elements within the moment operate in a much different way than they did prior to the shift in conditions. To use my terminology, the elements and parties enter into a moment that is lawless. Such a transformation and type of encounter may be less likely to occur in adjudication. In legal proceedings, there is less focus and attention given to the personal dimensions of the individuals involved in the conflict. Only the details legally relevant to the case are identified and considered in the courts. Likewise, the processing of a legal dispute may not create a deeply transformative encounter in which the parties can enter into lawlessness. To analogize further, water will not reach its boiling point if the conditions are not sufficiently changed, activated, or intensified. From Fuller's perspective, the set rules, structures, and actors within adjudication produce established and reliable moments, behav-

iours, and plans of action between citizens; the elements and norms of mediation produce fluidity and possibility in both the participants' roles and relationship.[58]

To offer an idealized example, I will return again to the instance of a couple who are seeking a divorce, and are using mediation as part of that process. Entering into the mediation, the two individuals may commonly form between them a lawful moment, wherein the experiences of the past and the shadow of law and adjudication cause their interactions to be tense and narrow in tone. I have described previously how and why that lawfulness might emerge when the spouses encounter one another. However, as the mediator guides the pair through a process of sharing their experiences, identifying their underlying emotions and interests, and learning to empathize with one another, the rigidity between them may gradually relax; the deterministic patterns of their painful past, the possibility of adjudication, and the use of self-regulation (among other lawful factors) that shape the moments they share may slowly weaken. A transformation of the relationship may take place when there is an ultimate release of the distrustful, adversarial, rigid nature of the individuals' encounters.

This shift can occur in mediation, in particular, because the exercise of being vulnerable and outward-focused helps the individuals to heal their pains, reestablish their trust, and imagine possibilities for the future that are not strictly defined by the prior lawful dynamic. Thus, when the couple is asked to brainstorm options to address their particular conflict, they may enter into a moment wherein the future is open-ended. They can then explore possibilities that are determined by their unique, subjective circumstances,

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58 Ray, *supra* note 26 at 803.

rather than solely by external, predetermined standards and dynamics. Again, these individuals may still be affected by legal norms and the so-called shadow of law, but they will have the opportunity and openness to choose their own path. With self-determination, they may use folk norms, personal preferences, and renewed understandings of one another to make decisions. This is an example of bottom-up or private ordering, which means that citizens are organizing for themselves their relationships and futures.[59] The moment being described is also one shaped by lawlessness, that flexible, adaptive, responsive time of encounter between citizens.

I argue that the principle of self-determination, the step of 'finding options,' and the moment of transformation in ADR possess a potential for lawlessness that can move the process into a different realm than that of legal proceedings or informal negotiations. This argument can be best explained using the concepts of improvisation and complex adaptive systems. Both are possible in mediation; both are characteristic of lawlessness. Improvisation is a model to explain the lawless nature of participants' behaviour, as they reach insight and brainstorm options. Complex adaptive systems (CAS) is a concept that describes the phenomenology of lawlessness, particularly within mediation and ADR. I have already given an explanation of the features of mediation that may prompt lawless encounters between individuals. Improvisation and CAS reflect two deeper dimensions of possible lawlessness in mediation.

The Unpredictability of Improvisation

Improvisation is an act, a way of behaving, that is unplanned and responsive to

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59 Ellickson, *supra* note 15 at 5.

the circumstances in which it is conducted. It requires a free agent who draws upon both internal and external cues to put forward a spontaneous thought or movement that may either resonate or challenge the immediate surroundings and individuals present. Improvisation is action--whether it be speech, artistic expression, or whatever other behaviour--based on instinct. Hanley and Fenton capture this mode of being in the following sentence: "When a person transcends the familiar, enters the unknown, and releases the genius within, his or her response to experiences at this level is intuitive, beyond the intellectual plane."[60]

Explanations of improvisation share three important similarities: the necessity of agency, trust, and flexibility within and between the actors who are improvising.[61] The significance of agency seems obvious in this context: without agency, the improvisors would be unable to think and act freely and instinctively. Trust is also central to the act of improvising because the mode of being is one dictated by the unknown, rampant with risks, and full of responsibility. For instance, jazz players enter into moments of unpredictability and insecurity, and must then have faith in themselves, their decisions, and their associates to emerge from that period stronger, successful, and hopeful. In addition to needing agency and trust, improvisors must be highly adaptable to the changing circumstances around them; even if one firm decision has been made, there can be new elements introduced (like a new musician in the jazz group offering her own interpretation) that necessitate a new or altered plan. These three necessary facets of improvisation cre-

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60 Mary Anne Hanley, and Mary Fenton, "Exploring Improvisation in Nursing," (2007) 25(2) Journal of Holistic Nursing 128.

61 See *Ibid* at 132; and Michael J. B. Read, "The Importance of Improvisation in Coaching" (2013), 6(1) Coaching: An International Journal of Theory, Research and Practice 47.

ate the framework that then allows for spontaneous behaviour. The open-minded, flexible framework needed for improvisational behaviour also encourages the agent in question to recognize the multiplicity of potential futures, and be available to adopt any of them, as necessary.[62] Ramshaw notes that while much improvisation is drawn from previous knowledge on the given content, the agent is free to ignore or distort that knowledge as s/he pleases.[63]

Based on the above characteristics, I describe improvisation as a lawless mode of behaviour, one that occurs within lawless encounters. It is therefore important to note that mediation necessitates improvisation when participants experience a transformation of their relationship. In that moment, the parties can no longer rely on frameworks formed within and prior to the conflict to guide their communication and planning. They must rely on their renewed understanding of and trust in one another, as well as their openness to the many possible paths that face the parties in the future. The fact that their self-determination (or in other words, agency) is highly valued and protected by the nature of mediation itself means that the participants are further empowered to interact in ways that are unexpected and nonlinear, compared to their relationship's history. Consequently, they may adopt divergent thinking patterns that can produce unconventional and non-legal arrangements. They can invoke folk norms, informal agreements, and creative interpretations to address their conflict, rather than being solely influenced by legal norms and practices. If insight and/or transformation is achieved by participants in mediation, the

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62 Carine Lewis and Peter J. Lovatt, "Breaking Away from Set Patterns of Thinking: Improvisation and Divergent Thinking." (2013) 9 Thinking Skills and Creativity 47.

63 Sara Ramshaw, "The Creative Life of Law: Improvisation, Between Tradition and Suspicion." (2010) 6(1) Critical Studies in Improvisation 3.

subsequent 'finding options' stage also becomes a zone of lawlessness and improvisation.

The above mode of interaction contrasts with the rationality and linearity of law and adjudication, as explained in the previous chapter. Rather than behaviour that may be structured and determined by adjudication, law, rationality, and interactional expectancies, encounters in mediation can be unprecedented and improvised. Accordingly, improvisation can indicate a shift into a moment of lawlessness. What remains to be examined in this section is the base dynamic of lawlessness. The concept of complex adaptive systems enables me to describe that fundamental dimension of lawlessness and transformation in mediation.

The Core of Lawlessness: A Complex Adaptive System

Improvisation is the behaviour through which participants in mediation create and navigate lawless periods; a complex adaptive system (CAS) is the underlying phenomenon of those lawless moments. It is the counterpart concept to that of the closed system used to describe lawfulness. Developed by Kauffman, Holland, and others after them, the idea of a complex adaptive system is a response to the closed systems described previously as stable, structured, linear, closed, and lawful. Complex adaptive systems, on the other hand, are templates that account for the many variables that face a given system operating in the world.

The model of complex adaptive systems is unique compared to the aforementioned lawful frameworks because of the following characteristics: it is open-ended, non-linear, self-organizing, and adaptive. It also consists of many dynamic agents that come

together as an aggregate, but are not fixed to one another intrinsically or permanently.[64] I extend this description of a CAS to suggest that it is--as an ideal type--a lawless entity. In it, there is no fixed structure that shaped its past, and determines its future. To deepen my explanation of CAS and lawlessness, I present the following continuum by Langton. It locates instances of complexity in relation to other types of moments:

Order -> Complexity -> Chaos[65]

Complexity here is the force that flirts with Order, yet anticipates Chaos. It is formed by independent, interacting agents or elements that have the capacity to affect the wider system.[66]

My points regarding mediation and CAS unfold in the following way: mediation brings together individuals (or representatives of groups) in often intense and complex conflict situations. In some cases, mediation can help participants to experience a transformation of their relationship and situation. This transformation, shift, or insight necessitates improvisation, as it marks an upheaval of the past order and structure of the relationship. Underlying such a moment is the form of a complex adaptive system, consisting of the many elements that have been thrown into disarray and creative tension due to the transformation of the relationship. Similar arguments are made by Rulh. He identifies several features of CAS that can be linked to the practice of mediation. Four elements that illustrate the connection between the process and the system are as follows: the way

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64 Bennet Stark, "A Case Study of Complex Adaptive Systems Theory - Sustainable Global Governance: The Singular Challenge of the Twenty-first Century" (2009), 5 Wisdom 10.

65 M. Mitchell Waldrop, *Complexity: The Emerging Science at the Edge of Order and Chaos* (New York: Simon & Schuster, 1992) 230.

66 Clay Beckner et al, "Language is a Complex Adaptive System: Position Paper," (2009) 59(1) Language Learning 18.

that mediation allows for multiple and varying interests and perspectives to be involved within one conflict resolution process (aggregation); the capacity of mediation to follow nonlinear processes of thinking and decision-making (nonlinearity); the acknowledgement of different factors--such as emotions--as legitimate components of the mediation process and resolution (flexibility); and the recognition of the many possible outcomes for one process (diversity).[67]

Based on these different facets, I suggest that the CAS represents the mystery and complexity of the transformed and evolving relationship of participants in mediation. For instance, certain personality traits of the two individuals may begin to interact in a way that engages a particular interest, that might then trigger a ripple across the system that pushes lesser relevant agents to the fringes and pulls reinforcing elements for that interest to aggregate in the centre. A period of order or lawfulness might emerge during the encounter, but because each agent is independent and self-organizing, a new node of activity may begin to emerge, and gradually reset the nature of the system. Indeed, a complex adaptive system is always on the "edge of chaos." By this, it is meant that order can emerge in CAS, but is open to possible changes that cause the elements in it to respond by reorganizing and adapting themselves.[68] Thus, as Pohl explains, "all complex adaptive systems anticipate the future."[69]

The source and nature of change in a CAS compared to a closed system is differ-

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67 J. B. Rulh, "Thinking of Mediation as a Complex Adaptive System" (1997), Brigham Young University Law Review 786-796.

68 Waldrop, *supra* note 66 at12.

69 Jens Pohl, "Some Notions of Complex Adaptive Systems and their Relationship to Our World" (1999), Advances in Collaborative Decision-Support Systems for Design, Planning and Execution 13.

ent; in the former, changes occur due to new dynamics and movements of the agents and elements themselves, whereas in the latter, changes occur due to gradual, structural shifts from forces above. Mediation as a complex adaptive system is open-ended and does not translate its elements back into a predetermined set of norms and concepts (like lawfulness and adjudication do); while it has rules and norms associated with it, they do not inherently restrict the dynamic, interaction, or outcome to be defined or predictable. Other norms, perspectives, factors, and possibilities are available to be incorporated into the interaction. As noted, it is the notion of the future, the unknown, the forthcoming, that sustains the lawless moment, and can produce unprecedented outcomes for participants in mediation to pursue. Lawfulness, on the other hand, is determined more so by the known past, in order to produce a known future. Adjudication and law can follow a similar, lawful pattern.

In this section, I have laid out my analytical device concerning improvisation, complex adaptive systems, mediation, and lawlessness. The following chapter will offer details on the way in which the ideal types of lawlessness and lawfulness are related, and how moments move along the continuum between them. As I will discuss, the analytical tool that I propose is not meant to identify the emergence of lawful *or* lawless moments, but instead, to consider what combination of the two seems to be emerging in a given context. Does the introduction of mediation into the legal system mean that there are fewer lawful interactions between citizens, or that there more moments shared between citizens in conflict resolution processes that include some balance of both dynamics? By explaining the relationship between lawfulness and lawlessness, the analytical device in-

tended is revealed; by seeing the interplay between the two possible dynamics, one can then begin to explore what kinds of moments are emerging between citizens in any given society.

Chapter Six: The Relationship Between Lawfulness and Lawlessness

Hobbes describes the state of nature as being conceptually, socially, and politically opposite to a society formed on law and order. The concepts of juridification and de-juridification possess a similar perspective, in the sense that they seem to portray society as a battle zone between the forces of law/state and citizens/communities. However, I offer a different explanation to the relationship between lawfulness and lawlessness, one that reflects the more nuanced nature of the world that humans create for themselves. It is more akin to the gradated conception of the shadow of the law. It also reflects Locke's view that pockets and moments of what I would call lawlessness can occur within societies that are generally formed by lawfulness. In this chapter, I explain my analytical device surrounding the relationship between lawful and lawless moments, and how and when it emerges. Several of the components to this argument have been alluded to or inferred throughout the previous chapters.

To preface the following discussion, I will summarize the main characteristics of lawfulness and lawlessness. Again, I describe the concepts as ideal types in a false binary--which will be disestablished later in this chapter. Lawfulness captures a moment in such a way that the elements existing between the individuals who interact are held in place in a predetermined order; the elements are subsumed and organized into a closed system that anticipates the future through the use of past responses. Their moment may likewise be limited in terms of scope, interactional expectations, and topic range. Emotions may not be given major significance in the interaction or outcome, as rationality may be prioritized instead. I draw a connection between adjudication, law, and lawful-

ness, in that each operates in time and interactions using a similar fixed, linear, normative form.

Lawlessness, on the other hand, creates a encounter between individuals that is unstructured and unanticipated; the elements that are active in such a moment operate freely and responsively, and can lead to an unprecedented path for the future. The core nature of mediation may facilitate the emergence of lawlessness between individuals in conflict. Having outlined the ideal types and false binary in question, I now move to unfold the true connection and tension that link lawfulness and lawlessness (and their associated approaches). By connecting the two dynamics, I enable the analytical model of lawfulness and lawlessness to describe to the real combination of dynamics in society. Then, one can begin to explore which type of citizen behaviour and decision-making approach seems be more prominent in a given collective (which in turn can reflect on the nature and functioning of said society). One may also be able to consider the possible significance of one approach over the other, as well as the different combinations of adjudication and mediation that some citizens now use to address conflicts.

I posit that there is a continuum and tension between lawless and so-called lawful spaces, modes of being, and processes. I describe the relations between the different moments as being inherently fluid. The ideal type framework is useful to maintain for this particular explanation. First, I recall the simple mathematical illustration regarding the four elements of law and mediation (those of the rules, actors, processes, and behaviours). As the reader will remember, I argue that the presence of more lawful components than lawless ones would form a moment shaped by lawfulness. This same basic

equation helps to illustrate my understanding of the continuum; if a new component from law is introduced into a zone otherwise formed by the elements of mediation, then the moment will likely shift along the continuum. The conflict dispute resolution approach of arbitration exemplifies this simplistic account of the continuum.

Arbitration as a Third Ideal Type

Thus far, the focus of this project has been on the emergence of lawful- and lawlessness in law, adjudication, and mediation; it is therefore also pertinent to include a third context and ideal type that helps to unify the apparent binary. I discuss arbitration as it is described as an ideal type in the literature; in reality, it is as nuanced and complex as adjudication/law/lawfulness and mediation/ADR/lawlessness. Arbitration is a practice for conflict resolution that is often situated in between adjudication and mediation. In arbitration, there is an arbitrator: an individual who has the role of a judge in hearing the conflicting perspectives, and giving a binding judgement and decision. The individuals involved may represent themselves, be represented by others, or are representatives for an organization or company. Arbitration can be initiated when a dispute of a non-legal nature arises, but does not have a clear or easy resolution readily available.[70] It is a process that has elements of both adjudication and mediation. It has a proclivity towards lawfulness, but with aspects of and opportunities for lawlessness.

Mentschikoff suggests that arbitration uses set rules, precedents, evidence, roles, and normative structures that are similar in nature and purpose to those of adjudication. Likewise, arbitration has the capacity to facilitate a mostly lawful encounter; the four el-

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70 Bishop et al., *supra* note 11 at 38-39.

ements of adjudication discussed throughout this paper align with those of arbitration. However, arbitration also has factors that make it open to lawlessness, such as the possibility for individuals to self-represent, for settings that are more informal (rather than a courtroom or lawyer's office), and for normative frameworks that are extralegal or non-legal. For Mentschikoff, this quality is connected to the fact that arbitration relies on common sense to navigate and decide cases; unlike adjudication, the practice need not be overly formal or methodological in its approach to disputes and judgements.[71] Due to its relatively lawful components, arbitration is perhaps less likely to facilitate creativity and open-endedness to the extent that mediation attempts. Due to its capacity to allow some lawless aspects, it is also less likely to remain within a specific, regulated zone in the way that adjudication is required. However, arbitration is still a good example of the possibility of a zone where there is both near order and near chaos held in one temporal zone. This is indicated in Fuller's analysis of the nature and use of arbitration.

Fuller argues that an arbitrator could not effectively facilitate a mediation; that said role and persona would be a threat to the integrity and purpose of mediation, which in turn requires a degree of purity in order to function properly.[72] Restated, a formal arbitrator would bring legal norms and lawfulness into a zone (mediation) that is ideally lawless. An arbitrator would also likely not be welcome to practice in a legal proceeding, either--even with the lawful tendency of arbitration; the degree of informality, lay knowledge, and folk norms invoked in arbitration means that its components are incompatible with the formal legal system, as well. Arbitration creates moments formed predominantly

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71 Menkel-Meadow, *supra* note 45 at 19 and 22.

72 *Ibid* at 19.

by lawfulness, but with components that can easily produce lawlessness, as well. Collaborative law (with lawyer-mediators) and evaluative mediation (with judgement-giving mediators) also combine these qualities to produce unique and effective methods for conflict resolution. The existence and usage of these practices therefore provide a concrete example of how lawfulness and lawlessness fall on either end of a continuum. They show how many instances in reality invoke a unique and complex combination of both forms.

The Lawful-Lawless Continuum in Practice

I posit that most moments shared between individuals fall somewhere in the middle of the continuum, and thus, are constituted in such a way that is neither predetermined *or* spontaneous. In each encounter, a unique moment is formed: a moment that is ever-shifting and changing, even if for a duration, it is more so lawful or more so lawless. Relatedly, I argue adjudication/law and mediation/ADR cannot themselves be held at each end of the lawful and lawless spectrum. There can be moments of lawfulness and lawlessness in both mediation *and* adjudication. The space formed within a mediation process can also be highly structured, predictable, static, and hierarchical; this is noted in Nader's critique of institutions designed to promote popular justice.[73] In addition, mediation's flexible form can be structured and manipulated in such a way that it is used to limit the options of parties with less power and influence in the situation (such as an individual with a dominant partner or an worker with a more senior colleague).[74] Some degree of lawfulness and predictability in mediation may therefore help to alleviate that risk of power imbalance.

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73 Nader, *supra* note 22 at 435.

74 Menkel-Meadow, *supra* note 45 at 12.

Similarly, the space within adjudication can shift towards lawlessness when a judge is faced with a hard case that requires a judgement not predetermined by past precedent or existing norms. In fact, Piper connects improvisation and law together as similar basic concepts, metaphors, acts, and methods that can interact and coexist with one another.[75] Adams contributes further to this conceptualization of law and improvisation (and thus, lawfulness and lawlessness) by describing the temporality of these entities/zones. He explains how critical legal pluralism is a reality able to maintain its relative stable state because of the momentary nature of improvised law. Lawfulness can shift into otherwise unstructured, lawless interactions via spontaneous, situational, fleeting thoughts and decisions of individuals without eliminating that lawless tone, and visa versa.[76]

To return to my systems-level explanation, a complex adaptive system could become more lawful as the self-organization of its components becomes repetitive or predictable. A closed system could become more lawless as its order and cycle becomes incompatible with a new element, and starts to adapt to the new, emergent dynamic. In the middle of the lawfulness-lawlessness continuum is a kind of moment that may be partly ordered, and partly emergent; it may be influenced by the past to a degree, but also open to the mystery of the future; it could be open and creative, but shifting towards a predetermined outcome. There is therefore a degree of ambiguity and mystery in the midst of the lawful-lawless continuum. From this perspective, the Hobbesian juxtaposition be-

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75 Piper, *supra* note 5 at 2.

76 Wendy Adams, ""I Made a Promise to a Lady": Critical Legal Pluralism as Improvised Law in *Buffy the Vampire Slayer*" (2010), 6(1) Critical Studies in Improvisation 9.

tween lawfulness and lawlessness--in which one cannot necessarily exist in tandem with the other, or in relationship with the other--fails to capture the full complexity of human lives and collectives. The Lockean understanding of the state of nature--in which a certain degree of lawlessness, emergent patterns, and order from below can exist in an otherwise lawful, cyclical, and ordered context--reflects a more nuanced and realistic understanding of human societies. It acknowledges the fact that our collectives are not solely ordered in a top-down, predetermined, normative fashion, nor entirely reliant on a bottom-up, emergent, normative force. There is both lawfulness and lawlessness to be found in most processes, institutions, and societies.

Two examples can be given to give a sense of the continuum in actual citizen encounters. First is the introduction of a lawyer into a mediation process. When a lawyer is present in a moment during mediation, a degree of the potential lawlessness of the situation is removed, and a propensity for lawfulness is formed. The influence of legal norms, concepts, and outcomes on the interaction will likely be increased. That said, the shift between lawful and lawless encounters may not always be so obvious or clearcut. It is possible, for instance, that the lawyer brought into a mediation session is invested in the ideology and open-ended norms of mediation, and will help to facilitate an interaction that edges the moment towards transformation and lawlessness. Likewise, a person who might otherwise be conciliatory, open-minded, and creative about problem-solving in his or her professional life could behave in a more adversarial, legalistic, and rational manner in the context of a conflict resolution process that affects his or her own life. In other words, he or she might change their behaviour and approach when he or she enters into

an interaction surrounding a personal dispute. By this, I mean to suggest that the variables in a given moment can produce unexpected situations, particularly when it comes to the actors involved. It is possible that the person with a mediation-related skill set who produces a more lawful tone may later be triggered and return to his or her more professional set of behaviours--thereby shifting the moment closer to a more lawless interaction.

Another example may help to illustrate how the continuum between lawfulness and lawlessness affects the nature of citizen behaviour, interaction, and decision-making. As noted in Chapters Four and Five, interactional expectancies and improvisation are examples of lawful and lawless behaviours, respectively. A moment that has both lawful and lawless dynamics within it will similarly involve a combination of referencing existing standards and expectations, while also extemporizing and improvising during the encounter. Perhaps an appropriate example of this combination of lawful and lawless behaviours and subsequent outcomes is a moment in which individuals make an agreement to resolve a dispute before entering into formal conversations with lawyers, to ensure that the agreement is fair, legal and/or appropriate; out-of-court settlements, informal bargaining, and private negotiations may be of this nature. Such a discussion about how the persons will address their particular dispute (whether it be far in advance of the involvement of the legal system, or closer to a set beginning of legal involvement) would likely be shaped in part by past, comparable situations and agreements, and relevant legal norms and considerations. In part, also, the interaction would be open to the influence of non-legal, folk norms, subjective preferences, and intuitive senses of the future. Such a moment may thus be characterized by lawful *and* lawless dynamics.

Many of our encounters on a day to day basis fall along the continuum of lawful and lawless moments, arguably rarely reaching a time when either end is engaged to the exclusion of the other. In order to understand the moments and interactions that we encounter in daily life and in dispute resolution (whether it be in adjudication, mediation, arbitration, or otherwise), it is important to identify which force and form is shaping them: lawlessness, lawfulness, or some combination of both. Often, there will be one dynamic that is more influential than the other; such a circumstance merits some analysis, in order to determine the effects that said force may be having on the situation. As theories like symbolic interactionism suggest, the kinds of micro-level interactions that citizens have can have sociological, macro-level significance. Likewise, it matters whether our conflicts and societies are being addressed in more lawful or lawless ways. While an approach dominant more in either force can be beneficial and empowering, each mode has the capacity to be destructive and restrictive, as well. The many dimensions, limitations, and applications of this lawfulness-lawlessness continuum will be explored in the following chapter.

Chapter Seven: Discussion and Conclusion

This project outlines two concepts, lawfulness and lawlessness, and the continuum that exists between them. Using this model, it seeks to describe some of the unique behaviours, perceptions, and decisions made by individuals in different conflict resolution processes. To show the utility of these concepts, I return the focus to the point where the paper began: the discussion surrounding mediation and adjudication. Throughout the previous chapters, I have touched on the applicability of the proposed analytical model to the overarching analyses of mediation and its role in society. I am indebted to the various scholars whose ideas I have used to support and strengthen my concepts. However, it is necessary to communicate succinctly the significance of lawfulness and lawlessness, as they relate to the literature that precedes them.

Revisiting Juridification and the Shadow of Law

Some of the similarities and differences between juridification, the shadow of law, and the lawful-lawless continuum have been alluded to throughout the previous chapters. In order to further locate my contribution in terms of its significance, I present it in context with the other two conceptualizations again. Lawfulness and lawlessness serve a similar, but more nuanced interpretive purpose as that of juridification. I intend for the continuum to describe certain, immediate dynamics and behaviours that can exist within moments between citizens; it is meant to offer some language and concepts that can analyze the normative and behavioural influences of law and ADR as they exist in encounters, rather than their potential impact. Thus, the lawful-lawless continuum does not contradict or critique (de)juridification, but rather, complements it.

Both of the analytical tools above draw out important observations about the dynamics of society, law, adjudication, and legal norms. In addition, the lawful-lawless continuum can help to convey some of those observations in a more nuanced and novel way. It can also account differently for the increasing tension that is emerging with the institutionalization of mediation into legal systems because it offers an analytical device to explain the unique nature of ADR, non-legal norms, and citizen behaviour within it; the continuum reveals the way in which mediation creates its own dynamic and force at the micro and macro level, which resists and interacts with the lawful momentum of adjudication/law. Similarly, lawfulness and lawlessness describe some of the distinctions and connections between a bottom-up and a top-down approach to organizing human collectives. Lawlessness as an adaptive, emergent mode of behaving reflects the same gradual, organic mobilization as citizens; lawfulness as a cyclical, predictable mode of being mirrors the same intentional, top-down mechanisms as states and legal systems. There is thus an ongoing, normative tension between bottom-up and top-down activity in society that is also encompassed in the lawful-lawless continuum.

Turning to the shadow of law, Mnookin and Kornhauser's concept describes the emergence of lawfulness in moments and interactions beyond formal legal institutions. The shadow suggests that citizen encounters outside of law are not necessarily or automatically lawless in nature; it mirrors the argument that the process of juridification has been successful in populating informal, non-legal encounters between citizens with legal norms and mechanisms. From my perspective, the observations of Mnookin and Kornhauser reflect the reality of human collectives: that lawfulness does reach beyond the con-

texts of law and adjudication. The shadow of law also challenges us to consider that there is a tension between the influence of law and lawfulness and the introduction of ADR and lawlessness--a tension that I agree is nuanced, gradated, and emergent. That said, this discussion raises the matter of Jacob's research, which suggests that the shadow of law (and relatedly, lawfulness) can fade away to the point that citizens operate and interact without much influence of legal norms or lawfulness.

Jacob's work hints that there can be a point wherein the tension between lawfulness and lawlessness can move towards the latter, as much as the former. While he does not go so far as to suggest what might be present in a moment beyond law or lawfulness, the analytical concept of lawlessness and its potential for unique behaviours and dynamics offers one lens to explore that end of the continuum. Metaphorically speaking, it also notes that there is not simply a shadow that consumes light, but that there is a differentiable force that reckons with the dark, as well. The lawful-lawless model therefore goes further in its account than Mnookin and Kornhauser's shadow of law, but still complements and engages with that significant theoretical contribution.

Overall, the analytical device of the lawful-lawless continuum enables observers to discuss the different perspectives at a more micro level, at that of an encounter, moment, and systems-level analysis. It accounts for the normative influences of law, adjudication, and the legal system (as does juridification and the shadow of law), but also offers an explanation of the normative dynamic and movement of ADR, mediation, and individuals. When broadened to a more macro level analysis, the project helps to raise and explore interesting questions about the significance of different conflict resolution practices

for citizens, interactions, norms, societies, and the future. It therefore achieves some of the multilevel, micro-macro relevance that the theory of symbolic interactionism also seeks to achieve.

The Future of the Lawful-Lawless Continuum

As stated in the introduction, my background and curiosity centre around mediation and its practice. However, the present project necessitated that I move from a focused look at ADR and mediation, to a broader consideration of law, adjudication, and society, as well. The analytical layers that emerged as the paper unfolded ranged from the bottom-up, top-down interpretative lens to the parallel descriptions of juridification and dejuridification. With each new dimension added, the analytical device became more nuanced, but also became more broad. It is therefore in a prime point for further development in future projects; in applying lawfulness and lawlessness to different issues, the tool can be refined, modified, and reinforced by the collective wisdom of academia.

What follows is a short list of suggestions for where the continuum might be applied in future studies. To begin, lawfulness and lawlessness should be more closely and carefully applied to law, adjudication, and legal systems. Those who are more familiar with legal studies will be able to further discern whether the continuum has validity for the analysis of the tension between lawfulness/adjudication/law and lawlessness/mediation. For instance, it is possible that one approach is indeed better suited for the well-being of both societies and citizens; a deeper exploration of the merits and disadvantages of lawful and lawless encounters may yield insights about the different needs and capacities of individuals and human collectives. In addition, it might be helpful to develop a

methodology to assess the extent to which a given society encourages and manifests lawfulness and lawlessness.

By forming some sense of where the tension is strongest in a collective (for instance, if the society is organized in such a way that encounters tend to be shaped by lawlessness more so than lawfulness), questions can be raised about the subsequent effects of that situation. On a broader scale, it would be interesting to use literature from legal, historical, and cultural studies to consider whether there are any correlations between the degree of development in a country and the lawful- or lawlessness of its citizens' interactions. Do certain socioeconomic-political contexts foster more of one type over the other? Does the area of tension in a particular context give any indication of the future of a country? Also, does the institutionalization of ADR into the legal system and social praxis in Canada give us any sense of the future of Canadian society and its institutions? Regardless of the approach taken, any future application and analysis of this analytical tool would need to commit to the same responsibility that I attempted to uphold (though perhaps not always successfully): that lawfulness, lawlessness, and their continuum must be used as concepts to *describe* phenomenon around them, rather than to critique or promote certain things over others.

There are several avenues that I may pursue with the lawful-lawless concepts in future projects, beyond further revisions and improvements on the analytical model itself. First, a question posed to me near the end of this project was whether the binary and continuum conceptualizations were the most optimal ways of explaining lawfulness, lawlessness, and the different conflict resolution approaches; even the continuum presuppos-

es a binary and linearity between the different concepts offered in the device. As I noted previously, the choice of the ideal types and artificial binary was made in order to ensure that the analytical tool was explained clearly for the reader. The continuum model flowed from that decision, as it helped to describe the relationship between the different approaches that I discussed. However, a reinvention of the continuum model that has thus far been used inspires new questions and opportunities for development. Would the use of a more three dimensional model reveal different dynamics or systems beyond those of lawful and lawless moments? Also, I have highlighted one core tension between lawfulness and lawlessness (as well as law/adjudication and mediation). Would another representation of this analytical device reveal other or different points of tensions that the binary or continuum are not able to describe? This would be an interesting, conceptual expansion of the present thesis.

Second, it would be productive and interesting to complete a full round of interviews with mediators and lawyer-mediators about lawfulness and lawlessness. I had originally intended on interviewing several mediators and lawyers, and secured the necessary Research Ethics Board approval for said research. However, approximately half of the individuals suggested to me were unavailable to meet with me, and the other half of them did not reply to the invitation. Fortunately, I did have the opportunity to conduct interviews with the two lawyer-mediators who responded to my request. In both semi-structured conversations, the participants offered anecdotes and reflections that resonated with my understanding of the tension between lawfulness/law/adjudication and lawlessness/mediation. In particular, they attested to the way in which moments and encounters with-

in mediation can shift slightly, moderately, or strongly towards an open-ended, emergent interaction or a more close-ended, pre-determined encounter. It was interesting to hear how the different personality types present in a mediation could trigger a shift towards what I would call lawfulness or lawlessness; the ideas about the temporality of moments and encounters seemed to be validated by the experiences of these two lawyer-mediators. That said, I have chosen not to go into great depth about the interviews because they served more as helpful conversations to better develop my thesis than as representative of lawyer-mediators in general.

Another possible project would be an examination of the arguments made around the privatization of conflict, as they are increasingly addressed outside of courtrooms and into informal or private interactions (like mediation or out-of-court settlements). The issue being argued is that cases and disputes that have significance for the wider population are being addressed out of the public sphere, thereby limiting the impact and ownership of said issues for citizens and governments.[77] I would pose questions about whether the perceived privatization of conflicts indicates a lawful or lawless thrust, and also whether a so-called privatized conflict loses its capacity to transform society or whether it simply operates in a different manner, using different norms, roles, and processes. Finally, a fourth undertaking that I can envision for the lawful-lawless continuum relates to the other academic and personal track that I am on: the possible pursuit of a Masters of Divinity and ordained ministry in the Anglican Church of Canada. Kauffman puts forward the idea

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[77] For example, see Noa Nelson, Adi Zarankin, and Rachel Ben-Ari, "Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation" (2007) Negotiation Journal 289.

of sacredness and God as being ever emergent, unfolding, and creative; in other words, he explores the concept of divinity as it overlaps with the notion of a complex adaptive system.[78] Without delving into a proposal of a new project, it would be a fruitful and fascinating study to consider the behaviour, interactions, and decision-making of Christians in the context of the church and Christianity from the perspective of lawfulness and lawlessness.

My intention of this project has been to develop an analytical model of the behaviours, decision-making, and normative dynamics that emerge out of adjudication, mediation, and other conflict resolution approaches. By offering lawfulness and lawlessness as terminology for describing moments shared between citizens, as well as broader, societal dynamics, I contribute to the literature a new way of explaining preferences and criticisms for different conflict resolution practices and movements. Ideally, the lawful-lawless continuum will now be strengthened, challenged, and applied to a myriad of different issues and disciplines. Although that is an ambitious goal, the lawful-lawless continuum seems to provoke questions and challenges that may give it life beyond this project. Likewise, it will hopefully be used to analyze not only the nuances between adjudication/law and mediation/ADR, but new topics in the future, as well.

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78 See Stuart Kauffman, *Reinventing the Sacred: A New View of Science, Reason, and Religion* (New York: Basic Books, 2008).

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