Alternative Dispute Resolution and the United Church: Theological and Jurisprudential Implications of Collaborative Decision Making

A Thesis submitted to the Faculty of Emmanuel College and the Theology Department of the Toronto School of Theology. In partial fulfillment of the requirements for the degree of Doctor of Philosophy in Theology awarded by the University of St. Michael's College

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Abstract of Thesis

There are two questions that underlie this thesis. The first asks why, in the last 25 or 30 years, there has been an enormous growth in Alternative Dispute Resolution in North American society. Not only the legal system has embraced mediation, arbitration, community circles, victim-offender reconciliation and related alternatives to litigation, but so too have school boards, business corporations, community groups and religious institutions. By looking at the experience within the United Church of Canada, which adopted ADR in 1997, some of the influences behind and implications of this shift are identified. These considerations are then revisited and explored in a wider examination of the question by a review of the literature, which discusses though seldom directly, why ADR has arisen in the last quarter of the 20th century.

The second question I address is this: How is it that people obey the law, or choose to act ethically? I identify a phenomenon I call “moral assensus,” which implies a moral “operating system” or grammar to which society collectively assents. Moral assensus is an alternative to “habits of obedience,” coercion or economic, cost/benefit models as a way to account for ethical and law abiding behaviour. Through metaphors drawn from management theory and science and through theological, philosophical and jurisprudential analysis I suggest how moral assensus contributes to our understanding of the role of law and ethics in the human project of living in community.

The connection between the two questions comes in my suggestion that the rise of ADR is in large measure attributable to a dilution of the moral assensus by overly rational approaches to law and ethics. In our highly individualistic culture, the inter-subjectivity required for a healthy degree of moral assensus is lacking. ADR contributes to both the discernment and generation of moral assensus. The principles central to ADR when absorbed through the experience of conflict resolution have the potential to transform the way in which persons participate in public discussions of legal, ethical and political issues.
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John William Burton

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Dedicated to the Glory of God

And to the people of the

Goodwood - Epsom - Utica Pastoral Charge

Without their support, this thesis could not have been completed
Introduction - An outline of the project and introduction to some key concepts

This thesis begins with a consideration of Alternative Dispute Resolution (ADR), a term covering a range of methodologies that have been developed over the last thirty years to address conflict, providing alternatives to litigation and related adversarial approaches. The United Church of Canada introduced ADR into its required procedures for dealing with conflict in 1997. The government of Ontario has in the last three years introduced ADR as a mandatory step in all civil litigation, except matrimonial causes where it is voluntary. The Law Society of Upper Canada amended its Code of Professional Conduct in 2000 to require that all lawyers advising clients seeking advice about a dispute inform them of the availability of ADR.

As a scholar who has studied both law and theology, I have an interest in ADR as an area where the two fields intersect. I begin with an obvious question: why has ADR grown in popularity so markedly in the last quarter of the twentieth century? I believe that the increasing reliance on ADR is indicative of a shift of major proportions in our cultural consciousness. The shift is not a linear development, but a spiraling feedback loop. ADR participates in the generation of the new cultural consciousness and at the same time is a product or outcome of that shift.

In his monumental treatise on the formation of the western legal tradition Harold Berman concludes that it is now taken for granted “that law, as a product of reason, is capable of functioning as an instrument of secular power, disconnected from ultimate
values and purposes...Thus not only legal thought but also the very structure of Western legal institutions have been removed from their spiritual foundations, and those foundations, in turn are left devoid of the structure that once stood upon them.¹ Ethics too has experienced a disorienting erosion of its foundation in a shared social morality, which was once assumed to exist. At the same time the term ethics is now often used to refer to what was once meant by natural or divine law. Human rights and democratic values are used in similar fashion to refer to a law above the law.

As law and ethics have experienced a disorienting loss of their foundations, physics, the most solid of sciences, has introduced us to the challenging notion that at the heart of matter, at the quantum or sub-atomic level, we cannot determine whether we are observing a particle (something material, that has a definable location and measurable dimensions) or a wave (pure energy that is in motion and incorporeal). What is even more alarming is that these sub-atomic particles seem to change their behaviour, manifesting themselves as matter or energy depending on our methods of observation. This has led some to claim that there exists a relationship (perhaps causal, perhaps responsive) between the observed phenomenon and the observer.

The certainty about the ordered nature of creation for which Newtonian physics served as a powerful metaphor is being challenged on other fronts as well. Management theorists, for example, are recognizing that hierarchies and bureaucracies, which can be thought of as applications of Newton's laws of motion within social organizations, are best suited to describing purely responsive objects pursuing unvarying orbits in space.

¹ Harold Berman, Law and Revolution, p. 198
where space is conceived of as void. Such organizational structures are not capable of the adaptation and dynamic interaction required by a world occupied by fields and forces, which is in constant flux.

Many ethicists have become aware that positivistic approaches to ethical decision-making, approaches (such as creating codes of ethics) that are informed by a Newtonian metaphor for social interaction, are inadequate. Methods that incorporate story telling, casuistry and dialogue are better suited to the ambiguity and diversity of situations requiring ethical reflection. Jazz, with its emphasis on improvisation is being proposed as a more adequate metaphor.

The legal system, which Berman describes as now removed from its spiritual foundations, looks very different if the metaphor is not Newtonian but quantum. In a Newtonian universe the hierarchical courts, the binding force of precedent and the structure and certainty of statutes suggest a world of unchanging order. In a quantum universe, however, the law can be particle or wave. The common law tradition is not the rule of the dead past, but a means of revisiting virtually any previously decided case, the structure and jurisdiction of the courts is under constant revision and legislation is, of course, always open to amendment or repeal.

The legal system, like sub-atomic particles, is experienced as both stable and in motion by those who are immersed in it. There is, however, a strong positivist inclination amongst the (legal) laity, a Newtonian expectation that the law should speak to every possible issue with clarity and precision. If there is ambiguity or obscurity, the popular perception is that it is a failure of law, usually attributable to its manipulation by
those seeking only to further their own interests.

The positivist orientation applied to the law can be identified in the ethical sphere as well. The field of ethics lacks the institutional structures that allow us to speak of a legal system. There is no ethical system in the sense that there is a legal system of courts of law and public officials who make and pronounce law. Nonetheless there is for many an inclination to think of ethics as something which should be systematized in the most structured sense of that term. This is most commonly manifested in the tendency to respond to ethical concerns by creating codes of ethics. It is ironic that the legal profession which, as inheritors of the common law and its casuistic traditions might be expected to apply that same approach to ethics, has been a primary exemplar of the positivistic approach, creating codes and commentaries that purport to address all possible ethical questions. Bio-ethics presents a contrasting approach, the development of casuistic and discursive methods of addressing ethical concerns. Positivism, reflected in the assertion “there ought to be a law,” nonetheless, remains the prevailing popular approach to ethical issues.

Berman claims, rightly I think, that the disappearance of the foundation of our legal system presents it with the most serious crisis it has faced in at least a thousand years. The mainline churches of North America are facing a similarly momentous crisis as a result of a closely connected disappearance. The churches refer to this event as the end of Christendom. It has implications not only for our life as worshipping communities and our understanding of how we relate to the broader society, but also for how we make ethical decisions internally and particularly for how we engage in ethical
discussion with the broader society.

The Church long presumed that it could point to its ethics and morality, derived from its theological foundations, and that they carried weight with all people. While some within the Church maintain this presumption, pluralism and the end of Christendom now oblige those who wish to be heard in the public forum to consider how we converse about ethics when there is no agreed foundation. If a positivistic approach to ethics is taken, the question of ultimate authority cannot be answered in a way that satisfies the Christian believer, those of other faiths and the non-believer. To return to Berman's image, the foundation of ethics for a Christian must be in God, as it has been for thousands of years. But in a pluralistic society one cannot ask others to accept that foundation. Can an ethical structure be built without a foundation? Certainly not if the metaphor of structure is informed by Newton's physical laws. The structure of law or ethics cannot float in suspension above a vacuum.

To summarize this introductory outline, my thesis will look closely at ADR as a way of bringing some clarity of focus to what can be described as one emerging mode of cultural conversation about legal and ethical issues. There is, it seems to me, an emerging consciousness within North American society of a need to acknowledge and adjust for the end of Christendom, the disappearance of the foundations of law and ethics, and the changed perspective that the new science gives to us on social interaction, institutions and consciousness - indeed on what it is to be human. The theological implications of this emerging consciousness include recognition of the way in which dualistic, rational modes of thought predominant since the Enlightenment have limited
our understanding. What is arising is an awareness that interpenetration rather than opposition provides a more helpful conceptual framework for living out our faith, or living ethically but without faith, in a world of increasing diversity and complexity. The advances in both telecommunications and travel which have been important contributors to that increase, have at the same time made it a physical reality that we are more closely connected to each other than ever before. As a mode of conversation, ADR provides both a means for facilitating the process of interpenetration in specific circumstances, as well as an insight into the nature of the processes which must occupy a newly vibrant public realm if society is to accommodate and be enriched by the diversity which is upon us.

A treatise of far vaster scope than I am undertaking would be required to work out in a systematic fashion all of the implications of this emerging consciousness. My humbler intention is to focus on the implications that can be drawn from a consideration of what the development of ADR suggests about the possible shape of a legal/ethical system that lacks a solid foundation. It will be my contention that something less solid may be required and that perhaps there never was a foundation quite as substantial as that metaphor suggests.

Chaos theory provides another metaphor that can be helpful in conceptualizing a world without foundations by introducing us to something called “strange attractors.” These are limits which systems set for themselves, or limits that are inherent in the nature of the system. Strange attractors act as organizing principles for what can initially appear to be totally random and chaotic events. They serve something of the function of
paradigms in Thomas Kuhn's presentation of that notion. Over time a pattern and continuity begin to appear as a sufficient number of events occur that we can begin to see some order. An example of such a computer-generated pattern is pictured here.

Berman describes a remarkably similar process that occurred when the Law Codes of the Emperor Justinian, essentially lost since the 5th century, were discovered by scholars of the late 10th century. The Codes, which amount to hundreds of pages of material, were basically random reports (arranged chronologically) of legal decisions and pronouncements of legal rules. The Romans had no thought of foundational principles or structures when they rendered those decisions and made those rules. They were entirely pragmatic, addressing only the presenting issue. Eleventh century scholars, however, through close attention, cataloguing, generalizing and abstracting, derived principles

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2 Thomas Kuhn, The Structure of Scientific Revolutions.
3 James Gleick, Chaos: Making a New Science. P.28
from those Codes which came to form one pillar of the foundation of the Western legal system.

Changing the metaphor from Newtonian to quantum, it might be said that the process of legal decision-making inherently contains some principles which, even if they are not present to the awareness of the decision-maker, become apparent, just as a strange attractor becomes evident over time as a series of mathematical events is repeated by a computer in what first seems to be a random fashion. Thus order, or at least a pattern, emerges. Order is usually thought of as something imposed from above or, alternatively, developed by building up from a foundation of rules or principles. Chaos theory suggests, however, that it may be something active in the midst of apparently chaotic events which can only be derived after a sufficient number of occurrences.

If the foundations of law and ethics have disappeared along with Christendom, we might look for new foundations, seek to rebuild the old, or change the metaphor. I will suggest that strange attractors provide a helpful metaphor for understanding how there can be order in a legal or ethical system without a foundation. I call this strange attractor moral assensus. What I mean by that term is described more fully in the text, but briefly, it refers to the shared morality that is generally enough accepted within a society to order it sufficiently so that it can function. Moral assensus is the reasonable expectation each citizen has about the behaviour of others and about how the appropriateness of their own actions will be judged. It is not to be understood as a fixed point. Assensus is something that is always emerging. I am tempted to coin the term "quansensus" to suggest that, just
as sub-atomic particles are matter and energy both (or that they change seamlessly from matter to energy and back, the difficulty in observation makes the language problematic) so assensus can only be thought of as a fixed point, if it is acknowledged that it will inevitably move on. It is stable enough to be identified for purposes of dealing with a presenting issue, but fluid enough that it can accommodate a new issue as it arises. My concern, therefore, is not to delineate the content of the moral assensus, which I maintain is never fixed, but rather, to suggest that moral assensus is a necessary structural element in any society that orders behaviour. It is inherent in any society, just as a strange attractor is inherent in apparently chaotic systems. Through this ordering the aims which the members of the society hold are furthered.

In order to provide a concrete starting point for the consideration of the process by which moral assensus is generated I will examine a recent development within the United Church of Canada. In 1997 the General Council introduced Alternative Dispute Resolution into the Church’s Manual as a required first step in resolving conflicts within the Church. In doing so, the Council was responding to both a perceived need within the denomination for more effective ways of dealing with disputes and a trend in the broader culture to resort to collaborative dispute resolution processes. Part of my task in this thesis will be to make the connection between what might be perceived as no more than an adjustment to the nuts and bolts of the Church’s disciplinary protocols and the broader process of discerning and generating a moral assensus.

In the three years since the policy was introduced there has been a growing awareness among those who are charged with its implementation (a group of which I am
a member) that the introduction of ADR to the Church offers little hope for significantly altering the way in which we deal with conflict in the United Church if it simply creates a cadre of experts who are sent in to mediate disputes when they arise. And so the focus of implementation is changing from training mediators to attempting to promote a "cultural shift." The cultural shift that is sought within the Church would open up the range of possibilities for dispute resolution and in particular, it would shift the normal first response to conflict toward collaborative approaches. Quasi-judicial processes would not be displaced. Rather they would be reserved for those cases that can only be addressed by the exercise of a judicial authority.

Within the secular legal system a similar recognition can be discerned as more participants experience ADR as both an alternative to litigation that is often more efficient and an approach to conflict that promises less damage to participants than the adversarial system. Some lawyers are beginning to see that ADR offers them a way to meet their clients' needs for reconciliation with adversaries, which can arise in situations where there are on-going relationships which will survive the law suit.

I will examine the introduction of the Alternative Dispute Resolution policy and the thinking behind it at the level of the National Church. I will also present three case studies taken from the experiences of Conflict Resolution Facilitators working within the United Church. The case studies will indicate the way in which an ADR approach to dispute resolution can begin to foster a cultural shift as a collaborative approach is extended beyond conflict management into other aspects of the life of an organizational system. The moral assensus, the shared expectations around which the community co-
exists, is what is being affected through this process.

It is my position that the generation of a moral assensus is a process that is ongoing and intersubjective. The insights of process theology, the new science of chaos theory and quantum mechanics, consciousness and brain studies and other fields which take seriously the connectedness of all things have all informed my understanding of this process. The first chapter of this thesis sets out some of this background as a way to frame the empirical exploration I will present in the section dealing with the United Church experience of ADR. In particular, I will draw on the analytic framework of the Taoist yin/yang as a way to portray the notion that moral assensus is the evolving product of orientations of human perception I have called cognitive and generative.

Chapter Two presents an overview of the introduction of ADR into the United Church of Canada. The adoption of ADR in 1997 was a response to forces, which have been pressuring the Church for at least twenty years to develop better ways of dealing with conflict. Over those twenty years the broader community has experienced a similar dissatisfaction with the established way of responding to conflict. It is over this period that ADR has grown in popularity in many sectors of our society, as I recount in Chapter Five. The experience of the Church can be taken as an illustrative instance of the pressures at work which led to the adoption of ADR by the legal system and other institutions. The second part of the chapter is a consideration of how the new science can inform our understanding of the manner in which these processes unfolded and continue to unfold.

In Chapter Three I look at three case studies which are composites taken from my
own experience and that of others who have worked within the Church as Conflict Resolution Facilitators. As well as suggesting the potential for a wider impact as collaborative decision-making changes cultural norms about human interaction, these cases are also intended to provide the reader with some flavour of the diversity in situations of conflict and approaches to its resolution which are captured by the term ADR.

In Chapter Four I introduce the theory of polarity management as a way to understand the forces at work in organizations and systems where ADR can be useful in managing conflict. Polarity management provides a key to understanding the functioning of humans as they live out their ontological interrelatedness, which has, in western culture, been so overshadowed by our equally ontological individualism. In this chapter I offer ADR and the collaborative approaches to social life of which it is one manifestation as an aid to understanding how we live out our essential interconnectedness, which lies at the heart of the theology I present.

In Chapter Five I survey some of the literature that ADR has generated and offer an exploratory response to the question of why ADR arose in the last quarter of the twentieth century. A polarity matrix will be introduced as a way of understanding the advent of ADR as a current manifestation of an ancient tension lying at the heart of the legal enterprise. That tension is alluded to in the balanced pairs of law and equity, certainty and flexibility and cognitive and generative epistemological orientations. This discussion leads to some reflection on the nature of law and its role in our society.

Chapter Six makes a connection between the way in which we approach conflict
(adversarially or collaboratively) and our conception of the self. Since ADR takes a collaborative approach, it both requires and fosters a reconsideration of the individualism that is the cultural norm of the west. Here I consider the theological insights of Miroslav Volf and the sociological insights of Jurgen Habermas in suggesting that ADR can contribute to overcoming the human inclination towards exclusion of the other by facilitating our engaging the other in collaborative decision-making about how we shall live together in human community. The chapter concludes with a presentation of how a casuistic approach to decision making can build on the basic methodology of ADR to facilitate cooperative approaches to resolving ethical questions.

Chapter Seven concludes with a restatement of some of the threads identified earlier and some suggestions about the direction, or directions, in which the collaborative approach to decision making exemplified by ADR may be growing. This trend has rich possibilities for contributing to the development of moral assensus in our pluralistic and inter-connected world.
Chapter One - The Role of Moral Assensus

The Contribution of Moral Assensus to Social Order

On the evening of June 9, 1993 the Montreal Canadiens won the Stanley Cup at the end of the longest hockey season on record. Such victories were no longer taken as a matter of course by Montreal fans in the 1990's as they had been during the team's supremacy some thirty years earlier. Exuberant, the faithful paraded from the Forum along downtown St. Catherine's Street. A few began to shout sovereigntist slogans and eventually the victory celebration degenerated into a small-scale riot, as shop windows were smashed and cars were damaged by the mob.

In an editorial published the following Saturday, the Globe and Mail reported that the Chief of Police, when asked why the force had been unable to stop the riot, had replied philosophically that they depend on "a social contract that demands the collaboration of the population. A part of the crowd," he added, "broke that social contract." The editorial went on to note that society depends on the rule of law and the willing obedience of all citizens. The police can cope with a small number of persons who choose to live outside the law but when, as happened that night a large number decide that they can break the law with no fear of punishment, the authorities are helpless to restrain them.

The rule of law under the social contract begins with fear, the editorial continued. Persons obey the law to avoid the discomfort, pain and shame of "a stinging blow from a nightstick, arrest, fine, imprisonment." But fear is not enough. If a society does not evolve beyond "the most base analysis of interests" to "encompass an equal concern for all the other selves that make up our universe," then, the editorial concluded, we should not be surprised at riots in the streets.

Fostering the "collaboration of the population" in the "social contract" upon which a well-ordered society depends is not a bad starting point for understanding the role of law. Law does not seek to foster order for the sake of order alone. Rather order is fostered for the sake of "creating the conditions where love can live," to adapt the phrase used by Harold Berman to describe the purpose of the law.

The question that engages me in this thesis is how is that collaboration being fostered at this time in North American society? If society is to enjoy a level of social order sufficient to enable all of its members to thrive, there must be some level of shared
understanding of what is and what is not ethical living. And citizens must govern their behaviour in a way that is coherent with that understanding. Law codes and ethical codes cannot prescribe with sufficient detail how the individual is to decide what is appropriate in each of the myriad possibilities for human interaction that present themselves daily. As the Chief of Police in Montreal acknowledged, society requires and relies on the collaboration of all its members to maintain social order.

Timothy Gorringe in his exploration of God’s Just Vengeance remarks that “the very legitimacy of law, and in particular the institution of trial by jury, presupposes widely shared values...consensus is necessary for there to be a human project at all...A law which is consensual, rather than repressive, is, like education, one of the things constitutive of that community without which human beings cannot survive.” 2 Gorringe’s claim that a consensual law is necessary for viable human communities warrants our attention, but requires a consideration of what is to be understood by the term consensus. Who counts as a member of the consenting community?

“The idea of consensus,” David Cayley has written in presenting the ideas of Herman Bianchi, “papers over the unequal distribution of power.” 3 A consensus model, in this view, presumes a freedom of humans as rational decision-makers to enter into contracts. The problem with such a model is that not everybody was represented when the terms were drawn up. 4 Consensus should be voluntary, not imposed; yet the law is...

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2 Timothy Gorringe, God’s Just Vengeance p. 262. See also p. 18-19, the problem with extreme positivism is bad laws cannot be enforced, justice must accord with common sense and community standards of morality.
4 In fact, of course, social contract theory does not suggest that any formal contracting
experienced by many as the hand of the powerful on their necks. They have no say as to
its content and it is applied to them with an inflexibility that is markedly less implacable
for society’s wealthier members. In other words the social consensus presumed by
social contract theory is in fact only the consensus of a privileged elite which they, as
holders of power, impose on the marginalized. What the elite experiences as consensus
the marginalized experience as authoritarian imposition.

If consensus is an illusion, then Marxist sociology, according to Cayley, suggests
that the analysis of the Chief of Police is misguided. Society is not governed by
consensus or a social contract. Rather, society is characterized by disensus, a divided
understanding of appropriate rules for its governance. This is a division based on class

was done. The terms of the contract are derived from the structure of society or the
desired structure of society and transposed back to a notional negotiation. The point
remains that the terms of the contract reflect the interests or ideas of less than all
members of the community. John Rawls’ veil of ignorance presented in A Theory of
Justice is an effort to overcome this criticism, but its ability to do so is hardly conceded
by all commentators. See Michael Sandel’s The Limits of Justice.

My remark in the text may not, however, be quite as flip as it seems when applied
to the traditional liberal understanding that the social contract is a notional construct.
Harold Berman suggests at p.67 in The Interaction of Law and Religion, that John
Calvin’s practice of requiring every citizen of Geneva to be baptized and to publicly
confess his faith and assent to certain codes of conduct prescribed by the church provides
a concrete instance of a social contract. It hardly needs saying that an elite drew up the
terms and even the population of those who swore the required oaths was hardly
universal.

5 See “And justice for all? Not when you’re poor.” Uxbridge Times Journal, October 4,
2000, reporting on the publication of the National Council of Welfare, “Justice for the
Poor” published Spring, 2000.

6 See Jurgen Habermas’ The Structural Transformation of the Public Sphere, where he
acknowledges the tension between the notion of “public opinion” as a representation of
the outcome of informed public discussion and the fact that in its origins in bourgeois
society, “public opinion” represented at most the consensus of an educated and well to do
elite. He goes on to discuss how in late consumer capitalist society “public opinion” is
imposed through the activities of elites commodifying culture and reducing the role of
the public to the acclamation of positions decided upon by the elite, positions that favour

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interest. And yet, the image of social conflict that lies at the heart of a dissensus model seems too antagonistic. For those at the margins, for members of disempowered groups the division may be far more apparent than to a white, middle-class male. But even at the margins, surely, there is some consensus about how we humans should be-in-community. And so Cayley presents Bianchi’s third model, which he calls assensus.

The term assensus finds its origins in Cardinal John Newman’s Grammar of Assent, which, in Bianchi’s summary, critiques the Church’s claim, that “God has bestowed truth upon us.” Rather, Newman says, we have to “ascend” to truth. The ascent assent to truth is a movement towards the Augustinian City of God, which is accomplished by lifting our vision from the immediate issues that overwhelm and block our capacities for insight. Humankind is called to engage in a spiraling, ascending process of assent to truth that is only possible in community through uncoerced discussion of the question of what is right and what is good. This question, which can be put as simply as “How are we going to live together?” is never ultimately resolvable (short of God’s reign) and so open-endedness is an essential feature of assensus.

It is my claim that what I shall call a moral assensus is necessary to a well-ordered society. Moral assensus need not, indeed should not, be a homogeneous construct. Assensus does not mean that everyone shares in every detail the same moral understanding. Rather, assensus is a process of seeking that level of agreement where each member of the society can live with the moral understanding that is being lived out by the society as a whole. In saying that one can “live with” the morality of the society, I have in mind a form of assent which is at least notional, but also involves a commitment

their interests.
to work towards a higher level of assent. This "working towards" requires compliance with the accepted morality, not its subversion, but also includes the commitment of the society to provide avenues for re-visiting those moral understandings to which some can (at the moment) give only notional assent.

Implied in the concept of moral assensus is an expectation that each member of the society recognizes that it is for the good of herself and of the society that the social contract exists and that each member adheres to it. Each person might choose different terms for the contract were he or she in a position to do so. If, however, there is a moral assensus then each person accepts the social contract as it is. It is an arrangement with which they can live. Roberto Ungar puts the notion this way: "But despite variations in extension, concreteness, intensity, and coherence, the presence of commonly held moral and cognitive orientations is always what makes organized social life possible. Shared beliefs allow people to understand one another and to know what they ought to expect from each other."  

A condition for living with moral assensus is that it must be constantly tested and refined in order to adapt to changes in the human situation. Each member of the society agrees to live with a moral assensus that they may well not entirely agree with, in part because they know that it is open ended. A process for change is part of the assensus. And yet some degree of certainty and stability are necessary to daily living. So assensus implies something less than a code 'written in stone' but more stable than an open-ended consideration of every ethical issue as if it were arising for the first time. Heterogeneity within the assenting community is thus a feature to be encouraged and celebrated. It is
the need to respond to the friction created by differences that will provide the energy required for revisiting the moral assensus. Thus it is kept from becoming the kind of imposed consensus against which Bianchi warns.

In this thesis I shall assume that human society exists to create the conditions where love can flourish and that ordering human interactions is necessary to do so. I shall further assume that society is engaged in a process of living out the level of moral assensus that is necessary to that ordering. From those assumptions I shall move to examine some features of how moral assensus is being generated in contemporary North American society.

The assertion that human interactions need to be ordered should not be taken as suggesting that society must run with the predictability of a clock or a boot camp. Order, as I use the term, means first that the limits of acceptable behaviour are known and assented to by all members of society (this is the stronger sense of the term). Second, it means that within the general framework provided by those limits most members of society have a reasonable expectation which is usually fulfilled as to how their behaviour will be perceived and responded to by others with whom they are interacting (this is the weaker sense of the term).

An example of the sense in which I am using the term order can be drawn from the way in which human interactions on the highway are ordered. In the stronger sense of the term traffic is ordered by the law, which requires that all vehicles stop when they reach an intersection controlled by stop signs in all directions. In the weaker sense, traffic is ordered when one driver waves to another if, at the same time, both arrive at a

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7 Roberto Ungar, *Law in Modern Society* p.30
four way stop from opposite directions and the second driver has a turn signal on. The first is signaling that he or she will yield to the second, in the expectation that the second will understand the signal and proceed. Although the Highway Traffic Act prescribes that the driver going straight through has the right of way, drivers in such a situation often choose to live by the weaker sense of order. This gives them more flexibility, but still falls within the general intent of order in the stronger sense.

The jazz critic Stanley Crouch has suggested that it is "empathetic order that is the fulcrum with which jazz moves the world." By empathetic order Crouch means to suggest that a successful innovation which moves the idiom forward without moving out of the jazz world requires that an artist balance: the traditions within jazz (4/4, swing, the blues, the ballad, and Afro-Hispanic rhythms), the influence of mentors like Ellington and Mingus, and the composer's own developing explorations that make new musical statements at the same time that those of the past can be heard in them. In speaking of a need for order in society, I have in mind a similarly integrative, generative and empathetic order that structures opportunities for each member to explore new forms of living out the promise which is implicate in God's creation.

If it is accepted that human society needs to be so ordered, we are led to the question of how this is to be accomplished. Legal codes have a role to play, for as Ungar observes, "rules become manifestations of the shared values of the group." Being of necessity general in their terms, however, rules cannot accomplish a complete ordering. A society that was completely ordered, in the strong sense, by a massive code of rules

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* Stanley Crouch writing in liner notes to *Citi Movement* recorded by the Wynton Marsalis Septet: Sony Music Entertainment, 1993.
governing every human interaction (were such a thing possible) would hardly be one that
would create the conditions where love could flourish. And yet neither will love flourish
where society relies on its members to determine in each moment how they are to order
their interactions. Order requires that each member of the society give up some of their
freedom to negotiate ab initio in exchange for freedom from endless and protracted
negotiations. At one level order is a device for saving human beings time by providing
for predictability in social interactions. This saving of time and energy frees people up
from negotiations about the mundane so that they can attend to the more difficult and
enriching human interactions where negotiation is necessary.

One further assumption I make is that the most helpful unit of analysis in
understanding human beings is not the individual but the interaction. Process
theologians, transactional analysts and systems thinkers10 all point to the richness of
understanding that comes when we shift our focus away from the individual conceived as
an independent actor determining how he or she shall behave. The approach that I take
to understanding what it means to be human takes the interactions of human beings as
constitutive of humanness. Interaction is prior to the individual, at least in the sense that
without interaction the individual could not become human, nor could she express her
humanness. Exploring the psychological foundations and the metaphysics of this
assumption is beyond the scope of this thesis. I will, however, return to this issue in
Chapter Six in considering the concept of the self that underlies the theory of moral

9 Roberto Ungar, *Law in Modern Society* p. 31
10 John Cobb and David Griffen, *Process Theology, an introductory exposition;* Eric
Berne, *Games People Play;* and Edwin Friedman, *Generation to Generation: Family
Systems in Church and Synagogue.*
assensus I am exploring.11

The Contribution of Alternative Dispute Resolution to Moral Assensus
An introduction to the process

This thesis is not intended to be a presentation of a fully developed theory of moral assensus. Rather, I shall examine Alternative Dispute Resolution as one forum within society that provides a mechanism for individuals and groups to engage in the process of enacting the moral assensus as it speaks to their situation. Through that examination I hope to illumine in some degree the process by which moral assensus is ever in formation. Whether law or ethics can be said to be grounded in a social contract, in natural law or in another underlying theory is beyond my concern. Attending to the continuous formation and reformation of the moral assensus will suggest that society can achieve an adequate level of moral assensus without agreement as to a common ground. That ground may in fact emerge from examining assensus, as grammar emerges from an examination of speech rather than as a set of rules which precede it. Members of the society can participate in the assensus without sharing the same understanding of why it is a good thing to do so.12

ADR is a term applied to a not yet closed category of methodologies for resolving disputes. It includes mediation, arbitration, healing circles, community conferencing and a growing number of other techniques that seek to increase the direct participation of

12 Stephen Toulmin “Ethics and Equity: The Tyranny of Principles,” p. 243
affected persons in the resolution of disputes. ADR is an “alternative” to litigation, but it would be a mistake, as I shall try to show, to think of it as the opposite side of the coin or in any way necessarily opposed to litigation. The adversarial system, which is the norm in the courtroom, is also the norm for dealing with conflict generally. ADR and litigation are both ways of defining and refining the moral assensus. ADR widens the range of options available to disputants. Its development and availability are changing and will continue to change the way in which litigation is conducted. But litigation in general and the adversarial method of truth determination by an impartial jury or judge in particular will remain important choices available within a wider range of options for resolving conflicts and refining the moral assensus.

Some practitioners of ADR, particularly those in the legal profession, approach it primarily as a way to simplify the adversarial process and avoid a lengthy and costly trial. More commonly, and this is the sense in which I use the term, it connotes an approach to disputes which focuses on sustaining or rebuilding relationships as a way to effect reconciliation. During the same period of time that ADR has been growing in the civil sphere, Restorative Justice has been introducing many of the same principles and understandings to the criminal law. The insights of the ADR and Restorative Justice movements, in my view, suggest that maintaining the distinction between civil and criminal matters is ultimately not helpful to the ordering of society, but making that case is beyond the scope of this project. I will focus my consideration of ADR and its role in the formation of moral assensus to conflicts that do not involve behaviour which society has criminalized. To criminalize means that the state has asserted it has an interest in addressing behaviour that in some other societies, and in western society a thousand years
ago according to Harold Berman, was a matter to be resolved by those immediately affected. The matters with which I am primarily concerned are conflicts where the state is content to allow those affected to choose the venue for resolution and to agree to a resolution of conflict themselves.

The examination of the recent ascendance of ADR will be left to Chapter Five. I now want to introduce the key methodological tool that I will use to examine how society struggles toward moral assensus. Wrestle might be a better word than struggle because it suggests the story of Jacob and the angel (or God) at the river Jabbok. And that is a central image for how I see society engaged in seeking moral assensus. Neither Jacob nor the angel emerged triumphant. The encounter produced both injury to Jacob and blessing, and in the encounter he was changed. In fact his identity was changed, as signified by his receiving a new name, Israel - one who struggles with God. The struggle with God is also a struggle with himself, and with his brother Esau. Crossing the river Jabbok is the final step in Jacob's journey of return to his

13 Genesis 34: 22-32
brother, whom he defrauded of his inheritance for a bowl of pottage. Before crossing over, Jacob must overcome his own reluctance and his fear of his brother's revenge. Such encounters occur continuously and in overlapping fashion within society and within its component institutions as people seek to resolve conflicts and ethical dilemmas.

The encounter at Jabbok is also evocative because Jacob's subsequent confrontation with Esau is often interpreted as speaking about the encounter between Israel and the nations. The struggle for moral assensus in North America has become a much more complex exercise in the latter half of the twentieth century as the assumed hegemony of white, Christian males has been challenged on all sides: by women and by people of diverse ethnic, cultural and faith backgrounds. Pluralism increases the challenge of assensus building and it may account, to some degree, for the search for new ways to resolve disputes exemplified by the rise of ADR.

The image of Jacob and the angel wrestling without ceasing, and without victory, is suggestive of the Taoist concept of yin and yang. The familiar yin/yang symbol

\[ \text{yin/yang symbol} \]

is a visual representation of the Chinese words, "which originally denoted the dark and sunny sides of a hill." The symbol suggests the flow as the sun moves overhead and the light and the dark exchange places. The necessity of each of the two opposites means that harmony and wholeness is not a static state achieved after the victory of one over the

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14 Gareth Morgan, *Images of Organization*, pp. 242-244
other, but a continuing state of tension between two forms of energy characterized by ebb and flow. The complementary yet opposite forms reverse their positions, first one, then the other being more prominent, but with neither one ever achieving permanent dominance. Each side of the yin/yang symbol contains a dot, representing its opposite. The symbol thus captures the reality that neither of these energy forces is pure. The opposite force is contained within each so that the inevitable reversal can begin whenever one force begins to predominate.

To take an automotive illustration, one might conceive of an automobile as being subject to two forces, one called go and the other called stop. At the extremes - on an expressway at top speed or parked in my driveway - go or stop dominates. Yet the other force is always present. A moving car must overcome friction, inertia and wind resistance which seek to stop it and a parked car has the stored energy of its battery and fuel always ready to propel it forward. The yin/yang image helps us see that in the ordinary motor trip go and stop are in a continual state of flux as I drive through city traffic, stopping at red lights and accelerating away from green ones. Constant monitoring of the balance of the two forces is required if the journey is to be safely negotiated. A car would not be a car if it contained only one force or the other.

Moral assensus is not static. It is generated by a continually evolving social process. Like the yin and yang, its component characteristics wax and wane over time. It requires that each member of society act in accord with the moral assensus as she understands it in the moment and in the concrete situations she faces. It further requires that she be open to engaging in reflection on and discussion with others of her perceptions of that assensus. As support for assensus weakens, it will be tested until it

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yields its shape and a new form of equilibrium is found. The moral actor must always be open to the possibility of embracing a changed understanding of moral assensus. Yet the new equilibrium, even as it is forming, will be experiencing pressures that will change it once again.

Around some issues, moral assensus may be stable over long periods of time. Where that is so, as Ungar notes, “the broader the extension, the concreteness, the intensity, and the coherence of the consensus, the less necessary do rules become.” The notion of assensus implies an openness to revisit even core issues and an acceptance of the possibility of major shifts. The change in North American attitudes towards minorities over the last fifty years, exemplified by the Civil Rights movement, is an illustration of how moral assensus evolves.

The yin/yang symbol, and also the image of Jacob and the angel, depict only two forces and provide only one forum for the struggle. They are therefore seriously limited in being able to capture the complexity and diversity of the ongoing struggle within a society to develop a moral assensus. One would need to develop an image of infinite dimensions to depict the process with which we are concerned. One way of imagining such an image is to think of a spherical Rubik’s Cube with an infinite number of...

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15 Roberto Ungar, *Law in Modern Society* p. 31 (I understand the concept Ungar refers to as “consensus” in the quote as essentially analogous in this context to what I am referring to as “assensus”)

16 In his work on inter-faith dialogue *Beyond Dialogue*, John Cobb has explored the dimensions of a far-reaching openness to be changed in our fundamental understandings and core beliefs that is not an abandonment but a reflective suspension that enables a deeper hearing of another’s perspective.

17 I use the term *Rubik’s Cube* to refer to a geometrical object consisting of numerous or innumerable interlocking objects of the same general shape. While the term “spherical cube” is geometrically inelegant, it is suggestively depicted in the logo developed by the JWBurton - The Role of Moral Assensus - Chptr.1 - 27
yin/yang combinations fitted together. The sphere is made up not only of intersecting pairs, but yin/yangs that are connected with other yin/yangs in manifold complex ways.

One way of understanding the task that I have set for myself in this thesis is as an examination of some component yin/yangs in the spherical Rubik's cube. In the next section I move to an examination of one such yin/yang that is both epistemological and linguistic which will be central to this effort. Then, in the next two sections of this chapter I will begin to explore the contours of the spherical cube from the perspectives of theology and legal philosophy. These explorations are intended to provide a framework for the discussion in later chapters of the role played by ADR and collaborative decision-making methodologies in the development of moral assensus in North American society.

The Cognitive/Generative Yin/Yang

Human experience, it may be said, is dependent on language. Without language humans would still have experience. We would eat, drink and walk about. But we cannot conceive of how we would "experience those experiences," how we would process that information in what we call consciousness, without language. Gibson Winter has observed that language, and particularly the metaphorical nature of language, can be said to be creative. "[T]hings only become things in our world through the words, phrases, names and sentences that make them part of our common life. 'Things' then really are word-things in the human world."18 Winter points us toward a non-essentialist way of understanding how we know. "We are constituted by our relations," he writes, in words

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18 Gibson Winter, Community and Spiritual Transformation p. 38

Mediation Information and Research Centre depicted on the cover of this paper.
that might be embraced by chaos theorists and process theologians, "This is true of all reality. We dwell in a cosmos of inter-related, internally connected energies and processes, each event affecting and altering every other event, however slightly."19

If language is central to the individual's processing and construction of experience, it is essential when the community seeks to process experience. We have come to depend on language to decide in community who we are and what we want. We need language to understand our past, our present position and our options for the future. We have also come to depend on language as the vehicle through which we engage in the struggle towards moral assensus.

Barbara Brown-Taylor suggests that we consider language as a deck of cards.20 We have in effect been dealt 52, which may seem sufficient, at first, to describe all reality. But then we discover a third black queen. And we have no language to describe her. We have no word for the queen of polka dots. So we use metaphor, simile, analogy. "She is like the others, like a diamond with the points smoothed into curves."

The 52 cards represent those elements of language we can be confident are universally understood by the relevant group with whom we are in conversation. Even this assumption can break down of course, particularly in our multi-cultural environment. Beyond the core of language that we assume is commonly understood we encounter terms and expressions that are ambiguous, which shift in meaning and nuance as they move from context to context. These shifts of meaning, among other impacts, create a great deal of confusion and misunderstanding. They spark disputes and conflicts. Thus

19 Gibson Winter, Community and Spiritual Transformation p. 35,36
20 Barbara Brown-Taylor, When God is Silent, p.90-91
human interaction seems to require as a part of any conversation a dialogue that is aimed at clarifying meaning. While such dialogue is not a sufficient condition for defining a moral assensus, it is a necessary one. Human beings must engage in efforts to clarify the meaning of language if they wish to reach a common understanding about ideas of justice or how society ought to be ordered.

I may tell my 6-year-old son that the grass stains on his pants mean they are dirty and it is time to wash them. He can disagree with me, but I can settle the dispute by insisting that he accept my interpretation of the word dirty - grass stains mean dirty. If I tell him not to get dirty the next day and he comes home with mud stains on his pants, he has good grounds to argue that they are not dirty - dirty means grass stained after all. And so he and I must engage in further discussion about the meaning of the word dirty before we can reach an assensus about the principle of not getting dirty.

If language is a forum in which human beings struggle to make meaning, we might identify two forces that are at work in a yin/yang counter-balance within it. Brown-Taylor points to these forces or inclinations in her metaphor of language as a deck of cards. Some words have a given and agreed meaning that we can take as clear and unambiguous, at least as a starting premise. Many more words, however, have a meaning that is derived or variable depending on context and local history and other factors. Words of the first type I will call cognitive and words of the second type, generative.

Cognitive words are those of which the meaning is manifest and unequivocal. The taxonomy of cognitive words will vary with each speaker, though there will be considerable coherence within a given community. That coherence will increase with
the homogeneity of the community. The cognitive concept is important not for the words that it contains, but because each speaker relies on it. Some speakers have a higher commitment to the cognitive nature of language and they may find themselves frequently frustrated when conversing with someone who does not share their understanding of what words signify. All of us, however, rely on the cognitive nature of language to some degree.

Generative language is that which is open-ended, allusive and metaphorical. Because it is ambiguous, misunderstanding is a real possibility. And yet it is the generative approach which expands the range of language so that it can describe that which is novel, such as the Queen of Polka dots.

Cognitive and generative ways of knowing, while similar to essentialist and representational understandings of reality, are functional not metaphysical categories. It is sufficient for purposes of aiding our investigation of the struggle for moral assensus to consider cognitive and generative orientations as tendencies that hold in balance two needs necessarily encountered in language: that some things will be spoken of as certain and that speech must be discovered or developed for those things that do not fall into the existing lexicon of the certain.

Cognitive language acts upon (or at least is treated in human interaction as if it acted upon) the listener. If she hears the word cognitively she has no choice but to acknowledge its meaning. Generative language interacts with the listener. When he hears it spoken he enters into dialogue with the language - calling upon previous uses of the word, his knowledge of the context and of the speaker and other factors he deems relevant to discern the speaker's intention. But the listener is also invited to construct
new or expanded meaning. He need not take the meaning as given by the speaker.

The tensive relationship of the cognitive and generative orientations toward language lies at the heart of the contending schools of judicial (particularly constitutional) interpretation. James White, in contrasting the approaches of two Supreme Court jurists, suggests that at one end of the continuum lies the view that the constitution can be understood as clear and plain language.

It is simply an authoritative document, the ultimate boss telling the rest of us what to do. The task of the judge is to be an intermediate boss, producing a text that has a similar structure: not reasoned, not explained, not creating in the reader the power that reason and explanation do... The Constitution is a document written in plain English making plain commands: if you think they are not plain, wait till I have spoken and I will make them plain.

On the other end of this continuum lies a very different conception of language and how we are to approach authoritative texts.

The community makes and remakes itself in a conversation over time - a translation and retranslation - that is deeply democratic not in the sense that it reflects, as a market or a referendum might, the momentary concatenation of individual wills, but in the sense that in it we can build, over time, a community and a culture that will enable us to acquire knowledge and to hold values of a sort that would otherwise be impossible. 21

The cognitive and the generative forces are part of a yin/yang ebb and flow occurring during the course of human conversation, just as the forces of stop and go are in constant ebb and flow during my automobile trip through the city. Thus I am unavoidably misleading when I speak of cognitive language or generative language in a way that suggests one can speak exclusively in one idiom. All language can fall into one or the other category at one moment of time or in a particular usage. All language

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contains some of the generative and some of the cognitive. Corrections and
clarifications as well as undetected errors are part of the process. Cognitive and
generative are orientations of the speaker and the listener toward particular uses of
language, rather than qualities inherent within language itself.

Identifying the cognitive and generative inclinations of language points to the
insight that this cognitive/generative yin/yang is also constitutive of knowledge. Janet
Conway asserts that “positivist views of knowledge that have characterized the ideologies
of both the capitalist welfare state and many of its socialist critics” need to be challenged
by a “new kind of knowledge...open to the possibility that new processes, agents and sites
of knowledge production may be in formation.” Conway has identified the importance
of conceiving of knowledge as a dynamic in which society participates, not as an
“existing authoritative body of knowledge” that is discovered, consumed and
dissemated. While her concern is with issues of economic justice the two differing
concepts of knowledge which she identifies as a positivist/production dichotomy parallel
the cognitive/generative yin/yang. If knowledge can be understood as both given and
produced, that is suggestive of the nature of moral assensus. I will argue that the struggle
to reach moral assensus can be understood as a continual rebalancing of cognitive and
generative understandings of law and ethics.

In his book on the use of metaphors in understanding organizations, Gareth
Morgan picks up this theme in observing that the culture in which we live is “an ongoing,

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^{21} James Boyd White, “Judicial Criticism” at 853 & 867
^{22} Janet Conway, “Knowledge, Power, Organization”

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proactive process of reality construction.” There is a tension between the objective circumstances that seem to confront us and the ability that we have, in groups or as individuals, to change those objective circumstances so that a new reality is constructed. It is in this creative tension that we live and breathe and have our being. Reality is neither solely an abstract essence nor purely creative self-actualization. It is a combination of the two that can be represented by the yin/yang of cognitive and generative forms of knowing.

In an essay that considers what it means to be a “fully human self,” Jennifer Nedelsky presents an understanding of how we know ourselves that has parallels with what Conway, Winter and Morgan have said about how we know the world around us. She observes that “we need a language that turns our attention to the full dimensions of our humanness, rather than to the stripped down image of the ‘rational agent.’” If we are to attempt an understanding of what our humanness is, we require language that is generative, language that can shape itself to the multiplicity of who we are. To know ourselves we need a way to speak of our unknowability. And yet if we are to know anything about what it means to be human, we need some positive touchstone. Nedelsky puts forward as such a touchstone “the purely formal claim of equal moral worth. It must be treated,” she continues, “as a kind of starting point, an article of faith, for which one might advance arguments, but which is not really subject of proof since it is not ultimately an empirical claim about any actual characteristics of human beings.” She thus affirms that it is creative interaction and the capacity for self-creation that are

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constitutive of the autonomous human rather than “the intentionally abstracted conception of the self that underpins contemporary liberal legalism.” There must, however, be an abstract linchpin as a kind of starting point. Recall that in each side of the yin/yang symbol there is a dot or linchpin, representing the presence of the opposite force, the presence of a point of the abstract that is in the midst of the concrete that is being created.

My intention in this section has been two-fold. First, I have sought to work with the yin/yang symbol in a way that suggests its usefulness for understanding processes that are part of human social interaction: language and the construction of reality. Second, I have introduced the notion of cognitive and generative ways of knowing which will inform the discussion which follows. As an aid to understanding how I see these two orientations manifesting themselves in human affairs, I have attached as an appendix to this chapter a list of pairs of opposites which often form their own yin/yangs. They might be thought of as some of the yin/yangs that compose the spherical Rubik’s Cube I suggested above.

The yin/yang symbol is not presented as a sort of equation that encapsulates the meaning or origin of the entire universe, such as the physicist Stephen Hawking claims to seek. It is not intended to explain all things. It is, however, the tool that I will use to sift a body of data that I will present in this thesis in the hope that a narrative thread is identified. Such a thread will be helpful in bringing more coherence to our understanding of the process of generating moral assensus by which human societies order themselves.
A Theological Variation on the Yin/Yang Theme

At the heart of Emil Brunner's book *The Divine-Human Encounter*, as Douglas John Hall points out, is his insight that truth is a meeting between God and the human; it is an action which takes place, not an essence which is. Brunner begins his explication of truth as encounter with the claim that there are two approaches to truth: the objective - which conceives of truth as something that is, something fixed and permanent, and the subjective - which conceives of truth as experienced, something personally appropriated. Brunner avoids the inclination to say that truth lies in some golden mean between the two. The antithesis of objectivism and subjectivism, which has so preoccupied the church, has been on the whole, he says, "a disastrous misunderstanding." The Reformation, specifically Luther, briefly pointed towards the need to break through this antithesis, but was quickly subsumed by it.

Brunner's theology is incarnational and relational. "In Jesus Christ, God reveals himself as the God who approaches man, the God who because his nature is love wills that man answer him in love - in that love which he himself as Creator and Redeemer gives him. The event of the incarnation marks the coming into existence of truth and grace." Truth lies in the meeting of God and the human, a meeting that occurs as each approaches the other, a meeting which, in the Christian understanding, occurs through the incarnation of Jesus Christ. To the extent that a "personal correspondence" between human and God is manifest in such a meeting, truth is made known.

The similarity between Brunner's categories of objective and subjective and my

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categories of cognitive and generative is, I trust, apparent. The objective, like the
cognitive is given and the subjective, like the generative, is open ended and creative.

Objective and subjective form another yin/yang in my spherical *Rubik's Cube*. There are
differences, however, which I think important. The term cognitive points to language or
knowledge that is known, suggesting the *act* of cognition, the participation of the
perceiver in the creation of the characteristic I call cognitive. The term objective
suggests that the quality of "knownness" is a quality of the thing known in itself. What I
am trying to convey is that the cognitive quality is a quality of the transaction between
the thing and the perceiver or speaker, not a quality of either the thing or the perceiver in
themselves. The reason for choosing the term generative to refer to the other part of the
yin/yang, rather than the term subjective, is that the latter word suggests an individualized
creativity, whereas by generative, I want to suggest that there is an interaction of the
individual with the larger environment which produces a new creation. When we speak
of a generative grammar we refer to rules that, potentially, allow for an infinite creativity
in the construction of language. But the novel language thus produced is always
grounded in the possibilities (delimited in the grammar) inherent in that which has gone
before.

More important than the similarity of concepts, however, is the way in which
Brunner resolves the dilemma posed by the inability to find truth through either
approach. In asserting that truth lies in the encounter between God and human, Brunner
emphasizes that encounter is a creative act. The subjective and objective meet each other
as opposing conceptions of truth and truth springs from their mutual engagement. Truth
is the creative outcome of encounter. This encounter affirms each side of the dualism

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while finding a way for both to exist in relationship. It is the tension of continuing relationship that is productive of truth, not the supplanting of thesis and antithesis with a synthesis.

The encounter of subjective and objective truth is not only a yin/yang; it is also a wrestling match between God and Israel, between the angel and Jacob, between the divine and the human. Israel and God continue in relationship and in struggle, but both are changed as a result of the struggle, thus the relationship is always a new creation. The loving act, which is productive of truth, consists in finding the balance that is appropriate to the circumstances of the moment. Relationship implies continuity and the valuing of each of the parties. Therefore the identity of neither is subsumed nor supplanted in the relationship and the possibility exists that the balance which is productive of truth will differ in the next encounter, as the circumstances differ.

The yin/yang concept can help to inform our understanding of the way in which objective and subjective orientations to truth can, when they encounter each other, result in the creation of a new truth. To illustrate this possibility I will briefly refer to a defining moment in American jurisprudence.

In the case of Brown v. Board of Education, the American Supreme Court defined a new moral assensus by allowing subjective and objective orientations to truth to find a new balance that fit the situation better than that which had preceded it. The decision of the Court reversed nearly two centuries of judicial interpretation that had held that “the proposition that all men are created equal” did not apply to men or women who happened to be black. The objective truth is that the drafters of those words, many of
them slaveholders, did not intend that they refer to blacks. That had been affirmed in numerous prior decisions. Yet the subjective truth was that by 1954 a majority of whites, as well as blacks, felt that those words should be applied to all persons, regardless of colour. And so the moral assensus that once existed around the doctrine of “separate but equal” education was transcended. What occurred was an encounter between subjective and objective truth that resulted in, to take Rilke’s words, the Court being “grasped by what we cannot grasp.”

Ronald Dworkin observes that when a ship is at sea and requires repair, it can only be repaired one plank at a time. If every rotten board is removed before replacing any, the ship will sink. That metaphor points toward the limitation in my own metaphor for understanding the struggle for moral assensus. While a spherical Rubik’s Cube of multiple yin/yang’s can be conceived of in the abstract, it can only be examined one plank, or one yin/yang at a time. I find it helpful to begin my consideration of that spherical cube with this examination of Brunner’s concepts of objective and subjective truth for two reasons. First, it introduces another yin/yang that is a component of the spherical cube. By examining it, our understanding of the inter-relatedness of similar yin/yangs is furthered. Secondly, Brunner holds the position that objective and subjective truth are connected by a tension that is resolved when it is understood as constitutive of

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28 I do not mean to equate the Constitution of the United States and the Declaration of Independence with the divine, a tendency which has led at least one American judge to suggest that for some “Law” has attained the status of a modern religion. (John Simonett, “Meditations on the Limits of the Law”) Without locating the higher truth, my point here is that it grasps us through an encounter with the reality of racism and the meaning of “humanity” which transcends objective and subjective approaches to truth.
29 Ronald Dworkin, Law’s Empire.
the relationship of God's loving encounter with humankind. This understanding of the divine/human relationship accords with my own understanding of what we can know of its nature, especially as it is revealed in the story of Jacob wrestling with the angel at the river Jabbok.

The Yin/Yang Theme in William Luijpen's Phenomenology of Natural Law

We have grounded the yin/yang concept by examining how it can inform our understanding of truth as creative encounter between subjective and objective and by considering how that bears similarities with the encounter of the human and divine. Both the cognitive/generative and the subjective/objective yin/yangs are continuous processes wherein the two forces or entities that encounter each other are productive of something beyond each. Without either being supplanted or subsumed each is changed.

I now want to move to another forum, that of legal philosophy. This discussion is an examination of another facet of the spherical Rubik's Cube which represents all of the yin/yangs that are active in the social task of struggling toward moral assensus.

William Luijpen considers the objective and subjective trends of thought as possibilities for understanding the origins of the consciousness of right (justice) which underlies the legal order. He summarizes his conclusion that neither is adequate to the task by saying "Theories that endeavour to explain the origin of the legal order exclusively 'from above' [objective theories] or 'from below' [subjective theories] fail precisely because of their exclusivism. This exclusivism is overcome in existential phenomenology." 30 By exclusivism, Luijpen is referring to the inevitable distortion of

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30 William Luijpen, Phenomenology of Natural Law p.59

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truth, which results if either approach is taken by itself. The objective account becomes simply a mirror of actual conditions, that which exists. And the subjective account treats truth as psychologically derived and thus entirely individual. These criticisms are similar to those of Brunner. If we are to understand the origin of the consciousness of right, then both objective and subjective perspectives must be part of the explanation. Luijpen goes on to develop an account which does just that.

Before setting out his resolution, grounded in existential phenomenology, Luijpen considers the possibility of a religious origin. Of the several theologians he considers, he comes closest to being persuaded by Brunner. It is not Brunner's resolution of what I have called the yin/yang of objective and subjective that Luijpen considers, but his conception of justice as "the disposition to respect in one's actions an order transcending man, an 'order of belonging.'" Brunner grounds the 'order of belonging' in the 'order of the Creator.' Justice, the system of rights that the legal order imperfectly attempts to embody, is derived from human belonging to God, which is lived out as human belonging to each other. Justice is constituted by the relationships that God has ordained for humans, the relationship of human to God and the relationship of human to human.

Luijpen's reservations about Brunner's position are centred on the latter's reliance on revelation as the source of human knowledge about the content of the 'divine demands of justice' and his claim that they can be enumerated. If divine revelation is the source of the concrete content of the concept of justice then "Right and justice are entirely

31 Luijpen p. 80
32 Note the connection between this account of the origin of justice in the Creator and Milner Ball’s understanding of law as grounded in the biblical beginning (see discussion in Chapter 5).

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Christocentric," which leads inevitably to a 'fanatical confusion of church and state.'

What attracts Luijpen in Brunner is the relationality implicit in the idea that justice has its origin in an "order of belonging". He goes on to consider and reject the Thomist approach to the matter as flawed by its essentialism. An understanding of objectivity as a reality 'isolated' from the subject, the idealism of Plato, led Thomists to locate 'truth in itself' (objective or essential truth) in the mind of God. Inevitably, claims to have discerned 'truth in itself' absolutize truth. Truth is whatever it is determined to be by its pious possessor. Again the danger arises of a 'fanatical confusion of church and state.'

Luijpen goes to some length to come to the claim that "phenomenology rejects the term 'in itself'" or objectivism understood as essentialism. He makes clear that this rejection is "only and exclusively a rejection of being that is not a term of encounter."

Rather, he asserts "Phenomenology understands philosophy not as a reflection on a pre-existing truth, but, like art, the bringing about of a truth." The 'bringing about' quality of the reflection on truth points to truth as in development within human community.

That development takes place through human encounter. It is a process not of discerning what the divine has disclosed only partially or discovering the nature of the essence located in an ideal and ultimately unknowable 'reality beyond reality,' but of discerning "a mode of [human] being together with others in the world."

Being is an encounter because for humankind "existence is co-existence." And so, as Luijpen puts it in the title of his sixth chapter, "Justice [is] an anthropological form of co-existence." To attain common freedom from fear of the Hobbesian wolfish

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33 Luijpen p.84, quoting Jaques Ellul
34 These quotations draw on Luijpen p. 141-145 unless otherwise cited.

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potential that is ever present in humans, we must live for the other in a group. It is that
impetus to community that 'is the beginning of humanity' (quoting Sartre). It is in such
'merging groups' that intersubjectivity originates. And the recognition of human
intersubjectivity is the origin of the consciousness of right or justice. Because the
authentic human self requires that the subject encounter the other, that is - participate
inter-subjectively in the group, a consciousness of the rights of self and others is
necessary to order those inter-subjective relationships. Consciousness of the rights, or at
least of the need for recognition of rights, is not enough. That consciousness must find
expression in law, else every encounter would be consumed with defining the terms of
encounter. Laws are rules of the game. Existence, like chess or baseball, requires rules
if the game is to be played at all.

This summary of Luijpen's philosophy of law cannot capture all of his argument.
My intention in presenting it was first to provide another perspective on the
objective/subjective yin/yang, one that rejects Brunner's theological or Christological
characterization of the encounter, but which resolves the dead end of objectivism and
subjectivism by themselves in a similar manner. The resolution emerges as the two are
held in creative tension. Luijpen rejects the notion of an essentialist objectivity. His
claim is that pure essence is a non-category. In terms of the yin/yang symbol essentialist
thought fails to recognize that objectivism contains a point of subjectivism. Luijpen's
resolution is to reject essentialism and propose that the nature of being is relational and
so truth is found in the relation of the objective and the subjective approaches. That
encounter is possible because both objectivism and subjectivism contain the other.

35 William Luijpen, quoting Merleau-Ponty at p. 141, note 103.
My second reason for presenting Luijpen’s philosophy of law is that it serves as a background for the discussion that follows. I share his view that “in and through the legal order humanity is, as it were, materialized.” That is, law is a necessary component of the environment in which humans exist, if they are to exist at all. Luijpen provides a philosophical explication of that claim. In the remainder of this chapter I will suggest that there is, and always has been, embedded within the legal system a yin/yang that is essential if law is to fulfill in the least measure its task of ordering society.

The yin/yang symbol is helpful in understanding the nature of the legal system as constituted by the creative tension of cognitive and generative orientations toward law. Various writers have put forward this pairing under various names: Eisenberg speaks of “text based law” and “generative law.” Dworkin speaks of the “plain fact” approach to a theory of law and an “interpretive” approach. Philosophers of law most often use the terms “positive law” and “natural law.” I do not suggest that all of these terms are subsumed under my labels of cognitive and generative. In each case the various perspectives offer different points of emphasis and nuances of interpretation. What I am suggesting is that the similarities of the pairings discussed provide some confirmation that the human way of knowing involves both cognitive and generative inclinations. When we consider law, therefore, it is unsurprising that there is a tension between understanding it as an object to be known or a subject to be grown.

36 William Luijpen, p. 221
37 Melvin Eisenberg, The Nature of the Common Law.
Legal positivists maintain that the law is simply that which the sovereign speaks. The one who has the power to enforce the law is the one who makes the law, and looking for justice, pre-existing rights or any ground for law in principle is fruitless. Oliver Wendell Holmes put it most baldly. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."\(^{39}\) Natural law theorists on the other hand hold that there is a law above the law, a law grounded either in God or in a social contract that is a necessary (though hypothetical) predicate to human society or in a sense of justice that is inherent in our humanness. John Murray puts it this way: "to inquire what natural law is, means to inquire, on the one hand, what the human mind is and what it can know, and on the other hand, what human society is and to what ends it should work."\(^{40}\)

Those who claim that the law is either positivist or natural criticize the opposing view with some justification. Positivism ultimately fails as it puts no brake on the sovereign and so the pronouncements of Adolf Hitler cannot be differentiated from the deliberations of a democratically elected parliament. Law as power or will accepts what the sovereign says as law, even if it leads to abhorrent results, because there is no normative ground against which to test the sovereign's will.

Natural law, on the other hand, is criticized on one of two bases. In the first case, if its origin is in the divine, then it is really not so different from positivism. The sovereign simply claims that whatever he or she wishes the law to be is divinely inspired. There is some check on the sovereign, however, in that others may claim a

\(^{38}\) Ronald Dworkin *Law's Empire.*
\(^{39}\) Oliver Wendell Holmes, "The Path of the Law," p. 9
different interpretation of the divine will. Claims opposed to the will of the sovereign can find some grounding in the religious traditions of the society. There is thus at least the possibility that the people will rise up against the sovereign if they are persuaded that he or she is acting contrary to God's will.

In the second instance natural law theories not grounded in religious belief may seek to ground the law in an inherent notion of justice, a concept of right that is claimed to be universal. Alternatively they may be grounded in a notion of social contract or first principle from which law is derived. The criticism here is that such grounds are insufficiently solid. Natural law theory, taken to its extreme, is flawed because it is open to becoming simply the choice of the individual exercising his or her free will - there is no compelling challenge to be made on the basis of notions of justice or right, because untrammeled individual free will means that one person has no basis for challenging what another claims is her or his concept of justice and right.

Luijpen resolves the positive/natural law dualism by recognizing that the two are in yin/yang relationship, to use my terminology. If law is the way in which humanity is made material, and if authentic humanity requires that we adopt an attitude of love toward one another, then law's purpose is to create the minimum conditions for love to thrive. Recognizing that human beings are social, that we are interconnected, means that it is a mistake to think that the individual free will can decide what is just or right without reference to the rights of others. In other words, when it is recognized that the nature of being human is to be interconnected, then that intersubjectivity requires that justice which seeks, through continuous creative interaction, to embody in law the

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40 John Courtney Murray, "We hold these truths," p.27
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minimum conditions for love. This is the ground of natural law. The law, however, is expressed and experienced primarily as positive, as the body of statutes and case law that we encounter in the courts and that we accept as directing our behaviour on a day to day basis. The positive law is not the law, but it is the way in which we know or the vehicle through which we discover the content of the natural law. The natural law, setting the minimum conditions for love which change with time and circumstance, is open-ended and always re-examining itself and thus the positive law is similarly open to re-interpretation and change. A nation-state's constitution, the ultimate national law, is not a simple text to be applied by plain language reading, but a generative grammar to inform and guide the re-interpretation of past legal conversation as it is applied to the present and projected into the unknown future. In similar fashion the Bible is understood as a text through which God is revealed. Only strict fundamentalist interpreters hold that the Bible is revelation in itself.

The orientations toward law that I refer to in the cognitive and generative yin/yang are in creative relationship. The yin/yang has manifested itself in the common-law traditions of North America in the relationship of law and equity, which has a long history in jurisprudence. When law and equity are linked together in a yin/yang relationship "law" is understood as that orientation toward the law that seeks to limit the

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41 From the perspective of social theory Roberto Ungar notes that positive law is a development that occurs as the community reaches a stage where the level of social interconnection is stretched to the point that the shared understanding must be codified in order to be sure that all are 'singing from the same songsheet.' “Positive law remains superfluous as long as there is a closely held communion of reciprocal expectations, based on a shared view of right and wrong. In this setting the normative order will not surface as formulated rules; indeed, it may remain almost entirely below the threshold of explicit statement and conscious understanding.” Roberto Ungar, Law in Modern

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discretion of the decision-maker and to enact or articulate the law with maximum clarity. In this context we can say law is the legalistic or literalistic orientation. "Equity" in this context is that orientation toward the law that allows to the decision-maker a greater range of discretion, looking beyond the text (whether statute or the principle derived from previous cases) for other principles that may support a decision that deviates from the narrowest interpretation. I have characterized "law" and "equity" in terms nearly synonymous with those that I understand by the words cognitive and generative. That understanding is too narrow to capture all of what "law" and "equity" mean within our legal system. I am pointing to a cognitive and generative orientation respectively within the "legal" and "equitable" not characterizing them as equivalent terms. I will return to this discussion of law and equity in Chapter Five.

Moral Assensus and the need to Rebalance the Yin/Yang of Law
A Restatement of the Theme

The moral assensus, which I claim is necessary in an empathetically ordered society, clearly cannot be embodied in any legal code. The spherical Rubik's cube is best imaged as swirling in constant motion, as it is on the Website from which it was taken. This suggests the impossibility of capturing assensus in a static text. Yet moral assensus has a great deal to do with law. The more one moves toward an understanding of law which comprehends the metaphors of literature, theatre and interpretation which I will explore in Chapter Five, and away from a positivistic "rules of the game" notion, the closer one comes to lifting law to that transcendence where it becomes interiorized conformity with God's desire for all creation. Moral assensus is then transmogrified into

Society p. 60

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conformity with God’s desire for all creation. Moral assensus is then transmogrified into universal affirmation of truth. It is my belief that the law of human societies is always in need of redemption and that this is particularly so in the face of the instrumentalism and positivism which have rendered it extremely susceptible to the manipulations of the powerful in our day. This redemption is possible through the merging of law and moral assensus which is the promise of God through the prophet Jeremiah, given in the words, “I will put my law within them, and I will write it on their hearts; and I will be their God, and they shall be my people.”

The fulfillment of God’s law that Christ promised cannot be separated from the realm of God, which he also promised. That the promise, despite struggles and setbacks, is in process of fulfillment is affirmed when we observe, as Timothy Gorringe does, that

[the totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own. This is the collective or common consciousness (conscience collective). It does not change with every generation, but links successive generations to one another. The values of this collective consciousness are symbolized in laws.

The “common consciousness” or moral assensus that can be discerned in human community and the continuing human effort to symbolize it through a system of law coherent with the traditions and aspirations of the human community and consonant with God’s desire for the good of creation provide confirmation of that promise that inspires the continuing effort to work toward its fulfillment.

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42 Jeremiah 31: 33
43 Timothy Gorringe, God’s Just Vengeance, p.54
Roberto Ungar puts it this way:

"The search for this latent and living law - not the law of prescriptive rules or of bureaucratic polices, but the elementary code of human interaction - has been the staple of the lawyer's art wherever this art was practiced with most depth and skill. What united the great Islamic 'ulama', the Roman jurisconsults, and the English common lawyers was the sense they shared that the law, rather than being made chiefly by judges and princes, was already present in society itself. Throughout history there has been a bond between the legal profession and the search for an order inherent in social life. The existence of this bond suggests that the lawyer's insight, which preceded the advent of the legal order, can survive its decline."

To this I would only add, and here I am paraphrasing James White, "In the world defined by [Ungar], who would not be a lawyer?"

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44 Roberto Ungar, *Law in Modern Society*, p. 242
45 James Boyd White, "Judicial Criticism" at p. 867
Chapter 1 - Appendix

**Cognitive Orientations**

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**Apodictic Language**

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**Some traditional Yin/Yang pairs**

**YIN**

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**YANG**
Chapter Two - The Introduction of Alternative Dispute Resolution to the United Church of Canada

Historical Background to the Introduction of ADR

This chapter offers a look at how the United Church of Canada has dealt with conflict during its 75 year history. The perspective I will take is not a survey across the breadth of the denomination but, an examination of the mechanisms embodied in the Church’s operational document, the Manual. In the previous chapter I suggested that it is helpful in understanding conflict to keep in mind the yin/yang relationship of cognitive and generative orientations toward legal and ethical disputes. Just as formalism and the positivistic approach to law waxes as flexibility and the exercise of discernment wane; so it is, I shall attempt to demonstrate, with approaches to disputes internal to institutions or organizations, if the experience of the United Church can be taken as typical.

Under the influence of a cognitive approach disputes are conceived of as conflicts between that which is right and that which is wrong. Thus conceived, disputes require an authoritative determination which will end the uncertainty. The party in the wrong is then expected to acquiesce in the decision. From the generative orientation, conflict can be understood as primarily an issue having to do with relationships. Cognitive disagreements are not ruled out in such an understanding, but conflict, it is recognized, is not resolved so simply as by a decision about who is right and who is wrong. In this approach, the community is prepared to set aside or live with cognitive disagreement, if that can be done with integrity, in order to maintain the relationships which have been disrupted by the conflict. A generative approach also invites consideration of the possibility that there is no substantive disagreement at the heart of much (though not all) conflict. Rather, conflict is seen as a rupture in relationship that may have little to do with the presenting issue. This is frequently the case in congregational disputes where disagreements require the peeling away of many layers in order to discover the personality and power issues that lie at their heart.
Dealing with conflict, one might expect, should be the life-blood of the United Church of Canada, given that it is constituted by three founding denominations which came together through a long process of reconciling or at least learning to live with differences in theology and ecclesiology. From its beginnings in 1925 until the General Council of 1982, however, the United Church’s procedures for dealing with disputes embodied the adversarial model of the secular culture, a model which the Church’s predecessor Protestant denominations and the Roman Catholic Church which preceded them, had embraced and even helped to develop.¹

The United Church Manual of 1928 provided in s.144 that a member or minister must lay a charge if he or she was aware of any matter “which is a proper ground of discipline.” No other person was permitted to lay a charge unless “a scandal [should] arise,” in which case the session of a congregation or a presbytery may investigate and lay a charge. The Manual of 1981 contained a similar provision (s.351), although the duty of individuals to lay a charge had been eliminated. The response to misconduct was still, however, an investigation and the laying of charges. In the event that charges were laid, and the respondent did not admit them, the Manual went on to provide for a trial. The Manual provided no alternatives to this process of charge and trial for addressing disagreements or disputes.

Although no centralized records were kept, the making of only minor changes in the discipline policy suggests that during the first 50 or so years of its existence the United Church was not devoting much of its energy to the laying of charges and the conduct of trials. A significant volume of such “litigation” would surely have led to the development of less resource intensive ways to address disputes. By the late 1970’s, however, there was a recognition that church discipline was a growing concern, and that

¹ See Harold Berman, *Law and Revolution*
the existing procedures were inadequate. At a minimum they were inadequate in providing procedural guidelines for the conduct of investigations and trials. The content of "charges" and what constituted "a proper ground of discipline" were undefined (as they remain). More substantially though, the structure of charges and trials was being viewed within the Church as inappropriate in some, if not all, situations of internal conflict. An adversarial model assumes a cognitively identifiable breach of generally recognized rules of belief and behaviour. Trials are inappropriate ways of dealing with conflict that is widespread in a congregation or presbytery. And the device of charges requires that conflict be characterized as "win-lose," rather than allowing for the recognition of mutual responsibility.

Informal Hearings - a first step

The Executive of General Council, in April 1979, responding to these types of concerns identified through various petitions it had received and through the report of a Sessional Committee of the 1977 General Council, appointed a Task Force on Appeals with terms of reference that provided for the design of procedures to be used in the "exercise of pastoral care and discipline and related appeals." There was a concern expressed in the terms of reference to balance "adequate pastoral concern and justice for the persons involved and the well being of the Church." The task force named was chaired by Reverend Bill Phipps, a lawyer as well as a minister and subsequently moderator of the United Church (1997-2000).

The Task Force presented its report in 1981 to the General Council Executive in the form of draft amendments to the Manual which laid out a three stage procedure for the resolution of a "difficulty, dispute, grievance or problem." The first stage urged the parties in conflict to meet together privately and attempt to work out their differences.
The Task Group indicated that its “primary assumption” was that most disputes would be resolved at this stage. Failing that, however, an informal hearing process was established. This process provided that a committee of three to five persons would be appointed to sit down with the persons in dispute and in an informal and confidential manner seek to resolve the dispute. Recalling his hopes for the process Phipps noted that he thought of the role of the committee as somewhat like a counselor. While not intended to provide therapy for the parties, the Task Group expected the committee to create an atmosphere of openness and trust in which the parties could move towards reconciliation of their differences, rather than maintaining a win-lose posture.

It is worth mentioning the historical context of this innovation. The 1960s and '70s had seen a great flowering of T-groups and other forms of group therapy. These practices were not restricted to persons suffering from 'mental illness' but, were in many cases primarily intended for those who sought to develop self awareness and personal fulfillment. Informal hearings, where the committee had the latitude to set its own procedure, offered the opportunity to address conflict which took from group therapy the approach of using confidentiality in creating an environment of safety and openness where the posturing and formal rules of the courtroom could be put aside and the real issues between the parties identified and addressed. Alternative Dispute Resolution and mediation (outside of the labour relations field) were not yet a significant presence in Canadian society. It would be misleading to say that the “talking it through” mindset of the Task Group in suggesting the informal hearing process anticipated that it would amount to a therapy session, or to suggest that this process anticipated the introduction of ADR in any linear sense. But it is fair to claim that the informal hearing process is evidence of the desire within the church to provide means for resolving conflict which

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2 Interview with Bill Phipps, June 19, 2000
are collaborative rather than adversarial. This desire reflects an awareness that the adversarial system is not always consonant with the Church’s sense of doing or seeking justice. And it is this same desire and awareness that continued to be a factor in the Church’s approach to conflict over the next twenty years.

Phipp’s and the task group rightly recognized that the informal hearing process could not function without the introduction of a formal hearing process as well. In other words the collaborative approach cannot be the only option, if for no other reason than that in some cases one or more of the parties will not be willing to collaborate. In those situations a final decision must be made by someone other than the parties.

The informal hearing process appears to have had a still birth. I could discover no one who could point to an instance of an informal hearing that achieved the objective of a resolution of conflict. Phipp’s pointed to the increasing litigiousness of our society, which certainly manifested itself in the church as a possible reason for this failure. The formal hearing process, with the rules of evidence and the protections of natural justice combined with the familiarity of its cognitive orientation to the delineation of rights and wrongs made the adversarial process more attractive for most disputants. The sketchy nature of the Manual’s outline of the informal hearing procedure left the hoped for nature of the proceedings unclear. Without a considerable effort at education, which did not occur, it is not surprising that many readers did not discern the intention to create an atmosphere of trust and openness. As a lawyer encountering the informal hearing provisions of the Manual my own first impression was that it amounted to a pre-trial, an opportunity to agree on the evidence and to focus the issues, with only a secondary intent to explore settlement options. The dramatic shift away from the adversarial system which had been hoped for would require a clearer articulation.
Congregational Consultants - another response to conflict

During the same time period that the Task Group was preparing its recommendation an initiative was introduced through the Division of Mission in Canada that also sought to provide means for congregations to address conflict in a manner other than the adversarial, a manner more consonant with the gospel’s call to peacemaking. Through the Officer for Congregational Support (Rural) in the Division of Mission in Canada a program was instituted which came to be called Congregational Support Consultants³. Each Conference was invited to appoint two or three persons (virtually all of whom were ordered ministers) willing to serve for up to two weeks each year within a congregation which required assistance in dealing with conflict or other issues affecting its life and well being. In return for volunteering, the Consultants received two weeks of education each year in congregational dynamics, conflict resolution and related subjects from veterans in the field such as Speed Leas and Loren Mead. One such consultant described their role as a combination of Conflict Resolution Facilitator and Intentional Interim Minister.⁴

The program operated for some ten years, petering out by the late 1980’s “for lack of interest,” or “due to financial cutbacks,” or perhaps both. The consultants may have been underused, but some good results were reported. One person involved with the program cited a lack of support from some Conferences, which simply didn’t appoint consultants or didn’t call on those that had been appointed, as a reason for the program’s demise. Regardless of the reason for that demise, the effort to implement such a program provides evidence of an awareness within the Church of a need for congregational support in many areas, one significant area being in dealing with conflict. The desire to

³ Interview with Morris Bartlett, June, 2000
⁴ Interview with Gordon Hume, June, 2000
find alternatives to the adversarial model, alternatives that recognize the systemic complexities of congregational conflict as well as the injustice that can result from resort to a trial setting in all cases, is demonstrated by this initiative.  

The Introduction of ADR in 1997

In the hope that a recommendation for the 1994 General Council about a new conflict resolution policy could be generated, General Council Executive gave permission for a consultation to be held in the early 1990's. The impetus, felt by the General Secretary of the General Council in the form of pressure from Conference Executive Secretaries, for seeking a new policy was based on a number of factors. The aftermath of the 1988 decision to make explicit the policy that homosexuality was not a bar to ordination had resulted in increased conflict in the United Church and a consequent recognition that neither the procedures nor the ethos of the Church were adequate for addressing the significant levels of conflict that surfaced. The informal hearing process was increasingly recognized as an inadequate response to conflict because it was so seldom resorted to. And an awareness of the rise in the use of ADR in Canadian society outside the church also contributed to the desire to look for another way. Other priorities intervened and it was not until after that General Council that a task group was formed.

At the 1992 General Council a policy addressing Sexual Abuse and Clergy Misconduct had been adopted. This policy did not provide for mediation or alternative

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5 Interview with Peter MacKellar, June, 2000
6 Interview with Virginia Coleman, June 15, 2000 and report of Bob Mills for Conference Executive Secretaries to General Council Executive, March 22-25, 1994, GC 229-231.

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dispute resolution and one of the questions raised in considering a conflict resolution policy was whether ADR should become part of the Sexual Abuse Policy. At a consultation of staff and volunteers working with the Sexual Abuse Policy held in 1995 concerns about attempting to mediate in situations where there was an imbalance of power, which is the case in virtually all instances of sexual abuse, led to the recommendation that mediation not become part of the Sexual Abuse Policy. Those participating in the consultation supported the initiative to introduce ADR into other types of conflict in the Church and left open the possibility of making it part of the Sexual Abuse Policy when more mediation experience had been developed.

The caution exercised in not introducing ADR into the Sexual Abuse Policy provides an instance of a point that needs to be emphasized. In my discussion of the role of mediation and other collaborative approaches to addressing disputes I am not presenting ADR as a panacea for responding to every conflict and every rupture in relationships. The power of the yin/yang image is that it suggests balancing opposites is the way to conceive of ordering our social relations. We fall into error if we propose that either yin or yang, cognitive or generative, adjudicative or collaborative is the only direction we should follow. In this work I will spend more time examining the positive possibilities of ADR because generative approaches to conflict are as yet still underdeveloped in our society. This focus should not, however, be taken as a claim that ADR should entirely displace adjudicative processes, only that we need to find a more appropriate balance of the two approaches. In Chapter 5 I will discuss some of the literature which critiques the introduction of ADR into the legal system and present polarity management as an analytic tool which discloses both the positive and negative potential of cognitive and generative approaches. Polarity management also provides a

7 Interview with Joan McConnell, June 2000.
methodology for understanding when and how to move between the poles with an intentionality which can maximize the positive potential of each.

One of the themes of the critique of ADR is that mediating processes presume an equality of bargaining power. In a case of sexual abuse the imbalance of power is a major component of the conflict. Mediating processes which require the abused and abuser to face each other and negotiate a resolution to an offense in which one party is innocent is itself abusive, or a continuation of abuse. ADR processes are not restricted to party-party or face to face mediations, however. In situations of sexual abuse a process which empowers the victim and constrains the power of the offender can in some cases provide a sufficient balance of power. This might be accomplished by providing the victim with an advocate or with support persons, by conducting the process in a way that includes community participation, by a mediation that involves no face to face meeting or by a reconciling meeting well after the church or the state has tried and convicted the offender. There will always be some cases, however, where the offender denies responsibility or is not open to the effort at reconciliation, or where the victim's vulnerability cannot be compensated for or overcome. In such cases only an adjudicative process will be appropriate and the institution (or the state) must assume, on behalf of the victim, the role of being a party to the offense.8

A task group was formed to consider the possibilities of an ADR policy for the church.9 The group met in November of 199610 and sketched out what would become

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8 See Desmond Ellis, “Safety, Equity and Human Agency: Contributions of Divorce Mediation” which presents empirical research showing women achieve better outcomes, including greater safety, when they resort to mediation, provided mediators are trained and skilled in addressing safety and equity concerns.
9 Membership included Cynthia Gunn, legal counsel to the General Council, John Hamilton, a lawyer who as an active layperson had provided legal services to the church for many years, Marilou Reeve, a lawyer and mediator, Roslyn Campbell, a minister and lawyer serving as Executive Secretary to Hamilton Conference and Jamie Scott, a
the policy recommended to and adopted by the General Council of 1997. The task
group’s focus was on mediation as the primary tool for addressing disputes. Mediation is
one of the most potent of the methodologies in the ADR tool-kit. It provides a way to
focus the parties on the issues in dispute, rather than on the personalities and their
positions. Mediation is effective in identifying and clarifying issues, then helping the
parties to create innovative and mutual solutions. The task group did recognize that
conflict within the church often incorporates systemic features. Addressing larger and
more entrenched conflict would in some cases require other processes, such as
community conferencing or similar circle processes, but mediation was anticipated to be
the one most frequently resorted to.\(^{11}\) It was in recognition of the wider range of
methodologies which would be employed, however, that the term Conflict Resolution
Facilitator was chosen in preference to Mediator in describing the persons who would be
trained in delivering the new policy.

The task group also recognized that Conflict Resolution Facilitators would need
to serve an educational function in addition to their primary role as intervenors in critical
conflict situations. The longer term objective would be to enable congregations to
resolve disputes without the need to call on an outside resource at all. In the shorter term
it was recognized that education of the wider church would make CRFs more effective.
In situations where they were called into a congregation which already had some
exposure to non-adversarial ways of understanding and working with conflict CRFs
would be able to assume at least a preliminary understanding of what is a very different

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orientation towards conflict. To begin that educational task in the midst of a highly-charged conflict increases the challenge a CRF faces.

The report of the task group which was adopted by the General Council of 1997 recommended a process guided by eight principles:

1) holism - responding to all of the needs of parties in conflict.
2) inclusivity - attending to the interests of the community as well as those of the immediate parties.
3) healing - re-establishing right relationship and balance, not punishment.
4) fairness - attending to the empowerment, dignity and respect of all parties, ensuring that there are no losers.
5) problem-solving - focus on resolution not blaming or scapegoating.
6) accountability - for harm done.
7) justice - addressing needs of all affected and seeking agreement of all to resolution.
8) love - overwhelming evil with good.

In pursuit of these principles two initiatives were to be undertaken simultaneously. Conflict Resolution Facilitators were to be nominated by each Conference and trained as quickly as possible. The General Council Office would develop and provide a training course in which the focus would “address multi-party dispute resolution and United Church polity issues.” Nominees would be required to have completed some training in mediation or other ADR methodologies before attending. The second initiative was to develop and implement strategies to raise awareness about both the new policy and about conflict resolution in general.12

The report also set out a draft model for dispute resolution. The process was to be initiated by a complaint being filed in writing with the court of the Church having oversight of the individual or body which was the object of the complaint. The process contemplates a complaint which can be reduced to "brief details of the conflict," and which can name persons and dates. A Conflict Resolution Facilitator will then be appointed to first diagnose the situation and then to recommend either that no action be taken, or that a particular form of conflict resolution be undertaken. The parties are required to participate in good faith, thus the process is mandatory. ADR must be tried before a party can proceed to a formal hearing, although 'tried' may mean no more than participating in the diagnostic stage.

The draft process provided for timelines in an effort to ensure that matters proceed expeditiously. It also provided that the CRF was to inquire as to the pastoral care needs of the parties and to make recommendations to the Executive Body of the Court which appointed him or her if such needs were not being met.

Somewhat to the surprise of the task group, rather than refer it back for further study the policy was passed by the General Council in August of 1997 and work began that fall to organize a national training event to which each of the thirteen Conferences was asked to send three persons with the pre-requisite mediation training who could become CRFs. The task group sought to achieve several objectives in the training session: to familiarize participants with the new policy, to build on skills and introduce new skills (particularly in the area of dealing with group conflict), to build a network and sense of cohesion amongst CRFs and to begin developing strategies for raising awareness throughout the Church about ADR and collaborative approaches to conflict. The first training event was held in April of 1998 and a second one was held in June of 1999. Forty-nine persons received the training in total.
About 15 months after the initial training the task group undertook a survey of CRFs and Conference Executive Secretaries in an effort to determine whether the process was being used and if so to what effect. Of eighteen respondent CRFs twelve reported that they had been called on in some capacity at least once. Most importantly, from the viewpoint of the task group, the survey and other less formal feedback indicated that CRFs were often used informally. The call for a CRF frequently came at a point in the conflict where positions would have become more rigid if a written complaint were prepared and thus the policy with its timelines and reporting requirements was not followed. Executive Secretaries reported that the policy and the availability of ADR needed to be more widely publicized and that there was general support for continuing with efforts to do so.

The early and informal use of CRFs was perceived by the task group as a positive development which the formal policy might seem to discourage. Thus a recommendation was made to the General Council of 2000 that the policy be amended to explicitly recognize the role of CRFs in such informal, consultative and purely optional situations13. The recommendation also called for a change in the roll of the CRF in determining whether or not a complaint should proceed. Rather than making a decision that, where ADR is inappropriate, a complaint not proceed, the CRF will return the matter to the executive of the appointing court which may then order a formal hearing or refer the matter to another appropriate decision-making body. The intention is to clarify that the CRF is not judging the merits of a complaint but, rather, is assessing the appropriateness of ADR in responding to it. In the Chapter 3 I will explore in more detail how the ADR process has been operating through an examination of some representative case studies.

13 The recommendation was adopted by General Council, though it only comes into force with the publication of the Record of Proceedings, anticipated in the first half of 2001.
Why ADR? Why now?
An exploration of what the new science can tell us.

From this outline it should be apparent that a shift has been occurring within the United Church over the last twenty years. For the first fifty years of its existence the Church’s formal conflict resolution mechanism was a cognitive structure, that conceived of conflict as an offense or a breach of the rules, as “scandal” or “a proper ground of discipline.” The appropriate response to such an offense was to call the offender to account, and if an admission was not forthcoming, then a trial was to be held and judgment pronounced. It would require research beyond the scope of this project to confirm my suspicion that the starkly positivistic nature of the available process discouraged its being used except in the clearest and most extreme cases. My expectation is that further inquiry would reveal that a culture of conflict avoidance supplemented when necessary by informal and improvised ways to address it developed. Whatever the case, dissatisfaction with the status quo was insufficient to give rise to significant change in the process until the late 1970s. In response to cultural changes (the increase in litigiousness, a new understanding of the role of relationship in conflict and the first glimmers of ADR in the secular society) and a growing sense that a cognitive approach was not always consistent with the Church’s understanding of the gospel call for justice and peace, the Church began to experiment with new approaches to addressing conflict. That experiment is still very much in process as the new ADR policy has not been in place for a sufficient period of time to warrant the claim that the pendulum has reached the end point of this swing towards a generative approach.

It should be noted that the changes to the Manual which introduced informal hearings in 1982 marking the beginning of a shift toward a generative approach to conflict in the Church’s processes, also included a clarification and restatement of the

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cognitive approach as well. The informal hearing process was seen as a complement to, not a replacement for, an adversarial procedure with final dispositive authority. The ADR process introduced in 1997 was similarly conceived of as one way to deal with conflict, not the only way. The task group has expressed the hope that ADR will become the primary way in which conflict is addressed and that formal hearings will be seen as the (seldom used) alternative. But the need for a quasi-judicial decision-maker is recognized, both to serve as an encouragement to use ADR as well as to deal with those cases where ADR is unsuccessful or inappropriate.\textsuperscript{14}

Part of my intention in this paper is to suggest that we can understand the introduction of ADR as a concrete example of a broader cultural shift away from the cognitive orientation of the rationalist/Newtonian/Enlightenment paradigm towards a generative orientation that emphasizes the centrality of relationship in our way of knowing and being, and that looks to the new science for both explanations and metaphors about the nature of existence. I will explore this proposition from a number of perspectives as I proceed. Here I want to point to some features of the development of conflict resolution processes within the United Church as suggestive of this shift. I should underscore the importance of the yin/yang understanding of what I mean by shift. It is not a complete rejection of the cognitive orientation which is occurring, but rather an exploration of the power of the generative and a reassessment of the most helpful circumstances in which to retain the cognitive orientation. Even the most enthusiastic writers about the new science do not discount the usefulness of Newtonian physics in many applications. They simply argue that the earlier expectation that Newtonian physics could explain all physical phenomena has to be set aside and a new quantum or chaos theory introduced, where appropriate, as being more useful. It is a process of

\textsuperscript{14} ADR Task Group Report to General Council, 2000

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re-balancing theories or orientations or paradigms, not a process of creative destruction of world views.15

Outside of the world of science, management theorists have been among the most enthusiastic in exploring the implications of the new science for our understanding of the world. Viewing the United Church from the perspective of organizational theory is thus one way in which we can gain some insight about what the introduction of ADR implies. I am thinking here not of the implications for our theology or ethical understanding or sense of justice, all of which considerations I wish to put on hold for later. Rather I am thinking about what the history I have sketched out above tells us about the functioning view which the Church as an organization has of itself. By functioning view I mean the self perception disclosed by the actions taken by the Church which may differ from the perception that it might claim for itself when asked for an articulation. Perhaps the distinction is no different than saying that the conscious awareness of itself may differ from the unconscious image that is in gestation as the balance within the yin/yang begins to shift.

The feature in the history I have sketched out that I wish to remark on is the apparent frustration of the first two efforts at introducing a new way of dealing with conflict. “When we think of organizations as machines,” Gareth Morgan writes, “we begin to see them as rational enterprises designed and structured to achieve predetermined ends.”16 Morgan continues, “When we talk about organization, we

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15 Sylvia Nasr in A Beautiful Mind (51-52) quotes John D. Davies, a historian of science who wrote of the early twentieth century, “The absolute world of classical Newtonian physics was breaking down...Newton’s laws were not the real universe but one seen through the unreal spectacles of gravity.” Newton’s laws still describe the universe of gravity in which humans in their ordinary lives live and move. But the new physics reveal the partialness of his perspective and also suggest new ways of understanding even the reality in which his laws still operate.

16 Gareth Morgan, Images of Organization, p. 17
usually have in mind a state of orderly relations between clearly defined parts that have some determinate order. Although the image may not be explicit, we are talking about a set of mechanical relations.  

The machine image in its application to an organization is marked by standardization of rules and regulations (drafting a blueprint for the machine), specialization of tasks, standardizing equipment and creating an identifiable and clear chain of command. The organization as machine seeks to enhance planning, coordination and control and achieve reliability, efficiency, precision, clarity, regularity and speed.  

The United Church of Canada came into being at a time when the machine image was the dominant organizational metaphor within the culture. That metaphor informs the structure of the Church in its division into pastoral charges, presbyteries, conferences and General Council, each with responsibilities, authority and duties delineated in the blueprints provided by the Basis of Union and the Manual. The General Council is divided into divisions - Mission in Canada, World Outreach, Ministry Personnel and Education - which also reflect the influence of the machine metaphor. Through rules and procedures the Church pursues the objectives of planning and coordination, if not control, of all its various constituent parts. It would be carrying the metaphor too far to claim that the United Church ever sought to establish a clear chain of command culminating in a central authority, but it certainly seeks to foster communication throughout the body to enable the pursuit of shared objectives.  

I do not claim that the machine metaphor as it has been lived out by the United Church has resulted in an organization that is as machine-like as the Prussian army of Fredrick the Great, or the business corporation of the 1950's Organization Man. But this metaphor which is such a feature of our cultural understanding of organization has  

17 Morgan p.19  
18 Morgan p.22-24
permeated the institution of the Church and structured the way in which the Church has conceived of itself and it’s possibilities for organizing itself.

Barbara Brown Taylor remarks\(^{19}\) that “We human beings tend to base our worldviews on the prevailing physics of the day.” The machine metaphor is, of course, derived from the same Enlightenment understanding of the world which was so indebted to Newtonian physics. And so as “our understanding of how the world works” is changing due in significant part to the insights of the new science\(^ {20}\), our understanding of how our institutions are and should be structured is up for revision. New metaphors of organization are beginning to replace the machine\(^ {21}\).

The discipline process embodied in the Manual of the United Church for its first fifty years was one exemplification of the machine metaphor. The Manual conceived of discipline as a response to an aberrant individual. Discipline was a mechanical process to deal with a part of the machine which had ceased to perform its proper function. The response to a malfunctioning component part is either to repair it, returning it to its previous condition by an act of contrition and repentance, or to expel it and replace it with a new part. That conception underlies the approach which is contained in the Manual from 1928 to 1981.

\(^{19}\) Barbara Brown-Taylor, The Luminous Web p. 49. David R. Johnson remarks in a similar vein, “Law and political philosophy have always drawn on the science of the day for analogies and for insights into the human condition. So it should come as no surprise that new findings by scientists regarding the operation of self-organizing systems may lead to new forms of lawmaking and to new ideas about the relationship between citizens and the state.” “Emergent Law and Order,” (p. 237) in John Clippinger’s The Biology of Business.

\(^{20}\) By “new science” I refer to developments in chaos theory, quantum physics, field theory and our understanding of the human brain. The contours rather than the content of the term are more relevant to my purpose, but I trust both will become more apparent as I return to this discussion from various perspectives throughout the paper.

\(^{21}\) Gareth Morgan explores the metaphors of organism, brain, culture, political system and psychic prison as well as machine in Images of Organization.
Thomas Kuhn\textsuperscript{22} has pointed out that scientific paradigms serve as a way to structure our understanding of how the world works so long as they retain explanatory and predictive power. When we bring to such a paradigmatic theory problems or questions that it cannot accommodate then pressure begins to build towards the development of a new theory. In analogous fashion the metaphors that structure our understanding of the way the world works experience strain as they lose their ability to respond to the needs we ask them to meet. In the United Church the machine metaphor as a way to think of organizational structure has been experiencing challenge for many years. The end of Christendom, the revitalization of congregationalism and the empowerment of the laity have all served to impose strains on the notion of the organization as a machine with a centralized structure of co-ordination if not control. One of the factors at work in the conflict of 1988 relating to the ordination of homosexuals was a resistance in the periphery to actions at the centre (General Council) which was grounded in part in a growing sense of local autonomy that resented what was experienced as an exercise of power by those in control of the bureaucratic structure. That the issue of autonomy was raised by those whose main motivation was homophobia does not render it any less real an issue than does the fact that states rights were raised in the struggles over civil rights for American blacks primarily by those whose primary motivation was racial prejudice.

The introduction of the informal hearing process in 1982 marked one response to the inadequacies of the machine metaphor. The Church was experiencing conflict which could not be accounted for or addressed in a mechanistic fashion. And the informal hearing process offered a new way to conceive of and respond to it. Informal hearings evidenced a recognition of the ambiguity of disputes and the importance of attending to

\textsuperscript{22} Thomas Kuhn, \textit{Structure of Scientific Revolutions}
relationships in resolving them. Clearly, those who introduced the process did not have it explicitly in mind that they were challenging the machine metaphor, or the concept of organizational structure that it stands for. The process of paradigm shift and cultural change doesn’t require such conscious awareness, in fact it is most often only available in hindsight.

The new science provides us with new metaphors for organization and for organizational change. If organizations are chaotic systems, or organisms, then change is not a matter of re-designing component parts, but of re-conceiving networks of relationships. If the conflict resolution process in the Church is not meeting its needs, then a machine-like organization would redesign the process after careful study with the expectation that the new process would ‘get it right’ and that the organization would thereafter function smoothly. To some degree that expectation was apparent in conversation with those who introduced each of the United Church’s three responses to conflict. Peters and Waterman\(^{23}\), however, have identified a less machine-like approach to organizational behaviour. In many cases it is better, they claim, to try an experiment rather than to design a ‘perfect’ solution. “Learning by doing” is the phrase the authors employed to describe an approach to organizational behaviour that recognizes the limitations of the ‘replacement parts’ metaphor and adopts the ‘strange attractors’ approach of chaos theory. In retrospect we can characterize the various approaches taken by the United Church as embodying to some degree the “learning by doing” approach. In each instance there was both an effort to design a new component based on research and experience in other realms but also a recognition that it was important to try something new and not to stall on trying to ensure a perfect design. In this approach, trying

\(^{23}\) Tom Peters and Robert Waterman, *In Search of Excellence*

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something new incorporates a recognition that reassessment and modification are part of the process. The design phase continues into the implementation phase.

The machine metaphor assumes that the organization or the system can be designed as if from a perspective outside of itself. The designer can see all the parts working at their assigned task, evaluate which is malfunctioning and determine how to repair or redesign it in order to attain proper function. Chaos theory and quantum physics provide a metaphor24 for the organization which recognizes that from within the system we don’t have that detached perspective or that ability to design. Heisenberg’s uncertainty principle suggests that when an organization looks at itself, the act of observation changes the organization, and so the effort to take a detached view is impossible25. Better then to make an educated guess at an appropriate response to a malfunctioning component and to monitor the result, for chaos theory suggests that apparently random behaviour, (learning by doing) repeated over and over, will begin to reveal patterns and through the working of “strange attractors” to form into coherent shapes.

The Church’s three initiatives respecting conflict resolution: informal hearings, Congregational Consultants and the 1997 ADR policy, can be understood as three efforts at ‘learning by doing,’ which from the perspective of the new science provide the

24 See Margaret Wheatley, Leadership and the New Science. My development of these metaphorical suggestions is not intended to suggest that the new science provides us with laws of organizational behaviour. Metaphor helps us to structure our thinking and to make sense of our environment, however, we need to remind ourselves that in so doing we are describing how we perceive the functioning and structure of our world, not how it is in an idealized, Platonic sense, nor in a scientifically verifiable Newtonian sense.

25 In The Interaction of Law and Religion Harold Berman makes a similar point, without mentioning Heisenberg though he may well have had him in mind, in saying, “We have learned that when the mind tries to operate wholly independently, when it pretends to stand wholly outside the reality it observes, it breaks down and becomes skeptical even of itself.” p.38
prospect of creating a response, or responses, to conflict which will better meet the needs of the organization. Those needs after all, reflect a broad and unpredictable range of situations of conflict which an organization as machine approach cannot adequately meet. The task group responsible for the 1997 ADR process has evidenced a more organic concept of organization, both in its recognition of the need to change the environment by educating about conflict, and in its ongoing work of recommending amendments to the policy to increase its flexibility and adaptability.

Perhaps the most helpful point of Morgan's work on metaphors in understanding organizations is the invitation to use numerous metaphors, recognizing that each one provides a different perspective, highlighting some features and relationships while failing to give to others their due. The machine metaphor is easily deprecated not because it is unhelpful, but because it has been dominant, which means it has been applied equally in situations where it is both helpful and unhelpful. Alternative metaphors provide us with stimuli to organize ourselves and to act in ways that we simply cannot see if we are restricted to one. We risk losing the benefit of the machine metaphor if we reject it absolutely rather than retain it as one way, but no longer the only way, of seeing.

Esther Dyson provides an interesting metaphor for organization when she invites us to think of it as similar to the immune system of a living organism. We have been inclined to think of bodily images of organization in the church at least since the time of St. Paul. His metaphor for the church with Christ at the head and each member fulfilling an assigned task dependent on specific functional gifts has informed our

26 "However, from the fact that man is aware of his perspectivism it follows that he transcends his perspectivistic approach. By approaching the truth through all kinds of different perspectives, he come constantly closer to the one absolute reality." William Luijpen Phenomenology of Natural Law, p 107.
27 Esther Dyson, "Forward" in John Clippenger ed., The Biology of Business
understanding and certainly contributed to the hierarchical structure of the medieval church and the rigidities of the machine metaphor. Clippenger suggests that in our thinking about organizations we have tended to use the bodily metaphor by focusing on the nervous system, with the brain at the top and the limbs and extremities simply following orders. The key to an effective and efficient organization in such a view is speedy communication along the 'information highway' of the nervous system. This image of the body and the nervous system is, it hardly needs saying, itself informed by the machine metaphor and Newtonian ideas of causation as forces acting on inert matter.

There is another system in the body which Clippenger suggests offers a powerful metaphor for understanding organizations. The immune system consists of numerous agents, immune cells, dispersed throughout the organization or body. Each cell shares an understanding of the expected response in a given range of anticipated events. The system functions, not under the direction of a single head (the brain), but out of a common sense of purpose either inherent in the structure of the components (as in genetic coding of cells) or, as in the organization, inculcated by training. Organizations create an ethos, a shared sense of how its members will behave in interactions with each other and with the outside environment. The immune system metaphor suggests a different way in which an organization can understand its functioning in response to conflict. The nervous system metaphor suggests that what is needed is a centrally imposed coherence. Conflict is to be routed up to the top where the appropriate decision will be made. Such a system requires rules and values treating all similar conflicts in an identical fashion. The immune system metaphor suggests that conflict is to be dealt with at the site where it arises. Any one of a number of agents can facilitate the process and the emphasis is on healing the wound, which may respond better to innovation than to precedent.
The immune system metaphor provides some insight into the nature of the changes which have been introduced into the United Church's approach to conflict over the last twenty years. The charge and trial approach which had existed for the first fifty years, like a nervous system, established a hierarchical structure. The rules of natural justice served as an assumed network of coordination. The Manual presumed the Church shared assumptions about what constituted a scandal, a charge or an offense. The process was tied into the hierarchical structure, with the final decision making authority being located in the Judicial Committee of the General Council. When the rigidities of that structure left it unable to respond to the conflict arising as the environment changed in the 1970s new procedures were introduced, and those procedures reflected (albeit inchoately) a new metaphor of the Church as an organization.

The introduction of informal hearings was an attempt to create immune cells, so to speak. An informal hearing was a site-specific intervention that was conducted under the cloak of confidentiality. Under that cloak the parties and the informal hearing committee had the authority to resolve the issue. One way of understanding the lack of acceptance of this process is to note that it was assumed that anyone who was to be part of an informal hearing committee would be sufficiently immersed in the shared understanding of how to respond to conflict that they could, like an immune cell, carry out the common purpose and address the rupture in the system. Informal hearings, however, relied on volunteers from within the Church, without providing them either with training or with clear procedural direction in the Manual or other documentation. Thus this effort can be likened to creating an immune system which relies on any of the body's cells to respond to disease. While not impossible to imagine, such an immune system could not work without first educating or training each cell (church member) to carry out the expected function.
The Congregational Consultants initiative fits the immune system metaphor even more closely. The consultants were trained to offer appropriate responses and they were chosen primarily from the ranks of clergy, a group that could be expected to have a strongly inculcated sense of the ethos of the organization and to be experienced (from pastoral ministry) in living out that ethos without significant central oversight. That the Congregational Consultants did not become a more sustained response to conflict in the Church may have had to do with the failure to attend to the prevailing nervous-system or machine metaphor. Congregational Consultants were not “creatures of the Manual.” They were created by executive action as quasi-independent contractors. They were to be paid, after an initial consultation, by the congregation in which they were working, or by its presbytery. Yet they were seen as agents of the General Council by at least some Conferences, which made them suspect to those who feared that General Council was operating out of a top-down, machine or nervous-system metaphor. There is irony in this perception, given that Consultants in fact represented an effort to shift away from the machine metaphor. The strength of the perception is evidence of the persistence of the machine metaphor and of the difficulty of changing an organizational metaphor from the centre.

The ADR process of 1997 takes into account each of these issues that served as impediments to the successful implementation of the earlier policies. That statement is not quite accurate in that it implies an identification of the impediments and a conscious decision to take a different approach. My research indicates that there was no such awareness. A machine metaphor assumes such awareness would be communicated to the central decision maker and a new process designed. As best I can determine a more

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28 Initially the Consultants were designated “Associate Secretaries of the Division of Mission in Canada” of the General Council which certainly contributed to that perception. Interview with Gordon Hume, June 2000.

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chaotic metaphor is closer to capturing the reality. In some sense the wheel was 
re-invented by the task group, without any awareness of the Congregational Consultants 
Initiative and with limited awareness of the background to the introduction of the 
informal hearing process. But in a chaotic universe it is recognized that every time the 
wheel is re-invented it looks a little different. It is only after a number of tries that the 
usefulness of roundness becomes apparent.

The ADR process, like the other two initiatives, reflects a shift to an immune 
system metaphor. CRFs are granted considerable discretion in their role. They are 
guided, however, both by the formalities of procedure laid out in the policy document 
and by the shared ethos inculcated through their training. In their response to conflict 
CRFs act in a site specific fashion and it is recognized that creativity is an important part 
of their approach. Like the human immune system, however, the ADR process is not the 
body's sole means of response. It operates in parallel with the nervous system, which is 
the process of formal hearings with their procedural guarantees, appeals and hierarchy of 
accountability.

Perhaps more significantly, the ADR process envisages a gradual shift in the 
culture of the Church as education about how to approach conflict spreads through 
congregations. If this aspect of the process takes hold the Church may move toward the 
situation where every member becomes an immune cell, that is to say, every member has 
the capacity to respond effectively to conflict when it threatens to rupture relationships or 
even the system itself. Such a state of affairs would provide a positive integration of 
conflict into the life of the Church by addressing it at the earliest stage when it represents 
a healthy dialogue of different perspectives. If conflict festers it not only becomes harder 
to address, but the focus shifts from the creative potential of diversity to a single minded 
desire to restore uniformity.
Like the other two initiatives the ADR process is a response from the centre. It may, therefore, encounter, as the Congregational Consultants initiative seems to have, some resistance or lack of buy-in from congregations and their members owing to their perspective that it is another manifestation of the machine metaphor. To the extent that the process is a technical fix to specific instances of conflictual dysfunction this perception is inevitable. The task group and the General Council, in identifying the need for widespread education about the process of dealing with conflict generally have recognized that shifting the metaphor of the organization, helping the Church to reconceive itself, is an important part of their task.

Ronald Heifetz\textsuperscript{29} points out that communities in distress usually seek leadership that promises them a painless resolution and a return to the \textit{status quo ante}. In relatively stable conditions leadership can be quite effective by simply attending to the maintenance of peace and order. When environmental change is such that the status quo cannot be maintained, technical fixes are no longer sufficient, indeed they amount to a form of denial. In such situations, Heifetz suggests, what is required of leadership is to prepare and empower the community to engage in adaptive work, that is, to find the best response to the changed circumstances. The best response is one that is faithful to the tradition, drawing on its core values, but is able to transpose that tradition into the way of functioning that the new environment requires\textsuperscript{30}.

Educating congregations and their members about ADR and conflict management has the potential of doing some of the preparatory adaptive work that the Church must do in adapting to the uncertain environment in which it finds itself. Certainly ADR and education about collaborative approaches to dealing with differences are not a panacea.

\textsuperscript{29} Ronald Heifetz, \textit{Leadership Without Easy Answers} pp. 69-73
\textsuperscript{30} See also the discussion of Ronald Dworkin's interpretive theory of legal development in Chapter 5.
They do, however, offer both the possibility of encouraging the Church to undertake the required adaptive work and of providing it with skills, tools and methodologies which will be helpful in carrying it out.

In an organization that functions under the influence of the machine metaphor it would be difficult if not impossible to suggest that the ADR policy might play a role in leading the Church to the significant work of adapting to the post-Christendom world. ADR would remain a tool in the kit of a relatively small box on the organization chart that is pulled out only to fix a specified type of mechanical breakdown. The previous initiatives of informal hearings and Congregational Consultants may have stalled primarily due to the power of the machine metaphor which so confined them.

ADR has the potential to contribute in a more significant way to the Church’s moving towards the adaptive work it must do, not because its designers were better engineers, but because the environmental and organizational changes which I have been characterizing as shifts in metaphor have better prepared the ground for such an initiative to have an impact. Education about collaborative ways of decision-making in the face of diversity and uncertainty is one way in which the ADR initiative contributes to preparing the Church for adaptive work. The education towards a cultural shift which the ADR task group has identified as part of its responsibility can be accomplished through explicitly educational efforts, resource material, workshops and training events. Conflict interventions also provide an opportunity for such education. Interventions also provide opportunities to refine the theory that is being taught and to see the possibilities and the risks in some of the initiatives that are being promoted. In the next chapter I will examine several case studies with these perspectives in mind.
Chapter Three - Case Studies in the Practice of Alternative Dispute Resolution

Preliminary Remarks

In this chapter I present three case studies constructed from my own experience and that of other Conflict Resolution Facilitators working within the United Church. The three situations illustrate the range of complexity which is to be expected in congregational conflict. I will refer back to these cases in the following chapters, drawing on them to clarify and flesh out some of the theoretical claims I will be making. The elements of the cases essential to understanding the dynamics underlying and influencing the conflict have been taken from actual experience but I have gone to some length to disguise the fact situations to ensure that no participants in the situations feel that confidence has been betrayed. In some instances I have combined elements of two or more different situations.

A further preliminary point needs to be made. The cases are presented both to illustrate the range of conflict situations and also the range of responses or interventions. The interventions employed by the Conflict Resolution Facilitator draw on a number of possibilities and reflect his or her experience and judgment. The cases are not presented as demonstrations of the best possible response but, as I have said, to illustrate the range of possible responses. Interventions are never made in a vacuum. There is a history to the conflict and to the relationship with the supervising court of the church. In every situation participation in ADR is voluntary, but not without an awareness that refusal to participate is likely to result in direct action by the higher court or a formal hearing to resolve a dispute and determine the rights of the parties. Just as in the civil realm ADR is an alternative to the courts or a legislative response to conflict, so it is in the church. While the adversarial system and the adjudicative mind-set are easily caricatured as pharisaic legalism which encourages a combativeness antithetical to the ethos of the church, it is worth remembering both that an authority with the power to pass judgment is firmly rooted in our faith tradition and that in any organization dealing with conflict there...
needs to be a “court of last resort” where claims can that are irresolvable by collaborative means can be finally determined. Whether it be resort to Moses by the people in the wilderness, or to the king by subjects of a feudal lord, or to the Supreme Court of Canada by a refugee claimant, or to the Judicial Committee of the General Council by a member of the United Church, a final adjudicative authority where every person has equal voice before ultimate dispositive authority is necessary to legal systems that seek to balance the need to do justice and our human limitations in doing so.

Apple United Church

The first case study arose in Apple United Church. Two members of a congregation had been involved together in a fund-raising project. The planning had gone well, but in the delivery of the project it became apparent that the two persons had different expectations about how that would happen. Adam, the man in the situation, who was also older, structured the event in such a way that it was his concept that prevailed. Beth, the woman, was disappointed and reported in the mediation session that she had confronted Adam in an assertive but appropriate fashion to say she was angry and hurt by what she took to be his manipulation of the way the event unfolded. Adam claimed not to be aware of or to recall this confrontation.

Some weeks after the event Adam was talking to Sarah, the newly arrived minister and said that he was concerned that Beth and Peter, the recently departed minister, had used some of the funds raised for a project in the church which was primarily of benefit to Peter. The project had no authorization from the board, Adam claimed. He reported to Sarah a conversation with Peter, in which he had asked if the board had authorized using money from the fund-raiser to pay for the lap-top computer Peter had acquired and which Beth, according to Adam, seemed to be the primary user.
Peter’s response was equivocal, but was reported to Sarah as categorical and affirmative. Sarah checked the minutes of board meetings and finding no such authorization thereupon reported the allegation to Presbytery that Peter and Beth had misappropriated funds. Presbytery conducted a review of the situation and completely exonerated Beth and Peter.

Although there were other persons in the situation who had some level of engagement with the conflict, I was asked to mediate with the four parties I have identified. Beth and Adam had fairly clear issues to resolve, Beth wanted to be heard about her dissatisfaction with Adam’s conduct of the fund-raiser and with Adam’s apparent manufacture of a spurious allegation of impropriety which damaged Beth’s reputation. Neither of them expressed a need to address any issues with Sarah, although it was clear that Adam’s triangulation of the minister had damaged Beth’s relationship with her. She had in fact greatly reduced her level of participation in the life of the congregation.

Peter expressed no need for mediation with either Adam or Beth, but he did want to meet with Sarah, with whom he was quite angry because she had instigated the review which he felt was a blot on his name, notwithstanding the exoneration. Sarah agreed to such a meeting. She felt she had acted properly, simply passing on to Presbytery an allegation that had been reported to her, and that Peter had been inappropriate in his expression of anger towards her. Both expressed a desire to have the other apologize and a reluctance to do so themselves.

As Conflict Resolution Facilitator I met with all four individuals one to one and obtained agreement to two sessions of mediation. The first would involve Beth and Adam. The second would involve Peter and Sarah. The possibility of including other persons in a process was discussed but, the parties all reported that the congregation of Apple United was largely unaware of the conflict. The Presbytery review had been
low-key and only a few people involved with church finances were aware it had taken place. The decision was thus made not to extend the circle of involved persons any more widely than these four.

The two mediation sessions were held and followed a pattern which appears to be a fairly standardized approach, judging from my training in various workshops and a review of material from several others. The mediator makes clear to the parties that he or she is a third party, a neutral person, who offers to meet with those in conflict in order to provide a process by which the parties may together create a resolution. The mediator is not called on to judge or to provide solutions. His/her role is to facilitate the parties’ use of a process. The process is open-ended enough that refinements and modifications to suit the needs of the moment are possibilities to which the mediator should be alert.

But in most cases the process is, in outline, as follows. After pre-meeting interviews with the parties to orient them and obtain their consent to proceed, a meeting will take place with both parties during which they will be invited to share their experience of the conflict, to hear the other party’s experience of the conflict and then to brainstorm, without judgment, possible solutions. When all possible solutions have been identified, the parties will be invited to evaluate the possibilities, then craft one that they can agree upon.

While the steps in the process can be enumerated very briefly, the time to follow through with them can be much greater. Some mediators press the parties to move quickly and keep a clear focus on issues relevant to the presenting dispute. My own experience is that there are often issues that may appear unrelated, but which are in fact central to one or both of the parties moving toward resolution and reconciliation.

Adam’s view of the issue in dispute was entirely focused on the allegations of financial indiscretion and the subsequent presbytery review. It was clear that as Beth related in some detail her experience of his behaviour during the fund-raising event itself Adam
thought this was a waste of time. It was important to the dynamics of resolution, however, that Beth, who was more hurt by the earlier incident than the later, experience Adam hearing her story.

Mediators encourage the parties to search out the underlying issues in their conflict and to set aside the positions they have taken and the resolutions that they have in mind as they come into the process. Airing the issues and identifying what each party really needs are critical to moving them toward agreement. Sarah and Peter both came into the mediation session with a strongly held view that the other person should apologize, Sarah for initiating the presbytery investigation, Peter for several angry remarks he had directed at Sarah. Because their positions were so entrenched it was difficult to encourage Peter and Sarah to talk openly about what their needs were. They had difficulty hearing each other as well. When a party is firm in their position they are less ready to speak openly or to listen. As mediator I took each aside privately and encouraged them to share with me at least what the underlying issues were. It was understandably difficult for either to articulate in the other’s presence the degree of hurt they had felt, and in Peter’s case the continuing anxiety he felt about potential repercussions of the investigation for his reputation. In the end the mechanism resorted to was to have each write a statement to the other in which they had agreed to acknowledge something of the feelings of the other party and the connection between their own actions and the other’s feelings. The word apology was to be scrupulously avoided. In the result, however, the word “sorry” slipped into both statements. Before statements were exchanged it was agreed that they would be destroyed after being read.
Blueberry United Church

The situation at Blueberry United Church had some features which might lead one to the conclusion that it was old business and that people should just “get over it.” The Conflict Resolution Facilitator was called in because a committee which had been established nearly two years previously to evaluate alternative Sunday School curricula and make a recommendation was experiencing continuing distress arising out of the fact that the Board had eventually decided to select a curriculum other than the one they recommended. Some members of the committee were nearly inactive in the congregation as a result of this experience, while others still attended regularly, but expressed a real loss of faith in their ministerial staff and the volunteer Sunday School Superintendent. The ministers and Superintendent had arranged several meetings with the committee to try and talk through the differences. Presbytery and Conference had been contacted and meetings had been held with representatives of those courts as well.

The CRF was asked to intervene by a Presbytery official, after the official had suggested such an intervention to the minister. The minister, Marvin, agreed to participate and did so with an active co-operation, but it was clear that his energy for trying to heal relationships with this committee was nearly exhausted. He simply didn’t understand their continuing sense of grievance. The CRF met with Marvin and with Sandra, the staff associate in charge of Christian Education and with the Sunday School Superintendent. She also had lengthy telephone conversations with each of the ten committee members to hear their experience of the matter and to outline a process for addressing the continuing conflict.

The first diagnostic observation of the CRF was that there was a great range of feelings within the committee. Some members were extremely angry at the decision, feeling their work was slighted and that the power structure of the church (the ministry
staff and superintendent and the governing board) had subverted the process to allow the staff to get their own way. Some members were much less angry, but felt a strong loyalty to the group. This dynamic was important to the proposed intervention. For some members the committee had become an important group experience. The intensity of feelings of attachment and the shared sense of grievance and of celebration of their own hard work selecting a curriculum to recommend, had bonded them together in a way that was threatened by resolving the conflict with the ministry staff. Though it was unacknowledged, they were in part resisting the grieving that would come with ending their committee's natural life by finding a new purpose for continued existence, their anger at the ministry staff.

While there was a certain amount of fact clarification needed; in terms of who said what to whom when, and what was meant by what was said, and who had authority to make which decisions, the most important need, in the CRF's view, was for the committee members to have their feelings heard and to leave them behind. They needed a funeral for their grievances and their group. Nothing that was alleged to have occurred would constitute a ground of discipline or a matter of concern about the propriety of the actions of the ministry staff, church board or committee. There seemed to be lots of decisions that were poorly communicated and some where judgments could, in hindsight have been better, but nothing that warranted intervention by a higher court in any sort of supervisory or oversight capacity.

Thus the process that was recommended and agreed to by all parties was intended to give all involved a chance to say what they needed to say, and what they needed other persons to hear. A circle process had been used in a preliminary meeting with the committee alone, whereby a talking stick was passed from person to person and only the person with the stick spoke. Speakers are asked to respond to a question or invitation posed by the CRF as keeper of the circle. For the meeting between the committee and
the ministry staff, including the Superintendent, a circle process was used for an introductory statement by each person, then two chairs were placed in the middle of the circle. All in the circle were invited, on a self-selecting basis, to take one of the chairs, designated the speaker’s chair, and invite another person to take the listener’s chair. The listener’s role was not to respond, challenge or argue with what the speaker said, but simply to hear their statement and to reflect back in their own words that which they heard. The speaker was asked by the CRF if that which was reflected back was what had been said. If so the speaker was invited to hand to the CRF a card which the speaker had prepared earlier on which was written a summary of his or her statement just made to the listener. The CRF did this by asking if the speaker was prepared to let go of that issue with this person. The process had been described to each participant before the meeting and their consent to participate, including consent to sit in the listener’s chair if called upon to do so, obtained.

As the process unfolded most of the participants identified particular persons with whom they felt aggrieved and spoke to them and were willing to let go of their card. One participant did not take the speaker’s chair, but made a prepared statement from where he sat, then left the proceedings about half-way through. One or two of the participants never took either the speaker’s nor the listener’s chair. After several hours all who wanted to speak had done so and the process was closed with prayer.

Cranberry United Church

The conflict at Cranberry United Church was much more widespread and of longer duration than at Blueberry or Apple. Some folks traced it back to a minister who had left more than ten years ago. When that minister, who was well liked by all accounts, left, many people felt that he had breached a commitment to stay longer. The
ill feeling that arose was exacerbated when he persuaded the choir director to join him at his new church upon the incumbent organist there retiring within six months of the minister’s arrival.

More recently there had been congregational stress around a subsequent minister who was perceived as bringing new ideas and a strong social justice orientation to the congregation. Some folks loved this initiative, others were highly distressed. After serving for five years during which conflict was always simmering and sometimes erupted, primarily between the minister and the “old guard” of the congregation, he left. His supporters felt he had been driven out. A period of intentional interim ministry had followed. During that two year interim the minister worked with the congregation to resolve some of their ongoing conflicts as well as to establish a new governance structure and a vision of the congregation’s mission and future. Following the interim period a senior minister was called, along with a younger associate.

The new pastoral relationship began to deteriorate quickly. The hope had been that the needs of the traditionalists in the congregation would be met by the senior minister and those who wanted change would be satisfied with the younger minister. Within eighteen months the senior minister left to take an early retirement and the younger minister was asked to resign as well, so that “a clean slate” could be offered to someone new. The grievances and conflicts within this congregation could be catalogued at length, but suffice it to say that when the CRF was called by presbytery there were multifaceted issues rather than a single presenting problem to resolve. The congregation was superficially split along lines of age, but very early it became clear that there were differences within each of the apparent camps. For instance the younger group had divisions between those who had grown up within the congregation and those who had recently arrived and the older group could be similarly divided between those who had been there for many years and those who had recently retired and moved to the

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community from the city. Almost everyone in the congregation had some conflict with someone else, either within the congregation or in presbytery. Unsurprisingly a considerable number of people had simply stopped participating.

The long history of conflict in Cranberry United indicated to presbytery officials that, rather than pick one issue or incident as “the problem” to be resolved, it made more sense to try to change the way in which the congregation as a whole dealt with conflict. A CRF was asked to intervene in a fashion that was primarily aimed at changing the cultural norms for dealing with conflict. The process decided upon involved educating a small group of members to become an in-house conflict resolution team. After being trained by the CRF their first task was to organize a congregational training event to share what they had learned and then to hold a practicum, a congregational event where one of the issues troubling the congregation would be addressed and a mutually acceptable position agreed upon. The hope was that the practicum would provide an experience of a different way to address difficult issues and that a positive outcome would provide a strong re-enforcement.

In the event, things went quite well. The team of in-house consultants were carefully selected to ensure they had the confidence of the congregation and were not identified strongly with particular positions in relation to the existing conflicts. The educational event was well attended and a positive atmosphere was created for moving forward to the test case. The issue chosen for decision was a long-standing conflict with the daycare which occupied part of the lower level of the building. Established as a church outreach with an assumption that many of the users would be church families the daycare had evolved to the point where its board was entirely made up of non-church members, except for three appointees reserved to the church by its articles of incorporation. Only two or three church families had their youngsters enrolled in the program. Some within the church wanted to increase the rent paid by the daycare to

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market rates in order to help the budget, while others felt that the daycare was an outreach to the community and that the church should continue to charge only a nominal rent. This issue was felt to be far enough distant from the ministerial turnover concerns that it could be dealt with in relative isolation from them, with little risk of the escalation that can easily happen in conflicts as issues get thrown together resulting in a general conflagration. The daycare issue did, however, largely divide the congregation on the old guard-new people lines that were evident in other areas and so it was hoped there might be some learning in how to deal with the more general polarity of tradition and change.

I won’t elaborate with further details about the underlying issues at Cranberry United, but I do want to describe some of the processes that were employed and also outline the closing liturgy that marked the completion of the ADR intervention. As part of the training of the congregation in understanding conflict the CRF relied extensively on the work of John Savage.1 His role renegotiation model for understanding the dynamics and inevitability of conflict was a major tool. Looking at Figure 1 the model portrays the life of a group or organization, or even of a two party relationship. That life begins with the sharing of information and expectations, the courtship period. If there is a commitment to continue the relationship, that commitment will be based on expectations about the role each party will fulfill, how they will behave within the relationship and what rights and responsibilities each assumes. Often this will lead to a period of stability and productivity. The relationship is ticking along just fine. There comes the time, however, when something is amiss. Needs are not being met. Commitments are not being kept. The expectations with which parties entered the relationship are disrupted. This may not mean that anyone has changed the expectations they have of themselves. Inevitably, however, not every situation can have been

1 John Savage and Joyce Savage, Conflict Management and Resolution.
anticipated for the life of the relationship and when something arises which calls up divergent expectations within the group, one party or other will experience uncertainty and anxiety. The illustration I have used to elucidate this process in workshops is to describe my own parents' early days of marriage. When my father told my mother one night at dinner that he enjoyed the beets she had cooked, he got beets for dinner for the rest of the week, until he asked for a change. Her expectation was that if you liked something once it meant you could never get enough of it. His was, that if you liked beets once, you might get them again next month. (I note in passing that his expectation that she would cook to meet his tastes, or even that she would cook at all, would probably result in some early re-negotiation in a more modern relationship.)

Savage goes on to describe various ways in which the re-negotiation is conducted and leads either to renewal of the relationship, or to termination. A refinement on the model is provided by noting that often disruptions of expectations result only in mild discomfort, what Savage calls a "pinch," and the parties may chose to ignore or suppress
their disappointment that things have changed. But eventually enough disruptions occur
that significant discomfort accumulates and, again in Savage's terminology, a "crunch,"
which cannot be ignored, is felt. It is at this level of anxiety that the three way fork in the
path depicted on the left side of Figure 1 is reached and something must be done to
clarify the situation. Either one party leaves the relationship, there is a conscious
renegotiation of expectations or there is an effort simply to muscle through the difficulty
by calling on goodwill to commit to live together in peace, but without the necessary
clarification of expectations. Clearly the middle fork is the one that the theory holds will
offer the best prospect for renewing the health of the relationship.

Teaching the role re-negotiation model to a group experiencing a conflict crunch
helps to normalize their experience. The model helps them to see that conflict, at least in
the form of pinches, is an inevitable dynamic in any relationship because it is impossible
that humans can share enough information to formulate expectations that will address all
possible developments. The model also identifies alternatives that are available as ways
of responding in a crunch and helps people see the possibility of a positive outcome
through the, admittedly painful, process of clarification and re-negotiation as an
alternative to the two alternatives which at first seem so attractive, termination or
re-commitment. By inviting the learners to identify their own expectations, pinches and
crunches the CRF gives them the opportunity to incorporate the model into their way of
understanding their own experience and to share their different experiences with each
other. The complexity of the congregational system becomes more apparent to them, but
at the same time a map is provided which shows patterns that follow an identifiable
logic, thus the system, though complex, is revealed not to be chaotic and the conflict
within it is no longer experienced as an alien and aggressive force threatening to destroy
it. Rather, the conflict is seen as a part of the life process which signals the need for a
response to adjust for an identifiable disharmony in expectations. Learning the role

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re-negotiation model helps to lower the level of anxiety about the specific conflict and about conflict in general. Lowering anxiety is necessary if folks are going to be effective in working together to resolve the issues that underlie the conflict.

The second process used at Cranberry which I want to examine I’ll call the “carding” process. A congregational meeting was held after the session which had made a decision about the day-care issue. This session was called to capitalize on the momentum created by the success of dealing with one contentious issue. The purpose was to put in the open the various issues troubling members of the congregation, to prioritize them and to decide upon the appropriate body for dealing with them.

At the beginning of the meeting each person present was asked to write, in order of importance, on an index card the three issues that most concerned him or her in the life of the congregation. The participants were then asked to pair up with a second person (preferably not well known to them) and to agree on a joint list of three concerns. The pairs then pair up with other pairs and again come up with a list of three. The quartets become octets and the octets groups of sixteen, with the same task of coming up with a list of three. The groups are then asked to reform in plenary session and the results are reported by each group. The concerns identified are then examined by the group so that common concerns, which may be stated in slightly different language, can be consolidated.

A preliminary prioritizing is achieved by noting how many groups identified the same concern. This is checked out with the full group and adjustments are made as agreed upon. Everyone may be agreed that a particular issue is a problem, but they may also agree that it is not the most important problem. Next, the task of assigning issues to various bodies is carried out. The worship committee, for instance, may be asked to prepare a recommendation about the inclusion of youth in communion to be brought back to the congregation for consideration in six months. The nature of the task and the
timeline as well as the degree of authority to make decisions need to be carefully spelled out.

As a final step each person is asked whether they can live with the concerns and priorities identified. If someone in the course of the exercise has dropped a concern which they still feel needs to be up on the list, a concern that no one else has named, then they are given the opportunity to name it and it goes on the list, albeit with a low priority.

This process provides participants with an experience of collaborative decision making in a way that also builds community. The expectation is that concerns are not isolated, but will appear in different guises in various places in the room. The sorting of concerns and priorities is achieved by the give and take of discussion. In my experience with this process it is quite astounding to observe the same concerns arise and be assigned similar priorities. The carding process provides a means for the group to organize itself, or at least to organize its concerns and the ways in which it can begin to address them.

One of the concerns identified by the congregation at Cranberry United was to deal with the early termination of the experiment in team ministry. The CRF suggested a two step process to help folks reach a point where blaming and bitterness could be left behind. In a first meeting of the whole congregation a circle process was used. Because the group was so large a decision was made to modify the process by creating an inner “speaking” circle and an outer “listening” circle. This is not to be confused with the speaker and listener chairs process used at Blueberry United. At Cranberry, participants in the speaking circle spoke to all persons present. The two circles were simply a way to manage numbers and the issue of hearing around a circle of nearly one hundred people. Persons in the speaking circle were invited to stay in as long as they wished. Persons in the listening circle were invited to stand if they wished to speak and to move to the speaking circle when one of its members chose to retire to the listening circle.

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The conflict team invited people around the circle to address the question of how the events connected with the dissolution of the ministry team had affected them. In other words they were invited to share their feelings. The conflict team made it clear that the feelings expressed were not to be discussed outside the room and that they were not to be challenged or critiqued by others in the circle. Finally it was made clear that information about what had happened and why and in particular the opportunity to ask questions, would be the process for the second meeting. The second meeting was also held in a circle format, but the talking stick device was not used, rather questions were posed and responded to by the person or persons with the information requested.

This two step process sought to separate the feelings of the members of the congregation from the intellectual and rational processing of information. Although such a separation is artificial and incomplete, it proved helpful in this instance. A sufficient level of trust had been built up through the earlier processes that many people were able to share quite openly how deeply they felt about events. Because the facts were not on the table in the first meeting feelings were not attacked as inappropriate because based on incorrect data. Folks discovered the depth of feeling of others with whom they disagreed and in that depth found common ground. The second meeting provided an opportunity for an evaluation of facts and experiences reported by others that was more productive than would have been the case if the rational and emotional were wrapped up together.

This two step process was not intended to lead to a decision. The conflict team made it clear that it was an opportunity to air differences and emotions, but was not intended to assign blame or pass judgment. Such an airing was felt to be crucial to enable the congregation to process the distress it carried from the experience of grief, anger and loss arising out of the early termination of a pastoral relationship it had hoped would help them put behind them a considerable history of conflict.

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Like the process at Blueberry United, this one was designed to allow people to express their grief, then give it a decent burial. At Blueberry participants handed the CRF the card on which they had written their grievance as a symbol of giving it up. The conflict team at Cranberry developed a liturgy to close the second meeting which had the same intent. A large bowl of water had been placed on a table at the front of the room and beside it a large pitcher. Sponges floated in the bowl of water. Folks were invited to come to the front, take a sponge and squeeze the water in it into the pitcher. In so doing they understood they were expunging the grief and anger around recent events, the grief and anger they had talked through in the process of the two meetings. The pitcher was then carried to a potted plant at the other end of the room and as people gathered around singing the hymn *In the bulb there is a flower* the water was poured onto the plant. In the spring the plant was transplanted into the church’s garden.

The Copper Smelter - another case study

I suggested in the previous chapter that ADR is misunderstood if it is conceived of as simply a tool that is available to be applied when a particular component in the organizational machine is broken and needs repair. The experiences which underlie these case studies have persuaded me that ADR provides a range of ways of functioning in the chaotic environments of organizations, congregations and communities as people really experience them. Conflict often presents itself as an either/or issue. If it is dealt with on that basis the opportunity to address underlying concerns and to help the congregation engage in the adaptive work which is required if it is to thrive in a changing environment, is lost.

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2 *Voices United.* Toronto: United Church Publishing House, #703.
Solving conflict by replacing or repairing a component in the machine amounts to what Ronald Heifetz calls a technical fix, when what the congregation or community needs is to adapt to a changed environment. In illustrating how avoiding the temptation to make a yes/no determination can lead to a creative outcome in a situation of conflict Heifetz\(^3\) presents a case study involving a copper smelting facility that was posing a health hazard to persons living nearby. The issue appeared at first to be whether or not to close the plant, a simple contest between jobs and health. William Ruckleshaus, Chair of the Environmental Protection Agency, had the authority to make a decision. Ruckleshaus discerned that he needed to both broaden the base of participation in the decision and to broaden the question. Closure of the plant was not an idle threat. Copper prices were so low the plant was already losing money. Closure might occur regardless of the decision about pollution abatement, but a decision to impose requirements on the plant would allow the owners to cast the responsibility for that decision onto the EPA.

The health issues were even more complex. Arsenic was a by-product of the production process. There was conflicting scientific evidence about the effect of various levels of arsenic, but it seemed clear that some negative impact would be experienced at any level. Is the appropriate response to eliminate all risk and shut the plant? Clearly we accept some level of harm as a society for the benefits of industrialization. But how much? And should that harm be imposed on some who receive no benefit, such as residents 25 miles away who receive only the most remote economic spin-offs from the plant's activities.

Ruckleshaus chose to institute a process of public consultation that was carefully structured to focus on information sharing. To defuse the high levels of emotions much of the discussion was conducted in small groups. As people participated in the process it

\(^3\) Ronald Heifetz, *Leadership without easy answers*, pp. 88-100.
became apparent that the community was dangerously dependent on this one employer. Plans for economic diversification began to be viewed as more important than the outcome of the presenting conflict. The community learned how to discuss issues and process strong feelings through a creative broadening of the discussion beyond the immediate source of conflict.  

Reflecting on the Case Studies

Imagine if the conflict at Apple United between Peter and Sarah had been resolved through a yes/no process. Both ministers were reluctant to apologize, but both wanted to hear the other do so. A decision maker who retained the authority to impose a solution would have to hear out both of them and then he or she would face three options. Both should apologize, neither should apologize, or only one should apologize. The decision maker could attempt to cajole or threaten the parties into a compromise, using the stick of a decision possibly not to their liking. But in the end any result would be experienced as coercive. Even if Sarah had to apologize to Peter, and Peter was excused from apologizing, he would likely feel that such a coerced apology was of little value.

ADR invites the parties to step back from the immediate issue and to learn about other issues and to learn about what the other party's views are. Imposing a solution shifts the focus of attention from the parties to the decision maker.

Parties in conflict long for closure, but they come to the conflict with a predetermined idea of what closure looks like. They are reluctant to do the work which

4 For another illustration of the way in which apparently clear conflicts around economic issues, such as jobs and health or jobs and the environment, can provide opportunities for creative leaders to move communities toward engaging in adaptive work rather than simply seeking out a technical yes/no solution see Hutchinson, Prophets, Pastors and Public Choices, Canadian Churches and the Mackenzie Valley Pipeline Debate.
is needed if genuine closure is to be achieved, because genuine closure, by which I mean a resolution with which both parties can live, requires that both give up their opening position, or at least risk being open to the possibility of giving it up. It isn’t easy to enter a process if one is told from the outset that one’s central objective is unobtainable. However, if parties are invited to hear each other and assured that they will be heard and further, invited to learn from each other, then the process itself will move them towards a reappraisal of their position and the possibility of altering it.

In the following chapter the discussion will move from the descriptive to a more theoretical level. What I have sought to do thus far is to describe these United Church experiences and suggest that the conflicts and the ways of dealing with conflicts are too narrowly understood if seen only through the lens of the machine metaphor. It may be possible in a stable environment to treat conflict as a malfunction to be repaired. In an uncertain and changing environment conflict, one can be sure, is virtually always a symptom of the need for adaptive change in the congregation or community. Responding to conflict, therefore, presents an opportunity. Persons caught up in conflict, like those facing any type of uncertainty, will long for a clear decision that will end their distress. Their discomfort and the desire to ease it can, however, become the means by which they are encouraged to engage in the taxing but essential work of adapting to a changed environment.

What follows will be an argument that the increased resort to ADR within North American society can be understood as symptomatic of a search for ways to engage in adaptive change as it becomes more and more apparent that the Newtonian, machine metaphors of the Enlightenment are inadequate. It would be beyond the scope of this paper to fully limn such an argument. What I do hope to do is suggest how ADR provides a window onto the process of searching out new metaphors and processes which can help people caught up in conflict address it more adequately. In undertaking this
exploration I move now to a consideration of how our theological traditions can be a resource for understanding the origins of this shift, its possible directions and its meaning for what we understand about God and God's desire for creation.
Quantum Physics and Polarity Management in a World Without Foundations

To claim that Western culture is experiencing a loss of its sense of foundations is not simply a manifestation of millennial anxiety. Harold Berman\(^1\) asserted some years ago that the underpinnings of the Western legal system had eroded, leaving it to rest on nothing more than a positivism that cannot ask, let alone answer, foundational questions. Stanley Haurwas, Nancy Murphy and Mark Nation published a collection of essays in 1994 whose title, *Theology Without Foundations: Religious Practice and the Future of Theological Truth*, suggests that the erosion of the foundation has occurred even under the house of faith. In his contribution to that collection John Yoder\(^2\) points out the complexities of such claims when he notes that, “rejecting foundationalism [as] a basic defining statement is itself a foundationalist move.” Yoder is not engaging in an infinite regress in making that claim. He is instead calling us to consider whether there is a “deeper and surer, more general level [that] is both accessible and imperative” at all, and whether the effort to identify that ‘deeper, surer, more general level’ is capable of success, or even worth the effort. Can we “start from scratch before attending to any concrete moral judgments?” Yoder suggests that, at least in the sphere of moral inquiry, we “begin again with what might be called a phenomenology of the moral life.” He goes

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\(^1\) Harold Berman, *The Interaction of Law and Religion*, p. 16 “What is dying is not so much [the institutional structure of law and religion] as the foundations on which the structure is built.” and *Law and Revolution*, p. 11, “The conventional concept of law as a body of rules derived from statutes and court decisions - reflecting a theory of the ultimate source of law in the will of the lawmaker ("the state") - is wholly inadequate to support a study of a transnational legal culture.”
on to claim, "The life of the community is prior to all possible methodological
distillations."³

The concept of moral assensus, which I introduced in the first chapter, is a
phenomenological rather than a foundational concept, in that it is discerned through
reflection on the life of the community and is not prior to it. Moral assensus is not
simply a mirror of the practice of the community, but is generated in the moral life of the
community. This process of discovery is an engagement in reflection, discussion and
debate about the practices of the community and what they disclose about the morality
that underlies behaviour. The discovery of the assensus also involves a critical reflection
on that disclosed morality, which is always subject to refinement to the extent that the
disclosed morality is discordant with the best morality⁴. In this chapter I want to suggest
how we might understand the role of ADR in the process of the development of moral
assensus in Western culture. ADR provides a forum in which moral decision making

² John Yoder. "Walk and Word: The Alternatives to Methodologism." In Stanley Hauerwas et
al. Theology Without Foundations: Religious Practice and the Future of Theological Truth,
at p. 77
³ See also William Luijpen p. 47, "It would be unthinkable that a legal order would reveal
nothing at all of the actual conditions existing in a particular society. For, if the legal order
primarily tries to determine what those conditions ought to be in order to be just, all its
regulations concerning this 'ought' would be in a vacuum unless they endeavour to regulate
existing conditions. A legal order is wholly meaningless if it does not come to grips with
actual conditions. Hence these conditions manifest themselves in that order."
⁴ See the discussion later in this chapter of Alasdair MaClntyre's Three Rival Versions of
Moral Inquiry. His third, traditional version of moral enquiry, carried out in the public
sphere, contributes to the discernment of the best morality, which is more solid than
genealogical, situational or post-modern moralities, though it lacks the claim of being
foundational. Ronald Dworkin's presentation of the law (discussed in Chapter Five) as an
interpretative exercise which seeks to maintain continuity with the past and to make the best
choice for the future elaborates what I here refer to as the best morality.

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occurs, and thus is part of the practice of developing moral assensus. It can also provide opportunities for reflection on the moral assensus. This exploration will, using the experience within the United Church which I have described in the preceding two chapters, offer some reflections on how the ADR experience is integrated into our theological heritage and further, how that experience might inform our always evolving theology.

In order to understand how moral assensus develops I have suggested that it is helpful to consider the Taoist yin/yang symbol. The symbol represents the continual interaction of contrary forces (i.e. light and dark, male and female). That interaction is not the struggle for dominance which Western concepts of dualism posit, but a dance towards balance where the fulcrum beneath the dance floor is ever shifting. The interaction symbolized by the yin/yang represents two forces that interpenetrate and require one another. There is no existence for either outside of the relationship. If one force were to overpower the other, it would mean the death of both. Moral assensus might be conceived, I suggested, as a spherical Rubik's Cube of inter-connected yin/yangs. The logo, pictured on the cover page of this thesis, developed by the Mediation Information and Resource Center is a visual suggestion of what I have in mind.

While there is no foundational yin/yang, at least none that we can discern with certainty from our perspective within the spherical Rubik's Cube, it seems to me that

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5 See the appendix to Chapter One for an illustrative, but far from exhaustive list of yin/yang and cognitive/generative polarities.

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there is benefit in identifying the cognitive/generative relationship as a central illustration of this dynamic in that it points toward and illuminates similar themes that we can observe elsewhere in the ongoing dance whereby the culture is discerning and generating moral assensus.

I have already mentioned the beautiful patterns that emerge when a mathematical equation is repeatedly run through a computer. The results first appear as very random points on the screen, but over countless iterations swooping loops begin to take form, revealing patterns that emerge out of what seemed a chaos of results. In this thesis I will run through several variations of the yin/yang as if it were a mathematical equation, revealing the pattern that I discern not in the identity of the results, but in their similarity. The equation for a yin/yang might be described both as one plus one and one into one (1+1, 1/1). What I mean by this (slightly strained) mathematical metaphor, is that I will suggest a number of ways in which we might conceive of how two concepts, forces or orientations are-in-relationship. I am not attempting to solve the equation, but to present a number of iterations and in so doing reveal a pattern, or strange attractor.

The cognitive/generative orientations toward law and ethics constitute the yin/yang to which I will most frequently refer. Each iteration is, however, unique. I do not wish to be taken as saying that the cognitive/generative yin/yang is equivalent to, or co-terminus with the other approaches which I do claim are similar, such as law and equity or positivism and natural law. My approach is not a linear construction of an

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7 See p.7 of my introduction
epistemological pyramid mounted on one clearly defined foundation, although as Yoder pointed out there is a sense in which we cannot escape the notion of foundations because we must begin somewhere. The confusion that I wish to avoid is that of equating the point at which I begin with the beginning. What I am exploring is one "equation" of many possibilities that can be run. I explore it in greater depth as illustrative, both of the pattern (what it shares with other possible "equations") and of the differences. Through this exploration the pattern implicate in other equations will, I trust, be more readily apparent. Thus I am not building on a foundation of yin/yang or cognitive/generative orientations, but positing a strange attractor which is revealed only through our discernment of the pattern it calls forth in a chaotic environment.

Quantum physics provides a suggestive model for understanding the process occurring within the yin/yang which is also a suggestive metaphor for viewing the cognitive/generative relationship as central to understanding human functioning. Many writers have remarked on the suggestive power of Heisenberg's uncertainty principle. Whereas Newtonian physics conceived of an irreducible elementary particle at the core of all matter, a divine dust of which all else is constituted, quantum physics has disclosed

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In The Meno, Socrates seeks to cut the Gordian knot of a puzzle similar to that I describe in the text - how can we come to know anything, since if we know something we do not seek to know it and if we do not know it, how can we seek to know that which we do not know. He claims that the soul knows everything from its previous incarnations, thus knowing is a matter of remembrance, not of developing from a foundation. (p. 42) Aristotle moved toward a more developmental model, which saw the origin of our knowing as being a potential within the human, which he or she developed through interaction with others. Augustine's resolution was divine revelation as providing at least the foundations of knowledge. See Alasdair Maclntyre's Three Rival Versions pp. 109-10.
to us that at the heart of matter there may not be matter at all. We are unable to say that
sub-atomic particles are indeed *particles*, because by some methods of observation they
are *waves*.

It really depends on how we measure them. If we seek to identify their
location, they have the property of matter and can be measured as such. If, however, we
seek to identify their movement through space, they exhibit the qualities, which we call
those of a wave, and not those of a particle. Observed for movement, they move and we
can see their paths through space. Observed for location, they are fixed and we can
observe their location through time.

At the heart of matter then, so far as our powers of observation allow us to
investigate at the moment, is this uncertainty that I suggest can be modeled as a yin/yang
relationship of matter and energy. There are similarities between this sub-atomic
yin/yang and the cognitive/generative one that can be observed as central in the fields of
law and ethics. The cognitive orientation is that which seeks fixity, a solid foundation
that will support the moral and legal decisions which must be discerned by observation in
the midst of the maelstrom of human activity. The generative orientation is that which is
in innovative and energetic motion. It seeks what is novel and creative in each situation
that is presented. Just as in sub-atomic physics, so far as we can tell, these particles
could not exist as either matter or energy alone, so it is with the cognitive and the
generative orientations toward legal and ethical inquiry, the process by which the

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9 "If we ask, for instance, whether the position of the electron remains the same, we must say
‘no’; if we ask whether the electron’s position changes with time, we must say ‘no’; if we
ask whether the electron is at rest, we must say ‘no’; if we ask whether it is in motion, we
must say ‘no.’ Robert Oppenheimer, quoted in *Charades*, Janet Turner Hospital.
development of moral assensus is lived out. Neither the cognitive nor the generative could exist on their own.

Barry Johnson has developed a model for identifying and managing unsolvable problems which provides yet another "equation" or perspective on what is occurring in the apparently chaotic environment in which humans find themselves as they seek to be-in-community. Johnson suggests that human interactions can be understood as constituted by polarities that are contrasting yet complementary orientations toward life, toward relationships or toward organization. Indeed polarities provide a way of structuring our understanding of most of the phenomena that constitute our communal life. The task for each of us, as individuals and as communities, is to manage the polarities of which life is constituted. Management implies participating in a dance similar to that of the yin and the yang within the Taoist symbol.

Johnson illustrates the power of the polarity management model by reflecting on the basic polarity of breathing - inhalation and exhalation. In the quadrant figure below Johnson puts inhale on the left and exhale on the right. We cannot survive if we do only one or the other. We need both, but we need to move back and forth between them. As inhalation replenishes our oxygen supply, our body produces carbon dioxide that must eventually be expelled, the positive outcome of exhalation. Exhaling, however, means we will soon lack sufficient oxygen and so must reverse the direction yet again and

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10 Barry Johnson. *Polarity Management*. p.21
The Breathing Polarity

<table>
<thead>
<tr>
<th>Left</th>
<th>+ Positive Quadrant</th>
<th>Right</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inhale</td>
<td>Get Fresh Oxygen</td>
<td>Exhale</td>
</tr>
<tr>
<td></td>
<td>Clean out Carbon Dioxide</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Too much Carbon Dioxide</td>
<td>Lack of Oxygen</td>
</tr>
<tr>
<td>Left</td>
<td>- Negative Quadrant</td>
<td>Right</td>
</tr>
</tbody>
</table>

endlessly. To try to "solve" the problem of breathing by only inhaling or exhaling, good and beneficial as both those processes are, is suicidal because there are weaknesses or negative consequences to each polarity which, alone, it cannot overcome. Life depends on the interpolation of the two actions working as a process in ongoing relationship.

One of the polarities that Johnson identifies as central to understanding the functioning of organizations is that of tradition and change. Traditionalists exhibit an
orientation similar to those whom I would describe as having a cognitive orientation to the life of their organization. If that organization is a church, their inclination is toward orthodoxy and doctrine. If it is a legal system, their orientation is positivistic. Those oriented towards change on the other hand, like those oriented towards the generative, seek to be on the move, looking for creative innovations and little concerned with maintaining continuity with the past.

Whatever the polarity, and there are many, Johnson's insight is that when an organization or an individual attempts to stay put in one of the upper quadrants in order to reap the positive aspects which one pole possesses (it matters not which pole they seek to stick with), there is an inevitable slippage into the quadrant immediately beneath where the negative aspects of that pole will be experienced. The positive can only be experienced if there is some movement back and forth from left to right. Staying put on the left or right is unsustainable and inevitably leads to a downward movement. That downward movement, however, is necessary as well as inevitable, for it provides the impetus for the movement from one side to the other.

The primary orientation toward legal and ethical disputes in Western culture is cognitive. In Johnson's terminology, Western culture is oriented toward the cognitive pole. The rationality and scientism we have inherited from the Enlightenment has left us a heritage of putting divergent points of view in opposition and letting them slug it out until the superior one prevails. The hope of Newtonian physics, a hope shared by Einstein and Hawking in their searching for a single explanatory "theory of everything," is that human ingenuity can discover the laws that underlie apparent contradictions.
cognitive orientation towards conflict predisposes one to seek the right answer in the expectation that it will resolve the conflict.

This predisposition to cognitive approaches in resolving conflict is connected to the essentially positivistic view of the law that has been remarked by Dworkin, Berman and other observers of the Western legal tradition. The ascendance of positivism is in part a consequence of the eclipse of natural law theories. The waning of Christendom has removed God as the normative ground of natural law and left theorists struggling to articulate a normative ground rooted in something other than the divine. Failing such a breakthrough, the popular view of law continues to be positivistic. Law is what is enacted by those in power. Law is viewed instrumentally and there is little discussion of the ends that are implicit in the laws that are enacted. I will leave to the next chapter some further reflections on this development in the sphere of law. Here I want to consider the impact of this pervasive legal positivism on the way in which we conceive of conflict theologically and approach it in the context of the church.

It may be helpful at this point to consider the cognitive and generative orientations as polarities and to locate them on a polarity matrix, which is what the figure on the following page depicts. The merit of the polarity diagram lies in its ability to identify the strengths and weaknesses within each pole and to derive from those strengths and weaknesses a way of understanding the movement which, within the yin/yang symbol, is hidden. If I am correct in asserting that we have inclined toward the cognitive in approaching disputes, this representation should provide a convenient handle on identifying the consequences, both positive and negative.

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A Cognitive/Generative Polarity Matrix

<table>
<thead>
<tr>
<th>Cognitive Orientation - positive</th>
<th>Generative Orientation - positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Clarity of Rules</td>
<td>• Focus on values/principles</td>
</tr>
<tr>
<td>• Predictability</td>
<td>• Innovative/creative</td>
</tr>
<tr>
<td>• Equality of Treatment</td>
<td>• Customized solutions</td>
</tr>
<tr>
<td>• Stability</td>
<td>• Adaptability in Changing Environment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cognitive Orientation - negative</th>
<th>Generative Orientation - negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Multiplicity of Rules</td>
<td>• Clashes/Compromises of Values</td>
</tr>
<tr>
<td>• Routinization – Loss of Vision</td>
<td>• Situationalism – Relativism</td>
</tr>
<tr>
<td>• Stereotyping</td>
<td>• Favouritism - Special Treatment</td>
</tr>
<tr>
<td>• Rigidity/Ossification</td>
<td>• Blow with the Breeze</td>
</tr>
</tbody>
</table>

This outline of the two polarities presents the strengths of each in the upper quadrant and the weaknesses in the lower. Johnson's theory suggests that weaknesses in each of the lower quadrants are met by the strengths in the diagonally opposed upper quadrant. One is inclined to stay in one of the upper quadrants out of concern for the weaknesses of the opposite pole. Staying with one pole, however, results in slippage from the upper to the lower quadrant. The temptation in the face of slippage is to struggle to stay with the current pole, rather than to embrace the wisdom of the other. If well managed, a polarity can result in a dynamic movement through all four quadrants,

J.W.Burton - Theology - Chptr. 4-111
with time spent in the lower ones being kept to the minimum necessary to derive the
impetus which keeps the system in motion.

Both our culture and our churches are predisposed to take the cognitive approach in responding to conflict in order to realize the benefits of clarity, predictability and equality, which are important to a rational conception of justice. The cognitive orientation values stability and serves to promote it as well. When the environment becomes unstable, the weaknesses of the cognitive approach are, however, exacerbated. Rules that seemed clear in an unchanging world must be modified, expanded and fine-tuned in order to fit unforeseen developments. Predictability of outcome degenerates into rote responses and the underlying rationale for rules is in danger of being lost. Equality of treatment is more difficult as the relevant population becomes more heterogeneous. Assumptions that the same treatment effects equality may be in error. As Anatole France pointed out more than 100 years ago, “[The poor] have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.” In search of a manageable equality inappropriate categorization of persons may develop and result in stereotyping. Finally the stability which is of benefit in calmer times becomes an unhealthy barrier to adaptation in changing circumstances. If it is too rigid, the system may only be subject to change by being broken.

The negative aspects of a cognitive approach should impel a system toward a generative response. As the number of rules with which people must be concerned

J.W.Burton - Theology - Chptr. 4-112
threaten to overwhelm them, a revisiting of values and principles can help to sort out the rules and to lessen the reliance on them. A focus on principles or values can be thought of as switching from the nervous system metaphor to an immune system metaphor\textsuperscript{12}. As the nervous system gets clogged with traffic going back and forth with messages (information from the extremities and rules from the brain), the immune system can assist with agents who are on site and imprinted with the principles which are important to the system and thus empowered to act on their own. Instead of imposing uniformity of treatment based on inappropriate categorization, the system can be creative and find solutions that take into account a wider range of factors. Most importantly, the generative orientation allows for adaptation to the changing environment.

The primary focus of the generative approach needs to be on the shared values of those who make up the system. The trap is the temptation to avoid the difficult task of working through the clashes of values that are bound to include some strong and fundamental differences of view amongst members of the community. Failure to address value differences will in time result in a degeneration into the situationalism and vacillation which comes of trying to deal with a chaotic environment with no sense of what are the \textit{strange attractors} or core values around which the system seeks to orient itself. To avoid this trap the system needs to continually restate the application of these values in ways, including rules, that provide the clarity, predictability and equality of the upper left quadrant. Restatement implies openness to re-examination and refinement.

\textsuperscript{11} Anatole France. \textit{Le Lys Rouge}. 1894 - quoted in the \textit{Globe and Mail} 22/7/00 - p. D3
\textsuperscript{12} See Chapter 2 where this metaphor is presented.

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In the United Church of Canada the cognitive orientation towards conflict was clearly dominant, at least in the formal processes available, until 1982. Though the Manual provisions underwent some revision in the years between union and 1982, the structure of the process remained the same. Looking at the formal response available in the Manual, one can only conclude that conflict was conceived of as a breach of the rules or disavowal of the doctrines of the Church. Where such breach or heresy occurred, an obligation was imposed on the one detecting it to bring a charge, and if the offender failed to recant or repent, a trial ensued. In other words, resort would be had to the adversarial system to determine the issue. Conflict which did not fit this structure of response, conflict in which there was uncertainty about who was at fault, where there was unclarity about the real issue or where there was no clear breach of polity or doctrine - such conflict had to be dealt with outside the formal system if it was handled at all.

If the situation at Cranberry Church had arisen under such a regime, it is unlikely that the United Church's structured (Manual) response would have been used. Only if tempers and hurt feelings reached such a point that, consciously or not, someone decided to "get" the other party, would they resort to the prescribed approach. One can certainly imagine a charge being laid against the minister who left ten years earlier. The charge might allege that he breached his undertaking to the congregation that he would stay, but it would only be made by someone angry or hurt enough to want to punish him. Laying a charge would not be the action of someone who thought a trial would achieve reconciliation of damaged relationships. A trial of the issue as to whether or not there was such an undertaking and whether he should be held to it could not possibly end with
a conclusion that would hold any hope for his returning and resuming his ministry in a way that would lead to reconciliation. In all probability an order to return would produce a short-lived and anguished effort to revive the pastoral relationship. The unlikelihood of any positive outcome, let alone a reconciliation, points to the limitations of an adversarial model in a complex situation, even if in one characterization of it, the issue is as simple as, "did the minister promise not to leave?"

I need to note here that neither the Manual nor the policy handbooks of the Church contained rules outlining an appropriate response to such an issue. Written procedures become important in large organizations as heterogeneity increases. The United Church has been and remains a relatively homogeneous entity, which allows it to rely to a significant degree on unwritten norms to provide clarity, predictability and equality. It is also a very small organization in some ways, by which I mean that much of its life occurs in congregations, most of which resist bureaucratic, rule oriented structure.

The reliance on unwritten norms to provide clarity, predictability and equality may have worked reasonably well during times of denominational stability, but as divergences of opinion and expectation surface, resort is more frequently being had to writing rules and policies (a cognitive response) which often do not enjoy the support of

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13 See Roberto Unger, Law in Modern Society at pp. 30-31 on the need for [written] rules only as a society or community loses its internally coherent assensus. In a similar vein Harold Berman writes in The Interaction of Law and Religion at pp.26-27, "The prevailing concept in contemporary Western societies that law is primarily an instrument for effectuating the policies of those who are in control is, in the long run, self-defeating. By thinking of law solely in terms of its efficiency, we rob it of that very efficiency."

J.W.Burton - Theology – Chptr. 4-115
the wider membership. The judgment that needs to be made as conflict arises is whether it can best be addressed by such a cognitive response or by a generative one. The key to determining the choice is the judgment as to whether the environment is stable enough that a rule can enjoy support and resolve the range of disputes that it will be expected to address. In a chaotic environment imposing solutions by enacting rules or pronouncing judgment often serves only to deflect the conflict from the issue to the rule, delaying the real work that needs to be done. 14

An illustration of how resort to specific rules is unhelpful was offered recently by the introduction of a private member’s bill in the Ontario Legislature. The bill proposed an amendment to the Highway Traffic Act to create a new offence of “driving while talking on a cell phone.” The bill is directed at eliminating a potentially hazardous driving practice by providing a specific rule that would apply to the behaviour in all circumstances. Such specific measures, in addition to contributing to an unmanageably complex code of conduct, deflect attention from the real issue, which is already addressed in the existing Act. “Failing to drive with due care and attention” is the definition given for the offense of careless driving. The proposal does not address the larger problem of encouraging drivers to attend more closely to driving by seeking to change public attitudes and behaviours. Rather, it simply adds one more item to an already overwhelming catalogue of regulated behaviours.

The cognitive/generative matrix can help to sort out how another of the conflicts

14 See Ronald Heifetz, Leadership without Easy Answers pp. 35-40 on technical fixes when adaptive change is needed.

J.W.Burton - Theology – Chptr. 4-116
at Cranberry was addressed. Twelve years before the CRF was called in, the congregation had established a daycare in the building. Like many Churches, Cranberry United’s building was largely unoccupied during the week and a daycare seemed like good stewardship of an underused resource. It was recognized that there was an element of taking care of their own in this project, as several families in the congregation had young children and were experiencing difficulty in finding affordable daycare for them. It was hoped, however, that the project would be a way of reaching out to other young families in the area, encouraging them to join in more aspects of the Church’s life once they made a first connection through the daycare. Provision was also made for a number of subsidized places to be available for lower income families.

Over the years, however, the daycare had not proved to be much of an entry point into the congregation. Although it was always full no one could identify anybody who had joined the church after enrolling their children in the daycare. There continued to be some church families who placed their children there, but only two or three. The congregation was disappointed that there had never been any use made of their offer to provide subsidized spaces. Since Cranberry was located in a middle class suburb, the congregation reasoned that either there was no need of a subsidy or that people were reluctant to make their need known.

Disputes with the daycare arose from time to time around issues such as the use of shared space, upkeep, and the amount charged for utilities and rent. The articles of incorporation for the daycare provided for the church to appoint a minority of board representatives and there was some resentment at this. The balance of the daycare board
was made up of parents of children enrolled in it. Some among them complained that it was unfair that "the landlord" should have a right to sit on "their" board.

Within the congregation there were those who favoured accepting the role of landlord and treating the daycare as simply a source of revenue, and hence charging them market rates. Others felt that the initial outreach objectives should not be abandoned and efforts to make connections and to find takers for the subsidized spots should be redoubled. In no case should the rent be raised, in this latter view, since that would create a hardship for the parents. There was also a small group who wanted to close the daycare, or force it to relocate. They thought it was not worth the bother and they would rather have control of their building than receive the extra revenue.

Although there was little written to embody the cognitive expectations of the parties to the daycare dispute, it was clear that they now found themselves in the lower quadrant of that pole. When the project was initiated, widespread participation by members of the congregation provided the clarity, predictability and equality that contributed to a stable relationship. Congregational members on the daycare board were actively involved in daycare activities, fundraising and committee meetings. Parents within the congregation provided communication linkages between the two organizations as well. Over time, representation on the daycare board became an obligation that was filled only with difficulty and without enthusiasm by the congregation and the parental linkage weakened as enrollment by children of church members declined. Thus the relationship slipped. Most importantly the shared values were lost. Daycare members came to presume that the church was only interested in the rent they paid. They

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stereotyped the church as a greedy landlord. Reciprocally, the church stereotyped the
daycare as a difficult tenant, ungrateful for the subsidy they received in the form of a
below-market rent. A multiplicity of rules existed in the form of unwritten expectations
about the nature of the relationship. These expectations were, however, very different for
different members of the daycare board since, owing to fairly rapid turnover, it had little
institutional memory. The congregation's institutional memory was similarly faulty. The
daycare members had no sense of the Church's conception of this project as an outreach
to the community and the Church, in consequence, felt quite misunderstood and hurt.

Both communities resisted moving toward a generative orientation to the
relationship. The perception each party had of the other's core values was that they were
significantly different (greedy landlord and difficult tenant). In fact, when explored
through mediation, they discovered their core values were very congruent. The daycare
members were oriented toward providing the best, least cost daycare experience for their
own children, and the church members were oriented toward the long-term viability of
the daycare, and the possibility of its playing a wider outreach role in the community.
The daycare folks, who had a much more intense investment in the daycare's
functioning, were concerned that the relationship with the church could not function well
through the sort of ad hocracy to which a generative orientation can degenerate. They
wanted the certainty of a written lease where all terms and conditions would be spelled
out. The Church folks did not want to give up their perception of the relationship being
more integrated than that and so they resisted a lease or other formal documentation.
The task for the Conflict Resolution Facilitator therefore was to move the parties toward
the generative upper quadrant, principally by helping them to articulate their own values more clearly. Since the CRF had discovered through preliminary consultations that there was in fact considerable congruence between the values of the two communities, a clash of values and a need to reject or significantly modify some was not anticipated. What was needed was for each group to be aware of the values of the other, to know that the other was aware of their values and to recognize that their values provided a source of guidance for their relationship.

The process that was used by the Facilitator was essentially a mediation process. Each board nominated three members to participate and also asked their staff person (the minister and the daycare's program director) to be at the table. It was understood that the representatives did not have the authority to bind their appointing boards, therefore any agreement would have to be ratified. The representatives met and were invited to share around the circle their reasons for being part of the daycare, their knowledge of its history and their hopes for its future. Values became apparent out of this conversation and they were identified. The participants were then asked to share their concerns about the relationship and when these were all on the table, they were reviewed with the intention of identifying mistaken assumptions they contained about the values of the other party.

In a subsequent session the parties reviewed the shared and congruent values they had identified and decided that to continue the relationship would be to pursue values that were important to all. They then worked out a list of specific responses to issues that had been bothersome (i.e. snow clearance during the week, use of storage space in the building), evidencing a cognitive approach. There was also agreement and

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encouragement for the two staff persons to be in closer communication, both with each other and with their respective boards. Staff was given authority to resolve minor issues that arose and were mandated to be the conduit for communication between the two boards or relevant committees about larger issues. Thus a generative (adaptable, relational, value focused) component was built into the agreement.

Johnson's polarity management theory holds that we cannot always stay in the top two quadrants. The objective is to minimize the time in the lower two. In this case, the inclusion of both cognitive and generative elements in the resolution provided a clear path for the relationship to follow when slippage occurs in the future. If the list of agreed procedures does not adequately cover an unanticipated situation and the discomfort of rigid positions is felt, then a path to the upper right quadrant in the persons of the staff has been identified. If the informal resolution facilitated by the staff is not able to resolve issues to the satisfaction of all, if ad hocracy becomes too much the approach, then the agreement is in place with a process to reclarify expectations and behaviour.

Although the CRF did not use polarity management as a tool in the process employed with the parties, the cognitive/generative polarity provides a helpful lens through which to see the dynamics of the situation, the mediation and the resolution. The case study also demonstrates that the term alternative in ADR is misunderstood if ADR is seen as a dualistic generative opposite to a cognitive adversarial model. Both cognitive and generative features were part of the process and of the content of the resolution. Polarity management helps us to balance the two. It is a theme of my presentation that the innovative ways of resolving disputes that I am bundling under the term ADR are not
displacing cognitive approaches but correcting an over-reliance on that orientation by providing a complementary approach. The challenge is in discerning where each is most appropriate and managing the movement between them. The yin/yang symbol, with the point of the yin embedded in the deepest part of the yang and vice versa, emphasizes this reciprocal relationship.

**Theological Explorations**

If the reader is willing to grant, at least for the moment, that an effective approach to conflict requires the type of interaction between the cognitive and generative orientation that I have been discussing, and also to grant that North American society has long evidenced a preference for the cognitive; then Johnson’s polarity management theory suggests that our primary experience of conflict will display the negative features of the lower left hand quadrant. I move now to the question of whether or not the preference for the cognitive orientation has anything to do with our theological heritage. To explore this possibility I begin with a polarity derived from Walter Brueggeman’s elucidation of the two trends he (and many other commentators) see in dynamic and creative tension within the history of Israel - the priestly and prophetic.\(^\text{15}\)

Brueggeman’s presentation of the two traditions is focused around the time of the

\(^{15}\) Although Brueggeman does not use the language of polarity management, his account of the reciprocal, complementary and mutually dependent relationship of the two traditions presented in the *Laidlaw Lectures* of 1997 clearly resonates with the structure of reality which polarity management models. I am suggesting his pairing of priestly and prophetic can be understood as another iteration of the yin/yang equation, a variation of the cognitive/generative yin/yang.
destruction of the first temple, the Babylonian exile and the subsequent return. The priestly analysis of the disaster which befell Israel was that the people had fallen away from obedience to the Mosaic laws, laws which prescribed the correct way to live out relationships: with God (worship), with each other (social relations) and with the natural world (purity). The code, which had been inherited from Moses, contained detailed instructions with the underlying theme that there was an intended order to the world, ordained by God and visible in the natural order of the world. The law set out the contents of that order and spelled out consequences for breaching it. There were rules about weaving cloth that did not offend the intended order by combining unlike threads. The law forbade yoking an ox and a donkey because that was putting two unlike creatures together, contrary to the divine order. It set out in exacting detail the structure of the Temple and the procedures for sacrificial worship, leaving no doubt that deviation would result in disaster.

If we return to the cognitive/generative polarity matrix, it is easy to locate the priestly tradition on the left-hand side. An extensive written code provides clear direction for behaviour in almost all of the life circumstances that one can imagine for an ancient, agricultural society. As with any written code the objective of predictability is furthered since anyone can refer to the code and know the consequences of obedience (God will bestow favour) or disobedience (God will become wrathful). Equality, of the kind focused on treating like cases alike, is achieved if the code is followed. The code both promotes stability in the society and is itself promoted in its credibility and efficacy during times of social stability.

J.W.Burton - Theology - Chptr. 4-123
The analysis of Isaiah, Jeremiah and others in the prophetic tradition was that the sacrificial cult was no longer pleasing to God. The primary critique was that the observance of the rules was not enough.\textsuperscript{16} God was not interested in the empty, cynical or merely rote performance of prescribed rituals. God was interested in what was present in the hearts and minds of believers, and that was known through their behaviour towards each other, particularly toward the lowliest and most needy among them. Thus the prophetic critique was that Israel had moved to the lower left hand quadrant of the cognitive/generative polarity matrix where it had lost sight of the values and vision that were important to God and further that its observance of the law had degenerated to rigidity, with no sense of the spirit underlying the letter.

The strengths of the generative approach represented by the prophetic tradition are its focus on the core values of the community: "Seek justice, love kindness and walk humbly with your God." If everyone is clear on those, then innovative and creative solutions to the challenges and problems of the moment become possible in response to difficulties which are not directly addressed by the rules. The rules can even be re-interpreted, bent or broken, as their incompatibility with the larger vision is recognized. The priestly critique of the prophetic orientation towards understanding what God requires of the community was that failure to hold to the prescribed form of worship and lifestyle left the people open to the temptation to worship other gods and to engage in

\textsuperscript{16} See Luijpen on this point where he writes, "The premise must be that law and morality have different objects. The law aims at man's behaviour as manifesting itself externally, while morality is concerned with the internal orientation of his will. For the law, results come first, but for morality the internal disposition." p. 221, note 70.

\textit{J.W.Burton - Theology - Chptr. 4-124}
worship and life practices that were offensive to God. Relativism and syncretism were real possibilities, and of course the risk of provoking divine wrath then arose.

This priestly/prophetic polarity is another iteration of the yin/yang equation, which I suggest follows a trajectory similar to that of the cognitive/generative polarity. The doctrine of law and grace, well known to Christian theology, represents another. By the time of Jesus, to restate this doctrine in terms of the polarity matrix, the religious leadership in Judea had become thoroughly embedded in the lower left-hand quadrant. The legalistic mindset of many of those who collaborated with Rome was evidenced in the multiplicity of rules, in the rigidity of their application and in the loss of the vision of their underlying spirit. Jesus, in contrast, offers pithy responses that open up new possibilities for interpretation of texts and rules by reminding his listeners of the fundamental values underlying the rules. Most famously perhaps, when challenged about a breach of the laws of Sabbath observance Jesus responded, "Was humankind made for the Sabbath, or was the Sabbath made for humankind?" In this rhetorical question, (which was asked by other rabbis as well), Jesus draws attention to the routinization of interpretation which has occurred and invites a generative approach, which is better adapted to the circumstances of the present.

Jesus' approach was not, however, a dualistic one. He did not reject the cognitive approach but corrected the culture's over-reliance on it by his use of the generative. His reminder that he came not to abolish the law but to fulfill it serves to affirm the need for both the clarity of rules and the flexibility of a generative approach to their application.

J.W.Burton - Theology - Chptr. 4-125
In the story of the woman caught in adultery Jesus does not reject the rule which
condemns her behaviour. After all, he tells her to "go and sin no more." What he also
does is to challenge those who would enforce the law with the death penalty to recognize
that the rule speaks to each of us. The intention of the law is not to divide humankind
into the righteous and the sinful, but to remind us that none is without sin and thus all are
in need of divine grace, which alone can effect the restoration of relationship which is
God's reconciling desire for humankind. Fulfillment of the law is reconciliation with
God, not a Kantian punishing of every last criminal.17

Paul, raised in a culture of excessive legalism, struggled with the polarity of law
and grace. In saying "all things are lawful for me, but not all things are helpful,"18 he can
be heard both to move to the generative side, rejecting the rigidity of the lower left
quadrant, and also to recognize the danger of the lower right quadrant where licence and
chaos lurk. The primacy of Christ in Paul's theology represents an appreciation of the
unifying and synthesizing dynamic which is required to effect reconciliation with God
and with our fellow humans. It is in the unity of Christ that the tension of cognitive and
generative orientations is resolved. In Christ the clarity, equality and predictability of the
cognitive approach is achieved, not through rigid rules, but through embracing the central

17 Timothy Gorringe. God's Just Vengeance. "This is the view expressed by Kant's famous
remark that even if a civil society were to dissolve itself tomorrow, ‘the last murderer in
prison must first be executed so that...blood guilt will not fall on the people’." quoting Kant
Rechtslehre Part II, 49E. at p.22, note 55. And further, “If it is punishment which gives us a
moral world, on the lines of Kant’s famous sentiment quoted earlier, then we need only
remind ourselves of John Cottingham’s remark, that such a view only makes sense if we
presuppose a bloodthirsty deity.” p.236.
18 I Corinthians 6:12 (RSV)

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value which infuses all people who open themselves to it, the value of self-giving love. This is how the reconciled relationship with God and our fellow humans is brought about, through the creative, flexible, universal yet radically particular generative power of the reciprocal love of God and human which is captured in the two-fold great commandment to love God and one's neighbour as one's self. In the unity of Christ the stability of the cognitive knowledge of God's love and the generative power to adapt to all the challenges of a chaotic universe are reconciled.

John Calvin in his commentary on the Ten Commandments provides a vision of the impact of this reconciliation of law and grace in Christ. The application of the sixth commandment is not so narrow, says Calvin, that we can claim to have fulfilled it if we simply refrain from murder. The cognitive law must be kept in dynamic relationship with the generative power of Christ's great commandment of love. And so the stark four words of this commandment must be read expansively through the lens of the law of love to express its full import. We must not only refrain from murder, the law tells us according to Calvin, we must go further and avoid creating conditions by our actions that will prove fatal to our brothers and sisters. Destroying the crops which people rely on for food, creating dangerous traps or swinging one's sword in a crowded market are to be avoided. But there is more than this; the commandment is only fulfilled if we do all we can to create conditions that will preserve the lives of our brothers and sisters. Thus we must care for them when ill, feed them when hungry and provide shelter when they are

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homeless. Managing the polarity of law and grace requires that we treat the certainty of
the rule as a constant stimulus to adaptive application of the law of love. That is to say
that our generative living out of the great commandment is informed, though not
treated, by the specificity of the cognitive law.

Alasdair MacIntyre’s20 presentation of what he calls Three Rival Versions of
Moral Inquiry offers another iteration of what I have called the yin/yang equation that is
suggestive of the pattern of how humans address disputes through moral and legal
reasoning. While doing justice to his closely reasoned argument would take me well
beyond the scope of this paper, I want to risk distorting it through simplification in order
to point to the way in which his resolution, and here I think I am not at risk of
misrepresenting him, can be viewed as managing the polarity of two alternative forms of
moral enquiry in a way that amounts to a third. The yin/yang relationship of cognitive
and generative is similar to MacIntyre’s categories of encyclopaedic and genealogical
methods of moral enquiry. His suggestion that Thomism provides a way in which that
enquiry can synthesize the two through attending to tradition provides a philosophical
unraveling of what I am suggesting is represented by this symbol. What is suggestive for
my thesis in this characterization of MacIntyre’s project is to note that his third way, that
of tradition, is a synthesis or an integration of the encyclopaedic and the genealogical
which is achieved by a deep understanding of each. This allows for drawing on the
strengths of either approach in the context of the third, which is an ongoing movement
through the polarities of the other two. His synthesis does not replace the other two
versions of rational enquiry; rather it posits a way to live in the creative tension of their yin/yang relationship. The following lengthy quotation summarizes his presentation of the Thomist, traditional version of moral inquiry.

...to each question the answer produced by Aquinas as a conclusion is no more than and, given Aquinas' method, cannot but be no more than, the best answer reached so far. And hence derives the essential incompleteness. For what Aquinas does is to summarize on each question the strongest arguments for and against each particular answer which have so far been formulated, drawing upon all the texts and all the strands of developing argument which have informed the traditions which he inherits - earlier patristic, Augustinian, Platonic, Neoplatonic, Aristotelian, the commentaries of Averroes and Avicenna, the contributions of Maimonides, and of course the texts of sacred Scripture. But when Aquinas has reached his conclusion, the method always leaves open the possibility of a return to that question with some new argument. Except for the finality of Scripture and dogmatic tradition, there is and can be no finality. The narrative of enquiry always points beyond itself with directions drawn from the past, which, so that past teaches, will themselves be open to change. And the narrative of enquiry is of course itself embedded in that larger narrative of which enquiry speaks in setting out the intelligibility of the movements of creatures from and to God.  

Maclntyre begins by presenting Adam Gifford as an archetype of the first position, which he calls the encyclopaedic. Gifford, says Maclntyre, took it as a matter of demonstration "that there is an eternal and unchangeable system and schema of morality and ethics, founded not on the will, or on the devices, or in the ingenuity of man, but on the nature and essence of the unchangeable God."  

The second position, the genealogical, is exemplified by Frederick Nietzsche of whom Maclntyre writes, "Nietzsche, as a genealogist, takes there to be a multiplicity of perspectives within each

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of which truth-from-a-point-of-view may be asserted, but no truth-as-such, an empty notion, about the world, an equally empty notion."  

MacIntyre goes on to locate the origins of these orientations in Augustine and Aristotle. Using the cognitive/generative polarity as a template we can put Augustine on the left, or cognitive, side and Aristotle on the right, or generative side (noting that these characterizations considerably abbreviate the complexity of their thought). "For Augustine," writes MacIntyre, "... the mind [is] by itself incapable of knowledge but for some external source supplying what the mind cannot itself supply." That source, says Augustine, is divine revelation. To say that without God we cannot know implies a cognitive orientation towards knowledge. Knowledge so conceived is "out there," locatable somewhere beyond our human capacity to experience it directly. Knowledge of what is good, right or moral has an external (and eternal) existence. When it impacts humankind with the force of divine revelation it is undeniable and life changing. Knowledge as divine revelation is experienced as an exterior force acting upon the individual.

"For Aristotle," on the other hand, "an adequate characterization of the mind is that of the mind as achieving knowledge." And further, MacIntyre claims, Aristotle's version of how we achieve knowledge involves a "conception of coming to know as the actualization of what is already present in potentiality in the intellect." That potentiality is not accessible by simply reaching into the filing cabinet of one's mind, but

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is disclosed through an active engagement with the social environment, the *polis*, in which one finds oneself. It is through interaction, through education and discourse, that one comes to apprehend what is potential in the intellect, but only known through the *polis*. In this conception knowledge is generated within the individual through a process of interpenetration. That which is within one in potential is drawn to awareness through the interaction of exchange with one’s fellow members of the *polis*.

Augustine practiced a form of deductive reasoning, locating certain knowledge in revelation and from there moving outward to the knowledge of what it is that God calls us to do in the moral dilemmas that confront us. Aristotle located knowledge of the good in the environment. It is, he claimed, potential in the mind, to be revealed through interaction within the community. To state the matter simply, Augustine locates knowledge of the good and the moral in God and Aristotle in the *polis*. Aristotle does not claim that the good discovered in the *polis* is immutable and eternal, as is the good discovered in God. Because the good is discovered through interaction and is specific to the culture of the *polis*, Aristotle avoids claiming that a universal good can be known.

MacIntyre presents Thomas Aquinas as resolving the tension between Augustine and Aristotle. Divine revelation for Augustine is a process in which the overwhelming God presents the good to human awareness. It is through grace, which always remains beyond human control, and grace alone, that humankind can come to know what is good. For Aristotle what is good is discerned through the efforts of the human mind, but that which is discerned in this way lacks the certainty, the quality of the absolute, which is an
attribute of divine knowledge of the good. Aquinas adopts Aristotle's stronger view of
the capacity of the human mind, but locates knowledge of the good, which it seeks to
discern, in God. Thus revelation, or at least one instance of revelation, for Aquinas, is
capable of being attained through the rational workings of the human mind, which seeks
after divine knowledge of the good. The limitations of human ability require a humility
about the capacity to know with certainty. Except for the clearest of revelation in
scripture "the moral life is the life of embodied moral enquiry." This Thomist synthesis
is not relativistic; it draws on tradition to guide decision making in the moment. But the
past is not absolute, because the knowledge of the good, which was disclosed to us, has
been, we recognize, perhaps imperfectly apprehended. And even the truth of revelation
can, in the light of new circumstances, be appropriated with a changed understanding of
what it imports about the eternal good lodged in the divine.

The strength of the Thomist synthesis as I have understood it is that it strikes a
balance between the cognitive orientation, which claims the clarity, predictability and
equality inherent in divine prescription as revealed in the tradition, and the generative
orientation, which provides the adaptability, innovation and creativity that is required to
respond to an environment which is always presenting humans with novel moral choices.
Those choices often present themselves as conflict within (or between) human
communities. When experience has presented similar situations over time, and
conditions are stable, the cognitive approach to conflict will be the most frequently used.

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²⁶ See also Alasdair MacIntyre, *Whose justice? Which rationality?*, p.189
²⁷ Alasdair MacIntyre, *Three Rival Versions of Moral Inquiry* p. 80
However conditions do not remain stable over time. Israel needed to hear the prophetic voice when Babylon was at the gates, Palestinian Jews needed to challenge the tyranny over scriptural interpretation of their legalistic, collaborationist religious leaders and Aquinas needed to respond to the challenge which the rediscovery of Aristotle brought to the neo-platonic theology of Augustine. The situations were not all the same. By considering different iterations of the conflict, one can identify the responses as located at different points within the polarity matrix. What I am suggesting is that the matrix opens up for observation the process that is underway as conflict is addressed within a society. The matrix allows us to locate various approaches to ethical reflection and to understand how they relate to different situations, which require our consideration. This review of how our ancestors in the faith have responded to conflict seeks to apply this tool, but also, to the extent that the tool is disclosive of the process by which our theological tradition has responded to conflict, to point to ways in which ADR is in continuity with that tradition.

I shall now move to a closer consideration of the role of conflict in Western society and in the Church through a revisiting of the case studies presented earlier. In this examination I shall continue to use the template of the cognitive/generative polarity. Then I will draw some connections between the understanding of conflict as a process, which is suggested by this examination, and the theological insights of process theology.

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Theological Reflection on the Case Studies

Conflict may be characterized as that interaction which occurs between humans at the meeting point of divergent expectations about how things ought to proceed. Reference to rules, tradition or authority can often resolve such conflicts in straightforward or technical cases. In such cases the disagreement is about means rather than ends. The more difficult type of conflict to resolve is that where, underlying the disagreement, there are differing understandings of the way things are. When conflict at this deeper level exists, it will often manifest itself as disagreement of the first type and the deeper disagreement remains hidden. Addressing the deeper issue is usually more painful and threatening and parties to the disagreement may collaborate in avoiding the work needed to do so. Unless the second level disagreement is dealt with, however, the first level disagreement will resurface even if technical solutions, which seem to satisfy both parties are agreed upon.

The challenge of resolving conflict or of finding a way to live with and manage it calls for parties who must live together to come to a sustainable agreement on how things should proceed. It may take some time for the second level disagreement to generate enough heat so that the parties are sufficiently motivated to face the more difficult task of examining and addressing the underlying disagreement about the way things are. That work requires that the parties to the dispute dig deeply enough to overcome their sense of otherness. Overcoming otherness does not mean the parties become unified nor that their perceptions of the way things are become one. To overcome otherness can mean

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recognizing the shared values that inform how all of those who are party to the conflict understand how things are. It is then that they can proceed with sufficient support for a common course of action.\textsuperscript{27} Overcoming otherness may mean no more than a mutual recognition of the humanity of the other. That may be the only shared value. However otherness is overcome, it is difficult work for the participants because it requires challenging the conception that we hold of self and of reality. If squarely faced, the outcome of working through the conflict and facing the challenge to our preconceptions is that we will be changed in our conceptions of self and of reality and in our relationships with those who were other but have become part of us through the power of love manifested in acts of reconciliation.\textsuperscript{28}

When Jesus came upon the crowd which was about to stone the woman caught in adultery he challenged their apparent agreement on how to proceed (killing her) and at the same time he challenged their conception of the way things are by saying “Let the one among you who is without sin cast the first stone.” The crowd initially conceived of the woman as other because she had sinned. Jesus invites them to see that each of them is the same as she: a sinner. Thus the crowd shifts their conception of the way things are. The power of this shift reconciles them to the woman, at least sufficiently that they spare

\textsuperscript{27} Ronald Heifetz describes the process in these terms, “Leading these factions required engaging each in the perspective of the other...Thus, leading across boundaries requires permeating and reforming the boundaries...one must invade the normal boundaries and convince each decision-maker to risk commitments to his or her “home” interests.” \textit{Leadership Without Easy Answers}. p. 119.

\textsuperscript{28} See my discussion of Miroslav Volf’s \textit{Exclusion and Embrace} in Chapter 6 for a fuller exploration of this theme.
her, even if they do not befriend her.

Ronald Heifetz, in the case study cited in the previous chapter, describes how this process of moving to the second, deeper level worked in the situation where a copper smelter was both the only source of jobs for a small town and a source of pollution which caused significant health effects and some deaths in the surrounding area. William Ruckleshaus, the director of the Environmental Protection Agency (EPA), the governmental agency with the authority to impose pollution abatement requirements, instituted a series of meetings of townspeople, company representatives and EPA researchers. The meetings began with the sharing of information, about the smelting process and the cost of lowering pollution, about the economics of the copper industry and of the local area and about the health impacts of arsenic at various levels of concentration. The meetings used a small group discussion format to allow the participants to talk with each other rather than dividing those who gathered, into two groups, experts who spoke and the people at whom they spoke. Heifetz’ analysis of why this process was successful in addressing the conflict led him to conclude that to a significant degree those concerned about health and those concerned about jobs were able to enter into the mind-set of the other. They were able to see how the other thought things were. This enabled the participants to understand that the demands made by the other about how things should proceed were not perverse. They made sense from that other’s perspective. The difficult deep-down value decision that the parties all had to confront was the degree of environmental damage they thought appropriate for the community to absorb for the benefit of economic well-being. The parties did not come to

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a common position on this, but they did come to see that those holding different positions had wrestled with the competing interests of jobs and health and had reached a reasonable, if different balance. To state the result in terms of a polarity management matrix, the parties recognized that jobs and health were shared values, two poles that could reasonably be managed in a number of ways. The participants identified the content of the negative quadrants and looked for a way to find a balance within, or a way of moving between the positive ones.

In the result, largely because of a world crash in copper prices, the smelter was closed. But the process, which Ruckleshaus had initiated, had prepared the local residents to adapt to the eventuality that at the beginning had seemed to be a devastating prospect. They had incorporated into their thinking something of the reasoning of the corporate owners of the smelter. This moved them to a new way of approaching the need to balance jobs and health, to take more responsibility for the economic life of their community and in particular, to seek a diversified and environmentally less damaging industrial base.

The importance of bringing parties in conflict to the point where they can put on hold their disagreement about how things should proceed cannot be over-emphasized. Doing so allows time to move the parties to a point where they have overcome that sense that they are dealing with the other. It is when the parties begin to develop a sense of mutuality that they can work together towards a resolution. In the copper smelter case study the sharing of information which led to a sharing of values may have seemed like a delaying tactic initially. But in the end, even though values identified were not shared

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completely or universally, the sense of otherness was overcome to a significant degree because all involved recognized that the values of others were not so divergent as they had in the beginning assumed. Otherness was overcome in the process of discerning and generating assensus together.

The urge to take quick action in a situation of conflict is identified by Heifetz as rooted in a desire to alleviate anxiety. Taking action, looking for a technical, quick fix, it is hoped will relieve the distress of those caught up in a conflict. Such relief is short-lived in most cases because the quick fix does not address the underlying value questions, which must be visited. Shared expectations about how things should proceed do not result in conflict. Conflict arises when there is a disagreement about what actions flow from shared values or from a divergence in values. In an environment of change and in organizations of diversity these types of differences will arise frequently.

Heifetz points to the role of authority, such as Ruckleshaus, Chair of the Environmental Protection Agency in the case study, in lowering anxiety and encouraging people to do the work needed to determine together how their values guide them in adapting to changed circumstances. In many situations within the life of congregations and communities such authoritative intervention is unavailable. That is when a process for addressing conflict can be helpful. It lowers the level of anxiety, providing the delay in taking action that is needed. This makes time available for the parties to undertake the harder work of addressing the sense of otherness that can be overcome through a collaborative examination of values and their implications for action.

In the Cranberry United daycare case study the Church Board and the daycare
Board both discovered shared values in their commitment to providing quality, reasonable care for local children. From that value base the conflict over how to do that, how to structure and operate the daycare, was more easily addressed. Prior to the intervention of the CRF the two boards had viewed each other as *other* and had presumed that their values were in conflict. The Board thought the Church just wanted revenue and the Church thought the daycare folks were unrealistically demanding and unappreciative of the Church's contribution to their centre.

In the Blueberry United situation it was not a divergence of values that underlay the continuing conflict, but a sense of hurt feelings. The committee felt that they had been ill-treated by both the ministry staff and the board when their recommendation was not accepted. Because this sense of resentment had never been sufficiently acknowledged it exacerbated the committee-members' sense that they were no longer part of the congregation. The committee felt the congregation treated them as *other* and in response they banded together, embracing their grievance, to provide themselves with a sense of community, but exacerbating their exclusion.

In that situation the process for addressing the conflict did not require an examination of values, but an airing of feelings. Often when we humans remain on the intellectual plane, we can maintain a sense of *otherness* in the face of considerable effort to overcome it. There is a strong ability to resist rational argument with rational argument in order to maintain an emotionally grounded sense of separation from the *other*. It has been my experience in many mediations and ADR settings that time spent on sharing within the group the hurts and anger that the conflict has generated is time
well spent. A resolution acceptable to all parties will often appear virtually spontaneously after spending a long time talking about feelings. Expressing and airing the emotional damage of conflict carries some risk, of course, and must be done with care and sensitivity by persons with adequate training and experience in human dynamics, but it almost always leads to the participants overcoming the sense of separation which, if unaddressed, will keep the conflict going indefinitely.

The standard party-party mediation process described in the Apple United case study invites the parties to share information and to express feelings about the conflict. They are then invited to collaborate together on a resolution, first by brainstorming options - a creative and non-judgmental process - and then by critiquing the options together to design one that adequately addresses the needs of each - a cognitive and rational process. In this case, as in the others, the process invited the parties to step back from their initial positions about the way things must proceed, a disagreement that allows them to maintain rather than overcome their otherness. Overcoming otherness is accomplished through sharing values or feelings to find common ground with persons heretofore seen as intractably opposed. This is the work of reconciliation to which Christ calls us.

Overcoming otherness does not result in an entropic porridge of unity, but in a broadening of the possibilities for new ways of understanding reality and new or deeper relationships which enrich the individuals who share this experience. Process
theologians John Cobb and David Griffen present a vision of God as “the ground of novelty” (28) who seeks to persuade all of creation to engage in a continuing process of creative transformation. In a Newtonian or Cartesian world of discrete individuals acting upon each other by forces that never penetrate the surface, each maintaining his or her essence as a cogito in unchanging stability, the possibilities for the surprise of novelty are theoretically zero. Fritjof Capra writes, “in Newtonian mechanics all physical phenomena are reduced to the motion of material particles, caused by their mutual attraction, that is, by the force of gravity...All that happened had a definite cause and gave rise to a definite effect, and the future of any part of the system could - in principle - be predicted with absolute certainty if its state at any time was known in all details.” In a process understanding “We influence each other by entering into each other. This contrasts with the view of efficient causation that has dominated the modern world, the notion that the cause is completely external to the effect.” (23) This entering into the other is also and always interpenetration with the divine who is understood as creative-responsive love. “The creative activity of God is based upon sympathetic responsiveness; and the responsiveness of God is an active receptiveness made in the light of an intended creative influence upon the future” (62). For humans, this creative activity of God is experienced both in community and in individual interaction with God. The divine intention is that we participate fully in both of these poles of experience as the creative

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39 John Cobb and David Griffen, *An Introduction to Process Theology*. The following discussion will draw extensively on this work. Page references in brackets will refer to that book in this discussion.

30 Fritjof Capra, *The Turning Point* p. 66

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possibilities for God and creation are maximized. And it is God’s intention that all creation delight in novelty along with God. “[W]e exist first of all in community and establish relative independence within it. With Tillich, [Whitehead] holds that participation and individuality are polar, so that the more we participate with others in community the more we can become individuals, and the more we become individuals, the more richly we participate in community. It is the view of isolated self-identity from birth to death that is the illusion.”(82) We can thus describe God’s intention for human life as the process of managing the polarity of the individual and the community.31

The participation in community which God intends for us, participation which is our response to God’s persuasive love, not to God’s command or pre-determining will, inevitably results in conflict, the coming together of individuals with divergent expectations about how things ought to proceed and about how things are. It is through encountering conflict creatively and in a spirit of love that humans move into the creative transformation which enriches us by providing a wider range of experiences which we incorporate into who we are. This in turn widens the possibilities for future experiences to be enjoyed. The enjoyment which God intends for us is not simply novelty or experience for the sake of the pleasure we might take in it as such, but for the sake of fulfilling God’s “initial aim” for each creature which is “that form of actualization which achieves the greatest enjoyment immediately for the occasion and for the subsequent

31 Paul Tillich expresses it this way in Love, Power and Justice at p. 43, “According to the polarity of individualization and participation which characterizes being itself, everything real is an individual power of being within an embracing whole.”
occasions it will affect." (98) "I came that you might have life more abundantly" thus can be understood to mean that God is calling us to confront conflict as presenting an opportunity for creative transformation, which is understood as "the essence of growth, growth being the essence of life. Growth is not achieved by merely adding together elements in the given world in different combinations. It requires the transformation of those elements through the introduction of novelty." (100)

The Newtonian/Cartesian understanding of humans as discrete and autonomous entities functioning in a world of linear causality is coming under scrutiny from commentators in a number of fields including; law, management science, philosophy and theology. Jennifer Nedelsky argues that, in our legal system, linear causality as the model of human behaviour has resulted in a "stripped rationality," which is persuasive only if the complexity of the human person as embedded in community is ignored. Gareth Morgan writes that our habit of 'thinking in lines' blinds us to the way in which "the seeds of the future are always enfolded in the oppositions shaping the present. A dialectal imagination invites us to embrace contradiction and flux as defining features of reality." Karl Rahner has claimed that interpenetration, overcoming our otherness is of the very essence of living out God's love in the world. Paul Tillich also expresses the idea that humans are called to overcome our otherness, suggesting that we are drawn by God to return to the unity, which was our origin and is God's intention.

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32 Jennifer Nedelsky, "Meditations on Embodied Autonomy."
33 Gareth Morgan, Images of Organization p.265.
34 Michael Sandel, Liberalism and the Limits of Justice.
35 Karl Rahner, "Unity of the love of neighbour and love of God."
“Love is the drive towards the unity of the separated. Reunion presupposes separation of that which belongs essentially together.”

Conflict, in Tillich's framework, can be understood as those occasions when our separateness is manifesting itself in our relationship with another or others. Such occasions, when differences are clearly defined, carry potent opportunities for moving toward unity, if the differences can be overcome.

That Enlightenment rationality and scientism have disclosed their flaws to us does not mean we should discard them. The process view, which I have presented here, argues that we could not do so even if we wished to. The gifts of the cognitive orientation, however, are only attainable if we keep it in balance with the generative. The problem has been, and this is an inheritance of the Enlightenment that we should discard, that we have greatly favoured the cognitive and in the result have slipped into the lower left-hand quadrant where we experience its weaknesses much more than its strengths. Our commitment to the cognitive is made more difficult to overcome because it presents us with a linear and dualistic conception of reality which posits that we must reject one view in moving on to the next. The only view that we must reject is the view that we must reject one view. The wisdom of Maclntyre’s synthesizing traditionalist version of ethical enquiry and of Johnson’s polarity management model is that each calls us to draw out the best of the past and the potential of polarities that seem incompatible.

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36 Paul Tillich Love, Power and Justice, p. 25. Tillich also writes at p. 80, “We have discovered the absolutely valid formal principle of justice in every personal encounter, namely the acknowledgment of the other person as a person.”
They point us towards the need to re-enter both past and future with a view to being
changed by the encounter.

A gospel prescription for resolving conflict

One of the few biblical passages to explicitly speak of how to address conflict is
that in Matthew 18:15-20, which provides a three-step process for dealing with disputes
in the church. Although the passage is clearly that of the early church, the voice of Jesus
can be heard. Matthew begins by characterizing conflict as offense, he then urges the
offended person to approach the offender “when the two of you are alone.”37 The first
step thus is not to run to the rulebook or to the authorities, but to work it out through
personal interaction.

If there is no resolution coming out of the direct encounter, then the offended
person is told to bring witnesses and again confront the offender. It is if the offender
refuses to listen to the witnesses, not if he or she refuses to listen to the offended, that the
parties are directed to the next step. Unless the witnesses are simply lackeys of the
offended, which I do not think is the sense of the text, then my experience of human
beings suggests that they will not simply accept the offended person’s statement of the
situation. They will hear both sides and offer their view, which will invite the parties to
move to a new understanding, to reassess their opposing visions of the way things are.
Only if that offer to reassess, implicitly made to both, is refused, is the matter to be

37 Note that the United Church’s informal hearing process adopted this first step in urging the
parties to speak together and try to work out the differences between them. The Manual,
1995, s. 068.

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referred to the whole church.

If the whole church hears the dispute between two of its members, then we can be sure that there will be a variety of opinions expressed. A general debate about the way things are will occur and the inclination of the offender and offended to treat each other as other may well be overcome as they participate in the broader reconsideration of the issue. Finally, if there is no resolution, the offender is to be treated as “a Gentile and a tax collector.” Recognizing that Gentiles and tax collectors were not popular in the culture, this text has often been taken to mean the offender is to be excluded from the community. Indeed this may be the proof text for the practice of shunning. Here, however, is where I hear the voice of Jesus most clearly. All we need do is recall how Jesus treated Gentiles (the Syrophoenician woman) and tax collectors (Zaccheus and Matthew himself). He welcomed them into the community, shared bread with them and accepted them as they were. Thus the final step in addressing conflict, as I read this text, is to put aside the immediate issue and to seek to overcome by other means the otherness, which is at the root of the conflict. Reconciliation will not be achieved so long as the issue is outstanding. But resolving the issue by formal processes of rational discussion is not always possible either. In that case a movement away from cognitive processes to enlist the generative possibilities of living out God’s love in affirming community is what we are called to do.
Chapter Five - Alternative Dispute Resolution and the Legal System

The advent of ADR in North American life

While many authors have commented on the rise in the use of ADR in the latter part of the 20th century none has yet offered a definitive theory to account for it. Prior to the early 1970s the use of mediation was essentially restricted to labour-management disputes. Arbitration was resorted to only in resolving conflicts in the interpretation of contracts in cases where it had been named as the dispute settlement mechanism. Some writers suggest that in the early 70's there was simply a desire to find a better way, a recognition that the adversary system was not always meeting the needs of the parties, nor of society. This dissatisfaction led to the movement that became discernible in the United States, Canada, Australia and in the United Kingdom toward the use of mediation and similar methodologies for the resolution of disputes. Some writers have traced the origins of ADR back to the beginning of the century. Others have noted the theme of reconciliation is found in the legal systems of Asian, African and Native American cultures. The Jewish Conciliation Board, founded in 1920 is but one illustration of the cultural and historic pervasiveness of the reconciling emphasis of many legal systems. Tracing its roots back to the Biblical courts of Beth Din, the Board perceives itself as "not only a body that dispenses justice, but even more as a body that tries to make peace among the disputants." And though the adversarial system is firmly entrenched in Western culture, if one looks back a thousand years, even there a reconciliation emphasis

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2 Howard H. Irving, Divorce Mediation: The Rational Alternative. p. 42
was central to the justice system. Diffuse though its originating influences may be, the literature commonly agrees that a reconciling approach to disputes became observable in the 1970s.

That reconciling spirit has given rise to the growth of an incredibly diverse movement. The traditional legal system has embraced ADR. In Ontario mediation has been made a mandatory procedure before civil litigants are permitted to proceed to trial. In matrimonial litigation, mediation is optional but is available to parties right in the courthouse. Neighbourhood reconciliation services have sprung up to help neighbours deal with barking dogs and disputed fence lines. The federal government employs mediators to work with farmers and their creditors. Private mediation services employ retired judges who are available to do summary trials for corporations willing to pay. Other mediation services work with family, labour/management, workplace and a myriad of other spheres in matters completely unconnected to traditional litigation. Professional or quasi-professional organizations of mediators have sprung up to offer training and certification, ethical standards and promotion. The range of institutions and individuals offering training in ADR styles to meet all needs is astounding. As well as courses offered by newly formed organizations of mediators, law schools now offer courses, programmes and degrees in ADR. In the United States a Uniform Mediation Act has been introduced evidencing the pressure to regularize and professionalize this field. In

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the contrary direction one can discern the continuing chaotic nature of its development by typing the word "mediation" into any Internet search engine and spending a few hours browsing through the many Websites that have sprung up.

The pressures leading to the development of more collaborative approaches to justice in the recent period arose first in two areas where the failures of the adversarial system were most keenly felt, criminal law and matrimonial litigation. In the former area, pioneers such as the Mennonite Central Committee, with its long history of chaplaincy to prisoners and peacemaking ministries, played a crucial role in experimenting with collaborative efforts, such as victim-offender and restorative justice programs where counselors worked individually with convicted criminals and persons against whom they had offended in hopes of facilitating a joint meeting which often proved cathartic for the victim and healing for the offender. In Europe the work of Herman Bianchi, former dean of the Law School at the Free University of Amsterdam, has sought to reconnect Western culture with the notion of sanctuary, a place where an offender could avoid retribution at the hands of his or her victims while he or she attempted to work out a plan of reconciliation. North American prison systems, with their disproportionately high populations of native Americans, provided a natural forum

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4 Gordon Husk, "Making Community Mediation Work."
for re-appropriating native methods of seeking reconciliation rather than retribution.  

The law courts have experienced a steady increase in matrimonial litigation as a proportion of their activity as the incidence of marriage breakdown has increased steadily through the last century. Howard Irving cites the establishment of the Los Angeles County Conciliation Court in 1939 as the first effort in North America to find a way to introduce a therapeutic component into the legal process. That process was unable to adequately address all of the needs of participants in marriage breakdowns. The conciliation movement spread throughout the United States and by the late 1960s was a formative influence in the development of the Unified Family Court system in Ontario. In its origins, conciliation sought to test the possibility of reconciliation of divorcing couples and then, if that were not an option, to find ways to minimize the harm to children as parents separated. Initially only custody matters were referred to the conciliation courts while property and support matters were dealt with by the adversarial method. It became apparent over time, however, that if the parties were fighting over property in a courtroom one day, it was difficult for them to re-orient themselves to a collaborative approach to custody matters in a mediator’s office the next. Because the conciliation court movement derived such impetus from its commitment to the welfare of

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9 In this paper I will not address some of the complexities such as whether restorative approaches are appropriate when offenders do not accept responsibility or theological issues such as atonement that are raised with more force in the realm of criminal justice than they are in the civil sphere with which I am primarily concerned.

7 Howard Irving, *Divorce Mediation*. p. 47

8 Irving uses the term conciliation interchangeably with mediation, but with a clearly therapeutic connotation.

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the children of divorce, it was able, in many jurisdictions, to assuage or at least overrule the concern of the family law bar that moving property and support matters into a collaborative venue would compromise the rights of the parties.

This positive interpretation of the development of conciliatory approaches to matrimonial disputes is challenged by some feminist scholars who have suggested that ADR was introduced into matrimonial litigation at a time when women were beginning to achieve some advances in the recognition of their rights to property and child custody in the event of marriage breakdown. In this view ADR is characterized as a counter-move by a patriarchal culture intended to perpetuate the disempowerment of women who have begun to assert themselves in the traditional legal forum.

Similarly, it is argued by some, ADR can be characterized as a response by the business and corporate elite to preliminary success enjoyed by environmental and social justice activists pursuing their objectives through adjudicative processes. In this understanding ADR is seen as the privatizing of what are public disputes, removing the glare of publicity that accompanies a trial and stripping plaintiffs of the rights to which law entitles them, rights which require the power of the courts for their enforcement.9

Other writers, taking a more sanguine view of the rise in ADR, point to general social trends, of which they see ADR as one manifestation. The rise in self-actualization therapies, a recognition of caring as a way to understand justice (primarily derived from


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feminist legal thinking) and the growing critique from a relational perspective of Western culture’s fixation with individualism (which is central to its rights orientation towards justice and has impoverished our community life) are all part of this mix of trends which have impelled lawyers and litigants to search for another way to resolve disputes.¹⁰

The pressure to find alternatives to the courtroom may in part be derived mathematically from demographic trends. In a suggestive analysis David Luban¹¹ begins by observing that in small stable populations the number of person to person transactions will, obviously, be few. If we assume that a given percentage of all transactions will become conflictual, he continues, the number of conflicts in a small stable population will similarly be small. As the number of persons with whom one comes in contact increases, however, the number of interactions increases much more rapidly than does the number of actors. In a world of “n” people, the number of two-party interactions is \((n^2 - n)/2\) or slightly less than the square of the number of actors. In a city of one million persons, that yields the possibility of something close to half a trillion interactions.

Assuming that the proportion of interactions which become conflictual is constant, and intuition suggests that the proportion would in fact increase as population rises in both density and absolute terms, the number of potential conflicts can be seen to be far greater in the world as each day passes.

¹⁰ Carol Gilligan, In a Different Voice, Deborah Tannen, The Argument Culture: Stopping America’s War of Words, and You Just Don’t Understand, Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving.”
¹¹ David Luban, “Settlements and the Erosion of the Public Realm.”
Justice Rosalie Abella of the Court of Appeal for Ontario has pointed out that our legal system has changed little over the course of the twentieth century. She quotes Roscoe Pound, former Dean of Harvard Law School who wrote in 1906 that “Uncertainty, delay and expense...[are] direct results of the...backwardness of our procedure. The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.” Abbella then goes on to remark that “Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today’s courtrooms.” It may be that her argument can be extended back to 1806, 1706 or beyond. Her point is made, however, by the question that follows, “Could a doctor from 1906 feel the same way in an operating room?”

The combination of the pressure of growing numbers of conflicts and the inability of the legal system to accommodate the increased volume, except by inadequate increases in the population of judges and lawyers and in the number of courtrooms has, in this view, found an outlet in private or semi-private ways of resolving disputes. Evaluative ADR methodologies are those which most closely resemble the familiar litigation model. Most frequently they involve the use of retired judges in private courts, arbitration and case assessments. The disputing parties contract with a third party to whom they cede the power to decide their case. Rules of evidence and procedural protections available in the civil courts are relaxed and, for a fee, the parties have their

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12 Rosalie Silberman Abella, “Professionalism Revisited.”

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dispute resolved quickly. These approaches can be characterized as a private sector expansion of the capacity of the law courts.

Simply deciding the presenting issue is not always a way to resolve a dispute. Ronald Heifetz’ distinction between issues that require technical solutions and those that require adaptive change is helpful in seeing that in many situations evaluative techniques may paper over the cracks in an organization or community, but will not prevent other disputes from arising again and again until the underlying issue is finally addressed. Technical solutions are most often appropriate where the parties neither anticipate nor desire an ongoing relationship. Where there is a continuing relationship and the dispute arises out of different core values or understandings of the way things are, then a quick decision that does not allow room for opening up a discussion about those core values may be counter-productive. Moving to a solution too quickly can leave both parties feeling that their real needs have not been heard.

Evaluative ADR and technical fixes are not to be disparaged, however. As one writer has noted, the procedural protections that are so important in the conduct of adjudication are burdensome and even counter-productive when the needs and expectations of the parties can be better met by informal and expedited processes. Cutting away those procedural protections in the interests of expediting decisions is a welcome development for many litigants if the dispute is confined to a difference of opinion about the interpretation of a contract term or rule of law or, as in mass consumer
transactions where there is no on-going relationship of the parties. In such cases the traditional court system with its procedural protections and opportunities for lengthy process has impeded the need of the parties for solutions that provide speedy certainty.

Cutting away procedural protections is not welcome, nor appropriate, for all disputes. I have already mentioned those who view the development of ADR as a corporate conspiracy intended to disempower feminist, environmental and social justice advocates just as they were beginning to enjoy some success in advancing their causes through litigation. In his dialogic polemic, “Conflict as Pathology” Richard Delgado writes, “powerful parties are able to make lawsuits go away by diverting them to ADR.” Citing studies that indicate that women involved in abuse and matrimonial cases fare less well in ADR than in court, Delgado argues that “mediation produces outcomes that favour the stronger party, even more so than standard, in-court lawsuits.” From this perspective ADR is not a way to trade off a quick decision for the delay of unneeded procedural protection. Rather it becomes a means by which the powerful can attain their ends away from the scrutiny of the courts which, however inadequately, provide the less powerful with a forum where they can be heard.

The studies referred to by Delgado, which have been affirmed by similar studies in the Canadian context, point to the need to avoid turning to ADR as a panacea for

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13 Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution”
14 Richard Delgado, “Conflict as Pathology.” at p. 1408

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disputes. Emma Laroque, writing about the use of diversionary approaches in the criminal field, powerfully makes the case that alternatives to the courtroom employed in native communities can be strongly coercive of women who have been abused.  

Other commentators criticize evaluative approaches to ADR as lost opportunities to achieve profound social change. In the introduction to his book making the case for a transformative approach to mediation, Bush describes the decision-oriented approach to mediation as focused on "the production of a voluntary settlement of the dispute." This emphasis, he claims, fails to capitalize on the "unique potential [contained in the mediation process] for transforming people - engendering moral growth - by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict." Here again, Heifetz' distinction between technical fixes and adaptive change is helpful. Bush's view is that a decision focus will distract participants from the transformative work, which can change their relationships with each other, and with the larger community. Decision focused mediation may develop into an effective means of obtaining quick solutions to discrete problems, but it does nothing to prevent disputes occurring again because it does not address the underlying values that led to the conflict in the first place. Transformative mediation will not only lessen the prospects for

presents empirical research showing women achieve better outcomes, including greater safety, when they resort to mediation, provided mediators are trained and skilled in addressing safety and equity concerns.

16 Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications."

conflict in the future, but will also convert a painful situation into an opportunity to become better persons.

A colleague once remarked that it would be unfortunate if the Conflict Resolution Facilitators trained by the United Church became nothing more than tow truck operators, parked on the side of “the highway of life in the church” waiting to be called in to separate the twisted wreckage of conflicted relationships. How much more helpful to the church and faithful to its mission it would be, to employ CRFs primarily as driving instructors, training church members to better negotiate the dangers of life on the road. This training or transformation, to apply my metaphor to Bush’s argument, is accomplished not only through workshops and seminars, but, perhaps most powerfully, through the experience of working through conflict with a transformative rather than decision-focused emphasis.

Carrie Menkel-Meadow, who empathizes with Bush’s transformative perspective, has concluded that some of the open-ended, generative energy of mediation must be sacrificed on the altar of “ethics [by which she means codified ethics], standards of practice and rules” because the field has become too full of practitioners and the public needs the protection of accountability and codification. This development, she says, is to be regretted to the extent that it limits the transformative potential of ADR, but it must be done to avoid the looming prospect of disorganization and loss of credibility brought

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18 Cynthia Gunn, Legal/Judicial Officer to General Council and staff support to the United Church’s ADR task group
19 Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No
about by a proliferation of practitioners whose lack of credentials and experience put the public at risk, at least in the view of veterans in the field such as Menkel-Meadow.

The literature briefly surveyed here suggests that for those who view the advent of ADR positively there is little reason to examine why it has grown in popularity, the answer is obvious - because it gives a better result than adversarial approaches. Critics are not convinced that the result is necessarily better. They have suggested that when such questions are asked as, “for whom is the result better?” or “whose ends are better served by ADR?” it becomes apparent that ADR benefits those who have power. In this view ADR has developed because minority groups and women had begun to enjoy some success in using the existing adjudicative processes. ADR is seen as a diversionary move to a forum where the powerful can impose resolutions that meet their needs away from the scrutiny of judges charged with the task of ensuring that the resolution of a dispute accords with the broad interests of society.

In this Chapter I want to suggest a theory as to why the use of ADR has grown in recent years. This theory also responds to criticisms of ADR. ADR as I use the term, encompasses a wide range of conflict interventions which are employed to facilitate collaborative approaches to decision-making. The matching yang to the collaborative yin is an adjudicative approach. Without question western society has been heavily reliant on adjudicative or cognitive approaches to the near exclusion of collaborative approaches, for several hundred years. Over-reliance does not mean that these approaches are inappropriate in every circumstance. In the discussion of the polarity

Answers from the Adversary Conception of Lawyers Responsibilities.”

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matrix which follows I attempt to open up the positive and the negative features of both the adjudicative and the collaborative approaches. Some types of conflicts and some types of social relations will be better suited to one approach than the other. Awareness of what we are doing and of the strengths and weaknesses of our approach, is necessary if we are to transcend a single-minded commitment to one approach. Transcendence of the lure of a single approach is required if we are to make progress toward the desired position of being able to move from one orientation to the other seeking what is best.

Movement within the yin/yang is not necessarily going to benefit the disempowered in every circumstance. Some movements will be an exercise of manipulative tactics by the powerful. The analytic framework provided by polarity management, however, provides a response to the manipulation by opening it up to view. It can then be exposed as inconsistent with the positive benefits available when the balance is tilted toward the other approach. Polarity management also provides a reminder to critics of ADR of the negative aspects of the adjudicative model which is, after all, the alternative to the collaborative orientation. If it is indeed true that the promise of ADR is being subverted by the powerful, the powerless need to remember that for centuries the adjudicative model was a primary tool of oppression. If ADR is a defensive move by the powerful, there is no reason to suppose that should they be obliged to abandon it they would not then seek to regain control of the judiciary to ensure that their ends are achieved.

Proponents of collaborative approaches to conflict resolution (and I confess to counting myself as one) who herald its transformative potential risk alienating those who simply want to solve their dispute. Perhaps it is the term transformative and its quasi-religious or therapeutic colouration that lies behind the uneasiness of some critics.

\[20\] See the discussion of the concept of “best” at p.5-35.
While I argue elsewhere in this dissertation that the transformative potential of collaborative decision-making is profound, that argument is grounded in the butterfly theory which holds that many small movements, because all things are connected, can have great consequences. Individuals engaged in conflict may experience a profound transformation, but a small change in their approach to human relations is all that is required for purposes of my argument. By learning new ways of dealing with conflict we will deal differently with disputes when they arise in the future, both with new persons and with persons with whom we have long standing relationships. And it is those small adjustments in individuals and their approach to conflict that carry the seeds of a broader social transformation.

Lax and Sebenius in their discussion of negotiation point out that persons enter into negotiations in order to achieve by agreement something that they could not achieve without the agreement of the other. Their analysis is apposite when we observe that dispute resolution is always a form of negotiation, as the parties seek an agreement that will address their concerns in a way that is better than they could expect from whatever the alternative to an agreement may be. Negotiations, Lax and Sebenius assert, involve a tension between claiming and creating value. Claiming value presumes a zero-sum game - you have to give me something in order for me to be better off. Creating value presumes that win-win solutions are possible - by cooperating we can both be better off. But, the authors point out, “the process of creating value is entwined with the process of claiming it.”

In a lengthy analysis built on the classic game of logic “the prisoner’s dilemma” Lax and Sebenius make a persuasive case that, over the long run, a posture of creating

21 David A. Lax and James K. Sebenius, The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain, 44
value - that is cooperating with the other party to increase the size of the pie - provides greater benefit to both parties. The move towards a creating or cooperative posture can only come about where there is a relationship of trust established. Trust, in this context, need mean no more than that each party becomes a good predictor of the behaviour of the other in given circumstances.

As an individual who has been oriented towards claiming discovers that by trusting others he can re-orient his balance of claiming and creating and advance his own ends, that individual is changed, or transformed. He will move more quickly to at least test the cooperative orientation in new transactions or relationships. Similarly, an individual who is inclined to cooperate, will discover that if he does no claiming at all, he will never achieve any positive outcome. He too will learn that finding a balance of claiming and creating improves his position and in this he will be transformed.

If the adjudicative model of dispute resolution is the only one available, the only posture for parties in conflict is to each claim value as forcefully as they can. The potential benefits of cooperation will be lost. But the adjudicative model will still be preferable where the possibility of building up a trusting relationship, even in the minimal understanding of trust presented here, is not present. The critics of ADR remind us that it is both naive and dangerous to presume good faith and trust are always present. The nature of the existing relationship of parties in conflict - a history of spousal abuse, or of class exploitation - cannot be overcome in a time of acute crisis by a mediator who urges everyone to act in good faith. Lax and Sebenius remind us, however, that trust is built up by small steps over many transactions. They also remind us that a balance of claiming and creating value (or in my terms a balance of cognitive and generative approaches to disputes) that favours the cooperative will create the most value over time. Thus there is both an individual and a social incentive to work towards finding that

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In the remainder of this chapter I will present several perspectives on how the generative and cooperative potential of ADR can be seen as a movement towards a societal re-balancing of adjudication and collaboration. That re-balancing is both a response to changes in our society and a contributor to those changes as we learn how to live together in ways that create mutual gain, socially as well as materially. The erosion of the nation-state as a sovereign legal authority, the growth of the inter-net as a social, political and economic medium, the increased pluralism brought about by international migrations of people and the general phenomenon we call globalization all contribute to the need for human societies to develop higher levels of trust. For increasing numbers of our disputes there are no authoritative adjudicators and the world has become too intimate for us to simply run from them.

Collaboration to resolve long-standing disputes will be critical for survival because we cannot afford to turn to arms as the ultimate adjudicator, as we have in the past. The shift to a culture of collaboration is difficult to achieve in the midst of an acute manifestation of a long-standing and intractable problem. But it is not impossible as the discussion of Lyndon Johnson’s handling of the civil rights crisis of 1965 in the next section suggests. In the long-run, however, it is not through the deft mediation of one major crisis after another that the human race will realize the potential which I claim collaborative approaches have to improve our communal life. Rather, it is through the resolution of innumerable small and mundane disputes that we will shift our individual yin/yangs toward a balance of adjudicative and collaborative approaches which will orient us individually and communally toward the level of trust necessary to enjoy the benefits of increased cooperation tempered with a more sustainable and appropriate competitiveness.
Locating ADR in a Cognitive/Generative Polarity Matrix

The range of perspectives on what lies behind the growth in ADR surveyed above is surprisingly broad, given the short history of the movement. It is not surprising, however, given that brevity, that there is no consensus on the reasons for its growth, nor on the direction which growth should take in the future, nor even on whether there should be growth at all. I want now to suggest a way to bring some coherence to this diversity, by seeking out patterns in the world of ADR. In doing so I will employ Riskin’s helpful matrix of types of ADR and create a polarity matrix with his typology, which I find useful in tracking the movements within the field. The range of perspectives can be understood by viewing each as an iteration of the equation that is being worked out slightly differently, just as a computer generates different trajectories in creating the familiar butterfly pattern. When one looks at the “archetypal dispute” which each commentator has in mind, or even the “typical range of disputes” and notes that different commentators tend to be talking about different types of disputes, the variations begin to be understandable, indeed some of the variation can be accounted for by locating the various iterations on the matrix I will develop.

Riskin's matrix of mediator techniques provides a helpful way to organize our understanding of the different perspectives on ADR as well as on the different styles of mediators. Bearing in mind this dual utility, let us take a look at the grid.
Figure "A"

Mediator Techniques
12 (Sept. 1994) Alternatives p. 257

<table>
<thead>
<tr>
<th>Narrow Problem Definition</th>
<th>Broad Problem Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Evaluative Techniques</strong></td>
<td><strong>Facilitative Techniques</strong></td>
</tr>
<tr>
<td>Urges/pushes parties to accept narrow (position based) settlement</td>
<td>Helps parties evaluate proposals</td>
</tr>
<tr>
<td>Develops and proposes narrow (position based) settlement</td>
<td>Helps parties develop broad (interest based) proposals</td>
</tr>
<tr>
<td>Predicts court outcomes</td>
<td>Helps parties develop options</td>
</tr>
<tr>
<td>Assess strengths and weaknesses of legal claims</td>
<td>Helps parties understand issues and interests</td>
</tr>
<tr>
<td></td>
<td>Focuses discussion on underlying interests (business, personal, social)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Narrow Problem Definition</th>
<th>Broad Problem Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation Issues</td>
<td>Substantive Issues</td>
</tr>
<tr>
<td>Other Distribution Issues</td>
<td>(Business, Personal, Social)</td>
</tr>
</tbody>
</table>

On the horizontal axis Riskin distinguishes between those who narrowly define the issue and those who broadly define it. Broader definitions of the issue include digging more deeply into the nature of the relationship of the parties and into the needs and values that underlie their dispute. Thus a transformative orientation towards ADR will be situated on the right hand side of the grid and an orientation towards confining ADR to quick

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solutions of presenting issues will be located on the left. Riskin locates evaluative and facilitative styles on the vertical axis where a similar comment applies. The facilitative approach focuses on enabling the parties to discover their own solution, or their own transformation, whereas the evaluative style has the mediator taking a much more active role, suggesting directions and even directing the process. Figure “B” (on the next page) combines Riskin’s categories into Evaluative/Narrow and Transformative/Broad and locates them as iterations of the cognitive/generative yin/yang that I have presented as a strange attractor in my theory of how humans deal with disputes. I am not suggesting that the concepts are identical but that it can aid our understanding to look at them as variations on a common theme. The figure puts the cognitive and generative poles onto a polarity matrix and identifies the positive and negative features of each as an approach to ADR. Cognitive approaches to ADR, such as mini-trials, judicial evaluations, arbitration and evaluative styles of mediation have the advantage of providing a neutral decision-maker, often with expertise in the subject matter, who is accepted by both parties as authoritative. The parties agree that the dispute will end here, thus bringing certainty to their situation. Costs and time will be saved. The benefits of the generative approach, using such methodologies as facilitative mediation, community conferencing and the as well as those employed by Ruckleshaus in the copper smelter case study, include insuring that all interested persons are given an opportunity to be heard, not only on the presenting issue, but on the underlying interests and values. The sharing of stories builds up the sense of community, which enables participants to function together and deal with differences in the future. A generative approach creates the opportunity for a wider range

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Figure "B"

Approaches to Alternative Dispute Resolution
A Polarity Matrix

<table>
<thead>
<tr>
<th>Cognitive Orientation</th>
<th>Broad Problem Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Evaluate Techniques</strong></td>
<td><strong>Facilitative Techniques</strong></td>
</tr>
<tr>
<td><strong>Other Distribution Issues</strong></td>
<td><strong>Broad Problem Definition</strong></td>
</tr>
<tr>
<td><strong>+ Positive Quadrant</strong></td>
<td><strong>+ Positive Quadrant</strong></td>
</tr>
<tr>
<td>• Presenting issue dealt with quickly</td>
<td>• Relationship focus encourages working together in future</td>
</tr>
<tr>
<td>• Neutral, Authoritative, decision-maker increases acceptance</td>
<td>• Parties design solution – creative, mutually beneficial solutions</td>
</tr>
<tr>
<td>• Finality of decision enables parties to move forward – less cost, time</td>
<td>• Principle based decision-making enables learning for future self resolution of conflict</td>
</tr>
<tr>
<td>• Predictability through reference to common codes, rules, precedents</td>
<td>• Adaptability to changing environment – issues and relationships can be revisited</td>
</tr>
<tr>
<td><strong>- Negative Quadrant</strong></td>
<td><strong>- Negative Quadrant</strong></td>
</tr>
<tr>
<td>• Routinized, formulaic decisions. Often splitting the difference is easiest solution, opportunity for creative, mutual benefit lost</td>
<td>• Pressure to settle too soon – marginalized, less powerful accede to create harmony with their needs unmet</td>
</tr>
<tr>
<td>• Compliance may not follow if one side seen as loser. Problem of monitoring compliance</td>
<td>• Solutions may ignore rights/values or compromise principles of some</td>
</tr>
<tr>
<td>• Narrowing of issues may leave most important matters untouched, conflict will resurface</td>
<td>• Broadening issues may prolong process, raise unrealistic expectations</td>
</tr>
<tr>
<td>• Some affected parties excluded by narrowing issues. Potential for future conflict if solution doesn’t meet their needs</td>
<td>• Consistency and Predictability lost if every situation approached as if for the first time</td>
</tr>
</tbody>
</table>

of solutions, and for solutions which will be supported by all, given that all participants contributed to their design.

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As Johnson points out, the shortcomings of each pole tend to reflect the strength of its diagonal opposite. Thus the weaknesses of the cognitive approach include its being limited to the range of solutions that a court would likely impose. Employing an expert or authoritative person, even one highly regarded by both parties, is less likely to result in the positive buy-in to the solution that comes from the parties designing it themselves. Narrowing the issues and the range of participants, which enhances the efficiency of a cognitive approach, may result in overlooking important disagreements about core values or underlying interests. Important participants may not be at the table. Generative orientations toward ADR can become unwieldy in terms of length of time, cost and the breadth of the range of issues that are raised. Expectations may be aroused which the process may not be able to meet. The lack of procedural protections which allows for flexibility and creativity, can lead to abuses, particularly by parties with the power and resources to impose their will, or by parties who can mobilize the community to their point of view at the expense of the marginalized.

As a management tool the polarity matrix is useful in helping organizations to be aware of their slip into the lower quadrant which indicates that they should consider a diagonal movement rather than the more comfortable response of staying with their preferred polarity. The polarity matrix can be similarly helpful in understanding the options available within the legal system in responding to criticisms of ADR, which will often be identifying situations where the organization or parties using it are doing so in a way that has landed them in one of the lower quadrants.

The best known criticism of ADR was written by Owen Fiss fifteen years ago in

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an oft-cited article titled "Against Settlement."\(^{22}\) Although he does not ask it outright, Fiss' critique is driven by the question, "Where would we be if Brown v Board of Education, [the case at the heart of racial desegregation in the U.S.] had settled quietly out of court?"\(^{23}\) Fiss' concern is that settlement is a movement into the lower right-hand quadrant and that there is a public interest in keeping issue determination in the courtroom, which requires staying in the upper left hand quadrant. Moving to the generative pole means losing the benefit of a neutral and authoritative decision-maker with power to impose compliance with his/her order. Settlement, Fiss claims, misconstrues the role of the courts. "These officials," he writes, "like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle." (my emphasis) In the same vein Fiss asserts that, "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."

Not all observers share Fiss' view that an emphasis on resolving disputes is inappropriate as an objective of a legal system. Timothy Gorringe reports that, "[i]n 1115, by the law of Henry I, 'an agreement supersedes the law and an amiable settlement

\(^{22}\) Owen Fiss, "Against Settlement."

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In a similar vein the Report of the Civil Justice Review for the Province of Ontario recommended in 1995 “that courts...become "dispute resolution centres" adopting a "multi-door" concept of dispute resolution and integrating alternative dispute resolution techniques”.

Fiss, however, puts the cognitive orientation towards law about as strongly as it can be put. In his account, the legal code or text embodies the ideals of an abstract and unchanging justice that is. Moral assensus has no role in the legal system in this view. The legal system acts upon society to "bring it into accord with" that ideal. In this view an authoritative decision-maker with power to impose decisions is the embodiment of justice. The perspective provided by a polarity matrix suggests, however, that a legal system which is thus wedded to the cognitive orientation will tend to fall into the lower quadrant. Recalcitrant reality will require increasingly brutal applications of force if it is to be brought into accord with the ideal embodied in authoritative texts. While Brown v Board of Education may seem now to exemplify a positive instance of judicial authority moving a reluctant society towards its higher ideals, the process of social change is far more nuanced than such an analysis suggests. A movement toward the generative pole is required when the core values of society are in transition or when they need to be reconsidered because circumstances have changed or conflicts in values have become manifest. The public debate and consideration required to ensure that core values are

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24 Timothy Gorringe, God's Just Vengeance, p. 123.
reshaped, rejected or re-affirmed with sufficient assensus to enable the legal system to function without resort to the police power occurs in the generative, not the cognitive pole.

In his discussion of the march from Selma to Montgomery Alabama in the summer of 1965 which served to catalyze public opinion in support of the Civil Rights Act introduced that year by Lyndon Johnson, Ronald Heifetz points to the manner in which the President was (in effect) able to bring a reluctant reality into conformity with the nation's higher ideals by operating in the upper right hand quadrant of the polarity matrix. Johnson, who was fond of quoting Isaiah 1:18, "Come now, and let us reason together, saith the Lord," resisted calls to impose order on a deteriorating situation of civil unrest by sending in the National Guard. By talking to all leaders, Martin Luther King and George Wallace in particular, and by encouraging the search for creative solutions, he allowed time for the nation, watching on television as white state troopers battered unarmed and peaceful black marchers, to experience the denial of voting rights as something deeply offensive to the values they all affirmed.

A march for voting rights from Selma to Montgomery had been turned back by state troopers. Civil-rights organizations initially planned to force a second confrontation by marching again, in greater numbers. When an interim injunction was issued by a federal court, King and his colleagues, decided against proceeding as planned. Instead they issued a call to clergy from throughout the country to participate in a march to the

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26 Doris Kearns-Goodwin, *Lyndon Johnson and the American Dream*

J.W.Burton - ADR and the Legal System – Chptr. 5-170
point where the first march had been turned back, where they would stop for prayer and then disband. Had the President imposed a solution by sending in federal troops to assert the right of the demonstrators to march, King's creative move, which did a great deal to forge links of empathy between blacks and the national white community, would not have taken place.

My point here is to contrast Fiss' position that the justice system can impose social change through asserting a cognitive law-that-is with the power of the generative approach to facilitate a broad social change by taking the time to involve as many parties as possible in negotiating a creative solution. This can hardly be the last word on the Civil Rights movement of course. But one can just as easily point to the school busing cases of the 1970s as illustrations of a negative outcome of a cognitive approach as to Brown v Board of Education as an illustration of the positive. And while Lyndon Johnson may, in this instance, have acted as a masterful mediator moving a reluctant public toward a long overdue change that brought social practice more closely into conformity with American values and ideals, the long history of racial prejudice reveals the propensity of the generative approach to permit accommodation of positions contrary to core values at the expense of the less powerful and marginalized.27 Neither the generative nor the cognitive approach is an absolute good, capable of achieving justice in every circumstance. Each has its strengths and weaknesses and is better suited to some

disputes than to others. In times of instability, whether at the national, organizational or interpersonal level, the cognitive approach can restore order more quickly, but the adaptive change needed to restore long-term stability is better achieved through generative processes.

Adaptive change requires the willing participation of all parties in the generative process. Implementing such processes without that commitment can exacerbate a destabilized situation. In situations of high conflict where there is no willingness to participate in ADR, the need to restore order through a cognitive approach is a precondition for effective change. The parties must spend some time in the upper left-hand quadrant before moving into the upper right. Such a situation is illustrated by the critique of the use of ADR in matrimonial disputes where there is a history of violence or abuse of the female partner, or in criminal courts where diversionary approaches are employed in cases of sexual assault, abuse and harassment. I have already referred to LaRoque's criticism of the use of circle conferencing in native communities. In her observation the emphasis of such approaches is on healing the offender by re-integrating him into the community and avoiding the counter-productive imposition of jail time. Achieving this result requires that victims, females and children, participate in a circle conference with the one who has abused them. In that circle victims experience pressure to forgive as a necessary step toward healing the offender and the community. LaRoque points out that not only is this structured confrontation often premature and traumatic for victims, but the re-integration of offenders into their small communities can at worst put victims at risk of physical harm, or at least create stress and anxiety for them.

J.W.Burton - ADR and the Legal System - Chptr. 5-172
Numerous authors have expressed similar concerns in connection with the use of ADR in matrimonial disputes involving violence against women. Studies have identified that women who are thus marginalized often fare worse in terms of settlement outcomes than women whose claims are resolved at trial. More importantly, there is a significant risk of increased abuse in situations where women, in a mediation setting, are expected to share feelings and demonstrate trust with men who, outside the safety of the mediator's office, are still committed to asserting their power over their former spouses.

Both the yin/yang symbol and the polarity matrix suggest that it is impossible to stay in one pole and unhealthy to try. The critiques arising out of women's experience just cited suggest that what has happened is that the positive outcomes of a generative approach are not being achieved in a given setting. In situations involving violence against women, to stay with the generative pole results in a shift from the upper to the lower quadrant. Generative approaches require that trust be built up amongst all parties, that all voices are heard and that shared principles be at the core of the process. Where these conditions do not obtain the process degenerates into the worst type of situationalism and the marginalized are overwhelmed by the power of the majority. Johnson's theory suggests that a diagonal move is the appropriate response. In this context that would involve either a more evaluative/directive form of ADR or a return to the courtroom. To paraphrase Fiss, what is needed is to drag a reluctant offender to conform to the ideals of society.

See note 15 in this chapter.
Figure “C” illustrates the movement through a polarity matrix of cognitive and generative responses to cases of domestic conflict where violence has occurred. In the

**Cognitive Orientation**
- Laws directed at preventing/punishing violence
- Defined penalties which separate offender from victim and community (other potential victims)
- Procedural protections for accused
- Equality/certainty of outcome is an incentive for offender to modify behaviour

**Generative Orientation**
- Principles aimed at harmony and healing of all persons
- Flexible response allows all concerned to design appropriate consequences for offender
- Rights of victims, community and offender all consider
- Responsibility of all for healing the harm is acknowledged and addressed

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**Negative Quadrant**
- Inflexible, ineffective penalties which fail to modify offender behaviour
- Alienation of people by process as well as potential for delay in addressing needs
- Focus on accused and interests of state leaves victim and community interests unaddressed
- Revolving door of justice – all participants feel caught in an ineffective system which has lost sight of human needs

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**Negative Quadrant**
- Community pressure on victims to forgive and contribute to healing of offender, leaving own needs unmet
- Offender responsibility denied or minimally acknowledged
- Natural justice concerns as accused is judged by community perceptions
- Failure to protect victim due to emphasis on healing and reintegration
- Failure to consider incarnation
- When appropriate for protection and retributive purposes

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**J.W.Burton - ADR and the Legal System – Chptr. 5-174**
view of Laroque and other critics concerned about the negative consequences experienced by women when generative approaches are employed, the participants in the process are located in the lower right-hand quadrant of the generative pole. Movement towards the upper-left hand, cognitive quadrant, the natural movement since it addresses the negatives of its diagonal opposite, may be blocked by the strong fears of other participants in the process about the negative aspects of the cognitive pole. In such a case where there is a blockage of the usual direction of flow, the recommended approach, according to Johnson,\(^\text{39}\) is to move up to the positive quadrant of the generative pole. By that movement not only is there a re-affirmation of the positive potential of a generative approach, but a mutual recognition of the negatives of the cognitive which are addressed in the upper-right quadrant. Going with the energy of those resisting change or movement builds empathy and enables those who resist change to hear the concerns of the critics. Thus the movement into the upper right-hand quadrant from the lower right provides a means of turning the wall of resistance into a bridge to the cognitive pole. If real empathy has developed, re-appropriation of the cognitive approach will not simply be a return to the adjudicative status quo. Rather, the parties will find a way to design a process that maintains a balance between the cognitive and generative poles and that meets the needs and concerns of all parties by keeping the process moving between the two upper quadrants, with occasional shallow descents into the lower ones acting as signals for adjustment or renegotiation.

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\(^{39}\) See Barry Johnson, *Polarity Management*. pp. 13-16 & 66-68
In the case of women at risk of abuse who can anticipate strong resistance to re-judicializing their conflicts with men, the polarity can be managed by moving back up to the generative upper quadrant. This would entail a critiquing of the current situation in terms of the ideals of the generative approach. Such criticisms might include: that all voices are not heard, or at least not heard equally; that where offenders are not called to account or to acknowledge their culpability for the harm they have caused, there is not the trust and honesty which the process calls for; and that to the extent women feel coerced into acquiescence there is not the achievement of "buy-in" to the solution which is part of the generative orientation. A critique made along these lines, indicating where the generative approach is failing in its own terms, leads to a discussion of responses which requires a side-wise move into the upper cognitive quadrant. This may result in imposing some cognitive qualities on the generative processes, codifying procedures and training requirements for example, rather than a move to the extremity of the upper left-hand quadrant, which is the traditional courtroom. The theory of polarity management suggests that the negative aspects of each orientation are addressed by calling upon the positive aspects of the other.

A polarity management approach would affirm that it is important to retain the adjudicative system as a part of the legal system. If nothing else, it serves as a means to

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30 See Carrie Menkel-Meadow's claim cited below that the time has come for mediation to sacrifice some of its transformative potential by recognizing a need for (cognitive) rules and regulations to protect against its being abused.

J.W.Burton - ADR and the Legal System - Chptr. 5-176
encourage recalcitrant parties to participate more meaningfully in ADR processes. But more importantly, there are situations where an authoritative decision-maker is required: to protect the interests of society, to efficiently meet the needs of the parties for a speedy resolution, or to provide protection for marginalized parties. Cognitive responses to women in the situations under consideration, it needs to be pointed out, are not without their shortcomings as well. The dissatisfaction with the negative aspect of such approaches that motivated the shift to generative responses was not exclusive to men. That dissatisfaction continues within much of the native community.

Cognitive approaches are particularly inadequate in the range of remedies they offer. Jailing offenders may protect victims during the period of incarceration, but offenders are eventually released and are often more dangerous at that time. In matrimonial litigation the courts are virtually powerless to enforce the orders that they make, as demonstrated by the enormous volume of unpaid support payments. For these and other reasons there has been little uptake of the feminist call to resist the movement toward ADR as a response to matrimonial violence.

It is not my intention here to do more than suggest how the theme of a cognitive/generative yin/yang account of the dynamics within the Western legal system as it begins to incorporate ADR can help to identify a way to understand some of its failures and point towards ways of addressing them. My response to the quest I began with in this chapter, of accounting for the development of ADR in the latter part of the 20th century, is to suggest that the nature of the process can be understood as a movement of innumerable cognitive/generative yin/yangs or polarities toward the generative
orientation. As experience teaches us that generative approaches are not a panacea but one of a range of approaches, then a re-establishment of cognitive elements into ADR processes reveals itself to be a strengthening of the movement, not a threat that the forces of cognitive retrenchment are at work. Both cognitive and generative orientations are required in the process of justice making. There will be few cases where one alone will be sufficient to achieve justice. The challenge and the opportunity that the rise of ADR has presented to Western culture is the expansion of the range of possibilities. Effective use of these possibilities will require continued attention to the factors that are at work in each situation in order to identify the best balance of the yin/yang in the moment.

At the same time that ADR represents a generative direction within the legal system, there are within the ADR movement cognitive counterforces beginning to manifest themselves. Some commentators on the development of ADR have suggested that because of the lack of consistency of training and practice of mediators, its creative potential needs to be sacrificed or limited by circumscribing the activity of practitioners with rules and codes. 31 There has been an enormous development, particularly in the United States, of legislation and professional organizations that prescribe codes of conduct, training requirements and procedures for ADR, particularly for mediation. Some commentators regret this development, many simply see it as inevitable, and still others welcome the professionalization of ADR. All of these developments within the

legal system indicate that ADR has stimulated a great deal of fairly rapid movement within the yin/yang or along the Mobius strip that runs through the polarity matrix. This activity is not entirely accounted for by the illustrations that I have examined through the lens of polarity management, but is rather a heightened expression of an eternal dynamic, which has always been at the heart of the Western legal system. The visibility of the dynamic is increased by the rapidity of this movement and by the insight available to us when we draw upon various models and metaphors, including those of the new science, to aid our understanding of the process.

Locating ADR within a law/equity polarity matrix

I turn now to a discussion of how the manifestation of this yin/yang dynamic is apparent in the larger legal system of which ADR forms but a part. This requires a review of how the yin/yangs of the cognitive/generative orientations within the legal system have been manifested over time and how the new science is both providing us with fresh metaphors for understanding this movement and also is changing our way of life so that the very nature of our legal system is being altered. I should note that some writers have suggested that ADR is a replacement for the adjudicative and adversarial legal system. In one presentation of this view, ADR is said to be a way to move out of or around the legal system in what amounts to a subversion of traditional adjudication. another writer suggests that humankind has progressed in linear fashion from trial by

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32 See Robert D. Benjamin, "Mediation as a Subversive Activity." and Nathan J.W.Burton - ADR and the Legal System - Chptr. 5-179
combat, through trial by jury and is now moving forward into a new age of collaborative decision making. It is too simplistic either to claim that ADR will introduce a new age of collaboration, or to claim that history moves forward in such a linear fashion. A review of the history of the Western legal system reveals a much more complex process of development as well as a long history of mediation, reconciliation and collaborative ways of seeking justice.33

The orientations toward law that I refer to as cognitive and generative are in creative and tensive relationship. A prominent way in which the yin/yang has manifested itself in the common law tradition is in the long history of the relationship of law and equity in the jurisprudence of the west. When they are linked together in a yin/yang relationship, “law” is understood as that orientation toward the law that seeks to limit the discretion of the decision-maker and to enact or articulate the law with maximum clarity. In this context we can say law is the legalistic or literalistic orientation. “Equity” in this context is that orientation toward the law which allows to the decision maker a greater range of discretion, so that she may look beyond the text (whether statute or the principle derived from previous cases) for other principles that may support a decision that deviates from the narrowest interpretation.

The characteristics associated with the negative and positive quadrants of each of the cognitive and generative poles apply in general terms to the law/equity polarity as well. The movement between poles which Johnson’s polarity theory suggests, a

Davidovich, "Mediation: A Process To Regain Control of Your Life"

J.W.Burton - ADR and the Legal System – Chptr. 5-180
movement from the positives of one pole, down to its negatives and then up on a
diagonal to the opposite pole, can be traced through the history of the relationship of law
and equity. The concepts of “law” and “equity” go back at least to the Greeks, but a brief
review of their place in the British legal system may illustrate how I see the creative
tension of the yin/yang as having been at work over time.

As Europe emerged from the disorganization that followed the collapse of Rome,
law was the purview of the king. As God’s appointed sovereign, the king was
authoritative both in the promulgation of law, its interpretation and its administration. As
the kingdom grew and the burdens of deciding legal cases grew with it, the king followed
the advice of Jethro to Moses\(^3\) and appointed judges to apply the law in his name.

Jealous of his prerogative as the sole authority entitled to pronounce the law, however,
the king made every effort to limit to an absolute minimum the discretion of his judges in
deciding cases. They were tightly confined within the narrowest interpretation of the
law.

In consequence of the restricted discretion of judges in the law courts, citizens
began to petition the Church for redress where the king’s judges could not assist because
the king himself had not spoken on the issue at hand. Summarizing centuries of
development and a myriad of rivalries and mixed motives let me say that, the Church
responded by developing the Courts of Chancery, the head of which was the Lord
Chancellor. These courts had no power over the bodies of British subjects, they could

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\(^3\) Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition.*
not imprison, brand, flog, boil or execute them as the king could, but they could impose fines and mandate behaviour. Over time the Chancellor’s Court came to be known as the Court of Equity. The Chancellor, and in time his appointees, had discretion in their decision making. However, from early times they began to bind themselves by maxims such as “he who seeks equity must come to court with clean hands.” Equitable maxims did not have the force of law, at least initially, yet their development can be understood as a movement through the polarity matrix, whereby even a decision-making institution created as a response to the cognitive rigidity of its rival is, over time, inclined towards the certainty, predictability and equality of treatment that law provides. The flexibility, which was so desired, can degenerate into favouritism and unprincipled differentiation of outcomes in like cases.

Unsurprisingly, jealousies eventually arose between the two systems of courts. Most famously, this became manifest when Thomas More was Lord Chancellor and Henry Tudor King.\(^\text{35}\) By the nineteenth century, however, the two courts had evolved to the point where the differences between them were sufficiently insignificant that they were formally merged. The power of both King and Church had diminished as

\(^{34}\) Exodus 18: 13-27

\(^{35}\) I do not intend to suggest that the rivalry of law and equity was the most significant factor in that tortured relationship. Ian Scott in “Sir Thomas More: Perfect Justice and the Rule of Law” (1986) 20 Law Society of Upper Canada Gazette, 209, suggests that More’s decision to accept death rather than compromise on his principles was not a slavish devotion to the particular principle at issue, but an assertion that some principles brook no compromise. As Lord Chancellor he had often been a legal purist, strictly enforcing the law even when the principles on which it was founded were antithetical to him. Thus the yin/yang of law and equity might be seen to be at work within More, even

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Parliament and the rule of law were in the ascendant and the Courts had long since developed an authority that was only formally derived from the monarch. The merger of law and equity was in some ways a consolidation of the growing independence of the Courts from the executive and legislative branches. Common law courts now have the authority to enforce equitable remedies with legal penalties (such as incarceration), but still refer to the concept of the "equitable jurisdiction of the court" in exercising certain discretionary powers (such as injunctions). 36

The historic development of Courts of Law and Courts of Equity suggests both the competition between and the complementarity of the concepts of law and equity. Aristotle pointed toward the necessity of each for a system of decision making when he defined equity as, "a correction of law where it is defective owing to its universality." 37 Gibson Winter clarifies this limitation inherent in the law to which Aristotle alludes in observing, "[f]ormulas or laws are universal and abstract. They provide useful boundaries in reflecting on moral issues, but they cannot resolve the concrete issues of personal lives and circumstances." 38 Equity seeks to address those disputes which, because of the specificity to which Winter refers, law cannot handle in a way that will

36 Consolidation of law and equity in the courts of the province of Ontario was accomplished by the Ontario Judicature Act, 1881. For the history of the development of the court system in Upper Canada and Ontario, a history which reflects this same tensive balancing of law and equity see Part I of Thomas Zuber's Report of the Ontario Courts Inquiry.


38 Gibson Winter, Community and Spiritual Transformation, p.46

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result in a solution that accords with the moral assensus.\(^\text{39}\)

Equity is not, however, a rival to law, a discretionary alpha to a legal omega. The historic rivalry of the competing courts notwithstanding, equity and law in practice work in complementary relationship. Courts of equity needed to exercise their jurisdiction in such a way that their decisions had persuasive moral force, if they were to be respected and adhered to. Perhaps under the influence of the casuistic ethical reasoning of the scholars of the Church, the Courts of Chancery from at least the time of Thomas More relied on paradigmatic formulations, analogies with earlier decisions and close examination of the circumstances of each case in their decision making. Over time, however, Chancery developed rules of procedure that ossified to the extent that discretion was greatly curtailed. The credibility of the Courts of Chancery was lost in the nineteenth century as they drowned themselves in that proliferation of rules. Charles Dickens' scathing portrait of Chancery as a sinkhole of procedural wrangling in *Bleak House* points to how "legalistic" (in the sense of rule-bound) Equity had become.\(^\text{40}\)

On the other hand, Law Courts cannot be completely free of discretion. Judges

\(^{39}\) Paul Tillich, in speaking of the relationship of love and justice makes a similar observation regarding the inevitable limiting of law owing to its generality. "Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation. Every decision that is based on the abstract formulation of justice alone is essentially and inescapably unjust. Justice can be reached only if both the demand of the universal law and the demand of the particular situation are accepted and made effective for the concrete situation. But it is love which creates participation in the concrete situation." *Love, Power and Justice*, p.15.

must make decisions about which facts are put into evidence, about the credibility of witnesses and about the meaning to be given to statutes that are universal and abstract in their formulation, but must be applied in concrete circumstances. The decision-maker must strike a balance between the strictly interpreted rule and the complexities of human interactions. That this process is a real one is evidenced by the written reasons given by judges as they decide the cases before them. Those judgments often disclose the careful weighing of competing claims, the rules of thumb as well as of law used in assessing credibility and deciding facts and even the sympathetic claims which have impacted the judge's decision making. If equity has been correcting the law every step of the way, law has prevented equity from running away with the decision.

A reflection on what law is, and where ADR fits into the legal system

Various writers have proposed different metaphors as ways of understanding that law is neither a purely cognitive application of the "black letter", nor is it purely discretionary. Martha Nussbaum, James White, Robin West and others have looked at law as literature, noting that an understanding of poetics and literary criticism can help the observer to identify, within the written reasons of the court, the balancing between

41 See for instance the comments of L’Heureaux-Dube J. of the Supreme Court of Canada whose reasons for the majority in Board of Education of Indian Head School Division No. 19 of Saskatchewan v. Knight (1990), 69 D.L.R. (4th) 489 include at pp.510, 512 & 513 the following: "Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case...the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."
42 Martha Nussbaum, Poetic Justice.

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the statute or the well settled principle of prior cases and the complexities and emotional factors that may urge a reinterpretation of the law. Richard Posner\textsuperscript{43} looks to economics and the insights that it offers about human behaviour to aid our understanding of the way in which certain clear rules of law are challenged again and again until finally a case arises where the clear principle is overturned and new law is made by the court.

Ronald Dworkin\textsuperscript{44} suggests that law can be understood as an interpretative act in order to move away from positivism without becoming mired in situationalism. He suggests that law might be thought of as a chain novel. Every judge is called to author a new chapter that must address the circumstances of the moment, but in a way that is coherent with what has been previously written. The decision rule\textsuperscript{45} which the judge applies is to discern the best interpretation that ties together all of the previous relevant decisions and to decide the presenting case in a way that is both in conformity with that notion of what is best and is itself best in the circumstances. ‘Best’ is understood by Dworkin to mean that which promotes the integrity of the political morality of the society, a concept that I understand to be analogous to what I have called the moral assensus.

In the final metaphor to which I will refer, Milner Ball suggests that legal process is theatre which enacts a story which must be linked back to the point of origin, that is to the Biblical story which tells us that God created both humankind and the law, the latter

\begin{footnotesize}
\textsuperscript{43} Richard Posner, \textit{Economic Analysis of Law.}
\textsuperscript{44} Ronald Dworkin, \textit{Law's Empire.}
\textsuperscript{45} John Fraser Nash first articulated this rule in his work on the use of game theory in
\end{footnotesize}
being necessary if the former is to be fully human. He writes, “Just now I only want to
point out that the theatrical mode of court aids judgment by stimulating connections that
enlarge the mind and that it does so insofar as it prompts us to make connection with the
beginning.”

I can hardly do justice to the explication of each of these approaches to
understanding the workings of legal process. It is sufficient for my purposes here to note
that conceptions of law as literature, economics, interpretation or theatre each share an
understanding of law as an interactive process. Statutes and reported cases are not to be
treated in the manner of the score to Beethoven’s Fifth Symphony, where the object of is
to reproduce in the present moment exactly what was in the mind of the composer two
hundred years ago. Rather, law is to be treated like the melody line in George
Gershwin’s I Got Rhythm, one of the most frequently played standards in the jazz
repertoire. The artist begins with that melody and then he or she improvises on it, while
remaining within the rules or grammar of the musical conventions of the day. There
must be integrity between the text and the performance. In the words of Charles Mingus,
“You need something to improvise on.” But integrity does not mean complete
correspondence in every detail.

46 Milner Ball, The Promise of American Law, p.68
47 Classical music includes great scope for interpretive shadings of that which the
composer has written. The difference between classical and jazz music that is central to
my metaphor is that in the latter form improvisation is of the essence, in the former it is
not part of the genre.
Legal process is a way in which the human community in the moment interacts with the human community of the past as well as that of the future. If the chapter of the narrative that we write today is coherent with the past, that is not to say that it is determined by the past. If the chapter that we write today impacts the future, that is not to say that it controls the future. The legal system is intersubjective in that it is a forum in which human beings in the moment work out how they are to best live together. The cognitive orientation draws our attention to the ways in which previous generations have sought to order human affairs. But the law as it is written cannot be allowed to be a dead hand directing the present. Looking back is both a cognitive and a generative exercise.

The generative orientation suggests possibilities for the future, but the future is not completely open. It would be unjust to ignore the reasonable expectations of society that law be developed in a coherent fashion.48 Because it is affected by the past, the future is, to some degree, fixed, an object of cognition. The role of law, “to create the conditions where love can live” in Berman’s wonderful phrase,49 cannot be fulfilled if the possibility exists that law can, in a moment, be changed into something entirely unexpected. Therefore looking forward must be done both cognitively and generatively.

The writers I have mentioned have in mind the adversarial process when they speak of law as literature, economics, interpretation or theatre. In many situations the intersubjectivity which law requires in order to fulfill its role is difficult to achieve within

48 In his examination of John Rawl’s Theory of Justice, Michael Sandel considers the origins of expectation and the role it plays in a theory of rights. Liberalism and the Limits of Justice.

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the adversarial system. ADR provides processes, which are helpful in many
circumstances in promoting intersubjectivity and thus enabling the law to better fulfill its
function. In some instances ADR is truly an alternative, in others it can play an accessory
role and in still others it may best be used either before or after a trial has settled some of
the issues. ADR also has the potential to provide society with processes for resolving
conflicts or considering ethical controversies that are not currently governed by positive
law. Collaborative approaches to dispute resolution can facilitate healthier ways to deal
with conflict and they can also facilitate healthier and more effective ways to make
decisions. The test for the appropriateness of collaborative approaches is whether they
will contribute to the achievement of the minimum conditions for love to flourish.

Thinking of law as literature, theatre, economics or interpretation raises the
question of what law is. My own preference is for a broad understanding which would
include all of the following:

- Berman’s concept, already referred to, that law is the means by which human
  communities create the conditions where love can live.
- The Jewish tradition which considers obedience to Torah, a word often translated as
  law, to be the way in which humankind conforms itself to the mind-will-spirit of God,
- The process approach of Cobb and Griffen which would suggest that law is that

  Spiritual Audacity*, Jacob Neusner, *Scriptures of the Oral Torah*. David Lerman,
  "Underlying Principles: Restorative Justice and Jewish Law." See also Paul Tillich in
  *Love, Power and Justice* at p.56, “In later Judaism the law is hypostasized in the eternal
  realm. Only its manifestation is temporal. This implies that it is the form of being
  which is valid for everything in every period. Obedience to it gives power of being.
  Disobedience involves self-destruction.” and also pp.64-66.

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which defines the current limits of our understanding of the best that humans-in-relationship can strive for, as they seek to achieve the divine intention which God holds for all of creation, and

- William Luijpen’s phenomenological existentialism which defines the positive law as setting the minimum conditions for enacting the love commandment of Christ, which is law in its broadest, natural sense.

Most of what is written about the law by those in the midst of interpreting, applying and creating it, however, assumes a narrower, more instrumental definition. The classic positivist definition of the law amounts to this: the law is what the sovereign prescribes. Luijpen, Dworkin and others have sufficiently critiqued this simplistic positivism. But it needs to be noted that, like Newton’s laws for the movement of planets which have been shown to be limited in their application and in their ability to describe and predict, positive law still describes with reasonable accuracy, our experience of law on a practical and non-reflective level. Positivism certainly is embedded in our adversarial system where the court’s inclination to seek a law transcending the voice of the legislature is circumscribed. As I have been engaged in writing these reflections on how the yin/yang informs our understanding of the law, I have reminded myself that were I to be called to appear before a justice of the peace for a traffic violation, anything but a positivist theory of the law would be unhelpful in negotiating my way through the experience.

The development of ADR as an iteration of the cognitive/generative yin/yang represents a popular response to the limitations of positivism. A movement away from the cognitive acceptance of the pronouncements of the sovereign toward the generative
re-interpretation and embellishment of them passes some of the power under the law into the hands of the people. I think it confuses our understanding of the community structuring mechanism of law to limit that term to apply only to rules and statutes. It is important to have an overarching concept which includes not only adversarial and adjudicative processes, ADR and other collaborative, informal means of resolving disputes, but also the even less formal ways in which humans make decisions, which is one way of understanding what is meant by the term “doing ethics.” That overarching concept in the Biblical Hebrew understanding was Torah and the best word we can find to cover it is law. It is important to have such a broad conceptualization as this because it points us toward the interconnectedness of ethical decision making in the most ordinary events of daily life and in the most singular and profound instances of legal adjudication. The interconnectedness is important in living out God's desire for the harmony of all things in the broad sense of all creation, and also in a more immediate sense. Whether in the Supreme Court or in negotiating our children's curfew, by drawing on what the two processes offer, and rebalancing the yin/yang as we go we enrich our relationships and ourselves. The concept of law I am presenting here is a spherical Rubik's Cube of intersecting and connected yin/yangs each of which is drawn into the whole around the strange attractor of the cognitive/generative yin/yang.

The development of ADR in recent years may seem to some a subversive

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31 “Ethics can in many respects best be understood as a process of developing, understanding, testing and refining the principles by which decisions are reached.” quoted in Roger Hutchinson, “Probabilities, Passions and Public Policy.”

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alternative to the legal system because the collective memory of the West has largely forgotten the time when the law meant something more than the word of the sovereign and the legal system was not restricted to the structure of courts established by and accountable to the sovereign. It has been well over 100 years since the British Courts of Equity lost the last vestige of the ecclesiastical connection which gave them some sense of allegiance to a law outside that of the state. But, as Harold Berman points out in *Law and Revolution*, in the development of the Western legal system there once was a myriad of legal systems. Not only that of the church, but those of feudal lords, merchants and cities competed with the royal law, in the sense that they asserted jurisdiction over certain areas of life and allowed no primacy to the law of the sovereign in those areas. The challenges of communication and travel were the practical part of the reason for the development of overlapping legal systems, and the overwhelming acceptance of Christianity which gave a universal underpinning to the natural law, was the theoretical and theological part.

The unitary and positivistic legal system of the West in the 20th century owes some of its coherence to the pervasiveness of Newtonian ways of understanding the working of the universe. That legal system posits (the theoretical possibility of) a universal legal code that can govern all situations that might arise. The image is that of society as a machine and the legal system as the rules for keeping it running smoothly. The machine image of social organization is beginning to manifest its limitations is as we
discover the practical limitations of written codes of the magnitude required to govern
behaviour in a world of ever increasing complexity. Human beings simply cannot absorb
all those rules. Too much time is required to search the code and interpret the relevant
provision.

The development of ADR then, can be seen as a response to the limitations
inherent in a legal system, which is conceived of as unitary and positivist. ADR can be
thought of as a legal system that is complementary and competitive in the way that courts
of equity as well as feudal, mercantile and urban courts were complementary to and
competitive with the royal courts. In the next section I will look at how complex
adaptive systems theory, which is derived, in part, from recent developments in the field
of brain research, can help us to understand the processes which Berman identified as
making up the multiple legal systems of the West of 500 years ago, and also the
development of new multiplicity within the legal system as we enter the 21st century. It
should be noted that the unitary and positivist conception of the legal system, the
pervasiveness of which can be traced to the Enlightenment and Newtonian physics, was
always a model and a way of focusing our understanding, never a completely accurate
description of reality. For instance we have retained multiple court systems throughout
the last 500 years, such as the divisions within Ontario of County Court, Supreme Court,
Provincial Court, Surrogate Court, Divisional Court and others, as well as the
establishment of numerous quasi-judicial bodies with varying levels of authority in

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52 See Fritjof Capra's characterization of Newtonian physics cited in Chapter 4, note 30.

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particular fields of jurisdiction such as the Labour Relations Board, the Ontario Municipal Board, the Commercial Registration Appeals Tribunal and the Rent Review Board. These evidence a legal system of multiple forums and approaches, notwithstanding the over-riding conception of it as unitary.

Law as a complex adaptive system and ADR as a mode of adaptation

The science of complex adaptive systems provides a new metaphor that informs our thinking about the nature of the legal system and the relationship of ADR to it. A cognitive and unitary conception of the legal system places God or the Constitution or some such authority at the pinnacle of a pyramid and views the law as the system of tentacles which, like the nervous system, teems with information as the pinnacle commands the activities of the periphery. The Enlightenment conception of a deistic, clockwork universe is a variation on this theme as the laws within the system, whatever their origin, are still conceived of as controlling its activities. Complex adaptive systems theory understands law as a “continuing group conversation about core values.” The legal system is constituted by all the participants in the larger social system, all of whom participate in that conversation. The legal system is a network of organizations, which

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53 David R. Johnson, “Emergent Law and Order: Lessons in Regulation, Dispute Resolution and Lawmaking for Electronic Commerce and Community.” David R. Johnson, and David G. Post, “Law and Borders--The Rise of Law in Cyberspace.” See also Roberto Ungar, Law in Modern Society. “Law as interaction...consists of the accepted practices on the basis of which all communication and exchange is carried on.” p. 50
facilitate this conversation. The legal system is made up of numerous organizations
some of which have no more connection with the legal system of courts and legislatures
than any other organization in the social system. And finally the legal system is evolving
and changing at a considerable speed, propelled by the technological advances that have
facilitated communication amongst the various systems which in combination constitute society.

Berman’s description of the interaction of feudal, urban and mercantile courts
with the royal courts provides an historic illustration of the working of complex adaptive
systems. The speed of interaction and adaptation was markedly slower, but the network
of scholars and lawyers, all of whom spoke and wrote Latin and shared a remarkably
similar education in the classics and particularly in the legal code of Justinian, served a
similar function to that of the Internet in our day. There was an ability to share
information from diverse jurisdictions and to analogize and draw principles from a wide
variety of legal systems. This communication and sharing of concepts crossed national
boundaries and also the boundaries of the functionally diverse legal systems. Thus a case
pleaded in a Florentine mercantile court could inform the decision making of a London
urban court. To a great extent the population could chose their forum for decision
making. Cities might compete for skilled trades or particular merchants by adapting their
laws to attract them. Merchants in contracting their joint ventures would draw on the
legal precedents that suited them and would refuse to deal with merchants or

54 David R. Johnson, “Emergent Law and Order.” p. 265

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jurisdictions that would not abide by those agreements. Enforcement of the law, always the great concern for unitary, positivist conceptions, was in part universalized by the universalism of Christianity and resort could be had to the Church or its courts to enforce the laws of a system that lacked the royal prerogative of jails and execution. To a great extent, however, enforcement came by the power of exclusion. If a city, for instance, lacked the authority from the king to enforce its laws by capital or corporal punishment, it could still enforce them by banishing offenders. A breach of the rules of a mercantile legal system resulted in a merchant who refused to be bound by its judgment finding himself short of persons to deal with in future.

In his exploration of the concept of law in the cyberworld of internet commerce, David Johnson describes a developing legal system that is not unlike that of medieval Europe. The “cycle time” of interactions and the flow of information are, of course, much more rapid. In the cyberworld, however, the traditional foundations of law in national governments with the jurisdiction to incarcerate or fine those who breach the law are greatly eroded. The primary means of enforcement thus becomes exclusion. Johnson suggests that laws or rules for the conduct of relationships and transactions will evolve in great multiplicity and participants in the life of the Internet will choose their forum according to their needs of the moment. Failure to abide by the law of a particular network of participants will result in exclusion from that network. Legal sub-systems will come and go, evolve and change, with considerable speed and they will be very little impacted by traditional nationally grounded legal systems. “Any insistence on ‘reducing’ all online transactions to a legal analysis based in geographic terms presents, in effect, a
new ‘mind-body’ problem on a global scale.”

Not every one of life’s possibilities can be governed by the complex adaptive legal systems of this cyberworld. Indeed persons will discover that they are subject to a range of legal sub-systems depending on the activity in which they are engaged. Nationally grounded legal systems will continue to function and govern a wide range of behaviours. The hegemony of the unitary, positivistic model of a legal system will, however, be eroded in the cyberworld, where participants will in many cases be discussing the content and structure of the legal system as they constantly consider changing it to suit their shifting needs. This erosion will also be visible in the traditional fields of jurisdiction of the adjudicative legal system. Persons in need of legal order to deal with past or contemplated transactions will increasingly look to means by which they can design their own legal rules. On the Internet this will develop, according to Johnson, as rules are negotiated and enforced, by exclusion. In the inter-personal realm ADR can be seen as a

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55 David R. Johnson and David G. Post, in Law and Borders: The Rise of Law in Cyberspace at p. 5. An indication of the shape of technology driven challenges to traditional legal concepts and structures is provided by the ongoing litigation in which the music industry seeks to shut down the Napster Website, which allows participants free access to copy-righted music. Margaret Wente in the Globe and Mail of July 29, 2000 (p. A15) quotes John Perry Barlow, formerly of the Grateful Dead and now a Fellow at Harvard Law School thinking and writing about the electronic frontier, who says, “It’s a war between the industrial age and the information age. The lawyers and litigators are artifacts of the industrial age.” Wente goes on to write, “They are fighting to hang on to a world where information was treated as hard goods, rather than expression; as property, rather than relationships. Property law simply doesn’t work in the information age.”

56 The question of whether the cyberworld legal system furnishes an appropriate or helpful model for thinking about criminal justice is beyond the scope of this paper. Exclusion may be an appropriate response to breaches of commercial rules, but as a response to crimes against the person, it seems to me inadequate in many circumstances. The cyberworld legal system is by definition one of transitory and superficial relationships, whereas crimes against the person are often intensely relational and always personal and must be dealt with in a way that takes that dimension into account.
method by which the increased complexity of our society leads to the development of legal sub-systems that can be tailored to the needs and expectations of participants. National legal systems, Courts of Civil and Criminal Jurisdiction will not disappear, but they will increasingly become one component of what will be recognized as a wider constellation of interacting, interconnected systems that provide structure for the organization of human interaction.37

The Civil Justice Review initiated by the Government of Ontario in 1994 envisioned in its preliminary report, issued in March of 1995, that courts will become "dispute resolution centres' adopting a 'multi-door' concept of dispute resolution and integrating alternative dispute resolution techniques."38 Some observers have expressed the concern that as government and the traditional legal system adopt and adapt ADR, the generative and transformative possibilities of these methods will be co-opted and ADR will become increasingly rule bound and will eventually be subsumed into the existing adjudicative structure. While some government initiatives will doubtless result in outcomes that serve the interests of those concerned to maintain the status quo for the adjudicative process, there is good reason to think that new legal sub-systems will continue to spring up, given the impetus of the forces which have given rise to ADR and the increasing ease of establishing alternatives where the traditional legal system proves

37 See also Roberto Ungar, at p.54 in Law in Modern Society. "A legal order operates against the backdrop of customary and bureaucratic law and...the differences among the types of law always remain fluid."

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unduly rigid and fails to meet the needs of those in conflict. On the other hand, the initiatives taken by the government, even if their proponents have fairly limited expectations along the lines of streamlining the traditional legal system, may develop a centrifugal momentum of their own and lead to increased diversity even within the court system.
Chapter Six - Society and Self: A Basic Polarity

The Concept of the Self

In Chapter One I remarked that “the approach which I take to understanding what it means to be human takes the interactions of human beings as constitutive of humanness.” I need now to return to this issue as a preliminary to considering how ADR and the generative orientation to law of which it is an exemplification contribute to the human project of seeking to live together in justice and harmony.

The issue here is really the understanding of the self. The inheritance we have from the liberal tradition in Western culture is a notion of the self that is radically individualistic. Popular culture may identify a longing for community, but that community is thought of as an achievement of choice - choosing the right neighbourhood, the right friends, the right social institutions, where right means compatible with me and my preferences. That kind of chosen community does not impact the core identity of the individual; rather it fulfills our desires. If community is a phenomenon that is chosen, then the self is always clearly distinct from the community.

It may be that community cannot be achieved in a culture that defines freedom to choose as the ultimate value. Robert Lane remarks that Western society suffers from “a kind of famine of warm interpersonal relations, of easy-to-reach neighbours, of encircling, inclusive memberships, and of solidarity in family life.”¹ The existence of such a craving and the resulting social malaise cannot be addressed without changes in cultural values that have thus far not been adopted. Thirty years ago Harold Berman

suggested that the commune movement which came out of the 1960's might be an advance guard for the sort of changes that are needed to achieve the healthy interaction of law and religion. He saw such interaction as necessary to create the balance of individual and communitarian orientations wherein lies the possibility of meeting the needs for relationship, without overwhelming the identity of the self. Communes have failed to fulfill that expectation, but the hunger remains that can only be filled by community which is a life-changing commitment, not a life-style choice remains.

Michael Sandel, in describing John Rawls' classic statement of the liberal conception of the individual in A Theory of Justice writes, "the identity of the subject can never be at stake in moments of choice or deliberation." That which is outside the individual does not, ultimately, change the identity of the individual. Interaction with others, in Rawl's neo-Kantian liberal view, gives us material to consider in choosing who we are or who we are to become, but the possibility of transformation remains internal. We are only affected in our core identity if we decide to be affected. "We are," in the liberal account, "barren subjects of possession first, and then we choose the ends we would possess."

Jennifer Nedelsky has written that, "Human beings are both essentially individual and essentially social creatures." In one sense the concept of self involves a "chicken and egg" dilemma. It is impossible to say which came first. Individuality and sociability are both ontological features of our humanness. The yin/yang symbol is helpful here in

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2 Harold Berman, The Interaction of Law and Religion
3 Michael Sandel, Liberalism and the limits of justice, p.161
giving symbolic utterance to the understanding that we cannot think of our individual essence apart from its relationship to the social structure that gives us birth and sustains us throughout our lives. Similarly we cannot think of society without an awareness of the constituent individuals who comprise it. As Nedelsky goes on to observe, “The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis.”

The conception of the self is important to understanding the process I have called the formation of moral assensus that underlies and is necessary to the functioning of the legal system which is in turn necessary for the ordering of society. Under a liberal, individualistic model of the self a social consensus as to what is just in any particular case, or as to what constitutes a just system for ordering human interactions, will require that each individual assent to compatible if not identical propositions. The process is necessarily rational, as what is required is that each individual be persuaded to choose. Thus, disputes will be decided primarily by marshaling the evidence and determining whether the action which is the subject of dispute fell within or outside what is prescribed by previously agreed rules. Individuals will weigh the evidence and decide. The system of justice will be strongly oriented toward the cognitive pole.

A communitarian conception of the self suggests a very different approach to justice. Michael Sandel offers this description of a community. “For a society to be a community in [the] strong sense, community must be constitutive of the shared self-

\[\text{\footnotesize 4 Michael Sandel, } \textit{Liberalism and the limits of justice}, \text{ p.133} \]
\[\text{\footnotesize 5 Jennifer Nedelsky, } \textit{“Reconceiving Rights as Relationship”} \text{ p.13} \]
understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life. The boundary between the self and the other is more permeable, though it has not disappeared. This communitarian self is constituted in part by the shared values, common vocabulary and a background of implicit practices and understandings. Stanley Hauerwas in speaking of the community of the Church puts it this way: "Our unity [as Church] is constituted by our inability to tell our stories without one another's stories." This communitarian notion of the self recognizes both the individuality of each story and the interweaving of all stories, constituting an overarching story, which is ultimately known only to God.

Perhaps an experimental piece of theatre I saw many years ago suggests the nature of this tapestry of stories. On three successive nights the same play, a rather straightforward British farce, was staged, and the same action presented. But on each night the audience was watching the action from the vantage-point of a different room of the country house in which the action was set. Thus something heard offstage on Monday was seen directly on Tuesday and described by other participants in the action on Wednesday. The stories wove together to form a communal story that was constituted by, but not limited to the individual stories.

Law, understood as that which orders society to enable love to flourish, would be unnecessary if there were no boundaries between individuals, if the self were absorbed in the community. To the extent that the individual remains distinct from the community,

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7 Michael Sandel, *Liberalism and the Limits of Justice*, p.172
law or a system of justice is required. The stronger the communitarian solidarity of a society, the less it requires the formalization of the law. Such a society can rely on the shared values and practices which are understood by the whole community and verifiable by observation on any occasion when the law is invoked. Moral assensus in such societies is much closer to consensus than to dissensus.

The Polarity of Self/Community as Manifested in the Legal System

It is worth repeating here Jennifer Nedelsky’s remark that, “The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis [on the individual].” The ill consequences for the legal system of our overly individualistic, rational and cognitively oriented culture will be adverted to in a moment. But I need to note here that it would be an error to hold up a communitarian ideal as a panacea, which would address those consequences. Barry Johnson’s model of “polarity management” is as applicable in understanding the relationship of self and society as it is in understanding the pros and cons of the breathing process. Just as an over-emphasis on inhalation will burst our lungs, and an over-emphasis on exhalation will suffocate us, so an over-emphasis on our social embeddedness will leave no room for the self, and an over-emphasis on our individuality will leave us empty of our humanity. What is called for is thus a conception of human society and a system of justice which facilitates the movement of both the society and each constituent member through the polarity matrix of individual and community. ADR provides a number of methodologies, as well as a

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4 Stanley Hauerwas, “The Church’s One Foundation is Jesus Christ Her Lord” p.153

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jurisprudential and philosophical orientations that have the potential to contribute to that movement within the polarity matrix. In so doing, it can contribute to the ability of individuals and societies to work at that balancing movement in the formation of moral assensus.

In any heterogeneous society, conflict is inevitable. Without perfect love, perfect knowledge or perhaps both, human beings will have to deal with differences that will inevitably arise between them. The transformative approach to ADR is premised on the view that resolving the difference is always a process that contributes to the moral assensus. In this understanding, deciding the conflict in legalistic terms – who is right and who is wrong - is of diminished importance next to the objective of providing an opportunity for those in conflict to overcome, to whatever degree possible, their sense of otherness and separation. Often this will involve the healing of fractured relationships. At other times it will involve strangers learning about strangers and being changed in the process. There will still be many cases, particularly those of deliberate harm against a person or identifiable group of persons, where the issue of right and wrong must be addressed. In such cases it will usually be the first step in the process of resolving disputes. But in other cases, after the parties have shared their stories, right and wrong may not be an issue at all.

9 Jennifer Nedelsky, “Reconceiving Rights as Relationship” p.13
10 As I present it, ADR also has a theological orientation that is conducive to the achievement of the objectives I claim. ADR is coherent with the Christian tradition and is a faithful living out of the gospel, in my view. One need not, however, share my theological orientation to adopt the view that ADR can make a significant contribution to managing the polarity of individual and community.
Transformative ADR must attend to the polarity matrix of self and community and not allow the legitimate interests of the identifiable individual to be overwhelmed. Injustice, power imbalance and maldistribution of resources and capacities cannot be overlooked in the name of achieving a resolution. The transformative burden falls heaviest on those who are the most advantaged in the situation. I will return to these claims for transformative ADR, but I want first to consider the understanding of the self that underlies the legal system that is in place in our liberal, individualistic society.

Although most disputes in Western society do not end up in the hands of lawyers, let alone in a courtroom, the trial is a paradigmatic social institution. Because a dispute could go there and because it is the social model for achieving justice, the adversarial approach has an impact on the structure of every dispute, even if it is unlikely that it will ever result in litigation. Disputants who are aware of the possibility of a trial will be impacted in their behaviour by their conception of what that means. And for many in our society a trial is something just short of war. It is, in the words of Ian Outerbridge, a senior litigator, “plain and simply a dog fight in which self-interest and self-defence are the sole motivating forces.”¹¹ This Hobbesian image is presented as an ideal by few lawyers, but is accepted as a realistic appraisal of the system, and in any case inevitable, by most.¹²

But as Sol Linowitz points out, self-interest confronting self-interest in combat gear need not be the only way of conducting a legal practice within our tradition.

Drawing on his experience as a small town lawyer in America prior to the Second World War and contrasting that with his experience as Senior Counsel to Xerox Corporation afterward, Linowitz identifies “a subtle shift that has been affecting all the American professions and many of our businesses - the shift from relationship to transaction.”\textsuperscript{13} Legal practice as relationship is defined by a lawyer whose role required that he know the law and advise his client what he could or could not do within the law. In this portrait Linowitz suggests that the lawyer was, rather than a hired gun, a custodian of the public good whose practice may often consist “in telling would-be clients that they are damned fools and should stop.”\textsuperscript{14} The shift from relationship to transaction is the shift to the hired gun role. Clients, particularly corporate clients, have abandoned the small town communitarian values Linowitz claims were the norm of the inter-war period. The individualism of laissez faire liberalism now permeates the legal and business communities. The laissez faire approach sees the public good as the result of the pursuit of individual goods. Thus no one needs to attend to the achievement of the public good. Efforts to achieve the public good by cooperative effort are, in fact, seen to be destructive of the very object they seek, particularly if the good is sought through the agency of the state. In this new world of liberal individualism legal services became just another commodity to be bought at the best price. Lawyers ceased being sage advisers with a certain professional distance from the ends sought by their corporate clients. Increasingly, they were hired not to monitor corporate activity in the name of the law, but

\textsuperscript{12} Sol M. Linowitz. \textit{The Betrayed Profession}.
\textsuperscript{13} Sol M. Linowitz. \textit{The Betrayed Profession}, p.38
to further corporate activity within the law, and to test and stretch the law or lobby for its revision if the general good, as represented by the law, conflicted with the individual good of the corporation. And so litigation grew into the major branch of the legal profession, as lawyers ceased telling clients to stop being "damn fools" and turned to the courts to achieve the aims of their clients by engaging in the "dog-fight" of personal interests.

Though corporate legal practice in the past may not have always been so rosily communitarian as Linowitz recalls it, his contrast of the "relational" and the "transactional" approaches to law is helpful. By relational I understand him to mean that the law is a system for ordering the whole of society and the role of the legal practitioner is not solely to advance his client’s aims, but to help his client adjust his aims so that they are consonant with the broader social objectives expressed in the law. The law is a tool for fostering the creative interaction that is at the heart of a communitarian notion of the self. By a transactional approach to law I understand Linowitz to have in mind an individualized understanding of the self. Each person decides on what is in her best interest and then pursues that interest primarily by choosing what is best calculated to achieve it, regardless of the impact on others. She assumes that others have the same attitude and it is in that similar lack of regard that fairness is said to reside. When interests conflict, in this transactional understanding, they are to be resolved by the exercise of power. Reason will be used to persuade the other party or the court of the merits of one’s case. Reason is employed, however, as an exercise of power rather

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14 Sol M. Linowitz. *The Betrayed Profession*, quoting Elihu Root, p.4

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than as the enlightenment tool for the disinterested determination of what is just.

If litigation, characterized as war with words, is the paradigmatic setting for dispute resolution in Western society, then all disputes have the potential to become contests of power. But it is not inevitable that society's final dispute resolution mechanism be a power contest. The origins of the Western legal system lie in European communities that valued relationships and emphasized reconciliation as a response to conflict. The long development of the Western legal system traced by Harold Berman suggests that it need not be oriented around the rights of the individual. The Enlightenment, the rise of capitalism and the rise of the nation-state all contributed to the current shape of our legal system.\textsuperscript{15} The recent advent of ADR as an alternative to the "dog-fight of individual interests" suggests that there is some recognition within Western society of the cost of an unduly individualistic legal system. ADR may represent a movement toward a legal system that embraces a more communitarian understanding of the self.

\begin{quote}
Embracing Reconciliation within the Polarity
\end{quote}

In his reflection on the long-standing and seemingly intractable conflicts in the Balkans, Miroslav Volf observes that, "more often than not, conflicts are messy. Indeed, they are very messy. It is simply not the case that one can construe narratives of the encounter between parties in conflict as stories of manifest evil on the one side and

\textsuperscript{15} Harold Berman, \textit{Law and Revolution}

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indisputable good on the other..."\(^{16}\) This is as true of conflicts between individuals as it is of conflicts involving nation-states or ethnic groups. And it is the messiness of conflicts that renders the "dog-fight" model of the legal system inadequate. The hope in such a view, if I can call it that, is that in war one party will decisively defeat the other and the issue will be resolved. Power will prevail and impose a resolution.

But as the experience in the Balkans attests, conflict is messy, and continues to be intractable even when one side has "won". The Second World War, characterized as a complete victory of good over evil, which included the eventual redemption of the vanquished, must be seen as an aberration or at least a rarity in human history. Conflict much more often waxes and wanes, rather than ending decisively. It will relocate, flaring up in one quarter and then another. Protagonists will shift allegiances and form new alliances in an effort to restore a situation that seemed to have been resolved by a war with a clear outcome.

Lesser conflicts, such as those within the Church, or those that result in lawsuits, are similarly difficult to resolve by the exercise of sheer power. The Church is an association of volunteers and there is little that can keep persons participating if a conflict is resolved by an assertion of power. Those who have "lost" will move elsewhere, or stay and continue to work for their position surreptitiously. A colleague reported to me once, upon being called to serve a Church where his predecessor had ministered for seventeen years, that on his first Sunday a couple introduced themselves.

\(^{16}\) Miroslav Volf, *Exclusion and Embrace*
by saying they had not attended for seventeen years, because they did not like the previous minister, but they were now ready to try again.

Although most civil trials end with a judgment and an award to one party or the other, and criminal trials result in a verdict and sentence, that is not always an end to the matter. Matrimonial litigation is perhaps the most obvious example of a type of conflict where the “dog-fight” can continue for years and require repeated return visits to the courtroom. But it is true of other litigation as well. Anti-trust cases famously drag on for years. Issues having to do with North America’s First Nations return to court again and again. Criminal cases may deal with a particular incident, but the relationship of the criminal and the society often involves a series of returns to the courtroom as he or she re-offends.

My point here is that the model of the legal system which conceives of society as composed of individual rights bearers, whose rights are determined in a court of law by a process just short of war is mistaken if it is thought that such determination is final. That model is founded on an understanding of the self that gives undue weight to its individualistic aspect. The legal system, in such a model, is asked to define and redefine the boundaries between the self and others. The Balkans are a powerful example of the difficulty, indeed the impossibility, of applying this approach in a simplistic, ‘one size fits all’ fashion. As the international community is asked to recognize increasingly smaller and smaller divisions within what once appeared to be a whole, the process of defining narrower and narrower divisions between persons replaces the process of finding ways for diverse peoples to co-exist in peace. Human beings, who must live in

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community, can only order their communities to a limited extent by drawing lines and assigning rights. At some point they must move from the pole of the individual and move toward the pole of the community, by reaching out to embrace the other.

Volf titles his book *Exclusion and Embrace* to summarize his claim that at the heart of conflict lies the human inclination to exclude those whom we characterize as *other*. War is the final stage of the process of defining oneself in distinction from others. At the social level a form of communitarianism is involved in this. The *in group* may form very strong bonds of solidarity by castigating the *other*. But such unchecked tribalism is little different from unmitigated individualism in that it draws too narrow a boundary around those who count as truly human. The *in group* locates itself on one side of a polarity matrix and refuses to engage the rest of humankind as truly human. This inability to embrace the other as human results in an inability to relate to the other except to exclude, which ultimately may be done only through violence.

The concept of the self lies at the heart of this inclination to exclude. A self identified as entirely individual, or a self identified solely through membership in a defined *in group* eventually turns to violence against those who do not conform to the expectations of the self or who refuse to become part of the *in group*. Volf writes:

...a tension between the self and the other is built into the very desire for identity: the other over against whom I must assert myself is the same other who must remain part of myself if I am to be myself. But the other is often not the way I want her to be (say, she is aggressive or simply more gifted) and is pushing me to become the self that I do not want to be (suffering her incursions or my own inferiority). And yet I must integrate the other into my own will to be myself. Hence I slip into violence: instead of reconfiguring myself to make space for the other, I seek to reshape the other into who I want her to be in order that in relation to her I

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may be who I want to be.\textsuperscript{17}

Because the \textit{other} is also an individual seeking to identify herself the dilemma is no more resolvable by submitting to a submersion in the other than by expecting the other to become entirely an aspect of one's own self. There is a polarity that must be managed. I quote Volf again in describing this aspect of our humanness:

Psychologists tell us that humans produce and reconfigure themselves by a process of identifying with others and rejecting them, by repressing drives and desires, by interjecting and projecting images of the self and the other, by externalizing fears, by fabricating enemies and suffering animosities, by forming allegiances and breaking them up, by loving and hating, by seeking to dominate and letting themselves be dominated - and all this not neatly divided but all mixed up, with 'virtues' often riding on hidden 'vices,' and 'vices' seeking compensatory redemption in contrived 'virtues.' Through this convoluted process the centre of the self is always reproducing itself.\textsuperscript{18}

I have already suggested that humans need to attend to a polarity of individual and community. A related polarity is that of \textit{self} and \textit{other}. These polarities must be managed both by individuals and communities. One way to image this "convoluted process" is with the spherical Rubik's cube I have presented as an interconnected network of yin/yang relationships. Volf suggests a more intimate metaphor of \textit{embrace}.

An embrace, he says, is an acting out of the human process of engaging the \textit{other} in a process by which the \textit{other} is incorporated into the \textit{self}, and the \textit{self} is incorporated into the \textit{other}. Volf works with this metaphor by breaking down an embrace into its component movements. He describes a four-part process that begins with the opening of one's arms to the other. This is a sign of vulnerability, invitation and request. The

\textsuperscript{17} Miroslav Volf, \textit{Exclusion and Embrace}, p.91.

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second step is waiting for the other to respond. The embrace cannot be imposed, nor its reception presumed. The third step, the actual embrace involves closing the arms, which is unthinkable unless reciprocated. As Volf notes “It takes two pairs of arms for one embrace.” Finally there must be an opening of the arms, a release and letting go of the other. An embrace does not effect union, but it does affect each participant, who then goes on to other relationships and other embraces. The participants have not become one, but they have each incorporated something of the other into themselves and so the other has become less other.

The yin/yang symbol in itself might be thought of as an expression of embrace. The two others, the yin and the yang are represented together in balance, but they are in fact in movement toward and away from each other. Their movement together is confirmation, clarification and re-generation of the other that is in each. The identity of each is enriched as the other is incorporated into each self, but that incorporation is kept from overwhelming the self as the other lets go.

Metaphors and models can be helpful in informing our understanding of the social world we inhabit. They may provide insight as to what underlies the visible super-structure and surface activity of our society. The yin/yang, the polarity matrix and the embrace all point to a way of understanding the two-fold human project of both defining ourselves and living together. What these metaphors suggest is that we are called to balance apparently opposed orientations or forces. Such a balance of dependent

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opposites seems to lie at the heart of physical reality according to what we know of the nature of particles and waves at the heart of matter. Similarly, the yin/yang of self and other lies at the heart of our social reality. Just as physicists cannot say with ultimate certainty whether they are looking at a particle or a wave, so the observer of human beings cannot say whether he or she is looking at something that at its core is an isolated individual or an imbedded element of a community. When moral assensus, which balances cognitive and generative orientations, is closely examined as a process central to ethical decision-making, it too reveals itself to be a ‘both/and’ not an ‘either/or’ phenomenon. These metaphors point to the fluidity of the human project. A static and unmoving balance is achievable only in the realm of God (and I suspect not even there).

In this world, to live means that we are constantly moving back and forth within the yin/yangs of the spherical Rubik’s cube; yielding and progressing, approaching encounter and retreating from encounter.

ADR as a contribution to public conversation about ethical concerns

Margaret Wheatley describes field theory as a developing area of scientific thought that is ripe with potential for understanding organizations. The word field, she notes was taken from the term applied to the background on heraldic shields. It refers to “unseen structures, occupying space and becoming known to us through their effects.” Examples are: gravity, electromagnetic effects and radiation. Fields exercise enormous influence over humans and our physical environment, yet they are difficult to describe or

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discern, apart from their effects. Wheatley takes fields as a metaphor and suggests that organizations need to attend to the nature of the fields they create. An aura of energy and excitement in a retail store can be a positive field, but a negative field can as easily influence an organization. The moral assensus which I suggest is necessary to an empathetically ordered society can be thought of as a field existing within it, or as a background field providing a context for it. Were it visible I suspect such a field would look like a pulsing version of the spherical Rubik's cube depicted on the cover of this thesis. That field of moral assensus, I claim, influences the relationships within our society and its morality, ethics and legal system. Though we cannot see the field, we can limn its contours by observing its effects. While we cannot control the field, we can influence it. Because it is detected through its effects, it is when its effects do not meet our expectations or desires that we might want to think about seeking to alter the field in order to achieve different effects. The over-emphasis on individualism of the liberal tradition to which Nedelsky refers, a judgment I share, can be thought of as an effect of the current orientation of the field to which I am referring as moral assensus. How then are we to seek to shift the balance so that the field begins to have effects which help us to address conflict in a manner that draws on the potential for such encounters to move toward embrace, rather than be treated as occasions for more rigidly defining the rules of exclusion?

ADR is a nascent social institution that offers some promise of shifting the balance of the yin/yang within the field of moral assensus. The recent rise in the role of
ADR within the North American legal system in itself manifests a shift in the yin/yang, but the balance still remains unduly weighted toward liberal individualism and the adversarial system. Encouraging the growth of ADR offers the possibility of facilitating in a conscious way what may have begun without awareness. Although governments have begun to introduce ADR and restorative justice projects which offer some prospect of changing the legal system, thereby shifting the field towards a more collaborative approach to justice, it lies beyond the scope of this thesis to consider the impact and potential of these initiatives.\(^2\)

What I shall do in the remainder of this chapter is to consider how ADR, when it is resorted to in such small scale and even mundane settings as the Church and the neighbourhood dispute, provides a vehicle for exposing ordinary people to a new way of understanding conflict and thus a new way of relating to the other. Out of such small experiences the cultural balance may be affected and the moral assensus find a healthier balance of individual and community interests.

Jurgen Habermas noted, nearly 40 years ago, that modern democratic societies suffer from the “liquidation” of critical, informed public discussion that shapes public opinion. Western nations have become consumers of culture and consumers of (as opposed to participants in) discussion. The role of the public in political life has become primarily that of “acclamation” - endorsing (or rejecting) the position presented to it, rather than engaging in reflection and transformation through debate. Other writers in

\(^2\) Ontario has mandated ADR as part of the civil trial process and Nova Scotia has implemented a restorative justice process throughout the province. Other provinces, including Ontario and the Federal Government have instituted pilot projects for restorative justice.

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remarking on the privatization of life have, like Habermas, noted that the loss of spaces or forums where informed discussion can take place has been a significant contributor to the loss of community. The town square has been displaced by the shopping mall. The front porch has been deserted in favour of air-conditioned living rooms and backyard decks. Town council meetings have become forums for shouted opinions or soporific technical detail, observed if at all over cable channels from the comfort and disengagement of one's home. Habermas takes us even further back in time, pointing to the coffeehouses of the late 17th century and the salons of the 18th, as well as the letter writing culture, which was sustained by numerous journals of opinion and discussion. Now, opinion is packaged like soap and presented for easy consumption as "experts" joust on closed sets before the cameras with the same rules applied to roller derbies and political commentary.

It needs to be noted that in pointing to institutions of the past that endorsed and encouraged broader public debate, all commentators acknowledge that this debate took place only among a privileged and small sector of the society. Education, property, gender and genealogy were some of the factors that served as boundaries. It need not concern us here whether those who were privileged to participate in the discussion underlying the formation of public opinion were in any sense doing so in a representative capacity that in some fashion justified the exclusion of the broader public from the discussion. The point of referring to the past is not to endorse it unreflectively, but to

22 See Parker Palmer, *The Company of Strangers* and more generally Robert Bellah et al, *Habits of the Heart* and *The Good Society*, and also Robert Putnam *Bowling Alone*

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take from it what we can learn that will inform our best judgments about moving forward. Thus we can embrace the notion of finding avenues for discussion which will inform public opinion without adopting the elitist attitudes that were part of the culture of the past. If we seek to develop contemporary venues for such wider public discussion we shall, however, need to attend to the difficulties of logistics and human inclinations that make it unlikely that entire populations will participate.

At the dawn of the 21st century Western society is, in Habermas' phrase, culture-consuming rather than culture-debating and in consequence is impoverished by the exclusion of many voices from the formation of a public opinion that has some political impact. Those who are consumers of political debate rather than participants are disempowered because they are denied, or deny themselves, the opportunity to become engaged in the communal life. By maintaining their impermeable individualism in order to avoid being affected in their core by social interaction, consumers relinquish the potent opportunity to participate in the formation of public opinion. A socially healthy balancing of the yin/yang of individual and community requires opportunities to engage in debate and discussion about meaningful issues and the nurture of social practices and institutions which foster a deeper engagement of individuals in the life of the community. ADR is one institution that offers such an opportunity. Although in one view ADR might be thought of as simply a tool for addressing certain types of conflict, the principles used for facilitating the discussion of contentious issues and making decisions in the face of differences can be helpfully resorted to in a wide variety of venues where social collaboration needs some institutional support. ADR can be characterized as a response to the needs of modern society.
to the social need for conversation which is structured in such a way that serious issues, which often give rise to conflict or differences of opinion, can be engaged by the participants in a manner that facilitates their achieving a healthy balance of their yin/yangs of individual and community identity.

The principles that underlie ADR are consonant with principles that Habermas has suggested are necessary for discussion that leads to the discernment of the "principles or norms that incorporate generalizable interests." Those principles accord with the requirements of communicative action - comprehensibility, truth, correctness and sincerity - which is Habermas' proposal for doing ethics and social decision-making. Where those conditions are met the resulting agreement embodies not merely a solution peculiar to the parties involved, it also embodies norms that will engender the assent of others who are prepared to consider the same or similar matters following the same requirements. It is important to note; that in Habermas' theory communicative action is always open ended. There needs to be a willingness to hear from parties unrepresented in earlier discussions as the interests of those parties become apparent over time. This does not mean, however, that discussion is endless repetition. Matters are revisited only where parties, whether represented or unrepresented in earlier decision-making, can, within the requirements of communicative action, claim that the norms derived from that earlier round are properly the subject of reconsideration.

The theory of communicative action suggests that "rather than contractual agreements among 'unencumbered' individuals with arbitrarily chosen ends,
[communicative action] involves processes of reflective argumentation among previously socialized subjects whose needs and interests are themselves open to discussion and transformation. The components of a mediation session do not squarely mirror the requirements for communicative action, but the congruence between communicative action and the principles underlying ADR can be discerned by describing a straightforward mediation session dealing with a complaint about a barking dog in terms of Habermas' requirements.

The first requirement, comprehensibility, includes not only the concept of a mutually shared language, but a common understanding of the claims that are made by each party. There is a learning about the nature of other human beings that takes place when a person who cannot sleep through the least obtrusive growls and snorts of a dog learns that others can sleep through constant barking at volumes that would frighten a mountain lion. As parties hear and mirror back each other's version of events they come to understand that their own perception is not the only way to view the situation. Thomas McCarthy says in his introduction to Moral Consciousness and Communicative Action, "Habermas' discourse model, by requiring that perspective taking be general and reciprocal [walk in the other's shoes], builds the moment of empathy into the procedure of coming to a reasoned agreement." This might equally be said of the sharing of stories,

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23 Jurgen Habermas, Between Facts and Norms, p.61.
24 Thomas McCarthy in Jurgen Habermas, Moral Consciousness and Communicative Action, p.xi.
which is the first stage in a mediation. It requires not acceptance of the other's version of things as “true”, but only that one make the effort to hear it, not for purposes of rebuttal, but so that the other’s story comes to be enfolded in one's own story, enabling the participants together to write the next chapter.

That the parties must speak the truth is clearly necessary to a successful mediation. This is so of course with respect to factual claims and claims about legal rights, but more importantly as to claims about their needs. If a party attempts to be strategic in their assertion of needs or interests, if the sleeper claims to need 10 hours of absolute silence at the risk of disabling exhaustion while performing work that requires enormous levels of wakeful awareness - anticipating that he or she can then negotiate the 6 hours of relative quiet which are really required - then the process stalls until the truth is clarified. It is only when the true needs of the parties are made known that the process can hope to engender empathy, as parties grant the legitimacy of each other’s needs and thus come to share a desire to discover means of meeting them.

Habermas' requirement of correctness manifests itself in the process primarily as the need to ensure that each party clearly understands the other. Some mediators will engage in exercises in effective listening, asking one party to reflect or mirror back to the other the feelings or facts they have just heard. While the therapeutic "touchy-feely" flavour of such exercises may make them inappropriate in some circumstances, there is great value in ensuring that what has been said is understood and in ensuring that the party speaking feels that they have been heard. Providing a party with the assurance they are heard is critical to the building of empathy.

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The final requirement, sincerity or truthfulness, is primarily an antidote to strategic maneuvering. A mediation process, particularly if lawyers are present, can be limited to a pre-trial maneuver if the parties are not prepared to explore their needs genuinely. If a party is posturing in the hopes of achieving more than their bottom line, in other words trying to win, then the outcome will be less likely to win mutual support than would otherwise be the case.

The necessity for open-endedness is addressed in the mediator’s principle that all persons with a stake in the outcome should be present at the mediation session. If the dog is disturbing many neighbours, then all will need to be part of the solution, or else there will be an endless series of discussions necessary.

Resolving a dispute about a barking dog is a long way from the type of dialogue Habermas has in mind when he refers to communicative action, discourse ethics or the type of debate that underlies the concept of the "general will" or public opinion that he describes as “more a consensus of hearts than of arguments.”26 But the practical principles necessary to all of these types of discussions converge, because what the principles seek to promote through dialogue is the overcoming of the otherness of humans and the discernment of how it is that we are to live together.

Overcoming our otherness is not accomplished by conversation alone. But without conversation that embodies the principles of communicative action, human beings are unlikely to balance the polarities of individual and community. Without that

26 Jurgen Habermas, The Structural Transformation of the Public Sphere, p.98.
balance being achieved, we live at either extreme, in isolation or immersion. Most often we live in the middle where there are two ways in which to pursue balance - by conversation or by conflict. In the latter lies the danger of violence. The possibility of violence, however, is a strong incentive to make the turn toward dialogue wherein lies the possibility and the hope of moving towards a mutually enriching encounter of the self and the other. As Winston Churchill put it, “Better to jaw-jaw than war-war.”

ADR is, for Western culture, a new way (or more accurately, a way rediscovered after a thousand years) of addressing conflict by focusing on reconciliation and relationships above rational determination of right and retribution. It offers the prospect which lies within every conflict of seizing the potential for dialogue and the possibility for transformation by seeking to rebalance the yin/yang of self and other, perhaps even to the extent of embracing the other.

ADR, by which term I am here referring to the whole range of dialogical/relational/reconciling approaches to conflict, is not a panacea but a mechanism for managing polarities within society. ADR is one orientation within a polarity matrix where it is paired with the adversarial system of dispute resolution. Every pole, Barry Johnson reminds us, has its weaknesses. For ADR the lower quadrant contains the risks of situationalism and submersion of individual identity and needs in a communitarian push for reconciliation. The adversarial pole, with which we are more familiar in the West, is a rights based, rational and decision focused approach to conflict. Rules and the rights they protect cannot be swept away, at least not prior to the coming of the realm of God. Rules and rights recognize the imperfection of our ability to do justice in the
moment. They are the way in which the larger society's voice is heard in each particular situation of conflict. When rules and rights are functioning well it is the disempowered, the unrepresented and the wider public interest that they protect. In a situation of imbalance skewed towards the pole of rights and rules, however, conflict is resolved with an excessive rigidity leading to injustice in many cases. It is because of the risk of imbalance in the polarity of an ADR/adversary system (relationship & reconciliation/rights & rules), that a mechanism or process needs to be in place which enables the parties to a conflict to bring to bear with appropriate force the rules and rights that are relevant. Though it is beyond the scope of this thesis to examine it in detail the Truth and Reconciliation process established in South Africa following the end of the apartheid regime illustrates the type of creativity that is required in designing a procedural mechanism that will be appropriate to the situation and foster the balancing of the yin/yang.

The concrete features of a decision-making methodology will need to be crafted to the needs of the social structure where it is to be applied. In situations such as the examples of Apple, Blueberry and Cranberry United Churches described in Chapter Three, it made sense to design a process specific to each situation. The strong commitment of Western culture, however, is to a universal system of justice. The dead hand of the Enlightenment continues to influence our conception of justice so that we seek not only invariable principles, but procedural safeguards, which must also be universal. A yin/yang model of justice can pry back those fingers and reconsider the universality of principles and also procedures.
An emphasis on relationship and reconciliation as the heart of justice demands a far higher degree of community participation in the justice system than is currently the case in Western society. The Enlightenment baby of rights and retribution, however, cannot be thrown out with the bathwater of ill effects that have resulted from an overemphasis on them. If principles and procedures need not be universal in their application, they still have a role to play as a presumptive starting point in our considerations. If for a given community dealing with a given situation, the presumptive principles and procedures seem inappropriate, they can be modified or even abandoned if the principles of Habermas' communicative action are followed. A system of justice risks sliding into situationalism unless it has at a minimum a universal principle that ensures presumptive principles will only be deviated from in the service of a higher sense of justice that would be offended by strict adherence.

Casuistry and its potential for informing public discussion

The principles of communicative action might provide the procedural framework for doing justice, but they are pretty abstract. If communities are to participate more fully in doing justice as they face their conflicts and contentious decisions, they will need more guidance. The ancient method of ethical reflection called casuistry provides an inexhaustible wealth of guidance for persons engaged in decision-making. I turn now to consider how casuistry might put more flesh on the bones of communicative action by providing a resource as conflict is addressed and decisions are made about how humans will choose to live together in community.
Gerald Shepherd has remarked that one of the opportunities presented by what is generally called the movement into a post-modern culture is that we are presented with an occasion to revisit in our past things which modernity dismissed as unworthy of examination. One such opportunity that has been seized by some scholars is to reconsider casuistry as a methodology for ethical reflection. Casuistry is, first of all, the case method. It is founded on the insight that as we consider how to act ethically, we can be aided by looking at how other persons have acted when facing similar choices, or how experts advise us to act when they consider similar cases. But casuistry is more than rote repetition of past practice or adoption of expert opinion. Casuistry requires reflection in the moment on whether or not past choices have been correct ones and whether those choices are consonant with the moral principles to which society grants moral assensus. And because we can be presented with infinite variations on familiar themes, it requires that we consider how past cases are similar to, or different from, the circumstances we face. Casuistry requires that we discern whether those differences are relevant and if so, whether they suggest we should change the decision we make. Casuists look not simply for differences and distinctions, but for those that are relevant to determining whether the decision accords with the moral assensus. This latter requirement calls for discernment of principles that can be drawn from cases. Casuistry holds that ethical decisions are guided not simply by the factual similarities between cases, but by the application of principles discerned from similar human experience.

27 In remarks to a workshop of the Toronto Conference of the United Church of Canada, With Diligence and Love, held September 27, 2000 in Toronto.
In the era which Jonsen and Toulmin call “high casuistry” (1556-1656), a wide community of scholars engaged in the discussion of a broad range of ethical issues through a process of casuistic reflection. Casuistry was also the tool used in the creation of taxonomic guides by clerics in their role as confessors for pious Christians who sought direction in ethical decision making and the avoidance of sin. These guides provided lists of situations commonly encountered in daily life (and some not so commonly encountered, a practice which eventually contributed to the demise of casuistry) and the decisions of scholars, not all of whom agreed, about whether a given action was sinful or not. The scholars of high casuistry approached cases inductively. Cases were resolvable by the application of principles, they held. And so high casuists engaged in complex and at times arcane consideration of cases and principles, seeking out the limits of application of the latter as they altered one or two details in the former. Because of changes in the economic life of Europe at the time, there was continuing pressure to re-examine the Biblical injunction against usury. The principle stated in Scripture can be briefly summarized as, "thou shalt not lend money at interest." Scholars noted, however, that what was a loan and what was interest were not definitively stated. And so cases were developed where the principle was said not to apply because of the structure of the transaction. Other casuists, and this was so particularly by the 18th and 19th centuries, approached cases deductively. They sought principles in the case and traced those principles through variations of the case, developing what Jonsen and Toulmin call a

28 Albert R. Jonsen and Stephen Toulmin and Ronald Miller in particular.

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"moral geometry." Though casuistry was most strongly associated with the Roman Catholic faith, and particularly with the Jesuits, it enjoyed a time of prominence in the United Kingdom as well. William Perkins was one prominent casuist who used cases primarily as illustrations of pronouncements found in scripture. Perkins, according to James Keenan, used cases as a "point of departure" for preaching purposes. They provided situational contexts to which scripture might be applied.\(^3\)

Casuistry, the preceding summary informs us, is a term applied to many different uses of cases. Jonsen and Toulmin describe "good casuistry" as the application of "general rules to particular cases with discernment [rather than sloppiness]"\(^3\) suggesting an inductive approach. But they go on to describe an experience that inspired their interest in reviving casuistry wherein they worked with a pluralistic group of ethicists commissioned to make recommendations about the propriety of new possibilities in medical research. After noting their surprise at the frequency of agreement in recommendations about specific research procedures they go on to report that the group discovered they did not all arrive at agreement by the application of the same principles.

"The locus of certitude in the commissioners’ discussions did not lie in an agreed set of intrinsically convincing general rules or principles as they shared no commitment to any such body of agreed principles. Rather, it lay in a shared perception of what was

\(^{32}\) Albert R. Jonsen and Stephen Toulmin, The Abuse of Casuistry, p.16.
specifically at stake in particular kinds of human situations. In other words, had the commission proceeded with its work by first developing a body of abstract principles they shared, they would never have reached agreement on them and thus never have been in a position to move to the cases. It was in moving to the cases that they discovered in each situation a moral assensus that could not be articulated as principles.

Richard Miller suggests that this tension of inductive/deductive applications of casuistry is a type of poetics. "Case-based reasoning is not held together by a chain of propositions, internally linked by their formal relations. Rather, cases are integrated into a complex network, requiring us not only to recognize substantive analogies between them, but also to coordinate them with a concern for circumstances, presumptions, and authoritative opinions toward the end of persuading an audience." He goes on to urge us to "view casuistry as an eclectic, inter-disciplinary inquiry [that] invites genre bending." This approach conceives of casuistry as a way in which we can broaden the range of relevant considerations in ethical decision making.

Too much "genre bending" might result in a casuistry that is "bent out of shape" as happened in the past, according to Pascal. But Miller is not urging us to embrace a situational or entirely non-rational approach to ethical decision making. Rather he, like Jonsen and Toulmin, points us back to Aristotle's observation that ethics is a practical science, not an exact one like geometry. In a practical science rules are presumptive, not absolute. In cases where injustice seems to result from the strict application of the rule,

34 Richard B. Miller, Casuistry and Modern Ethics, p.240.
the rule can be set aside for this case. That does not mean that it will be set aside in the next case.

A practical science requires an intuitive and even (on occasion) inarticulable application of judgment and experience. Jonsen and Toulmin liken the practice of casuistry to the diagnostic process of a medical practitioner. While the practitioner requires familiarity with medical research and knowledge of diseases and their processes, each presenting patient needs to be considered as, at least potentially, a unique variation or even a major deviation from the norm. A clinician's taxonomy of disease is like an ethicist's taxonomy of principles and cases. Each begins by reasoning analogically, looking for what is similar to past experience in the current case. But conclusions must be "presumptive, rebuttable, and open to revision in the light of fresh evidence." In marginal and ambiguous cases there will be room for disagreement.

The clinical analogy suggests that casuistry is itself a yin/yang or polarity. Principles established by practice and experience can be applied inductively to common situations. Sniffles and a cough mean the patient has a cold. Taking money from my wallet constitutes theft. Inductive reasoning in the clear case avoids the time consuming exercise of always beginning at ground zero. But it risks overlooking that which is unique and highly relevant. Reliance on principles can also bog down (as the usury debates did) when there is reluctance to re-examine a well-established principle that is under pressure. Insistence on preserving a principle that the moral assensus is

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35 Richard B. Miller, Casuistry and Modern Ethics, p.245.
abandoning leads to the development of what lawyers' call "legal fictions," which redescibe the facts so that they accord with the principle. Deductive reasoning invites us to look for new principles or new manifestations of established principles when cases begin to arise that seem irresolvable in a way that accords with our intuitions. The insistence on seeking out generalizable principles serves as a check on the risk in decision-making that power imbalances, misplaced empathy or other considerations may be over-weighted in the particular case.

Jonsen and Toulmin suggest that in the period leading up to and including the era of high casuistry the use of cases in the confessional served an educational as well as a religious function. The common people, they claim, were able to develop an appreciation of "the morally relevant features of actions." As the characterization of casuistry as a practical science implies, it is in its ready applicability to the situations encountered in daily living that its great merit lies. That ease of application is not absolute but relative to the ethical practice most common in our day that requires the learning of codes of abstract principles that are not always transparently related to the infinite variations that life affords.

Casuistry sacrifices the certainty of absolute rules and rights by entrusting justice to a process with procedural protections which Jonsen and Toulmin, based on their study of the actual practice of scholastic casuists, summarize as: "the reliance on paradigms and analogies, the appeal to maxims, the analysis of circumstances, degrees of

probability, the use of cumulative arguments and the presentation of a final resolution. Clearly these protections alone are insufficient to address concerns such as power imbalances and flawed or dishonest information about the case. There is nothing contradictory, it seems to me, in combining these procedural steps with Habermas' four requirements for communicative action in establishing a forum where conflicts, decisions or ethical dilemmas can be addressed. Ideally one might hope that a large population of persons eager to be educated in this type of discourse existed. My experience suggests that is not the case. However, when a conflict erupts within a Church or within the community an opportunity arises to provide both assistance in dealing with the specific subject matter in dispute and some exposure to the methodology of ethical decision making by application of the case method in a process guided by the principles for communicative action. ADR, particularly when there is a commitment to its transformative potential, is a response to conflict that embraces that opportunity.

Addressing an issue

I will close this chapter by presenting a suggestion as to what such a process as I have outlined might look like in practice, dealing with an issue that presents an ethical dilemma for many congregations. Whether in the centre of cities or in small towns, nearly every Church receives requests from folks who come to the door looking for food or cash to help them out. Often there is a story accompanying the request, though in the current environment of welfare cuts little explanation is required to back up the statement

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of need. Especially when such requests become frequent, congregations need to develop a policy as to how they will respond. A conflict may arise if there are strong differences of opinion as to what constitutes an appropriate response, but even if there are no strong feelings involved, an ADR process can be a helpful way to consider the matter: helpful in reaching a decision, helpful in deepening congregational understanding of the issue and helpful in educating the congregation in casuistic communicative action.

Habermas' model requires that all who have a stake in the outcome should be part of the process. Rather than leave the minister to decide the issue on her own, the congregation might include as many interested members as possible. The circle might be broadened to include homeless persons or others who have asked for assistance. Persons who work with the poor might be part of the discussion. Persons from social agencies, from government or from other affected organizations are possible participants. The wider the circle is drawn, the more comprehensive the process will be in providing the decision makers with a sense of what the situation is really like. Deciding whom to include in the process also requires deciding how they are to be included. Will those who are not part of the congregation have any input into the decision, or will they simply provide information? This preliminary decision will require some deep reflection about what the nature of the Church is.

The process will require that participants identify what it is that they need. There will be an inclination to take positions: "We can't afford to give much." "We are called to sell all we have." "My welfare cheque runs out before the end of the month." "We have to eliminate the deficit." Underlying those positions are needs: to balance Church
budgets, to live out the gospel, to feed families, to fulfill public trust responsibly.

Dealing with this one issue is not an occasion for meeting all of these needs. The participants must determine which needs are most directly affected by the decision to be made, how they will be affected and how much. The process is intended not to work out a comprehensive balancing of all needs, but to help participants discover what the needs are which drive persons who hold different positions. When parties speak their needs in truth and clarify what the needs of others are, they leave no room for strategic positioning and move toward the building of empathy, which provides the occasion for a shared solution.

Once the parties are participating in the process with sincerity, the tools of casuistry can be usefully employed to examine the issue. The parties can agree as to what the paradigms are. Perhaps all can agree that the Church should not be expected to give all its resources to those who come to the door. It is reasonable to set limits to this form of charity in order to have resources to enable other forms of work to relieve the needs of the poor, perhaps by addressing causes rather than symptoms. On the other extreme, it may be agreed that turning away every person who comes to the door, regardless of their story, regardless of the time of day or season of the year, is not a policy that the Church wishes to follow. Through a process of discussion, the outer limits of possible responses to the issue are clarified and narrowed, which helps both to identify the range of potential responses and to identify the principles that all participants can agree upon. In this situation such principles might include; “don’t bankrupt other programs,” and “don’t turn anyone away without at least listening to them.”

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The process moves from paradigms to analogies. What situations are similar? How are they handled here? How do other Churches or similar organizations handle them? Why do they deal with it that way, and do we want to follow their example?

As other cases or similar situations are considered, principles and norms will begin to emerge. Participants can examine both their applicability to the instant situation and how much support they enjoy. Principles may be drawn from other sources or cases and considered in the same fashion.

The casuistic process then calls for an analysis of the circumstances, which in fact requires a preliminary step, the delineation of just what the (relevant) circumstances are. This is the requirement to gather empirical evidence. Who is coming to the door? How often? Are they "regulars" or "one-timers"? What other agencies or supports are available? What is the impact of refusal of help or token assistance?

What constitutes relevant data necessary to an informed consideration of the issue is a question the answer to which will require some reflection on how to balance the need for sufficient information with the impossibility of perfect information. The analysis of the data, once it is obtained, is not free from difficulty either. What inferences are we to make from the raw numbers about poverty in the neighbourhood and the size of welfare cheques?

The next step is to assess degrees of probability. In classical casuistry this step involves consideration of the likelihood that a given action conduces to the good or otherwise. In developing a policy on the issue of requests for immediate charity, the same consideration is at stake. In responding to beggars at the door, this step calls on

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participants to engage in some utilitarian reflection. If it be agreed that denying aid to those who come to the door is not a good in itself (some rugged individualists may claim that denying help in fact is helpful to those in need), then the possibility of harm by denial must be weighed against the possible good to be achieved by allocating the resources elsewhere. The degree of probability of harm or good from possible courses of actions needs to be considered as well.

Finally there must be a solution. The congregation must act. If the process has fulfilled the objectives I claim for it, the decision will be at least a moral assensus on that one issue. The parties will agree to abide by and support the decision. But that assent is conditional on the right to open the question for reconsideration if, as Habermas provides, persons identified as stake-holders to the decision cannot agree to the norm established or if circumstances change in a relevant degree. In that case, if they agree to live by a decision reached through a similar process, the community will revisit the decision.

Obviously every decision in the life of a community cannot receive the full consideration of the whole community by such a process as this. Time and energy are limited. But contentious issues are natural candidates for such a process. Diversity of opinions, which can lead to conflict, can also provide the energy for collaborative approaches to decision making. People make time for issues where they have a passion. ADR, which has developed to help people experiencing conflict to make decisions which all can support, does not require that they have reached the stage of overt conflict or dissensus. ADR, as I conceive it, is not restricted to its current role as a structured
response to conflict. ADR can become a means of unlocking the creative potential of humans in community to decide together how best to create conditions where love can live. John Wade has suggested that rather than refer to this social institution as ADR we adopt the term ADM, so that we move from Alternative Dispute Resolution to Appropriate Decision-Making.39 Wade’s term suggests the wider impact on society of these processes that I claim is the potential lying within them.

The United Church of Canada which introduced ADR only three years ago as a response to poorly managed conflicts has begun to recognize that a transition to ADM offers a means to transform what might be seen as a management tool into a means of living out the gospel call to be peacemakers. In the post-Christendom era the United Church does not see its role as proselytization, or as seeking to impose a Christian order on society. By learning to engage in dialogical decision-making, congregations will change not only themselves and their members, they will also have an impact on the wider community. Systems theorists tell us that if one member of a system changes his behaviour, the whole system is affected. By changing the way in which one social institution makes decisions, by shifting the balance of the yin/yang so that relationships are emphasized more than rights within the congregation, the broader society will be changed. The contours of the change cannot be foretold, nor controlled. But if I am correct in asserting that North America is currently experiencing the negative effects of being overcommitted to the individualistic orientation of the individual/community yin/yang, then the Church, in living out a new way of living together, has the potential to

39 John Wade, “The Transition of ADR to ADM”.

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move society into a healthier balance. And that potential is what I shall briefly consider in my concluding chapter.
Chapter Seven - Conclusion

Though we still see in a mirror dimly, let there be (a little more) light

Janet Turner Hospital uses the indeterminacy of the new physics as a strange attractor\(^1\) or theme in her novel Charades. In one scene Katherine, aunt of the young woman who gives the story its title, is described as nearly running into the Royal Bank building on Toronto's Bay Street. That building is clad in mirrored panels about four feet wide, which are set at right angles to each other and arranged like an accordion along the street. Katherine sees a man reflected in one of the panels who looks like Nicholas, a lover from her past. As she steps toward the image and realizes it is only that, she also discerns that what she sees is a reflection off of the door of a hotel down the street, which in turn is an image bouncing off the window in the open door of taxicab. Despite all the refraction of images, Katherine manages to locate the man in whom they originate and eventually observe him directly. His hair differs from that of her former lover, though it may only be due to age. And the distinctive birthmark or mole on his neck is a different shape. Even when she moves from the reflected image to the real man, we are not sure if Katherine is seeing the man that she knew some twenty years before.

The moral assensus which I claim acts as a strange attractor in our legal and ethical reasoning is as illusive as the image of Nicholas bouncing from mirror to mirror, refracted through the years since Katherine has seen him. The pluralism of North American culture might be thought of as constituted by a near infinite arrangement of reflecting surfaces set at every conceivable angle. When an ethical decision or a legal

\(^1\) See the discussion of strange attractors in Margaret Wheatley's Leadership and the New Science, Chapter Seven and my discussion in Chapter Two in the text accompanying note 24 at p. 72.
judgment needs to be made, the situation that gave rise to it enters into the kaleidoscopic arrangement of mirrors. Those who must reach a decision or form a judgment are obliged not only to discern “what really happened” and all the relevant factors which form the background to the case, they must also discern the principles relevant to it which will guide them in their decision. Like the facts of the case those principles are refracted through many different interpretations and understandings.

The moral assensus will appear to the observer with the cognitive clarity of black letter law only where the clearest, broadest and most universal of principles can be readily applied to a situation in which the facts are undistorted by the reflecting process that affects most human perception. In the great majority of cases, however, humans must make their ethical decisions and legal judgments with something less than such a precise delineation of the moral assensus.

If certainty is as illusive as this metaphor suggests, then accommodating our lack of certainty needs to be given central consideration in how we do justice and how we do ethics. One approach is to simply claim certainty with an authoritative voice. A senior trial judge, perhaps facetiously, once did so by saying that until he had decided the facts of a case, nothing had really happened. That is an inadequate way of understanding the relationship of a trial to the facts giving rise to it, but it also fails to provide a solution to the dilemma of indeterminacy which faces every human. All too frequently we encounter situations where ethical decisions and legal judgments must be made without the possibility of resort to an authority that will declare what is real and what is not.

Living with indeterminacy requires not a false declaration that it has been
overcome, but tentativeness in reaching conclusions and in making decisions and judgments. We cannot remain frozen by this need for tentativeness until truth is revealed, however. We must act. We act not with the assurance that we have grasped the truth, but with the humble recognition that though we may be wrong (and when we discover that to be so we must return to the matter). We have, however, the assurance that we have followed a process which gets us as close as possible to truth, justice and the best ethical decision. By that process we seek to wrest the facts out of the kaleidoscope of mirrors in which we are immersed. Then we struggle to apply the relevant principles, as we understand them.

ADR is one such process by which those who have a stake in the decision hear the stories of those affected. By looking closely into the mirrors in which the illusive, relevant images appear the decision-makers seek as much clarity of fact and principle as they can agree upon. If the process works, they will have enough to make a decision or a judgment which all can support.

In this thesis I have attempted to identify some of the mirrors which reflect the facts and principles that provide the input for such a decision-making process. All participants are themselves mirrors, reflecting facts and principles for others to see. But there are also mirrors provided by new (and old) science, the yin/yang image, traditional legal reasoning, liberal models of ethical reflection and a myriad of other constructs which assist us in putting some shape to our observations of the life in which we live and move and have our being. Janet Turner Hospital quotes Werner Heisenberg’s remark that “[w]hat we observe is not nature itself, but nature exposed to our method of
questioning.” Implicit in that remark, it seems to me, is an affirmation that we learn something deeper about “nature itself” if we expose it to different methods of questioning. We also learn something deeper when we open up the method of our questioning itself to examination and critical reflection. William Luijpen puts it this way: “...from the fact that man is aware of his perspectivism it follows that he transcends his perspectivistic approach. By approaching the truth through all kinds of different perspectives, he comes constantly closer to the one absolute reality.” And so the kaleidoscopic house of mirrors should not cause us to despair that we can never know the truth about “nature itself.” Rather, that house of mirrors reveals to us that “nature itself” is far more wondrous and alive and multi-faceted than we could ever have imagined, which is cause for excitement and awe.

While wonder and awe are terrific, however, we are left with the question of how to operate in the day to day. How are congregations to make decisions about what colour to paint the basement floor? How is society to make a decision about whether or not a crime has been committed, and what to do with the offender? How are businesses to decide whether to drill for oil in a country ruled by tyranny? How are school children to resolve their disagreements on the playground?

At some point we must act. We must risk the irrevocable consequences of the decisions we take about how to proceed. This is where Biblical faith can provide some

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2 Janet Turner Hospital, Charades, p.298.
3 William Luijpen, Phenomenology of Natural Law, p. 107. In the same section Luijpen also quotes Heisenberg offering a caution to our urge to know absolutely: “I am unable, and you do not want me, to supply an identity card, by means of which one can easily and at any time check whether what I have said is in agreement with ‘reality.’” p.109, note 87.
consolation. The story of the first humans is an affirmation that God did not intend that we should have perfect information. Knowledge of good and evil was explicitly forbidden to Adam and Eve, for with it we should be as God, that is to say omniscient. And so we humans struggle not to gain the perfect knowledge reserved to God, but to gain as much knowledge and the best knowledge that we can within the limits of our fallible natures. With that necessarily limited knowledge to inform our decisions we must then act. Both the need to act and the fact that our ability to know is limited are constitutive of our humanness.

Aristotle recognized that ethics is a field where we act with imperfect information and in so doing we risk error. The tentativeness for which that recognition calls is not a barrier to action, but a bridge to revisiting past judgments and reconsidering them, rather than following them slavishly. In some cases it means reversing them, and seeking to reverse the actions that were taken in reliance on them.

The need to act and the impossibility of certainty create a tension in which every person and every society must struggle to live. Kant sought to resolve the tension through the categorical imperative and Rawls through his device of the original position. If quantum physics is an adequate metaphor, however, there is no possibility of such certainty-at-the-core. The yin/yang introduced in Chapter One provides an image of the tension that it is ours to balance and rebalance. The polarity matrix discussed in Chapter Five provides a way of understanding the dynamics of how contrary forces locked in embrace support and enrich each other. Volf’s metaphor of embrace as constitutive of

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4 Genesis 3: 3-5.
what is meant by the self presented in Chapter 6 points to the necessary interpenetration of self and other central to our being. There is no unitary nucleus around which the elements of legal, ethical or other human systems spin. Without the relationship of at least two entities, be they energy or substance, there is neither.5

What I have presented is a number of perspectives on how the moral assensus in our social system can be discerned and how it is generated. Moral assensus acts as a field6 that is made known to us as we perceive and experience its effects. It is a balancing of yin/yang dualities, which I characterized in their multiplicity as a spherical Rubik's cube. It is not a unitary essence but a relationship that is discerned and generated in the yin/yang flow of the cognitive/generative orientations which balance that which is known with that which is novel. Moral assensus is most clearly discerned when there is a sense of a “law above the law,” when a common agreement arises that rejects the rule as it exists in deference to a rule that was heretofore inchoate. Often enough, however, the law embodied positively in statutes and cases can be accepted as representing the moral assensus on a particular point. For just as the law is well settled on how to respond to many of the situations that commonly arise in life, so the moral assensus does not remain obscure with respect to that which is frequently encountered. At other times, however, that assensus is but dimly visible, or it must be admitted that there is dissensus in a given

5 T.S. Elliot’s line, “So the darkness shall be the light, and the stillness the dancing.” points to the ineffability of the absolute which lies in the relationship and not in a centre that can be conceived in any substantialist fashion as separate from the relationship. East Coker III, T.S.Eliot, Collected Poems, p.200.

6 See the discussion of field theory in Margaret Wheatley’s Leadership and the New Science, Chapter Three and my discussion in Chapter Six in the text at p.215.
area, for instance with respect to abortion.

If a society is to achieve a sufficient degree of the social order which I have suggested is required for its functioning, not only is moral assensus necessary, but also some means of generating the moral assensus which ensures it is broadly accepted as legitimate, even if there is not universal agreement about the entirety of its content. A cognitive declaration of the law is not enough to create the moral assensus required to ensure that the law will command the level of obedience required to fulfill its ordering function. The law, though duly enacted, may be ignored. Even in the deepest days of Stalinist absolutism it was not enough simply to have the law proclaimed. The cult of the leader and the continual fanning of flames of revolutionary ardour were necessary devices to provide the populace with some sense that obedience to the law was participation in a "socialist legality" that was legitimate and that they could embrace. Even for Stalin, fear alone was not enough to impose order.7

Thomas Cahill provides a rather pathetic illustration of the need for something like moral assensus to give laws efficacy when he tells of the efforts by Roman Emperors in the waning days of their power, to give their pronouncements the vigour required to induce obedience. "As the emperor's laws become weaker," he writes, "...the Divine One's edict is written in gold on purple paper, received with covered hands in the fashion of a priest handling sacred vessels, held aloft for adoration by the assembled throng, who prostrate themselves before the law - and then ignore it."8

A society with a coherent moral assensus covering most of its life together will

7 Harold Berman, The Interaction of Law and Religion p.29.

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embody that assensus in its practices and in its laws. It is known cognitively. There needs to be a mechanism, however, for generating moral assensus in those situations where the positive law has not spoken, or where changed or novel circumstances require that it be revisited, or where an exception appears warranted. ADR is one such mechanism, or rather a collection of mechanisms with a common orientation towards collaboration and relationship. ADR provides a means for citizens to engage in conversation about ethical and legal issues where there is a need to clarify how the law, or an ethical principle, is to be applied in a given situation. On a case by case basis it thus contributes to the ongoing process of discerning and generating the moral assensus.

I have argued that the principles central to ADR - listening to the story of the other, seeking out the interests behind positions and working collaboratively toward solutions - are compatible and complementary with what Vol't has said is needed to overcome ethnic exclusivism and what Habermas has presented as a mode of ethical discourse. To the extent that this is so, then ADR, which is often resorted to in congregations, neighbourhoods, families and the workplace, offers a means by which habits of conversation more congenial to collaborative decision-making about legal, ethical and political issues may be developed.

It is not my claim that ADR on its own will lead to a reinvigoration of public spaces and a resurgence of social discourse similar to the cafe society of 17th century Vienna or the town hall culture of New England. I have presented ADR with the claim

\[9\] p. 209 ff.
\[10\] p. 220 ff.
that it is one manifestation of such a cultural shift. That shift remains more potential than realized at the moment, for as Jurgen Habermas pointed out forty years ago the forces that impel us to be consumers of debate and discussion rather than participants are powerful indeed. The intervening years have seen those forces grow not wane. What has happened, however, is that awareness of the ubiquity of those forces has increased as well. That awareness has fostered some responses, which can be described as counter-cultural. Any cultural movement or institution which enables people to experience themselves as interacting within the social structure rather than being acted upon by forces outside themselves harbours seeds which may give rise to a reclaimed sense of the polis. Inherent in that human community denoted by the term polis, is the possibility of participating more fully in our own lives through fuller participation in the lives of others, even as we open ourselves to allow their increased participation in our lives.

It would be hubris of the highest order to claim that the introduction of ADR into the United Church of Canada and the limited experience with it thus far are the sine qua non which will spark the social change to which I have alluded. At the heart of the Christian faith, however, lies an experience of how profound social change can begin with a movement that is apparently small and insignificant. Therefore I do not discount the catalytic potential of this new way in which the United Church is seeking to live out the gospel. By shifting its orientation away from the adversarial approach to conflict toward the reconciling and relational the Church may have a far broader impact on society at large than it could imagine achieving through more direct action.

This thesis has not been intended to establish with implacable persuasiveness that
the world will change in the direction I have sketched above if the United Church continues to practice ADR in the manner I have described. Rather, I have looked into both the introduction of ADR in the Church and its advent in the wider culture as if they were mirrors in the kaleidoscopic hall of mirrors to which I referred earlier. The perspective thus gained has provided me with an opportunity to suggest that ADR is congenial to and demonstrative of a theological understanding that God has created humans as both essentially individual and social. God calls us to live out who we are through processes of interconnectedness and relationality rather than as isolated and unitary individuals acting upon each other without ever penetrating the surface. That theological stance is the *strange attractor* that has brought whatever degree of coherence I have managed to divine to my reflections on the role of law and the need for a wider understanding of the role of law in our culture. Law in Western culture currently has a strong inclination to view itself as a Newtonian regulator of discrete social units, which, if unchecked, would bump up against each other, introducing disorder into a carefully constructed arrangement that emphasises avoiding contact. The wider understanding of the role of law which I argue is required for a healthy social order is pointed to by the ADR approach to conflict. That view holds that the role of law is to guide our social interactions in a way that balances the need for individual autonomy with the interpenetration necessary to human community.

As the use of ADR continues to grow in the legal systems of the West, it may become merely another tool to facilitate the working of the adversarial system. That is most
likely to happen if evaluative techniques\textsuperscript{11} predominate. It is too early to say, however, that will be the case. Many ADR practitioners are committed to its transformative potential. That potential, I have argued, lies in its congruence with the principles of Volf and Habermas to which I referred above. As people experience that way of dealing with conflict, they will be empowered and enabled to respond differently in any number of settings. The difference will be a reorientation away from conceiving of themselves as entities which are acted upon, or which act upon others, and instead conceiving of themselves as interconnected with others in such a way that they cannot truly be themselves without respecting and nurturing those interconnections.

Throughout this thesis I have spoken of law and ethics without clearly differentiating the two. I will conclude by confessing that I cannot really distinguish a boundary between them. A clear distinction can be drawn between positive law and ethics, but my use of the term \textit{law} is broader than that. As I reflect on what I have observed happening in my practice of ADR within the church, it is best described as the practice of \textit{halakhah} which Josef Soloveitchik (and others) characterize as aligning one’s self with God’s desire for what is best for humankind and for each individual. When \textit{halakhah} is truly understood, one “thereby comprehends, grasps and encompasses with [one’s] intellect the will and wisdom of the Holy One, blessed be He.”\textsuperscript{12} I would expand that slightly to say that one thereby comprehends, grasps and encompasses with one’s heart and soul and mind (one’s entire being) the will, wisdom and desire of God for all creation. Achieving the full promise of \textit{halakhah} is to be accomplished only in the realm of God. But it is that vision to which we

\textsuperscript{11} See Chapter 5 – Figure “A” at p. 5-13
are called in the here and now.

The word "law" as it is commonly understood at the dawn of the 21st century is still an emaciated survivor of the legal realists. *Torah and halakhah*, which can both be translated as *law*, have far more flesh on their bones. A substantial portion of that flesh is attributable to the lack of a distinction between law and ethics. For the *halakhist*, God is the field in which humankind lives and breathes and has its being. The effects of that field are observed, and its nature is inferred, as humans work out how they are to act in conformity with its considerable but not controlling influence in the situations which daily confront them. Moral assensus, as I have presented it, plays a similar role. It is the field that influences our actions and responses, though it does not control them. While I assert that the moral assensus is of God, one need not adopt that view in adopting the metaphor that it is a field that is known in its effects on the human community. ADR provides one means for humans to begin to discern together how the moral assensus is to be lived out in the moment. This involves considering ethical and legal questions in the narrow sense of those terms, but it is not restricted to that. It also involves discerning with a little more precision, that *law* which conduces to creating the conditions where love can flourish. ADR, when its transformative potential is realized, allows us to peer together through a glass which, though still obscured, is a little less dark. By bringing the light of each individual to bear on an issue of concern, the whole community is enabled to see the matter with greater clarity and to discern more plainly where it is that God is urging them to go.

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13 See the discussion of field theory in Margaret Wheatley’s *Leadership and the New Science*, Chapter Three and my discussion in Chapter Six in the text at p.215.
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