

# Is Mediation a 'Mode of Regulation' or a 'Mode of Security'?

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## Introduction

Thanks to Mylene for arranging this thoughtful seminar, Pascale for the excellent assistance, and to the conference organizers for inviting my participation. It is my pleasure to be here today.

Along with my two colleagues, I have been asked to respond in 15 minutes to the title question.

To begin with, let us consider the genre of interrogation implied by the 'Is ... something ... this or that?' form of the question before us.

Despite its seemingly open-ended texture, the opening '**is** mediation...' suggests that mediation exists. But here we confront a danger of assuming in advance a being that ought to be under review — there is, after all, no necessary or enduring essence to mediation.

Indeed, the word has assumed quite different meanings over the centuries. In the 1540s, for instance, it connoted a now obsolete meaning — to 'divide in two equal parts' from the Latin *mediatus*, 'to halve.'

Later it came to mean a state of being ‘in the middle’ (from Latin *medius* “middle”), and perhaps it is here that we might detect a foreshadowing of our use today as conciliatory interventions by a third party.<sup>1</sup>

If nothing else, changing uses of the word ‘mediation’ over time, as Wittgenstein tells us, conjured different meanings. Those varied meanings, in turn, suggest that mediation should be approached as a dynamic **becoming** rather than a settled **being**.

Similarly, what emerge as modes of regulation or security is a matter of history, of power relations as they unfold in the development of collective lives.

Consequently, I will respond to the question by insisting on the contingency of its ‘concepts’, as they depend on local expression for their historical emergence. A certain nominalism will, therefore, contour my response.

### **Approaching Mediation**

When approaching mediation in this way, we might refer to a specific example. Interestingly, an early conflict resolution programme that started in 1976 — the ‘Community Boards’ of San Francisco — defines mediation in specific terms. Its website invites readers to expect certain things at an initial meeting of parties to a mediation:

“As neutral parties, the mediators guide this meeting, asking questions and enforcing ground rules. They don’t judge, weigh evidence, or deliver a verdict... The ultimate goal of any mediation is for the parties, themselves, to create their own workable agreement. This agreement helps resolve the current issues, while attempting to minimize possible future disputes.”<sup>2</sup>

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<sup>1</sup> <https://www.etymonline.com/word/mediate>

<sup>2</sup> <https://communityboards.org/resolution-services/business-mediation/> Access date, 20/01/2019.

Community mediation as understood by this programme aims at achieving relational harmony and peace-building. It claims for itself — through setting ground rules — a ‘neutral’ space in relations of conflict. It aims to regulate dissension between individual parties in the here and now, but also to reduce the risk of future conflicts, (and so provide security to community members).

In the early days of the programme, Raymond Shonholtz envisaged interventions that would develop ‘communities’ by ‘empowering’ *individuals* to take responsibility for resolving conflicts in their midst; the wider quest was to enhance civic participation and social harmony, and thereby foster the active engagement required for vibrant democracies.

But even with this community development focus — not unlike many intercultural or transnational forms — mediation typically aims to work with, and alter, **individuals**. The basic unit of change rests here with individual parties — they are required to work through conflicts under a mediator’s gaze on order to reroute them from paths that led to conflict.

Community development and peace is thus predicated on disputing individuals working on settlements that will enable non-disputing identities.

Two decades ago I examined how powers of mediation brought ‘disputing individuals’ into focus through ideas, rituals, and processes. My work approached mediation — not as a panacea for justice — but as an indication of changing power relations at a given moment in history.

Drawing on Foucault’s work, I considered techniques (or technologies?) of mediation — e.g., laying ground rules, assuming a ‘neutral’ space, reframing statements, caucusing, etc. — as examples of disciplinary and pastoral powers that became popular at moments in history where fields of justice were fragmenting.

Of particular concern to me, was the way that mediation programmes emphasised individual dispute resolution, and settlement, often as an ancillary power to criminal justice. The problem is that by emphasising conflicts between individuals, mediation often ignored the social, cultural, political, and economic factors that produced discordant relations and indeed disputants...

I might add that more recently, commentators like Lagasnerie and Fassin have echoed this worry about individualised logics in the context of criminal justice. They too note that the focus on individuals in criminal judgments and punishment has the effect of overlooking underlying social logics.

The basic point is that by highlighting individuals as *a priori* vectors of mediation's control, the social relations that produce conflicted contexts and people are eclipsed.

Even so, to get back to the question, how might we understand this contingent, power-orientated sense of mediation in relation to social regulation and security?

### **Modes of Regulation?**

Specifically, when powers of mediation emphasize disciplinary normalisation, they mostly seek to forge non-disputing, individuals. The aim is to normalise amicable individuals who live in harmonious societies — all sanctioned by a mode of regulation that buttresses state law.

Indeed, the phrase 'law and order' signals the close relation between disciplinary 'modes of regulation' that augment — but work outside of — law and sovereign powers.

In this light, John Braithwaite's work on responsive regulation might be interpreted as an echo of Shonholtz's call for mediation to control behaviour in civil society, and serve as a basis for Republican democracies. But the emphasis on individual change is still very much part of this liberal formulation; the state remains important, but if it is to act

responsively, then it must enable forms of regulation beyond its coercive, sovereign force.

Equally, and perhaps more directly in line with the phrase 'mode of regulation', we might recall the often-overlooked work of Deborah Baskin on community mediation.

Taking a cue from Neo-Marxist theorists, she (1988) understood post-Fordist capitalism as increasingly organised around **modes of consumption** (not production) to absorb untapped capital flows.

But such disruptive changes to economic bases required new ways to curb emerging forms of conflict and dissent. Specifically the changes called for flexible **modes of regulation** to forge passive, consuming, individuals, and at the same time deploy consenting ideological frameworks.

For Baskin, community mediation exemplified just such a flexible mode of regulation. Its informal conflict resolution techniques allowed the state to extend its reach into private domains from a relative distance (her argument dovetails with Santos' later sense that informal justice expanded state control to new areas of life, but under the dubious guise of state retraction!)

In other words, when mediation is fixated on achieving individual settlement at all costs, it tends to reinforce state-sanctioned social orders. Its informal rituals respond to late capitalist demands for flexible modes of regulation by normalising docile individual consumers who do not resist this society's novel exploitations.

What I take from her analysis is this: when a mode of regulation is exclusively focused on expunging individual conflict, it leaves unchallenged the power of exploitative social relations.

Or to put this another way: when the power of community mediation is exercised as a pliant way of regulating individuals and conflict in favour of a state's designated collective order, then its socially transformative potential falls away.

But can community mediation emerge in ways that facilitate equitable social changes?

I think it is. Community mediation, that is, need not be an apparatus of regulation that trains individuals normatively to deal with conflict in favour of a given socio-economic order.

Mediation could also potentially regulate social transformation, approaching conflict as neither *necessarily* good nor bad, but as an indication of problematic social relations. As response, community mediation may then be mobilised to define and resist problematic social relations.

Tied to collective rather than criminal justice, community mediation could also be called upon to serve apparatuses of regulation that seek **social** — as opposed to individual — transformation, promising thereby to address the foundations of given conflicts.

This approach suggests the possibility that collectively understood apparatus of regulation might enable new forms of mediation. But what of the latter's potential relation to visions of security that pervasively confront us nowadays?

### **Mediation and Apparatuses of Security?**

When mediation operates as a pastoral power, it intervenes as a diligent shepherd attending to a wayward sheep. The purpose is to focus on each one, and thereby protect and secure all — moreover, pastoral powers should help reinforce a state's legal powers.

Foucault's lecture, published as *Security, Territory, Population*, begins by asking whether 'the general economy of power in our societies is becoming a domain of security'.

He then explores how an emerging 'pact of security' tied state control to social spaces defined as a 'population'; thereby linking sovereign and governmental powers (biopolitics).

Such apparatuses of security move beyond the disciplinary normalisations of regulation, and deploy new technologies that target neither the legal person, nor the normatively disciplined individual; they are directed to an amorphous population. Risk-based, prudential, prevention, actuarial, and A.I. forms of knowledge are thus evoked to reduce the chances of insecurity that might appear within so-called problem populations.

Of course much is embedded in this brief scan, but it allows us to ask how community mediation, when directed to conflicted populations, might relate to apparatuses of security.

As I see it, techniques of mediation that serve dominant neoliberal apparatuses of security typically seek exclusively to reduce the risk of future conflict, paying little attention to the wider logics that yield conflictual relations. An emphasis on prevention defines and targets populations (or communities) as conflict-ridden.

Even in the community-based Boards example in San Francisco, the basic aim is to manage both the risk of future conflict within communities, and prevent the same via lasting settlements. Mediation's main purpose is to secure harmony that protects and secures a state-sanctioned, communal order.

But what if securing that very order fosters and festers destructive conflict? What kind of community mediation might be called upon to recalibrate visions of order and security, and so pursue different hopes for safety and justice?

In other words, as with a mode of regulation, mediation need not be bound to one mode of security. Rather its power relations could help to imagine new 'apparatuses of security' — such as those that call for collective forms of justice to exceed the narrow concerns of biopolitics and populations.

I should say more, but given the time, let me reiterate my overall thought: community mediation is not one thing — nominally it emerges variously through local power-knowledge relations that place themselves in the service of collective imaginings.

With that in mind I have traced an implicit question: is community mediation best approached as seeking individual settlements to further dominant modes of regulation or security?

Or should we reframe it as a set of ideas, powers, and rituals that could be mobilised through, and as ways to transform, relations of destructive conflict?

As should be clear I prefer the latter. Community mediation might then emerge as a power that brokers new ways to exist with others out of conflicted situations.

That collective understanding of mediation — as a relational force — would undoubtedly release new apparatuses of regulation and security; but these apparatuses need not tie normalised individuals to state regulation, or prevent problem populations to achieve security. The promise here is to think about mediation as a set of power relations associated with social regulation and security are driven by local vernaculars.

In conclusion then, my response to the question is that mediation is not one thing, and that while its different power relations (discipline, governmentality) could be linked with specific modes of regulation and security, there is nothing necessary about such developments.



This is why I have called for renewed meanings such that ideas and rituals of mediation be viewed as a relational intervention associated with the regulation of social transformation, and collective security enunciated by local vernaculars. The ongoing promise of justice, in my view at least, demands precisely such reassessments!