Exploring 'Ownership' of Conflict:
Legal Wrongs in a New World Order

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Abstract

In the legal tradition, torts and crimes have been conceived of, studied, and addressed as distinct categories of legal wrongs. In both of these categories however, independent movements in dispute resolution – Alternative Dispute Resolution (ADR) and Restorative Justice – have offered parallel procedural and normative challenges to the legal understanding of wrongs. This thesis takes these independent developments as together comprising a single re-imaginative discourse that challenges state-based law as the intermediary of disputes. Accordingly, this thesis explores the emergence and implications of this discourse in which legal wrongs of both civil and criminal designation are re-imagined as subjective conflict and removed from conventional legal categorization. It seeks to survey, clarify, and situate this discourse as one with which the conventional legal discourse has been negotiating politically.

Building on Nils Christie's conception of 'conflicts as property,' the thesis frames this negotiation in terms of public and private claims to ownership over conflict and its resolution. Accordingly, a clarified notion of ownership of conflict – containing both moral and legal dimensions and characterized as a constitutional issue – is developed in order to interpret and critique its state. In light of the challenges offered by the emergent discourse, the thesis re-assesses the relationship between the state and private individuals as it has emerged through that negotiation. In doing so, the author notes a shift in the moral assessment of ownership, and calls for the traditional categorizations to be re-assessed on that basis.

Résumé

Dans la tradition juridique, les actes délictuels et les crimes ont été conçus, étudiés et traités comme étant des catégories distinctes d'infractions légales. Toutefois, dans ces deux catégories les mécanismes indépendants de résolution de conflit - Mode Alternatif de Résolution des Conflits et Justice réparatrice – ont parallèlement proposé des questionnements procéduraux et normatifs à la compréhension juridique de l'infraction. Ce mémoire propose d'unir ces développements indépendants afin d'établir un discours unique et créatif défiant l'État de droit en tant qu'intermédiaire au conflit. Conséquemment, ce mémoire étudie l'émergence ainsi que les implications relatives à ce discours à travers lequel les infractions juridiques de nature civiles et pénales sont repensées en tant que conflits subjectifs soustraits aux différenciations juridiques conventionnelles. Ce mémoire cherche à étudier, clarifier et situer ce discours comme étant celui avec lequel la justice conventionnelle a négocié sur le plan politique.

S'appuyant sur la conception de « conflit en tant qu'immobilisation » de Nils Christie, ce mémoire encadre la négociation des revendications à la propriété, tant publiques que privées, plutôt que le conflit même et sa résolution. Conséquemment, un concept clarifié de propriété du conflit est établi, contenant à la fois les dimensions morales et juridiques et caractérisée par une dimension constitutionnelle, avec l'intention d'interpréter et de critiquer son état. À la lumière des défis offerts par le discours émergent ce mémoire réévalue la relation entre l'État et les particuliers puisque cette dernière a pris forme à travers cette négociation. Ce faisant, l'auteur note un changement dans l'évaluation morale à la propriété, et demande, sur cette base, que les différenciations traditionnelles soient réévaluées.

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"From a beautiful lake in the mountain
Two rivulets came down,
With a rustle and flutter like ribbons of blue
By delicate breezes blown.

O'er beds of golden lustre,
In the shadow of rock and tree,
They sang the same tune with their silvery tongues
And clapped their hands in glee.

O'er rocks with mosses mantled
They eddied and whirled like a waltzing pair,
Till hand in hand with laughter and leap
They mingled their misty hair."[1]

-THOMAS BUCHANAN READ

[1] Thomas Buchanan Read, *The Poetical Works of Thomas Buchanan Read,* vol 1 (Philadelphia: JB Lippincott, 1868) 194 at 194-195 (excerpt from "The Twins").

AN INTRODUCTORY OVERVIEW

This thesis engages with the conceptual and political categorization of legal wrongs. More specifically, it engages with this categorization as it relates to "ownership"[2] – the public or private entitlement to address those wrongs. In practice, this entails addressing the criminal-civil distinction, as – for at least five hundred years – civil and criminal wrongs have characterized these legal categories in the common law tradition.[3] Accordingly, these categorical designations have so firmly monopolized our understanding that it is nearly impossible to discuss legal wrongs without their invocation. Indeed, this thesis – though ultimately seeking to illustrate an independent perspective – finds it necessary to invoke these categories regularly for even the most basic identification purposes.

More than simply categories however, these designations include their own conceptual and normative understandings of the wrongs that fill their ranks, and thus distinguish themselves from one another on a basis that is presumed within their use.[4] Accordingly, to understand categorization simply in terms of civil and criminal wrongs is to limit oneself to the conceptual parameters that those particular imaginings possess. Here, then, it is important to note that this work instead seeks to explore the public and private distribution of ownership which, while underlying and forming part of the legal fiction that is the crime-tort categorization, is not bound to those understandings. It proceeds having in mind that the criminal-civil understanding of wrongs, and the categorization of wrongs on that basis, is but one possible imagining. It is thus open to other possibilities. Indeed, the very impetus for

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[2] See below, Chapter Two.

[3] See generally, David Seipp, "The Distinction Between Crime and Tort in the Early Common Law" (1996) 76 BU L Rev 59 (noting, in the common law, the complex development of a procedural and conceptual distinction between crime and tort from the 12th to 16th century).

[4] See e.g. Kenneth W Simons, "The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives" (2008) 17 Widener LJ 719 (giving both a doctrinal and normative overview of the crime/tort distinction); See e.g. Louk Hulsman "Critical Criminology and the Concept of Crime" (1986) 10 Contemporary Crises 63 esp. at 71 (characterizing crime as a socially constructed frame of interpretation, and suggesting that to speak of events as 'crime' involves a number of presumptions about those events).

this exploration arises out developments in which the conventional understanding of legal wrongs and their arrangement are challenged.

This challenge has arisen out of the significant changes that the world of legal dispute resolution has undergone over the last four decades. Both the growth of Alternative Dispute Resolution (ADR) in the civil realm and Restorative Justice in the criminal realm have shifted the resolution of wrongs outside formal public legal processes and their normative prescriptions, instead relinquishing them to private processes and outcomes.[5] Though arising independent of one another, these two movements demonstrate a great deal of unity. This thesis thus finds its beginnings in these parallels, and takes these two movements as forming a single alternative discourse emerging transcategorically in the realm of dispute resolution.[6]

Within this discourse, the conceptual distinction between criminal and civil wrongs is eroded.[7] As this alternative paradigm gains traction, it presents both a conceptual and political challenge to the dominant legal paradigm and its categorization of wrongs, presenting an opportunity to explore the construction of legal categorization. More than simply an opportunity, however, these challenges also indirectly give rise to a new perspective with which to seize that opportunity. As the differing actors and determinations within these competing paradigms encounter one another, the question of which actors and whose determinations ought to be granted primacy inevitably arises.[8] The question of *who owns conflict* is posed – and

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[5] See below, "*Two Streams, One Dream: Legal Wrongs in Conflict's Discourse*".
[6] *Ibid*.
[7] Patricia Hughes & Mary Jane Mossman, "Re-thinking Access to Criminal Justice in Canada: a Critical Review of Needs, Responses and Restorative Justice Initiatives" (2001) <online: www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_2/p01.html> (indicating a "blurring" of processes and a need to re-evaluate the distinction in light of that); See below, "*Two Streams, One Dream: Legal Wrongs in Conflict's Discourse*".
[8] See e.g. Carrie Menkel-Meadow, "Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo LJ 2663 (discussing the public-private tension over the outcome of civil wrongs) ["Whose Dispute?"].

prompts reflection on the past, present, and future of the categorization of legal wrongs in those terms.[9]

As will be seen, this notion of ownership of conflict can serve as a valuable framing device for understanding the organization of legal wrongs generally, as well as specifically in regard to the impact of this emerging discourse. Before it can be used in a way that more closely reflects its potential, however, the notion must itself be developed. As it stands, the notion is not fully clarified, and is frequently invoked either in passing or used in ambiguous, even inconsistent senses.[10] Accordingly, before applying ownership as an interpretive and critical framework, this thesis first seeks to discern a theory of ownership. This theory can then serve as a framing device for understanding the categorization of legal wrongs in those terms. Using this framing device, this work will ultimately seek to understand the implications of the emergent discourse on the categorization of legal wrongs.

In order to accomplish this, this thesis has three interrelated aims. First, it seeks to propose a *collective approach* to understanding the developments occurring in both the civil and criminal realms of dispute resolution – and thus for the consideration of the categorization of legal wrongs thereafter. Secondly, it seeks to *clarify and develop the notion of 'ownership of conflict'* as a framing device with which to understand legal wrongs and their categorization. Thirdly, instigated by the first two aims, it seeks to understand the *collective implications* of the emergent discourse on the ownership of wrongs. The outline of the thesis reflects these aims.

In Chapter One, the thesis begins by exploring the emergence of two parallel movements: the growth of Alternative Dispute Resolution (ADR) in the civil realm,

[9] See generally Nils Christie, "Conflicts as Property" (1977) 17 Brit J of Crimonology 1 (First given as the 'Foundation Lecture' of the Centre for Criminological Studies, University of Sheffield on March 31, 1976).

[10] See e.g. Christine M Englebrecht, "The Struggle for 'Ownership of Conflict': An Exploration of Victim Participation and Voice in the Criminal Justice System" (2011) 36 Crim Justice Review 129 (Not fully developing the notion of ownership, likening it to involvement and participation or entitlement to such, using it to imply practical control, as well as using the senses of both legal and moral entitlement without distinction).

and Restorative Justice in the criminal realm. Here, the work adopts a collective perspective and proposes that these two independent movements can be understood as a single emerging alternative discourse – referred to here as 'conflict's discourse' – in which the legal construction and resolution of wrongs are challenged. To demonstrate this, the parallel procedural and conceptual elements of both movements are explored and laid side by side, demonstrating their commensurability and laying a foundation for their collective consideration. Ultimately, the shift toward private normative ordering inherent in this discourse is identified in order to more fully understand the instigation of questions of ownership arising thereafter.

In Chapter Two, the notion of ownership of conflict is introduced as a framing device with which to interpret the categorization of wrongs both conventionally as well with the changes brought about by conflict's discourse. Here, the notion of ownership is clarified and developed so as to provide a more sophisticated frame of understanding. This entails identifying *legal ownership* as the assigned legal entitlement to dispose of a conflict as one sees fit, and *moral ownership* as perceived moral entitlement that ought to inform its legal counterpart. Ownership as it exists within the conventional legal model is briefly explored as to provide a practical illustration of ownership as well as serve as a reference point going forward. Lastly, ownership is situated as a constitutional matter, highlighting its political significance and inviting an analysis of the changes brought about by the emergent discourse.

Given the normative and political challenges presented by conflict's discourse, Chapter Three explores the 'experience' of the conflict imagined in the first chapter as it negotiates a new practical arrangement of conflict resolution, and thus reflecting a changed framework of moral ownership. The encounter between public and private visions of dispute resolution is highlighted, and the results of the subsequent competition are explored so as to discern their normative underpinnings. To do this, a North American 'jurisprudence of self-determination' is discerned through observing those conflicts in which private resolutions are supported as a matter of self-determination or constrained by a public vision of justice. This jurisprudence offers a

moral organization that differs considerably from conventional law, as well as a rationale used to justify that organization. Finally, the thesis closes by briefly summarizing the totality of the first three chapters, and discussing possible implications and extensions.

Summarily, this thesis seeks to make two general contributions to this area of law. The first and perhaps most significant, is to suggest and develop a particular perspective: taking upon itself the task of interpreting, clarifying and situating a number of complex and multifaceted – though interrelated – elements into a comprehensive picture. This perspective is one from a step back, and is necessarily broad. While it demonstrates its position clearly with detailed analysis, this thesis resists being drawn into possible subsidiary debates where doing so would distract from the cumulative task at hand. By doing so, it remains broadly descriptive so as to point out the bigger picture. Importantly, this entails a transcategorical consideration of legal wrongs that engages both the civil and criminal realms. In *presuming* their current distinction, convention has seen the conflicts that populate these realms separated in curriculum, scholarship, and professional practice; accordingly, they lack both points of contact as well as a common language. The perspective here offers a rare opportunity for comparative study within a coherent framework, and also critical reflection. A further, no less important aspect of this perspective is the politicization of the organization of legal wrongs. Framing the decision-making associated with *conflict resolution* as a constitutional issue brings another dimension to this area of law, and requires further acknowledgement of the liberty of disputing individuals beyond initial decisions to legally prohibit conduct.

Finally, this thesis seeks to put that perspective to use, demonstrating the implications brought about by recent developments when considered in that perspective. In doing so, this thesis seeks to bring this perspective to life, using the notion of ownership to demonstrate the fundamental changes at work in the organization of wrongs.

CHAPTER ONE

TWO STREAMS, ONE DREAM: LEGAL WRONGS IN CONFLICT'S DISCOURSE

1.1 Introduction

Over the last four decades, two separate streams of thought have flowed, gained force, and carved their way into the legal landscape. Though born out of formally distinct legal environments and for their own respective reasons, the two together can be understood as forming a broader social and intellectual development in the world of legal wrongs. Though certainly deserving of attention individually, it is their collective development and implications with which this thesis is concerned.

The first stream, running through the civil realm, is seen in the emergence and dramatic global rise of the Alternative Dispute Resolution (ADR) movement. As part of this movement, states have enthusiastically, and at times aggressively, relinquished their involvement in the resolution of civil disputes – insisting litigation should be considered a last resort.[11] Accordingly, private disputants have gained greater control over their disputes, and have turned to 'alternative' consensual processes – such as mediation – for the resolution of those disputes. Intertwined with these developments, there has been recognition that disputes are broader and more complex than a purely legal consideration allows for.[12] Consequently, a contextual approach toward dispute resolution has become commonplace – giving consideration to the personal and social elements of disputes, and emphasizing stakeholder self-determination.[13]

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[11] See e.g. England and Wales, Civil Procedure Rules: Practice Direction – Pre-Action Conduct at r8.1 [CPR].

[12] Susan Silbey & Austin Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject" (1989) 66 Denv U L Rev 437 at 480.

[13] Nadja Alexander, "Global Trends in Mediation: Riding the Third Wave" in Nadja Alexander, ed, *Global Trends in Mediation* 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2006) 1 at 10.

The second stream, running surely through criminal justice, is contained within the restorative justice movement. In a manner similar to its civil counterpart, restorative justice involves the removal of criminal disputes from conventional legal procedure and its substantive prescriptions. From the perspective of restorative justice, crimes are viewed primarily as a violation of social relationships; personal harms rather than legal violations of state law.[14] As such, they are thought of as broader than their strict legal components, and their resolution requiring a full consideration of stakeholder needs.[15] Accordingly, restorative justice advocates direct engagement between offender and victim to facilitate resolution of their inter-personal conflict.[16] This interaction takes place primarily through dialogue-oriented processes – such as victim-offender mediation programs – where stakeholders undertake consensual resolution of their conflict.

Though formally separate, these two streams have developed with remarkable similarity in their fundamental focus. In each of these developments, the approach has been framed largely in the language of 'conflict resolution', going beyond purely positivist constructions of legal wrongs to recognize the broader complexity of disputes. Accordingly, the two movements have seen narrow legal disputes broadened to include non-legal social content, and rigid, state-controlled legal procedure give way to flexible stakeholder self-determination. In short, both civil and criminal realms have seen a *re-imagination of legal wrongs as conflict* and their processes understood as modes of conflict resolution.

Through this re-imagination, a discourse of conflict resolution has emerged alongside, and to some extent displacing, the traditional legal discourse. Containing its own concepts, normativity, mediums, and value systems, 'discourse' should not be understood in a solely linguistic sense. As legal wrongs have been shifted outside the

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[14] Mark S Umbreit & Marilyn Peterson Armour, "Restorative Justice and Dialogue: Impact, Opportunities, Challenges in the Global Community" (2011) 26 Wash UJL & Pol'y 65 at 66 [Umbreit & Armour].

[15] Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 37 [Zehr, *Little Book*].

[16] *Ibid.*

conventional legal discourse it has marked a drastic change in the way they are constructed and ultimately understood. Discourses, in this sense, can be understood as "systems of thoughts composed of ideas, attitudes, courses of actions, beliefs and practices that systematically construct the subjects and the worlds of which they speak."[17] Accordingly, the expression of new values, emergence of new mediums, attitudinal shifts, and normative re-ordering found in these streams together produce an alternate construction of the world, here referred to as 'Conflict's Discourse'.

As such, this emerging discourse marks an evident departure from the dominant legal construction of disputes, challenging the existing practical and normative reality of legal wrongs. Indeed, these emergent perspectives have largely been constructed in direct contrast with the dominant legal framework. Auerbach elucidates this idea in saying that "law so dominates the way we think that there is not even a satisfactory generic name for our own alternatives...To call the 'non-legal', as one must, is still to remain enclosed within the dominant legal categories. It is suggestive of the current power of legal modes of thought that alternatives lose their distinctive identity. Instead they are defined by what they are not rather than what they are."[18] This is especially blatant in civil developments, where *Alternative* Dispute Resolution advertizes its discursive secondary citizenship on its face. This, however, isn't to say that these understandings are dependent on the dominant legal discourse. Instead, in being defined in relation to existing norms, it is only to show that these emerging developments exist as challenges to the traditional legal construction of reality. As such, they are recognizable as departures from past paradigms; unique worldviews in their own right. It is with this recognition that this work proceeds, and ultimately depends on.

As this chapter progresses, it will demonstrate that these two streams, though having developed independently, together constitute a broader re-imagining of legal

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[17] Iara Lessa, "Discursive Struggles Within Social Welfare: Restaging Teen Motherhood" (2006) 36 British Journal of Social Work 283 at 285 (referencing Foucauldian 'discourse').
[18] Jerold S Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983), at 14.

wrongs as conflict, and in this sense demonstrate a certain degree of commensurability. Beyond this, it seeks to demonstrate that this emergent discourse, transcending traditional legal distinctions, represents a departure from the conventional legal understanding upon which those very distinctions are based. In doing this, this chapter will set the stage for further exploration of this new paradigm in application, and eventually the implications it may have for the organization of conflicts generally. To do this, this chapter will examine this discourse as it is seen in both the civil and criminal context, first within the trend toward Alternative Dispute Resolution, and subsequently through the restorative justice movement. In exploring these developments, this chapter will explore the new processes, values, and outlook that give rise to this new discourse, investigate its interaction with the conventional legal worldview, and ultimately, develop an understanding of the how legal wrongs, re-imagined, exist within conflict's discourse.

1.2 Alternative Dispute Resolution and the Civil Stream

Regarding the civil stream, the emergence of the conflict's discourse has largely taken place in conjunction with the 'Alternative Dispute Resolution' (ADR) movement. The growth of alternative processes has given rise to alternative understandings, and has fostered the development of the perspective with which this chapter is concerned. Though initially gaining momentum as a practical means of dealing with legal disputes, the qualitative features and values of ADR processes have led to an alternative consciousness regarding legal disputes. In looking at ADR as a movement, one can trace the emergence of this new paradigm, and begin to see civil wrongs as conflicts.

1.2.1 ADR: Processes and Principles

The modern Alternative Dispute Resolution (ADR) movement has received considerable attention within the legal community, yet the term itself has yet to be

given agreed definition.[19] In a very general (and literal) sense, ADR refers to any "dispute resolution processes that are 'alternative' to traditional court proceedings."[20] Given this breadth, ADR can be considered "a generic and broad concept, covering a wide range of activities and embracing huge differences of philosophy, practice and approach in the dispute and conflict field."[21] This range of activities might in theory be near-infinite, but in practice, ADR typically refers to a select number of processes that have been used with some regularity, such as mediation or arbitration.[22] In this way, ADR is best understood as an "umbrella term," under which fall extra-judicial processes "in which an impartial person assists those in a dispute to resolve the issues between them."[23] Even limited to these more common processes though, the range has been recognized as "highly disparate,"[24] and the diversity is only compounded by the "considerable variations in process features and application" within these categories.[25] Accordingly, discussing 'ADR' with any precision presents some difficulty.

Adopting this broad understanding of ADR, we can see considerable variation across its spectrum of processes. Perhaps the most significant disparity existing within this range of processes might be between processes that can be considered "facilitative" and processes that are "determinative."[26] Facilitative processes, such as mediation or facilitation, are those involving a third party, usually having no advisory or determinative role, who provides assistance with the *process* of dispute resolution.[27] Determinative processes, such as arbitration, are those where a third party investigates the dispute, often through a formal hearing, and makes a

[19] Susan H Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution*, 2d ed (Oxford: Oxford University Press, 2011) at 5.
[20] Tania Sourdin, *Alternative Dispute Resoution*, 3d ed (Sydney: Thomson Reuters, 2008) at 3.
[21] Henry Brown & Arthur Marriot, *ADR Principles and Practice*, 3d ed (London, UK: Sweet & Maxwell, 2011) at 2 [Brown & Marriot, 3d ed].
[22] Sourdin, *supra* n20 at 3.
[23] NADRAC, *Dispute Resolution Terms* (AGPS, Canberra: March 2003) as cited *ibid* at 3-4.
[24] Jean R Sternlight, "Is Binding Arbitration a Form of ADR?: An Argument That the Terms 'ADR' Has Begun to Outlive Its Usefulness" (2000) 2000 J Disp Resol 97 at 102 [Sternlight, "Binding"].
[25] Sourdin, *supra* n20 at 3 (footnote 8).
[26] NADRAC, *Alternative Dispute Resolution Definitions* (AGPS, Canberra, March 1997) as cited *ibid* at 4.
[27] Sourdin, *supra* n20 at 4.

determination regarding the *outcome* of the dispute, either non-binding or binding.[28] Through this, "one can distinguish ADR mechanisms on the basis of whether they culminate in a consensual resolution...or whether ultimately a settlement is imposed."[29] Given the similarities between the latter and conventional adjudication, some commentators have questioned whether binding arbitration fits with other self-determinative resolution processes.[30] This ultimately goes back to the definitional question, as

> "one can easily define ADR in such a way to either include or exclude binding arbitration. If one defines ADR as anything other than litigation, surely binding arbitration qualifies. Alternatively, if one defines ADR to emphasize its informality, its focus on interpersonal relationships, its low cost or speed, or its ability to foster personal growth and awareness, binding arbitration does not necessarily fit the bill."[31]

Although it is not necessary for the purposes here to definitively assert whether or not binding arbitration properly falls within 'ADR', this point of controversy is illuminative of a distinction between the technical categorization that *is* ADR, and a certain value-driven commonality that can be found *within* ADR. It is the latter with which we are concerned, and thus the understanding of Alternative Dispute Resolution necessary here is not technical, but a matter of substance. The visibility of those values, however, can be seen to vary in different processes, growing as they travel "a continuum according to how far they move parties away from the legal and judicial system into a world of privatized justice."[32] Though it may be true that "[t]he principles that are shared in ADR are far more significant and fundamental than any differences of view and practice,"[33] these principles may not be as pronounced in each of the differences of practice. Accordingly, the values and perspectives relevant here are more evident in the consensual, dialogue-driven, and non-adjudicative processes of the Alternative Dispute Resolution phenomenon, such

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[28] *Ibid*.
[29] Katherine VW Stone (ed), *Private Justice: The Law of Alternative Dispute Resolution* (New York: Foundation Press, 2000) at 8.
[30] See generally, Sternlight, "Binding" *supra* n24.
[31] *Ibid* at 99.
[32] Stone, *supra* n29 at 8.
[33] Brown & Marriot, 3d ed, *supra* n21 at 29.

as mediation. As a consequence, the foregoing analysis will largely focus on mediation as embodying this emergent discourse of conflict resolution.

1.2.2 The (Re)Emergence of an Idea: 'Popular Dissatisfaction' and an 'Alternative'

ADR generally is by no means a new phenomenon, so it might be more accurate to speak of its *re*-emergence. Historians note that in pre-capitalist societies, people of varying social status invested "extraordinary amounts of time in mediation, an investment that (proportionately) far exceeds the resources devoted to the adjudication of disputes" in modern times.[34] The ancient Greeks, for example, employed "sophisticated use and knowledge" of 'alternative' dispute processes, and the Romans considered stays of proceedings for party mediation.[35] In more modern societies, the United States has a long history of what could be deemed ADR. A great number of citizens, "through three hundred and fifty years of [American] history, chose to withhold their disputes from lawyers and judges out of the deep conviction that law subverted more important values that they deeply cherished."[36] As early as the 17th century, where despite there being an "elaborate, sophisticated judicial and legal system," disputes were normally handled outside of that system.[37] Even in the contemporary era then, ADR has a long history, and those discussing it more precisely might differentiate between "old" and "new" ADR.[38]

The 'new' ADR movement, of concern here, first emerged in the United States in the 1960s when a non-legal revival "arose from the euphoric hope that burst forth during [that time], when community empowerment became a salient theme of political reform."[39] Through this, ADR was seen as a site for self-governance and democratic renewal. The "communitarian euphoria" for alternative dispute resolution

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[34] Derek Roebuck, "The Myth of Modern Mediation" in Derek Roebuck, *Disputes and Differences: Comparisons in Law, Language and History* (Oxford: Holo Books, 2010) at 395.
[35] *Ibid*.
[36] Auerbach, *supra* n18 at 16.
[37] *Ibid* at 19.
[38] Jeffrey W Stempel, "Reflections on Judicial ADR and te Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?" (1996) 11 Ohio St J Disp Resol 297 at 309.
[39] Auerbach, *supra* n18 at 116.

manifested itself in proposals for programs such as "neighbourhood reconciliation boards" that would encourage residents to "channel conflict into locally based and locally responsive tribunals designed to promote 'the democratization of justice'."[40] As one initiative, the American Friends Service Committee (AFSC) created a plan for "citizen dispute settlement" that drew upon tribal practices and mediation programs.[41] Here the underlying philosophy was "a conception of disputes as a form of property that 'should belong to the community rather than the formalized judicial system,'" and a belief that courts were "remote, inaccessible institutions that represented the interests of the state and values of the legal professionals."[42] ADR was therefore framed in terms of "community initiatives" and "community justice."[43] It was this community-based movement that acted as the "forerunner to other forms of institutionalised [ADR]."[44] Thus, self-determination and an emphasis on participation were prominent components of the ADR movement from its outset, and though these political motives would become secondary to more practical justifications as ADR was increasingly utilized by the legal community, these early themes would continue to colour ADR into the future.

In spite of these earlier political developments, many commentators trace the birth of the modern ADR movement to a paper presented in 1976 by Frank Sander at the Pound Conference on "The Causes of Popular Dissatisfaction with the Administration of Justice". At this time – as the conference's title indicates – attendees were concerned with the "problems of procedure and administration well-known to many legal professionals."[45] In contrast to the political concerns found in ADR's communitarian beginnings, the Pound Conference and the professionals of which it was made up were more concerned with judicial efficiency and

[40] *Ibid* (some internal quotations omitted).
[41] *Ibid* at 117.
[42] *Ibid*.
[43] Raymond Shonholtz, "The Promise of Conflict Resolution as a Social Movement" (1990) 3 J Contemp Legal Issues 59 at 61.
[44] Alexander, supra n13 at 11.
[45] J Clifford Wallace, "Judicial Reform and the Pound Conference of 1976" (1982) 80 Michigan L Rev 592 at 593.

dissatisfaction with court processes on an operational level.[46] Within that dissatisfaction, a "litany of deficiencies was endlessly recited: court congestion; delay; high costs; denial of access."[47] Caseload was a major concern, and courts were said to be showing "evident signs of crisis."[48]

Thus, ADR thus offered a possible solution, and again the growth of 'alternatives' emerged in contrast to the dominant court model, this time on a practical level. Sander's paper, entitled "The Varieties of Dispute Processing,"[49] envisioned a court screening process whereby different disputes would be dealt with by different processes: some by litigation, some by mediation, some by arbitration, etc; a concept often called a 'multi-door courthouse' "in which doors represent a spectrum of dispute resolution options."[50] Through this, Sander introduced the idea that the appropriateness of different processes might vary for different types of dispute, and posited that traditional litigation might not always be the answer.

Coming in the context that it did, from a historic gathering of legal scholars and professionals (Sander was invited to the conference by the then-U.S. Supreme Court Chief Justice[51]), a suggested move away from conventional adjudication was taken as the emergence of a "new ideology"[52] in the legal academy. Sander's presentation was therefore heralded as the "inaugurating event of the modern era,"[53] or more dramatically, the "big bang moment"[54] of ADR's history. Though this might not be entirely accurate given ADR's previous use, it is illustrative given the flurry of activity that followed. After Pound, "the story of modern ADR explodes

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[46] Auerbach, *supra* n18 at 117 [Wallace].
[47] *Ibid* at 122.
[48] *Ibid*.
[49] Frank EA Sander, "Varieties of Dispute Processing" in AL Levin & RR Wheeler, eds, *The Pound Conference: Perspectives on Justice in the Future* (St. Paul, MN: West Publishing, 1979).
[50] Alexander, *supra* n13 at 4.
[51] Michael L Moffitt, "Before the Big Bang: The Making of an ADR Pioneer" (2006) 22 Negotiation Journal 437 at 439-440 [Moffitt, "Before the Big Bang"].
[52] Steven N Subrin, "Teaching Civil Procedure While You Watch it Disintegrate" (1993) 59 Brooklyn L Rev 1155 at 1156.
[53] Stempel, supra n38 at 309.
[54] Moffit, "Before the Big Bang" *supra* n51 at 437.

forward, with burgeoning activity in courthouses, in scholarship, in law school curricula, in legislation, and in practice."[55] It is in this 'burgeoning activity' that conflict's discourse emerges, creating a new lens through which to see civil wrongs.

1.2.3 Stepping Outside the Law

Given these beginnings, alternative dispute processes have largely been understood in terms of how they differ, both politically and procedurally, from conventional adjudication. Such formulations are useful in a project of differentiation such as this, as the contrasts built into ADR commentary only serve to reinforce this thesis of re-imagination. As previously indicated, the array of technically-alternative processes varies to a certain degree, and accordingly, might differ in the clarity with which they demonstrate the re-imagination of legal disputes and their processes of redress. Given this, focusing here on mediation and its components as exemplary of the emergent 'system of thought' leads to its clearest manifestation. A brief overview and analysis of mediation is therefore in order.

Generally, mediation can be described as "a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication."[56] Mediation as a process can vary in its specific application, with the mediator taking on differing levels of involvement, whether being passive and solely facilitative, or taking a more involved role, making creative suggestions as to how the dispute might be resolved.[57] Though its specific uses might differ, the fundamental elements of mediation are consistent across its variations. In mediation, the parties themselves exercise considerable control in terms of process, content and outcome; self-determination is considered the cornerstone of the

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[55] *Ibid* at 438.
[56] Brown & Marriot 3d ed, *supra* n21 at 154.
[57] *Ibid* at 153.

process.[58] Accordingly, the mediator has no determinative power, and any resolution is consensual.

Through this process, self-determination ultimately governs the negotiations. Positive law thus can inform the substance, but is not a controlling factor. Indeed, mediation "de-centers...law as the primary variable explaining how disputes are resolved."[59] Disputes are framed according to the content that the parties view as important, and not necessarily according to legal terms or concepts (though these may be informative).[60] Furthermore, the resolution of the process, the mediated settlement, does not have to conform to that which would be prescribed under law.[61] Outcomes can therefore differ *quantitatively* from that which would be awarded under the prescriptions of an adjudicated decision, or might differ *qualitatively*, including outcomes not generally awarded under positive law, such as apologies.[62] Relevant parties are thus free to construct their disputes as they see them, and settle them as they see fit. Accordingly, mediations are often said to operate "in the shadow of the law,"[63] and their growing prevalence as an example of "de-legalization."[64]

This 'de-legalization' is central to the emergence of conflict's discourse; it is through setting aside the conventional legal construction of the world – its concepts, processes and prescriptions – that one is able to re-imagine in terms of conflict and conflict resolution. Legal disputes, moved outside the law's framework, are mere *disharmonies*, ripe for re-interpretation. Operating outside conventional legal

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[58] Sourdin, *supra* n20 at 57 (in discussing Australia's National Mediation Accreditation System and Standards).

[59] Carrie Menkel-Meadow, "From Legal Disputes to Conflict Resolution and Human Problem-Solving: Legal Dispute Resolution in a Multidisciplinary Context" (2004) 54 J Legal Educ 7 at 7 [Menkel-Meadow, "Disputes to Conflict"].

[60] Stone, *supra* n29 at 20; see generally Russell B Korobkin, "The Role of Law in Settlement" (2005) in Michael L Moffit & Robert C Bordone, *The Handbook of Dispute Resolution*, eds., (Jossey-Bass, 2005).

[61] Sourdin, *supra* n20 at 68.

[62] See generally, Deborah Levi, "The Role of Apology in Mediation" (1997) 72 NYU L Rev 1165.

[63] See especially Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950 at 950.

[64] See generally, Austin Sarat, "Informalism, Delegalization, and the Future of the American Legal Profession" (1983) 35 Stanford L Rev 1217.

dimensions, conflict's discourse has its own unique focus, value-system and morality.[65] As a manifestation of this, mediation should therefore not be seen as a procedural adjustment for the conventional legal paradigm, but rather itself part of a new paradigm in which conventional legal procedure is often inadequate.

1.2.4 Seeing Civil Wrongs through a Different Lens

1.2.4.1 Seeing Conflict

Though the concept of 'conflict' has numerous definitions of varying complexity, in its most basic sense it can be understood as a disharmony of interests (whether perceived or actual) between parties.[66] As such, it would seem obvious that legal disputes would fall under that category. In spite of this technical compliance, commentators within conflict's discourse draw a distinction between conflicts as a broader event and disputes as they are constructed, and ultimately narrowed, within law's machinery.

From this perspective, conflicts, as socially complex, party-specific phenomena, do not enter the legal realm unchanged.[67] To be workable within the legal discourse, conflicts must first be "translated into legal language."[68] In translation, the legal system "takes a conflict and makes it into a dispute - a narrowly-focused, legally-defined event with which the court can deal."[69] Through this process, conflicts are necessarily reduced, trimmed and ultimately remoulded in order to be

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[65] See e.g. Menkel-Meadow, "Whose Dispute," *supra* n8 at 2669-2670; Thomas J Stipanowich "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution'" (2004) 1 J Empirical Legal Stud 843 at 848; See generally Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[66] See generally Dennis JD Sandole, "Typology" in Sandra Cheldelin, Daniel Druckman & Larissa Fast, *Conflict: From Analysis to Intervention*, 2nd ed, (New York: Continuum, 2003) at 42-56.

[67] Auerbach, *supra* n18 at 117.

[68] Shonholtz, *supra* n43 at 72.

[69] Louise Otis & Eric H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 Pepp Disp Resol LJ 351 at 358.

legally recognizable. Accordingly, legal disputes are best understood as a "much narrower subset of actual human, social, political, and economic conflicts."[70]

'Conflict', then, "may be viewed as a generic term, with 'dispute' as a class or kind of conflict that manifests itself in distinct, justiciable issues."[71] Courts, as adjudicators of *legal* matters, require the elimination of non-legal elements. Obliging, the legal machinery empties the matter of "its social content... as [conflict] becomes a case,"[72] and has the effect of "juridicizing the conflict."[73] Consequently, "[t]he cause and the resolution of the broader conflict behind the legal dispute are, at best, only incidentally the object of the judicial contract; the judge can safely ignore this wider conflict as long as he or she handles the dispute."[74] Legal disputes, then, are understood as the select, narrow *portions* of broader conflict with which the legal system is willing (and able) to engage. Within conflict's discourse, legal wrongs, as *aspects* of conflict, might be seen as conceptually inadequate for broader considerations; indeed much would fall outside the conceptual parameters of pre-traced wrongs. In short, "law fails to take account of disputants' [broader] interests. It necessarily abstracts and objectifies their situation."[75]

In contrast with this reductionism, those working within conflict's discourse attempt to "move the focus away from legally constructed 'cases' to the broader notion of culturally and contextually embedded [conflicts] having existences, before, during, and after formal legal disputes."[76] Accordingly, they recognize that "while 'disputes' may be about legal cases, conflicts are more broadly and deeply about human relations and transactions."[77] With an appreciation of the 'social content' of conflicts, "the vocabulary of alternative dispute settlement is peppered with psychological terms such as needs, motivations, perceptions, and understandings,

[70] Menkel-Meadow, "Disputes to Conflict" *supra* n59 at 16.
[71] Brown & Marriot 3d ed, *supra* n21 at 6.
[72] Auerbach, *supra* n18 at 120.
[73] Otis & Reiter, supra n69 at 358.
[74] *Ibid* at 359.
[75] Silbey & Sarat, *supra* n12 at 480.
[76] Menkel-Meadow, "Disputes to Conflict" *supra* n59 at 12.
[77] *Ibid*.

rather than...legal terms such as entitlements, duties, performance, and breach."[78] Conflicts, as social interaction, are not universal forms, and their contextual specificity is essential. Accordingly, while those working within the legal discourse might suffer from "trained incapacity in letting the parties decide what *they* think is relevant,"[79] inhabitants of conflict's discourse rely on those very perceptions to construct the conflict with which they are concerned. In view of that, "recognition that a conflict exists is thus an important first step, but more important is a desire to understand the conflict as a complex manifestation of human relationships, which depends on these relationships for both its origins and its solution."[80]

Moving outside the legal conception of disputes, focus changes from a rights-based understanding to a needs- or interest-based understanding.[81] Through this change of focus, commentators have described a "reconstruction of the juridical subject."[82] From the conventional legal perspective, "the juridical subject has been...conceptualized as a possessor of rights, of entitlements to particular kinds of treatment by the state."[83] Distancing itself from this, the ADR movement "participate[s] in, and advances, a critique of rights" by instead focusing on subjective interests and preferences.[84] The placement of the individual within the field thus becomes less prescribed, and more self-governed. It also becomes less straightforward, as by shifting focus to interests and needs, "the juridical subject is provided with a more complicated, richer human character."[85]

Dealing in terms of the broader interests of disputants, the parties themselves become central to the conflict. Within the legal discourse, legal wrongs arise out of pre-conceptualized, pre-ordained rights; conflicts, however, rely on the subjective interests of disputants for their constructions. In the pre-determined legal

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[78] Stone, *supra* n29 at 20.
[79] Christie, *supra* n9 at 8.
[80] Otis & Reiter, *supra* n69 at 372.
[81] Silbey & Sarat, *supra* n12 at 479.
[82] *Ibid* at 437.
[83] *Ibid* at 472.
[84] *Ibid*; *Ibid* at 479.
[85] *Ibid* at 491.

framework, "...disputants become observers rather than participants. Silenced by the language of the law, separated from judges who are conspicuously elevated above the proceedings, disputants have no choice but to become litigants."[86] In contrast with the passive legal model where parties are subjects of abstract rights, the conflict model provides individuals with a more influential role as they are "conscious of creating and affecting the dispute through their own choices."[87] In this way, parties themselves are *part* of the conflict as the conflict becomes a reflection of those parties. Otis and Reiter explain that

> "[t]he crucial point is that it is the participants themselves who determine the ranking of issues engaged by a conflict and who decide which issues are crucial, which are tangential, and which are not important at all. The nature of the conflict, coupled with *the ways in which the participants understand and characterize that conflict*, largely determines the intensity of the conflict, the scope of its issues, and ultimately the options for its resolution [emphasis added]."[88]

Through this involvement, a conflict perspective is less concerned with parties having 'rights of', but rather 'interests in'. Parties are understood as stakeholders in conflicts, rather than 'possessors of entitlements'. In this sense, conflicts cannot be understood in relation to what might be considered 'corresponding' legal wrongs and their resulting disputes; instead, conflict, existing within its own discourse, is a unique concept.

1.2.4.2 Seeing Conflict Resolution

Given, the variability and subjectivity of conflict and its creators, the rigid legal framework and its processes do not seem to provide an ideal environment for the 'construction' of conflicts and the pursuance of broader interests. Indeed, it has been said that "the field of dispute resolution or alternative dispute resolution (ADR) in law has grown out of recognition that the conventional legal system of legislative enactments, litigation practices, trials and court decisions are not always adequate to

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[86] Auerbach, *supra* n18 at 12.
[87] *Ibid*.
[88] Otis & Reiter, *supra* n69 at 374.

deal with all kinds of human problems."[89] Even with legally-recognized conflicts outlined by law, resolution is constricted. It is worth noting that the process of litigation "is extraordinarily limited both in the kind of factors that the court can take into account in arriving at its determination, and in the scope of the judgements that it can make once it has decided which party should succeed."[90] Menkel-Meadow calls the latter constraint "limited remedial imaginations," in recognizing that "complex problems [often require] complex and multifaceted solutions."[91] Given the recognized complexity of conflicts and their required resolution, a new perspective toward conflict resolution has been necessary as well.

In accordance with this growing recognition of complexity within conflicts, the widespread use of mediation signals a move away from adversarial processes to a problem-solving approach.[92] The flexibility inherent in the process "gives parties more power and greater control over resolving the issues between them...and provides for more effective settlements covering substance and nuance."[93] Mediation therefore serves as a forum as much as a process, providing an opportunity for self-determination by encouraging parties to identify their interests and needs, generate options and create their own outcomes.[94] The relative absence of legal constraints within that forum is thus a considerable advantage, allowing "creative and flexible decision-making."[95]

Though the new perspective toward conflict resolution is intertwined with the emergence of new 'procedures' for conflict resolution, it should not be considered as limited to this practical operation. As part of the emergence of 'new ways of doing', there have also been 'new ways of thinking about doing', that is, new values and

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[89] Carrie Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model,* Menkel-Meadow et al, eds (New York, NY: Aspen Publishers, 2005) at 4.

[90] Brown & Marriot 3d ed, *supra* n21 at 32.

[91] Carrie Menkel-Meadow, "The Trouble With the Adversary System in a Postmodern, Multicultural World" (1996) 38 Wm & Mary L Rev 5 at 14 [Menkel-Meadow, "The Trouble"].

[92] Brown & Marriot 3d ed, *supra* n21 at 46.

[93] *Ibid*.

[94] Alexander, *supra* n13 at 10.

[95] Brown & Marriot 3d ed, *supra* n21 at 32.

standards to which these processes adhere. Shonholtz, in discussing the emergence of "the social ideology of conflict resolution," asserts that "instead of seeing conflict resolution as an alternative dispute resolution scheme for courts, corporations and institutions, let us first see it as a statement of social values."[96] Having done so, we can then "discuss the field of conflict resolution in broader terms than as a merely new instrument or technique for the expeditious resolution of conflict."[97] Evaluating alternative processes merely as procedural adjustments, and considering them on the basis of the values and objectives of conventional legal processes would therefore be misguided. As Stipanowich explains,

> "in most cases the best measure of effective ADR is not as a surrogate for public adjudication, but as an intervention strategy to promote *what a trial was not designed to accomplish*: getting quicker and less costly resolution, tailoring creative solutions, serving business goals, improving relationships, enhancing the quality of human interaction, and 'opening up' the dispute resolution process to the broader community [emphasis added]."[98]

Accordingly, processes of redress within conflict's discourse have their own values, standards and morality, distinct from those of the conventional legal paradigm. Menkel-Meadow writes that "[s]ettlement can be justified on its own moral grounds—there are important values...that support the legitimacy of settlements of...legal disputes. These values include consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice."[99] This justice, however, is noted to be "a new paradigm of justice;"[100] it involves moving beyond our conceptions of justice as binary and legally prescribed toward an understanding of justice as "co-

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[96] Shonholtz, *supra* n43 at 68.
[97] *Ibid*.
[98] Stipanowich, *supra* n65 at 848.
[99] Menkel-Meadow, "Whose Dispute" *supra* n8 at 2669-2670.
[100] Caroline Harris Crowne, "The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice" (2001) 76 NYU L Rev 1768 at 1769.

existential,"[101] and mutually negotiated. In this sense, "mediation contributes towards rendering justice more human, participatory, and accessible."[102]

This 'co-existentialism' is indicative of the broader approach to the resolution of conflict found within conflict's discourse, and emphasizes the interconnectedness of stakeholders to a conflict. This interconnectedness manifests itself in the potential "social utility"[103] of conflicts. By understanding that conflict is "an integral part of human behaviour, and there could be no movement or change without it,"[104] capitalizing on conflict through more participatory conflict resolution becomes a valuable element of the process. Harnessing conflict through dialogical processes then has the potential to not only be an educational[105] process, but a transformative process for those involved. In discussing mediation's objectives, Nadja Alexander writes that

> "[t]hrough a process of recognition and empowerment parties are provided with the opportunity to transform the way they relate to each other. Implicit in the goal of transformation is the concept that parties will transcend their own self-interest and embrace the meta-interest that links them to each other. In other words the aim is for parties to develop a shared perception of their relationship, which will lead to changes in how they interact with each other."[106]

The process of conflict resolution, like its object, is therefore inextricably tied up with the social relationship existing between stakeholders. Through seeking to capitalize on transformative possibilities, those employing alternative processes recognize conflict as a "dynamic and potentially beneficial social force,"[107] and see conflict resolution as much more than the mere disposition of legal claims.

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[101] Giuseppe De Palo & Luigi Cominelli, "Mediation in Italy: Waiting for the Big Bang?" in N Alexander (ed.), *Global Trends in Mediation* (The Netherlands: Kluwer, 2006) 259 at 263.
[102] Otis & Reiter, *supra* n69 at 363.
[103] Carrie Menkel-Meadow "Conflict Theory" in Menkel-Meadow et al*, supra* n80 at 7 [Menkel-Meadow, "Conflict Theory"].
[104] Brown & Marriot 3d ed, *supra* n21 at 6.
[105] Otis & Reiter, *supra* n69 at 391 (noting conflict resolution as a pedagogical exercise).
[106] Alexander, *supra* n13 at 11.
[107] Otis & Reiter, *supra* n69 at 373.

1.2.5 The Mobilization of Alternatives

Since its modern inception in the mid-1970s, Alternative Dispute Resolution and the field of conflict resolution have grown dramatically in terms of both pervasiveness and sophistication; something of a "quiet revolution."[108] ADR's growth has been considered a global phenomenon, though having particular prevalence in common law countries.[109] Over the course of this development, few areas of the conventional legal universe have been left unaltered:

> "[C]ourts and government agencies have supported its use, mediation and conflict resolution organisations have been established, Bar Associations have embraced its principles, practitioners from a wide range of professional disciplines ... have trained in its use. Books and articles have been written, conferences and seminars have been held, and the public and the media have come to appreciate its value... In many law firms, litigation departments have been replaced with dispute resolution departments."[110]

In addition to existing institutions being affected, new mediums have themselves been created out of the movement. New specialized journals have emerged to house the flurry of academic interest, and countless ADR organizations now exist "that had not been contemplated barely [thirty] years earlier."[111] As conflict's discourse has emerged, intellectual and political platforms to support and facilitate that discourse have emerged also.

The growth of the ADR field has of course coincided with the increased use of its processes, spurred on by the political and practical motivations outlined above. Among the growth of ADR's processes, mediation has seen particular escalation in its use. It has been posited that "[i]n terms of legal practice and legislative activity mediation is arguably the fastest growing form of ADR in the world."[112] More surely, it can at least be said that mediation "has entrenched itself as the most significantly

[108] Stipanowich, *supra* n65 at 845.
[109] Alexander, *supra* n13 at 7.
[110] Brown & Marriot 3d ed, *supra* n21 at 1.
[111] E.g. the Conflict Resolution Quarterly in 1983, The Journal of Dispute Resolution (University of Missouri) in 1984, and the ABA's Dispute Resolution Magazine in 1994; The ADR Institute of Canada in 1973, The Institute for Dispute Resolution (CPR) (US) in 1979, The Centre for Effective Dispute Resolution (CEDR) (UK) in 1990; Brown & Marriot *supra* n21 at 45.
[112] Alexander, *supra* n13 at 6.

used non-adjudicatory [process]."[113] This growth, however, has not occurred passively, but has rather been 'mobilized' through various mechanisms whose purposes were that of encouraging the use of mediation.[114] These mechanisms, largely state-driven, have played a considerable role in the emergence of mediation to the degree that it has. These efforts to mobilize mediation include any number of strategies, each with varying degrees of force. Mechanisms can range from establishing mandatory mediation programs, to creating referral procedures, to instituting financial incentives or to simply educating disputants of the process and promoting its benefits.[115]

On the compulsory end of the spectrum, mediation has been mandated for disputes meeting specified criteria in jurisdictions such as Germany, The Netherlands, and some Canadian provinces.[116] Similarly, a "soft mandatory" model is utilized in Australia, whereby courts exercise a judicial discretion in referring cases to mediation.[117] Among those jurisdictions unwilling to make mediation mandatory, there still remains clear encouragement of mediation through other mechanisms. England and Wales, for example, have developed various pre-action protocols "regulating parties' conduct before court action is commenced, which aim to facilitate settlement without the need to launch proceedings, all of which encourage the consideration of ADR."[118] Complementing this, the Civil Procedure Rules (CPR) allow the judiciary to impose cost sanctions on parties unwilling to explore mediation prior to, or during, litigation, should their refusal be "unreasonable".[119] In spite of these less forceful mechanisms, there exists a clear opinion on the part of the English judiciary that "parties should be encouraged so far as possible to settle their disputes

[113] Brown & Marriot, *supra* n21 at 1.
[114] Alexander, *supra* n13 at 24.
[115] *Ibid*.
[116] *Ibid* at 24-25; see also Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2004) 42 Alb L Rev 677 at para 9.
[117] Alexander, *supra* n13 at 26.
[118] Brown & Marriot 3d ed, *supra* n21 at 44; CPR, *supra* n11.
[119] See especially *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 at para. 12-33 (expounding upon r44.3 CPR).

without resort to litigation."[120] Indeed, Rule 8.1 of the CPR Practice Direction explicitly states that litigation should be a "step of last resort."[121] In line with this, legal aid has even been extended to ADR users.[122] Other jurisdictions, such as Quebec, take a more tempered approach where voluntary judicial mediation, free of charge, is integrated into their court systems.[123] Through these variations, however, it is evident that "court-related mediation initiatives have been the primary level for [mobilization]," largely due to the fact that they sit at the "crossroads of out-of-court and in-court dispute resolution."[124] With such clear legislative and policy direction, it is evident that states are actively relinquishing their involvement in the resolution of conflicts, and consequently pushing private justice forward.

Driven, to a considerable degree, by these mechanisms, mediation has emerged as a dominant force within the dispute resolution universe. In North America, observers have questioned whether mediation might be the "new status quo,"[125] noting that "[i]n practice, mediation has been the de facto resolution process for nearly two decades in many jurisdictions."[126] As noted above, the court systems have been instrumental in this, and court-connected programs make up the largest and most visible product of the shift. In the United States, the Alternative Dispute Resolution Act of 1998 "required each of the 94 districts to 'authorize' use of ADR in civil actions. Each district was empowered to design its own ADR program, but required to adopt procedures for making neutrals available to parties."[127] Reflecting

[120] Oliver LJ in *Cutts v Head* [1984] 1 All ER 597; More recently, Lord Woolf emphasized that courts should utilize their given powers to see that ADR is encouraged as far as possible in *Cowl v Plymouth City Council* [2001] EWCA Civ 1935.
[121] CPR, *supra* n11 at r8.1.
[122] Loukas Mistelis, "ADR in England and Wales: A Successful Case of Public-Private Partnership" 6 ADR Bulletin 1. online: http://epublications.bond.edu.au/adr/vol6/iss3/6 at 2.
[123] See generally Otis & Reiter, *supra* n69 at 353; Judicial Mediation Service – Court of Appeal of Quebec, "Judicial Mediation", online: Court of Appeal of Quebec website <http://www.tribunaux.qc.ca/c-appel/English/Altres/mediation/pamphlets/medpam.html>.
[124] Alexander, *supra* n13 at 24-25.
[125] Tracy Walters McCormack, Susan Schultz & James McCormack, "Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators, and Lawyers" 1 St Mary's LJ 150 at 154.
[126] *Ibid* at 153.
[127] Stipanowich, *supra* n65 at 849; see also Crowne, *supra* n100 at 1768.

state encouragement, the U.S. court system, in varying degrees, is demonstrative of the increased prevalence:

> "The nation's most extensive court mediation and ADR system is that of Florida, which began with the establishment of one of the first citizen dispute settlement centers (CDS) in...1975. In 2003 Florida boasted 11 CDS programs, 41 country mediation programs covering all circuits in the state, 23 family mediation programs, 11 circuit civil programs, 22 dependency mediation programs, an appellate mediation program, and several court-connected arbitration programs."[128]

To the north, the Canadian government has adopted a similar stance, with "at least eight of the provinces, all three territories, and the Federal Court hav[ing] some form of ADR attached to the court system."[129] It seems accepted by most commentators that the question is no longer *whether* ADR has a place, but rather how it is mobilized.[130] Given the rise of ADR to its current position, some have even begun questioning whether *litigation* should now be deemed the 'alternative'.[131]

1.2.6 Challenging the Dominant Discourse

The prevalence of extra-judicial and extra-legal dispute resolution has grown so dramatically that it is now recognized "as a distinct system of dispute resolution,"[132] a unique entity in its own right. As discussed above, it is apparent that this system goes beyond mere procedural differences, and rather encapsulates its own conceptions, values and perspective distinct from traditional legal envisionings. The emergence of this alternative discourse can therefore be seen as "an indication of fundamental changes at work in our legal system and in our concepts of justice and law."[133] In discussing the development of judicial mediation specifically, Otis and

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[128] Stipanowich, *supra* n65 at 849-850.

[129] Otis & Reiter, *supra* n69 at 354.

[130] *Ibid*; Judith Resnik & Orrib B Evans, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St J on Disp Resol 211 at 240.

[131] See Peter S Chantilis, "Mediation U.S.A." (1996) 26 U Mem L Rev 1031 ("The use of mediation to resolve disputes is so prevalent that the Author is reminded of Roger Fisher's comment at the Harvard Negotiation Workshop 'that litigation is an alternative way to resolve a dispute.'" at 1034); see e.g. Marriot & Brown, *supra* n21 at 2; see also Jean Sternlight "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 Nev LJ 289 (noting instead, the potential use of 'appropriate dispute resolution' terminology at 289 n1) [Sternlight, "ADR is Here").

[132] Alexander, *supra* n13 at 6.

[133] Otis & Reiter, *supra* n69 at 351-352.

Reiter suggest that it "heralds a new, participant-centred normative order"[134] – an observation that might be extended to the discourse in general, and is worth unpacking here.

In explaining his conception of 'normative order', Neil MacCormick uses the example of forming a queue to describe a "kind of orderliness that we sometimes discern in human behaviour [occurring] when people follow common norms of conduct;"[135] this kind of order is then referred to as 'normative order'. He continues, saying that "[i]t is a 'normative order' because, or to the extent that, one can account for it by reference to the fact that actors are guiding what they do by reference to an opinion concerning what they and others ought to do."[136] 'Order', here, can thus be understood as organization, coherent arrangement, or sequence, and it becomes 'normative' through its guidance by norms.

Using this conception, then, and considering the emergence of our alternative discourse, one might deduce two separate but interrelated normative 'orders' – both of which are useful here in understanding the significance of this emergence. The first 'order' can be considered as a normative *arrangement*, a new arrangement of dispute resolution mechanisms reflecting new prescriptive norms. Secondly, 'order' could be understood in the *sequential* sense, not limited to the chronological, but rather focusing on primacy. In considering these two orders, one can distinguish between changes to institutional organization – changes that might well be the result of practical policy decisions – and changes to the underpinnings of the way we understand dispute resolution generally. Recognizing the latter, Otis & Reiter suggest that "what we see happening is not - cannot be - a dilution or dumbing down of the adjudicative function...but rather the development of another form of justice...based on an entirely different model of rendering justice,"[137] and similarly "the emergence

[134] *Ibid* at 353-354.
[135] Neil MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007) at 1.
[136] *Ibid* at 16.
[137] Otis & Reiter, *supra* n69 at 361.

and acceptance of a new conceptualization of the law, one that no longer views law as a transcendent and immutable state monopoly."[138]

Through exploring the ADR movement, it is clear that a novel discourse has emerged and progressed to the point that it now challenges the existing dominant legal discourse, it conceptions and values, its institutional arrangement, and ultimately its discursive primacy. At this point it is sufficient to note that this challenge is occurring – that where conflict's discourse gains normative weight, conventional legal conceptions necessarily lose a certain degree of primacy. As Auerbach notes, "[c]onceptions of the role of law change, and assessments of the advantages and disadvantages of submitting disputes to its processes not only shift, but exist in perpetual tension."[139] In line with this, interaction between discourses, or 'interdiscursivity', occurs where "the adjudicative norm still colors their disputes, gives urgency to their resolution, and provides at least an implicit threat to keep them on track."[140] Though it may be too soon to suggest that conflict's discourse has displaced the conventional legal discourse in its normative dominance, it can at least be admitted that these two competing discourses exist in tension with one another. Accordingly, and in anticipation of the following chapters, one ought to be prepared to consider the full implications of the rise of conflict's discourse.

1.3 Restorative Justice and the Criminal Stream

The criminal stream of conflict's discourse has developed largely, though not exclusively, within what is known as the Restorative Justice (RJ) movement. Taking place in the more ideologically-explicit criminal atmosphere, restorative justice has emerged as a direct challenge to the dominant conception of crime and its management. As such, the emergence of conflict's discourse through restorative justice has been much more overt than in its civil counterpart. In this sense, the relationship between restorative justice practices, their values, and their political

[138] *Ibid* at 402-403.
[139] Auerbach, supra n18 at 4.
[140] Otis & Reiter, *supra* n69 at 358; see also Korobkin, *supra* n60.

implications require much less unpacking than in the civil stream; the restorative justice movement has been very explicit about its re-imaginings. While ‘restorative justice’ is generally referred to in terms of its processes, it is worth noting that its title is also an *objective*. Thus, while ADR’s alternative understandings might be seen to have *followed* practical developments, RJ’s alternative understandings have instead *driven* its practical developments. Accordingly, through exploring restorative justice’s rejection of the dominant conceptualization of crime and criminal justice, and its presentation of an alternative perspective, yet another manifestation of conflict’s discourse becomes apparent. Within this perspective, criminal wrongs are thus re-imagined as conflicts in a manner similar to their civil cousins.

1.3.1 Restorative Justice: A Process and an Objective

Restorative justice, as a generic heading, encompasses within itself a certain degree of variation. This variation, however, all falls within a relatively narrow scope as to its values, processes, and certainly its objectives. Accordingly, a broad but unified definition of restorative justice can be thought of as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”[141] In more focused terms, restorative justice refers to processes whereby stakeholders – consisting of the offender, the victim, and occasionally community representatives – come together in a dialogical environment to discuss a criminal offense committed, and negotiate restitution.[142] Restorative justice therefore “involves a different way of viewing crime, by focusing on the injury to the victim and the community, rather than the state.”[143] As such, it is “promoted as an alternative to the present criminal justice system based on punishment and deterrence.”[144]

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[141] Zehr, *Little Book*, *supra* n15 at 37.
[142] *Ibid*.
[143] Brown & Marriot 3d ed, *supra* n21 at 295.
[144] *Ibid*.

As a movement, restorative justice is very much non-centralized, "adopted mainly in scattered, small-scale programs."[145] As such, individual programs have developed mostly in isolation of one another, resulting in a lack of uniformity. At the same time, criminal offenses and their effects also vary, and necessitate different formats and practices. Consequently, restorative justice is utilized in a number of ways, by a number of different groups, and at a number of different points in the justice process.[146] Regarding processes, the majority operate as "restorative justice dialogue" and are generally made up of formats known as victim-offender mediation (VOM), group conferencing, or 'circles'.[147] Though varying slightly in their structure and parties present, these processes are much more alike than dissimilar:

> "All have in common the inclusion of victims and offenders in direct dialogue, nearly always face-to-face, about a specific offense or infraction; the presence of at least one additional person who serves as mediator, facilitator, convener, or circle keeper; and usually, advance preparation of the parties so they will know what to expect. The focus of the encounter nearly always involves naming what happened, identifying its impact, and coming to some common understanding, often including reaching agreement as to how any resultant harm would be repaired."[148]

Of these processes, "by far the most popular form...is victim-offender mediation (VOM), which is somewhat similar to a civil law mediation."[149] VOM differs slightly in that the 'mediator' in these instances is "fully aware that the defendant bears the responsibility of repairing the damage he has done."[150] In fact, a national survey of U.S. restorative justice programs indicated that 65% of programs required the defendant admit guilt prior to participation.[151]

Further variation occurs in the administration of restorative processes, both in terms of who triggers the process, as well as the point at which the process is

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[145] Sara Sun Beale, "Still Tough on Crime? Prospects for Restorative Justice in the United States" (2003) Utah LR 413 at 421.

[146] Mark S Umbreit et al, "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls" (2005) 89 Marquette LR 251 at 269.

[147] *Ibid*.

[148] *Ibid*.

[149] Ric Simmons, "Private Criminal Justice" (2007) 42 Wake Forest L Rev 911 at 953.

[150] *Ibid*.

[151] Mark S Umbreit & Jean Greenwood, *National Survey of Victim Offender Programs in the U.S.* (St. Paul, Minnesota: Center for Restorative Justice & Peacemaking, University of Minnesota, 1997) at 8.

triggered – the two of which are interrelated. Restorative schemes can be police-based, linked to courts or administered by criminal justice agencies; hence, the point at which offenses would be referred to the processes differs according to the point at which these institutions come into contact with those offenses.[152] Accordingly, "[u]se of these processes can take place at any point in the justice process, including pre-arrest, pre-court referral, pre-sentencing, post-sentencing, and even during incarceration."[153] In this regard, the U.S. national survey indicated that of those offenses referred to restorative processes, 3% were pre-court, 34% were diverted from within the court process (prior to guilt-finding), 28% were post-adjudication but pre-sentencing, 28% post-sentencing, and the remaining 7% classified as at "various points."[154] Of those offenses dealt with, vandalism, theft, minor assaults, and burglary made up the "vast majority" of referrals.[155] As restorative processes have expanded however, there has been a trend for VOM programs being asked to mediate more serious and complex crimes such as assault, rape, and murder.[156]

1.3.2 Restorative (Re)Emergence: Resurrecting Historical Wisdom

Restorative practices and their worldview, much like civil 'alternatives,' have a long history pre-dating their modern movement. Paradoxically, modern developments are actually a "return to older concepts of criminal justice."[157] What is now referred to as restorative justice finds its origins in the approaches developed in "numerous indigenous cultures throughout the world"[158] and in "pre-modern societies in Africa, the Middle East, and Asia."[159] 'Restorativists' thus have as their task the "reactivat[ion] and perhaps re-imagin[ation]" of those "restorative

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[152] Henry Brown & Arthur Marriot, *ADR Principles and Practice* 2d ed (London, UK: Sweet & Maxwell, 1999) at 302 [Brown & Marriot 2d ed].
[153] Umbreit et al, *supra* n146 at 269.
[154] Umbreit & Greenwood, *supra* n151 at 9.
[155] *Ibid* at 7.
[156] Frank D Hill, "Restorative Justice: Sketching a New Legal Discourse" (2008) Institute for Law and the Humanities, online: <http://www.kentlaw.iit.edu/Documents/Institutes%20and%20Centers/ILH/frank-hill.pdf> at 2 [Hill]; Umbreit & Greenwood, *supra* n151 at 16.
[157] Simmons, *supra* n149 at 951.
[158] Umbreit et al, *supra* n146 at 255.
[159] Hill, *supra* n156 at 2.

traditions."[160] Accordingly, viewing criminal offenses as primarily something other than conflict between individuals is a relatively modern phenomenon. Even in looking at more 'modern' societies there is evidence of crime's interpersonal beginnings. Scholars note that it was in the 11th century when a "major paradigm shift occurred in which there was a turning away from the well-established understanding as a victim-offender conflict within the context of community."[161] At this time in England, King Henry I issued a decree "securing royal jurisdiction over certain offenses...against the King's peace,"[162] thus appropriating crimes for the state and rendering the conception of crimes as interpersonal conflicts secondary. It is against this conception that restorative justice emerged once again a millennium later.

The *modern* restorative justice movement thus finds its beginnings at a similar time as the re-emergence of alternative civil processes, developing out of victim-offender mediation programs in Canada and the United States in the 1970s.[163] Beginning in 1974, the first Victim Offender Reconciliation Program (VORP) was developed in Kitchener, Ontario, Canada and later replicated in the U.S. in 1978.[164] Unlike its civil parallel, the restorative justice movement grew at a slower pace, and through the 1980s it remained small, with "few criminal justice officials view[ing] such programs as a credible component of the system."[165] Moving forward, the movement gained recognition, fueled largely by the "failure of the public criminal justice system to satisfy the needs of...crime victims."[166] From the mid-1980s to the mid-1990s, the movement slowly became recognized internationally, and England "initiated the first state supported Victim Offender Mediation Programs...during this period."[167] In 1994, the movement gained further support with the American Bar Association (ABA) endorsing the VOM process, marking a new era of support for

[160] *Ibid*.
[161] Umbreit et al, *supra* n146 at 255.
[162] *Ibid*.
[163] Hill, *supra* n156 at 2.
[164] Umbreit & Greenwood, *supra* n151 at 2.
[165] Umbreit et al, *supra* n146 at 259.
[166] Simmons, *supra* n149 at 911; see also Brown & Marriot 2d ed, *supra* n152 at 294.
[167] Umbreit et al, *supra* n146 at 260.

restorative practices, and foreshadowing the growth to come.[168] By the year 2000, upwards of 1200 programs were operating worldwide[169] and restorative justice had developed into a truly "global phenomenon."[170]

Within the United States, restorative justice has gained considerable ground, with there being a "fairly extensive development of formal public policy at the...state level supporting the restorative justice dialogue practice of victim-offender mediation."[171] In 2005, there were twenty-nine states with a reference to VOM or VOM-type programs in their state codes, seven of which had "comprehensive guidelines for VOM programs."[172] In 2011, speaking specifically of the American juvenile system, Umbreit and Armour noted that:

> "Already, there are nineteen states in America that have introduced and/or passed legislation promoting a more balanced and restorative juvenile justice system. Thirty other states have restorative justice principles in their mission statements or policy plans. There are individual restorative justice programs in virtually every American state, and a growing number of states and local jurisdictions are dramatically changing their criminal and juvenile justice systems to adopt the principles and practices of restorative justice."[173]

In Canada, where the modern movement began, growth is also evident. In a number of Canadian jurisdictions restorative justice is receiving considerable attention, with a 1998 survey finding "almost 200 initiatives under way across the country, including conferences, seminars, publications, and a wide range of programs."[174] Furthermore, the 1996 amendment to the sentencing principles in the Criminal Code was undertaken in part to "encourage the use of community-based sentencing and draw on key restorative elements,"[175] with paragraph 718.2(e) saying "all available

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[168] Umbreit & Greenwood, *supra* n151 at 2.
[169] Erin Ann O'Hara & Maria Mayo Robbins, "Using Criminal Punishment to Serve Both Victim and Social Needs" (2009) 72 Law and Contemporary Problems 199 at 201.
[170] Daniel W Van Ness, "An Overview of Restorative Justice Around the World" (Paper delivered at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 18-25 April 2005), [unpublished] at 13 [Van Ness, "Overview"].
[171] Umbreit et al, *supra* n146 at 291.
[172] *Ibid*.
[173] Umbreit & Armour, *supra* n14 at 68.
[174] Department of Justice, *Restorative Justice in Canada: A Consultation Paper* (Ottawa: Department of Justice, 2000).
[175] *Ibid*; Criminal Code RSC 1985, c C-46 (1st Supp), 718.2(e).

sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders."[176] With these changes, the Canadian legislature made clear their openness to alternative processes, and their willingness to move away from conventional responses to criminal offenses – paving the way for future restorative development.[177]

Outside of North America, restorative justice has seen even greater support. In 2000, the international community recognized restorative justice in a formal capacity when the United Nations Congress on Crime Prevention drafted a proposal for the U.N. Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters which encouraged the use of restorative justice practices by member states.[178] In 2002, the European Union made clear its stance and adopted a strong policy of support for victim-offender mediation, issuing a Council Decision indicating that member states should "promote mediation in criminal cases and integrate the practice into their laws by 2006."[179] These explicit indications of support both contribute to the continued growth of restorative justice, as well as reflect the strong support within Europe for restorative practices. Despite the considerable growth in North America,

> "European nations have clearly outpaced American policy development and implementation...with Austria having established the first national policy commitment in the world to broad implementation of victim-offender mediation in 1988. Numerous other European countries have now made strong policy commitments to restorative justice and, particularly, victim-offender mediation. Germany has an exceptionally broad and large commitment to victim-offender mediation, with more than 468 programs and 13,600 cases referred annually... England is currently going far beyond a focus just on VOM, with a national policy recommendation to implement restorative justice policies and practices throughout the country."[180]

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[176] *Ibid*.
[177] See e.g. *R v Gladue* [1999] 1 SCR 688.
[178] *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2000/14, UNESCOR, 2000, UN Doc E/2000; (2000).
[179] EC, *Council Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings*, [2001] OJ, L 82.
[180] Umbreit et al, *supra* n146 at 262.

In light of these developments, it is clear that there is a strong trend in favour of restorative justice practices. This trend is has seemingly gained momentum over the last two decades, not only in Europe, but globally. Despite being a "relatively young reform effort,"[181] the movement is certainly growing and is showing no signs of stopping.[182]

1.3.3 Seeing Criminal Wrongs through a Different Lens

1.3.3.1 From Crime to Conflict

Though seeing crime as conflict might once have been the norm, viewing it as such in the contemporary era is to contradict the dominant construction, heavily ingrained in both the system's features as well as minds of individuals – two facets which are, to a large extent, intertwined, with a conception of crime being closely tied up in the way it is dealt with. Indeed the "paradigm shift" in criminal justice in the 11th century was not the result of an effort to specifically reconceptualise the understanding of conflicts, but rather adjust the jurisdiction for handling them.[183] In any case, the relationship at focus changed from that between stakeholders to that between the offender and the state, therefore contributing to the contemporary conception.

It is thus at this point which we find ourselves and where conflict's discourse emerges in contrast. As a starting point, it is recognized that the "criminal justice system is largely based on the proposition of crime being an offence against the state."[184] Within this proposition – both literally and socially – it is worth noting the formulation of crime as an 'offense'. In its usage one can note two senses relevant to current consideration. First, an 'offense' can be understood as "a breach of law, rules, [or] duty,"[185] and as such is a matter of deviance rather than a clash of interests – an understanding at the heart of the purely legal conception and treatment of crime.

[181] *Ibid* at 304.
[182] Van Ness, "Overview," *supra* n170 at 13.
[183] Umbreit et al, *supra* n146 at 255.
[184] Brown & Marriot 2d ed, *supra* n152 at 294.
[185] *The Oxford English Dictionary*, online, *sub verbo* "Offense" (2a).

Secondly, it can be understood as a "hurt, harm, injury" or "[t]he action of...wounding the feelings of, or displeasing another."[186] In this sense, it comes closer to an understanding of 'conflict', though here of course remaining 'against the state'. These understandings are of course interrelated, and it is thus in both of these senses that restorative justice re-imagines criminal 'offenses' as conflicts – rejecting both the narrow legal construction as well as the state appropriation of the conflict from stakeholders.

In their general construction, criminal wrongs are seen as violation of state law. As such, their existence is defined in pre-determined and codified terms, subject to the same narrow scope identified with civil wrongs. Accordingly, the criminal justice system focuses almost exclusively on the defendant's behaviour and whether it fulfills the requisite criteria for a given criminal offense. Through the law taking a "unilateral" perspective toward 'deviance,' it shifts perception from conflict to non-conflict and facilitates its goal to *act upon* the offender.[187] Christie explains that the "non-conflict perspective is a pre-condition for defining crime as a legitimate target for treatment"[188] – treatment here understood in the broader, rehabilitative sense.

Focusing solely on the defendant's behaviour – and the defendant itself as an object –naturally excludes both broader considerations within the event as well as any parties outside the defendant-state relationship. Restorative justice recognizes both of these limitations, and has at its heart the appreciation of the dynamicity of conflict as well as the acknowledgement of those affected by the behaviour. Indeed the movement has at its core its commitment to "focus on the harms of wrongdoing more than the rules that have been broken" and to "show equal concern and commitment to victims and offenders, involving both in the process of justice."[189] By

[186] *Ibid* (3a and 4b).
[187] Christie, *supra* n9 at 4.
[188] *Ibid*.
[189] Howard Zehr & Harry Mika, "Fundamental Concepts of Restorative Justice" (1998) 1 Contemp Just Rev 47 at 54-55.

focusing on stakeholders and their conflicting interests, restorative practices “treat crimes as conflicts between the victim, the offender, and the community.”[190]

Focusing on the specific harms in the conflict, rather than the legal violation, expands a narrow legal dispute into a broader, multi-dimensional conflict. By removing the conflict from a legal environment, stakeholders step out of “a [legal] subculture with a surprisingly high agreement concerning interpretation of norms, and regarding what sort of information can be accepted as relevant”[191] and into an atmosphere where the conflict can be constructed according to individual perceptions and interests. Such constructions naturally go beyond legal content to include the social. As such, conflicts can be not only behavioural, but also perceptual or emotional.[192] Restorative practices inquire of stakeholders “what happened [and] how it affected them,”[193] building the conflict based on subjective response and an “acknowledgement of interests.”[194] The emotional considerations of restorative practice demonstrate its contrast with conventional legal constructions:

> “Emotion is central to understanding one way in which restorative justice differs from the traditional justice system. The traditional justice system does not make room for emotional expression; it emphasizes rational argument, which...cannot function as a vehicle for the expression of emotional states. Restorative justice views the expression and exploration of emotions as key to understanding the effects of the crime.”[195]

Revisiting restorative justice’s definition as “a process to involve...those who have a stake...and to collectively identify and address harms, needs, and obligations,”[196] it is apparent that the personal (and non-legal) needs of stakeholders themselves constitute the conflict. Concessions have been made in the legal discourse regarding victims’ ‘voice’ in the legal process, but these reforms are limited in their effect on

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[190] O’Hara & Robbins, *supra* n169 at 202.
[191] Christie, *supra* n9 at 4.
[192] Menkel-Meadow, “Conflict Theory,” *supra* n103 at 7.
[193] Daniel Van Ness, “The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System”, in *Restorative Justice: Theoretical Foundations* 1 (Elmar G.M. Weitekamp and Hans-Jurgen Kerner, eds., Willan publishing 2002) at 3.
[194] *Ibid* at 5.
[195] Hill, *supra* n156 at 16
[196] Zehr, *Little Book*, *supra* n15 at 37.

the proceedings as well as negligible in the proportion of time allotted for them.[197] In contrast, the construction of conflicts as broadly and subjectively as needed is central to the objectives of restorative justice. With the interpersonal content of conflict, here too are stakeholders a key consideration. Seeing crime as "fundamentally a violation of people and personal relationships,"[198] criminal wrongs are re-imagined as conflicts whose dynamicity reflects that of those very people and relationships.

1.3.3.2 From Criminal Justice to Conflict Resolution

Given the personal nature of 'criminal' conflicts and their subjective construction, the adversarial process and the rigid legal reality in which it operates once again seems inadequate "to deal with all kinds of human problems."[199] Over and above the binary guilt-innocence outcomes and the few options available through the relatively rigid sentencing process,[200] perhaps the greatest inadequacy of the conventional criminal justice process *as a process of conflict resolution* is in regard to participation. Running alongside the restorative justice movement of the last three decades has been the consistent criticism regarding the lack of opportunity for victim participation in criminal proceedings.[201] Observers remark that "victims ultimately have no control over the adjudicative process or the outcome of the trial because all real decisions are made by the judge or prosecutor."[202] Christie poignantly remarks on the systemic state 'representation' of the victim in criminal proceedings, stating that the victim

> "is *so thoroughly represented* that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first *vis-à-vis* the offender, but secondly and often

[197] See e.g. Bree Cook, Fiona David & Anna Grant "Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia" (1999) 19 RPPS Australian Institute of Criminology at 62, 111 (discussing Victim Impact Statements and their 'tokenism').
[198] Howard Zehr, Fact Sheet: Fundamental Concepts of Restorative Justice (1997) National Institute of Justice.
[199] Menkel-Meadow et al, *supra* n89 at 4.
[200] Simmons, *supra* n149 at 975.
[201] See e.g. Peggy M Tobolowsky "Victim Participation in the Criminal Process: Fifteen Years After the President's Task Force on Victims of Crime" (1999) 25 NEJCCC 21 at 21.
[202] Simmons, *supra* n149 at 916.

> in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state [emphasis added]."[203]

In a similar, but less explicit appropriation-via-representation, the offender is also displaced from the process as his case is assumed by a professional who resolves his case "through dialogue, negotiations, and argument of legal professionals, a process in which he is only involved to the degree his attorney feels he should be."[204] The norm of plea bargaining begets further distance, being a process of language and strategy "in which defendants almost never participate."[205] Even in the trial environment, however, the defendant (as with the victim) "only participate[s] in a very limited way, by testifying as witnesses under strict and formal rules."[206]

These exclusions go beyond the procedural, extending to the emotional and psychological elements of conflict resolution as well. Highlighting the implications for the inter-personal relation of stakeholders in the conflict, Christie says that "the victim is so totally out of the case that he has no chance, ever, to come to know the offender. We leave him outside, angry, maybe humiliated through a cross-examination in court, without any human contact with the offender. He will need all the classical stereotypes around 'the criminal' to get a grasp on the whole thing."[207] For the offender, this distancing is even starker as "[t]he offender is positioned outside of society, as in *People v. Offender*, and has every incentive to reject the concerns of society for those of his own self-interest...Furthermore, throughout the procedure, the offender is discouraged from taking responsibility for the act and is instead encouraged to engage in exculpatory strategies."[208] With this procedural and psychological distance, "the stereotypes and rationalizations that offenders often use to distance themselves from the people they hurt...are never challenged."[209] In

[203] Christie, *supra* n9 at 3.
[204] Hill, *supra* n156 at 9.
[205] Simmons, *supra* n149 at 949.
[206] *Ibid*.
[207] Christie, *supra* n9 at 8.
[208] Hill, *supra* n156 at 8.
[209] Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice,* (Waterloo, ON: Herald Press, 1990) at 16.

contrast with these exclusionary practices, inhabitants of conflict's discourse are of the view that "conflicts represent a potential for activity, for participation," as well as "pedagogical possibilities."[210] Accordingly, the dominant adversarial criminal procedure represents a lost opportunity to involve individuals in an important and potentially beneficial facet of life – the resolution of conflict.[211]

In recognizing this potential within conflicts, and in contrast with the conventionally exclusive state practices, restorative justice is "grounded in the belief that those most affected by crime should have the opportunity to become actively involved resolving the conflict."[212] Accordingly it is the parties themselves that are the central focus of the process and are empowered to resolve the conflict.[213] In order to facilitate this, restorativists promote the idea that "conflict resolution surrounding criminal behaviour should be cooperative rather than adversarial."[214] Together then, the parties negotiate restitution.[215]

Through this process, restorative practices are guided by "operational values" such as empowerment, inclusion, collaboration, and encounter.[216] Restorative practices, such as victim-offender mediation, are therefore designed to be flexible, interactive, and self-determinative – both in terms of process and outcome. VOM exemplifies this, with its process empowering the stakeholders through being informal and generally "without lawyers or judges present."[217] These practices are therefore a dramatic change to the way in which criminal conflicts are resolved in the purely legal framework. Indeed restorative justice "focuses on the process as much as –and perhaps more than – the outcome. [It allows] both the victim and defendant an opportunity to do what the traditional criminal justice system denies them: the ability to tell their stories to each other directly and to work together to [resolve the

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[210] Christie, *supra* n9 at 7, 8.
[211] *Ibid* at 7.
[212] Umbreit et al, *supra* n146 at 255.
[213] Zehr, *Little Book,* supra n15 at 37; Simmons, *supra* n149 at 957.
[214] O'Hara & Robbins, *supra* n169 at 202.
[215] *Ibid* at 204-205.
[216] Van Ness, "Overview," *supra* n170 at 5.
[217] Simmons, *supra* n149 at 946.

conflict]."[218] This collaboration places emphasis on the shared relationship of those with a stake in the conflict and often seeks a transformative effect on that relationship.[219] This dynamic and cooperative resolution can be considered a process of "creating justice,"[220] rather than administering it. In facilitating conflict resolution, restorative justice "imagines, and seeks to bring about, a system of justice which is responsive to the vicissitudes and dynamism that characterize individual experiences of crime."[221]

1.3.4 Confronting the Dominant Discourse

In looking at restorative developments in modern day criminal justice, it is apparent that they offer an approach unlike that of the conventional legal agenda. It is worth reiterating, however, that this approach should not be understood solely in terms of procedural adjustment. Restorative justice goes beyond an alternative *approach*, and includes an alternative *understanding* of criminal wrongs as well an alternative response.[222] As such, it is much more fundamental than a "change in sentencing policies."[223] Whereas previous "criminal justice reform movements have often dealt primarily with fine-tuning the existing structure...restorative justice...has major implications for system-wide change in how justice is achieved."[224] This can be said to be through the process of "creating"[225] justice: a justice not meted, but one that is achieved "when the needs of the primary stakeholders are met to the extent possible."[226] Accordingly, restorative justice "is not concerned with using criminal punishment to re-constitute a pre-ordained order; restorative justice is concerned with restoring individuals and communities which, by definition, consist of *local*

[218] Simmons, *supra* n149 at 947.
[219] Umbreit & Greenwood, *supra* n151 at 17.
[220] Umbreit et al, *supra* n146 at 254.
[221] Hill, *supra* n156 at 1.
[222] Van Ness, "Overview," *supra* n170 at 13; Simmons, *supra* n140 at 944 (representing a "serious paradigm shift").
[223] Simmons, *supra* n149 at 947.
[224] Umbreit & Armour, *supra* n14 at 68.
[225] Umbreit et al, *supra* n146 at 254.
[226] Paul McCold, "Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model" (2000) 3 Contemp Just Rev 357 at 361.

orders of meaning [emphasis added]."[227] In seeking these localized meanings, restorative justice dislocates the rigid legal framework in favour of flexible interactive environments.

Through this "radical re-visioning," conflict's discourse emerges – a discourse that is "less rigid in its formalism and more agile in its application," one that "recognizes value of alternatives and embraces multiplicity."[228] As this discourse emerges – and to the extent that it emerges – with its own values, norms and language, it necessarily displaces the dominant legal construction of the 'criminal' world. Accordingly, it constructs its own world, with its own subjects. Effecting this displacement, restorative justice "[enacts] an inversion of the priorities of traditional legal discourse,"[229] emphasizing private, local needs over public, state needs. Attending to these private needs, it "emphasizes the historical, social, institutional, cultural, and ultimately constructed and constructive nature of the individual subject as opposed to the universal and transcendent subject of traditional legal discourse."[230] Considering this specificity, "the richness and complexity of restorative justice cannot be expressed," nor understood "in the vocabulary of...traditional legal discourses."[231] It is through this localization of focus and complexity of vocabulary that conflict's discourse "construct[s] the subjects and the worlds of which [it] speak[s]."[232]

Enabling this discourse then, is the space created for it by the recession of state determination. As crimes are submitted to processes such as victim-offender mediation, they are usually diverted away from future procedures and prescriptions of the state legal framework.[233] As seen above, this diversion occurs at varying points in the criminal process, and predominantly at "pre-disposition" phase; in other

[227] Hill, *supra* n156 at 31.
[228] *Ibid* at 1, 2.
[229] *Ibid* at 1.
[230] *Ibid* at 2.
[231] *Ibid* at 30.
[232] Lessa, *supra* n17 at 285.
[233] Umbreit & Greenwood, *supra* n151 at 9.

words, before the state itself decides what the response should be.[234] The U.S. national survey conducted by Umbreit and Greenwood indicated these figures at anywhere from 65-72%.[235] Some of the time, in less serious property crimes or with first-time juvenile offenders, "VOM programs enable the victim and offender to circumvent the criminal-justice system altogether."[236] To this effect, some jurisdictions have granted police discretion to decide how to proceed using restorative practices.[237] At any pre-disposition stage, however, negotiated settlement leads to 'legal' prescriptions taking a secondary normative position.

In most cases, the criminal justice system is not avoided entirely, and a criminal action is brought by the prosecutor's office before it is diverted to mediation.[238] Accordingly, dismissal of that action relies on the discretion of the state, and ultimately any resolution must be acceptable in its view for that dismissal.[239] In spite of restorative justice's "de-emphasis of the role of the state in criminal justice matters," the movement has nonetheless emerged into a world where crimes are 'state-owned', and it remains a political reality that to a large extent its programs "usually operate under the aegis of state supervision."[240] With this in mind, the state is "unrepresented" at the mediation table but might nonetheless be influential.[241] This isn't to say, however, that conflict's discourse is inoperative – rather, simply qualified. Once again the emergent discourse is 'informed' by the dominant legal framework – at least to a certain extent. Once again the political reality is one of interdiscursivity.

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[234] *Ibid*.
[235] *Ibid* (combining 'prior to court','diversion', 'post-adjudication, pre-disposition', with the range consisting of 'at various points').
[236] O'Hara & Robbins, *supra* n169 at 201.
[237] Van Ness, "Overview," *supra* n170 at 6 (The New Zealand *Children, Young Persons and Their Families Act 1989*, for example, allows police to refer juveniles to family group conferences, or have them make apologies, conduct community service or pay restitution; in England, the Thames Valley Police are themselves trained to conduct conferences with the relevant parties).
[238] Simmons, *supra* n149 at 952.
[239] *Ibid*.
[240] *Ibid*.
[241] *Ibid* at 953.

With this in mind, it might be tempting to speak of the state as granting the space rather than conflict's discourse demanding it, but to do so would underestimate the extent to which conflict's discourse has presented itself as a coherent and legitimate way of constructing the world. Safely, it would suffice to simply recognize a political and discursive interplay at work. After all, the emergence is what we are concerned with here, and not specifically its causation. In any case, this is a significant departure from the traditional state monopoly over criminal justice. In that departure "[a] discernible movement towards a 'private' as opposed to public ordering of the criminal process may be occurring."[242] With restorative practices becoming all the more prevalent, as well as expanded to mediate increasingly serious and complex crimes, the movement is gaining momentum. This alternative may not have completely displaced the legal framework, but it is certainly gaining ground. In this way, "[t]o the extent that [mediation] displaces traditional criminal proceedings, it transmutes the criminal matter into one susceptible to private dispute settlement," and in other words re-imagines the criminal wrong as a conflict. [243]

1.4 Merging the Streams and Following its Course

Over the last four decades, two separate streams of thought have emerged in distinct regions of the legal landscape. On one side, we have seen the trend of Alternative Dispute Resolution spring forth through a flurry of activity and entrench itself as a leading framework for the construction and resolution of civil disputes. On the other side, the Restorative Justice movement has flowed, perhaps more quietly, but nonetheless establishing itself as legitimate model for the consideration of criminal wrongs and their processes of redress. Though having different rates of growth, with ADR being in something of a "young adulthood"[244] and restorative

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[242] Helen Fenwick, "Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?" (1997) 60 Mod L Rev 317 at 318 (discussing the call for victim participation generally).
[243] O'Hara & Robbins, *supra* n169 at 205-206.
[244] Stempel, *supra* n38 at 309.

justice “still in its infancy,”[245] these two developments have both grown to a point of considerable sophistication.

Despite their distinct points of origin, these two streams have remarkable parallels in the way they view both their objects and the role of their participants. Taken together, they constitute a novel discourse of conflict and conflict resolution. This discourse goes beyond the terminological, embodying a new system of thought with its own values, practices, language and morality – a discourse distinct from its legal counterpart, a new paradigm unconstrained by positivist legal constructions. This emergent discourse thus transcends the traditional legal distinctions, and represents a departure from the conventional legal understanding upon which those distinctions are based. Within this reality, the two streams bleed into one another, forming a single worldview. As such, a new lens through which to see the world of disputes is created.

Through that lens, legal wrongs are seen to be reductionist, excluding valuable interests that do not fall within law’s narrow scope, their processes of redress viewed as rigid and exclusionary. In conflict’s discourse however, respective ‘wrongs’ have been re-imagined as conflicts, and embraced for their multiplicity. Both ADR and restorative justice have therefore acted as mediums for the expression of conflict’s discourse, embodying values and creating practices reflective of the nature of conflict – dyadic, subjective, and dynamic; a clash of interests, necessarily constructed through those interests and their holders. Within this discourse, civil and criminal wrongs are no longer seen as such; no longer distinct legal conceptions, but now commensurable interpersonal conflicts. By recognizing them as broader and more complex, the conventional legal frameworks designed to address these conflicts have too been seen as inadequate – both in their constructions of wrongs as well as their processes of redress. Accordingly, both streams have resulted in more dynamic systems of creative conflict resolution in lieu of binary systems of adjudication. If one is able to see past the inherited terminology that colours ‘offenders’ and ‘victims’

[245] Simmons, *supra* n149 at 911.

within the criminal stream, they too are recognized simply as stakeholders in a conflict.

Significantly, where the legal frameworks have been found wanting in regard to the expanded complexity of 'conflict', those frameworks have in part been demoted to a secondary normative position.[246] In both streams conflict has been, to a very real extent, removed from state control. To this extent, disputes are often no longer the province of adjudication and legal prescription. As outcomes become a matter of negotiation and self-determination, the legal construction and its administrators are no longer determinative, but instead merely inform private decision-making. With this, the re-imagination of legal wrongs as conflict has seen an accompanying movement towards the *privatization* of conflict. As public criminal wrongs are relinquished to private stakeholders, and already-private civil wrongs are further privatized by being removed from the public court system, the public system of law has been challenged as the intermediary of disputes, and an "erosion of the public realm"[247] of conflict resolution has become apparent.

In this way, the emerging discourse has presented not only normative, but political challenges to the dominant legal discourse and its prescriptions. Of course, the emerging discourse does not simply replace the legal discourse. As the two worlds collide in both theory and reality, competition necessary occurs for both normative primacy as well as the practical determinative right to resolve conflicts. Succinctly, this can be understood as occurring between a public, state-designed system of law, and a private, self-determinative system of conflict resolution. As will be seen going forward, this encounter between these two ways of understanding, and managing, conflict gives rise to new questions whose answers may have serious ramifications for the organization of legal wrongs.

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[246] See discussion above at 2.2.4 *Challenging the Dominant Discourse.*

[247] See generally, David Luban, "Settlements and the Erosion of the Public Realm" (1994) 83 Geo LJ 2619 [Luban].

CHAPTER 2

OWNERSHIP OF CONFLICT: EMERGING QUESTIONS AND A THEORY TO FRAME THEM

2.1. A New Paradigm and a New Question

In exploring the emergence of conflict's discourse, its foundation is quite noticeably at odds with the traditional paradigm of public law. With great emphasis on party involvement and control of both procedure and content, stakeholders are understood to be central in defining the scope of conflict as well as creating its resolution – without being chained to prior legal designations or conceptions. In short, conflict's discourse is both normatively and practically rooted in self-determination. In considering these developments, it is clear that they represent more than mere procedural adjustments to the existing legal framework, but go further to include a number of significant conceptual and normative changes at the very pillars of the legal system. With these changes come new fundamental aspirations for the law as a normative framework. New conceptualizations of the law's objects and methods here have been tightly bound with changing notions of justice and its requisite legitimacy. Accordingly, the conventional legal discourse has encountered stark challenges to both its practical and philosophical premises.

In the legalist model, legal wrongs might be understood to exist in a standard sense, that is, as conceptions that exist apart from any given situation. The need to administer 'justice' on a mass scale, and from a centralized position, has of course led to the categorization and 'definition' of legal conflicts. These conceptions, of both civil and criminal designations, themselves trigger in any hypothetical exercise a particular response prescribed by law. The law of civil wrongs operates according to

the "principle that for every right there is a remedy;"[248] similarly, the criminal law is based on the notion that each given criminal offence requires a particular sanction corresponding in seriousness or nature.[249] Whether through calculations of damages or assessments of deservedness, the law ultimately seeks to provide an objective answer to questions of substantive justice given legally cognizable circumstances. This standard ideal of justice is reflected in what one author has called "the most general statement about justice," saying "that it requires that each gets his or her due" and "that it requires that relevantly like cases be treated alike."[250] Accordingly, the legal model, as *centralized* law, has long preoccupied itself with developing a standardized and objective conception of justice – embodied in an external assertion of what that 'due' is.[251] These standardized 'dues' are necessarily correspondent to particular legal visions of behaviour. In the conventional model of dispute resolution, the central question for a framework of law might be, in simple terms: *what ought the outcome be* for justice to be served?[252] Accordingly, adjudication in the legal model – with its application of public law – serves as an opportunity for a public vision of justice to be instituted.[253]

In contrast, the emerging discourse of conflict resolution disturbs this model, both by indicating a competing site for achieving 'just outcomes,' as well as by re-

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[248] John CP Goldberg & Benjamin C Zipursky, "Torts as Wrongs" (2010) 88 Texas L Rev 917, abstract at SSRN <online: http://ssrn.com/abstract=1576644> [Goldberg & Zipursky, "Torts as Wrongs"].

[249] See e.g. Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 Crime and Justice 55; Also, the use of mandatory minimum sentences or sentencing grids are a particularly strong example of this. See e.g. United States Sentencing Commission, *2013 Guidelines Manual, Chapter Five: Determining The Sentence,* online: United States Sentencing Commission <http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/5a_SenTab.htm>

[250] Matt Matravers, "The Victim, the State, and Civil Society" in Anthony Bottoms & Julian Roberts (eds) *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Collumpton: Willan, 2010) (p1-16) at 5.

[251] This preoccupation might be discerned out of the numerous "theories" of justice long informing state policy, such as corrective justice or just deserts, as well as the more-or-less standardized formulation of sentencing guidelines generally.

[252] Of course there are other questions, but as one civil commentator notes, "[q]uestions about what the defendant has done are ultimately subsidiary to questions about what the plaintiff is entitled to get." (Benjamin C Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Geo LJ 695 at 733). A similar outcome-based focus is apparent in criminal law, though focused instead on the defendant, with the sentence as imposing "justice".

[253] See generally Owen Fiss, "Against Settlement" (1984) 93 Yale LJ 1073; Luban, *supra* n247.

imagining the notion of justice itself. As self-determinative conflict resolution outside the legal machinery rises in prominence, the notion of a state monopoly on dispute resolution has been noticeably challenged.[254] With this, the legitimacy of the law's role as the arbiter of what is just has been questioned by the mere presence of an alternative source of justice. Relatedly, the very notion of 'justice' employed by conflict's discourse proves problematic for a state model of meting out pre-prescribed substantive justice. As many commentators have noted, negotiated justice as opposed to "imposed justice"[255] is more than a change in method, representing a new *conception* of justice.[256] Sought through more relational terms, justice is seen as the result of the negotiated, mutual deliberation by those subjective parties directly involved in the conflict – those with the greatest stake. This process and its participants are the very source from which justice derives its legitimacy, and thus form the basis for that which it produces. Justice – in this emerging normativity – might not be 'just' when externally imposed by those not properly placed to do so.

Consequently, it might be questioned whether a broader framework of law is positioned, either procedurally or philosophically, to make prescriptions regarding substantive justice in this emerging paradigm. Though it is commonly recognized that the changes outlined in the last chapter are an "indication of fundamental changes at work...in our concepts of justice and law,"[257] what is the extent of these changes? Is the question of substantive justice thus obsolete for lawmakers confronted with this alternate vision of private dispute resolution? Certainly this concern requires qualification. In developing a more comprehensive understanding of how conflicts ought to be resolved, one need not adopt an exclusive stance. Likewise, as both public and private justices exist in opposition, one need not completely displace the other. Of course self-determination might be the antithesis to public law in an

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[254] Otis & Reiter, *supra* n69 at 356-357.
[255] Otis & Reiter, *supra* n69 at 363.
[256] See e.g. Alexander, *supra* n13 at 6 ("different sort of justice"); Crowne, *supra* n100 at 1769 ("new paradigm of justice"); Sternlight, "ADR is Here" *supra* n131 at 304 ("beyond existing conceptions"); Zehr, *Little Book supra* n15 at 37.
[257] Otis & Reiter, *supra* n69 at 351-352.

extreme sense; however, the presence of competing normativity need not (and rarely does) result in uncompromised results. The encounter between the two fronts of justice – public and private – inevitably entails a negotiation as a new equilibrium is developed, the one ceding to the other where political climate directs.

Indeed, as the new paradigm has emerged, it has not proceeded without resistance.[258] The discord between the emerging self-determinative model and the inherently regulatory public legal model has resulted in debate over which conception ought to be subscribed to. Proponents of a "public view" of the justice system point to its broader, societal construction of justice, its potential to "engineer greater social good," and subsequently, its capability of "transforming society into something better."[259] Accordingly, implementation of public justice through the legal model facilitates societal design – whether through ordinary dispute resolution between individuals or a more dramatic "structural transformation" of bureaucratic institutions.[260] Private, non-legal resolution is thus opposed as it emphasizes private needs over broader public and societal good, and does not provide the public law opportunity to express how things ought to be.

In a society valuing liberty, however, the state cannot be afforded absolute discretion over conflict. Accordingly, at the point of contact between these two discourses, a political negotiation has necessarily occurred, creating new questions as to where, how, and why one discourse ought to be granted normative primacy over the other. In other words, the legal community has – in the face of conflict's discourse – had to decide which types of conflict to keep within the ambit of public management and its justice, and which to relinquish to private resolution. Thus, the

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[258] See especially Fiss, *supra* n253.

[259] Erik S Knutsen, "Keeping Settlements Secret" (2010) 37 Fla St U L Rev 945 at 954; Interestingly, the most pronounced defense of a public conception of the justice system occurs in the context of the private civil justice system: see generally Fiss, *supra* n253, Luban *supra* n247. This may however, merely be due to the fact that the privatization of dispute resolution is more far-reaching in civil justice than in criminal. Accordingly, both the increased 'threat' of the private view as well as the sophistication of the debate might account for this. Alternatively, given the historical association of criminal law as public law, this public conception may just be presumed within the literature.

[260] Luban, *supra* n247 at 2629 (situating Fiss' Against Settlement into a broader body of work).

problem must be framed in situational terms. With the presence of two competing paradigms, one rooted in public imposition of justice and the other in private construction, the most urgent question for a legal system cannot be '*what ought the outcome be?*' in a given conflict, but first '*who ought to decide the outcome?*'. Put another way, the debate becomes that of *whose* justice ought to be implemented. This question, as will be seen, is much more than a matter of selecting procedural venue. Rather, it is of great normative significance, piercing to the very foundations of what it means to undertake conflict resolution in a liberal society. In this way, the negotiation between public and private discourses very swiftly becomes a question of legitimacy, and ultimately, liberty.

This negotiation, its outcomes, and its rationale will be explored in more detail in Chapter Three; however, it is first necessary to develop a perspective with which that exploration can be framed and its results interpreted. To do so, this chapter draws upon a concept of 'ownership' as a way in which claims can be made over conflict and its resolution. By exploring the notion of 'ownership of conflict' and developing it as a critical constitutional framework, we can better understand the emergence of conflict's discourse and its practical implications; furthermore, we also equip ourselves with a new lens through which to see and critique the organization of legal wrongs along political lines. Here, then, we can answer the question of whose conception of justice ought to be granted primacy by first asking another: *who owns conflict?*

2.2 Owning Conflict? Toward a Theory of Ownership

Frequently, the notion of 'conflict' is thought of as simply a state of disharmony, an abstract label more descriptive than material. In 1976 however, Nils Christie delivered a soon-to-be influential lecture titled "Conflicts as Property," expounding the intrinsic value of conflict and alluding to what he saw as its 'proprietary' dimension.[261] Conflict, he suggested, ought not to be thought of as

[261] Christie, *supra* n9.

merely an ethereal state of affairs but rather a discernible "potential for activity," a tangible opportunity, capable of use, manipulation, and self-determinative exercise.[262] In this view, it is the "*conflict itself*" that is the property, rather than simply the fruits of its resolution.[263] As property, this interpretation inevitably provokes the notion of ownership, and importantly for both Christie's work as well as this thesis, the potential for (mis)appropriation of that conflict. With this perspective, one is able to look beyond having rights *within* conflicts, but rights *to* conflicts. In order to begin to appreciate the implications and utility of the notion of ownership however, it is necessary to first explore what the term entails, considering both how it is used as well as how it *can* be used in order to best fulfill the analytical purposes sought here.

Christie himself did not expressly define a notion of ownership, instead highlighting the practical possession of the property and its consequences. In this intellectual endeavour, he himself was much less interested in developing a precise concept of ownership than he was of using its inference to illustrate the state of dispute resolution and suggest an alternative. Beyond that, Christie's speech – by his own admission – represented "the *beginning* of the development of some ideas, not the polished end-product."[264] The notion of ownership was thus left to be explicated more fully by those to follow. Though not providing the reader with a concrete understanding, his work does serve as a source from which a richer understanding can be extracted. A closer look at both his work as well as that of later authors reveals possible inferences of two different senses, each representing a different conceptualization of ownership. Accordingly, the task at hand is not about determining what ownership *means* but rather clarifying the ways in which conflict

[262] *Ibid* at 7-8.
[263] *Ibid* at 7.
[264] *Ibid* at 2 [emphasis added].

might be owned as 'property', allowing for more conscious and deliberate application.[265]

2.2.1. Law and Morality: Descriptive and Normative Ownership

In its most general usage, and perhaps most straightforwardly, ownership might be conceptualized in a legal sense, that is, the legal *entitlement* to use and dispose of property as one sees fit.[266] In terms of ownership of conflict-property specifically, this would entail using and disposing of *conflict* as one so chooses. In other words, ownership here would be the legal discretion to make those decisions regarding the handling of conflict, such as the decision regarding what one would accept or perform in exchange for resolution of the conflict at hand. Further, as an aggrieved party, it would also entail the freedom to choose whether – and how[267] – to pursue a course of conflict resolution. As legal ownership, it would also include the power to exclude others from making these decisions, as well as to delegate one's discretion. In short, ownership in this sense is understood as a *legal* entitlement to self-determination regarding conflict's pursuance and resolution. As one author notes, however, ownership in this sense is a socially constructed "legal fiction," and does not necessarily reflect the subjective moral perception of those party to the conflict in a non-legal sense.[268]

Recognizing this, a second sense of the term has been evoked in order to address this potential discord and mark non-legal 'rights' that would otherwise go unacknowledged. Consequently, in both Christie's work as well as in much of the literature since, the notion of 'ownership' has also been used in a way distinct from

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[265] The exploration here will be limited to understandings of ownership in an *entitling* proprietary sense, and will not seek to address the notion of ownership as 'having responsibility for' as is used in some literature; see e.g. Ross Homel et al., "Preventing Alcohol-Related Crime Through Community Action: The Surfers Paradise Safety Action Project" in *Policing for Prevention: Reducing Crime, Public Intoxication and Injury* (Monsey, NY: Criminal Justice Press, 1997) at 49.
[266] See e.g. Jonathan Law & Elizabeth A Martin, *A Dictionary of Law*, 7ed (Oxford: Oxford University Press, 2009*), sub verbo* "Ownership" ("The exclusive right to use, possess, and dispose of property").
[267] E.g. Whether to submit the dispute to formal legal processes as opposed to informal negotiations.
[268] Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Westport, CT: Praegers Publishers, 2007) at 188.

the stricter legal sense, both in consequence as well as conceptualization.[269] Such a notion was evident in Christie's work as he demonstrated a critical disposition toward systems where "conflicts have been taken away from the parties directly involved and...have...become other people's property," in spite of the 'legality' of that transfer.[270] Similar critiques are evident in later literature as well, signifying what might be understood as a conceptualization of ownership in *moral* terms.

The notion of moral ownership of conflict thus can be understood as having a *moral right* to use and dispose of conflict.[271] These rights, then, are not those resulting from positive legal conferral but are rather understood as naturally occurring as a result of one's position in relation to the conflict at issue. Christie reflected this idea, saying that "[c]onflicts ought to be used... [a]nd they ought to be used, and become useful, for those originally involved in the conflict."[272] The notion of moral ownership, however, has not been limited in assignment to those immediate stakeholders, but has by some been used more broadly to encompass a wider population; Christie himself spoke of conflicts as "neighbourhood-property,"[273] and the notion of "community ownership" of conflict is widespread.[274] In this sense, and unlike their legal counterpart, moral rights are not necessarily exclusive. Accordingly, a discussion of moral ownership in a shared situation might entail a more specific mention of a particular individual or group having moral *primacy* where their entitlement outweighs others'. Speaking of 'having moral ownership' of a conflict

[269] See e.g. *Ibid*.
[270] Christie, *supra* n9 at 1 and 3*ff* (referring to public officials as 'thieves' despite the fact that the law demonstrating their legal rights).
[271] The connotation of this version of ownership might resemble that of 'natural rights' in the sense that it is one that all parties would have, without any additional pre-conditions needing to be satisfied, and as well are not requiring conferral through political action (see HLA Hart, "Are There Any Natural Rights?" (1955) 64 Philosophical Rev 175 at 175). The term 'moral' was chosen here as more flexible, however, simply suggesting a claim based on what is sensed to be 'right' rather than one necessarily rooted in the philosophy of natural rights. This broader use accommodates a potential understanding that the state might be said to share moral rights with primary stakeholders as representatives of a broader polity (perhaps with the polity itself having 'natural rights'), whereas conferring 'natural' rights upon the state or a 'neighbourhood' may entail some philosophical difficulty;
[272] Christie, *supra* n9 at 1.
[273] *Ibid* at 12.
[274] See e.g. Auerbach, *supra* n18 at 117.

despite other relevant stakeholders (in whatever degree) may in actuality just mean having proprietary primacy.

Moral rights are evidently *normative*, indicating who *ought to have* determinative right, in contrast to their legal counterpart, whose nature is externally *descriptive* of a legal entitlement, that is, who *does have* determinative right under the law.[275] Though moral rights are not conferred by law, they are conferred by a particular normative position or assessment. Thus, the distribution of ownership in this sense – and the degree to which it is exclusive or shared – could of course vary according to differing normative bases. Noticeably, this sense of ownership conveys information unexpressed by that of the legal sense. It is important, then, to recognize the notion of moral ownership and consider the dimension which it conveys, rather than dismiss it as simply not 'real' ownership.

2.2.2. Using Ownership as a Critical Framework

In looking at the different uses above, it is apparent that each denotes a different meaning. It ought to be recognized, however, that despite these differing meanings, they are not necessarily competitive; rather, they each speak to a different "level of analysis."[276] The legal interpretation of ownership can be understood as a descriptive indicator of where determinative rights actually lay, whereas the moral interpretation can be understood as a normative indicator of where they ought to.[277] Logically, these are independent assertions. As Bergstrom points out, "there is a logical gap between 'is' and 'ought'; this means that from [premises] about the way the world is, nothing can be derived about the way things ought to be."[278] Likewise, normative premises offer no descriptive information. Both of the meanings above thus pertain to a separate dimension of ownership and thus possessing unique

[275] Lars Bergström, "The Concept of Ownership" in Nordic Council of Ministers, *Who Owns Our Genes? Proceedings of an International Conference*, October 1999 (Tallin, Estonia: The Nordic Committee on Bioethics, 2000) at 4 (distinguishing between legal entitlement being descriptive from a perspective *external* to the particular legal system, looking in, and a partially normative *internal* perspective).
[276] *Ibid* at 2-4.
[277] *Ibid* at 3.
[278] *Ibid*.

expressive utility. Each notion communicates information that the other cannot, and are thus invaluable independently, offering answers to different questions.[279] In this semantic exploration then, it is intended here not to say which way ownership should be conceptualized, but rather point out that both have their unique uses and thus each warrants consideration.

On a practical level, it is rather important that each sense be given such consideration. In addressing legal ownership in the context of sexual offences, Amanda Konradi explicitly objects to it as the sole conceptualization, positing that "if we think of ownership of crime in this way – as something only one party can have at a time...it restricts how we think about 'injuries' as well as how we treat [relevant parties without legal ownership]."[280] Recognizing the fact that legal ownership does not preclude moral ownership from resting elsewhere, Konradi here draws attention to the dangers of considering but one dimension. The result of thinking about ownership in such binary or singular terms, she suggests, is a restricted understanding of ownership and its context. Indeed, adopting a legal conceptualization of ownership may lead to the dismissal of relevant stakeholders who do not have a legally 'proprietary' claim, but only to the extent that a legal claim to ownership *displaces* a moral claim to ownership as the only variable of consideration. It might be prudent to adjust her claim to say that if we *only* think of ownership in this *legal* sense, it might lead to such problems.

With this, it seems *imperative* that one conceptualization does not displace another. As noted above, it is entirely possible that different notions of ownership point to different possessors of those rights. It is precisely this discord which demonstrates the importance of maintaining multiple conceptualizations if the notion of ownership is to have use as a site of critique. Both the potential divergence of possessors, as well as the importance of being conscious of both indicators, is

[279] See e.g. *Ibid* at 4-5

[280] Konradi, *supra* n268 at 188 (Konradi is here objecting specifically to the exclusive nature of legal ownership as it is bestowed upon the state rather than victim in rape cases; thus the language "one party...at a time" refers to a binary state of public vs. private ownership).

succinctly illustrated through an example by Frank Snare, who noted that "[a] slave's hand is his hand – whose else would it be? – and yet it is his master's property, not his own. Whatever arguments there are against the institution of slavery have to be based on moral considerations... Slavery is immoral but not self-contradictory."[281] The divergence between a moral right to self-ownership[282] and the legal right of property is evident here. Moreover, this example illustrates the importance of being aware of, and making explicit, both of ownership's senses. To think of ownership as purely legal, here as elsewhere, would be to assess its state as purely sound whilst ignoring the moral questions at play; similarly, to speak simply of one's moral claim to self-ownership would be to do so ignorant of legal power structure. It is only through the interplay of moral and legal rights, their mutual suspicion, that one can take a critical stance. Within any normative reality, a system of law ideally ought to align these notions of ownership in order to bring law into accordance with the normative position it seeks to enforce. In such a way, moral ownership ought to inform legal ownership.[283] It is by checking legal empowerments against moral sense that the law is subject to critique. Consequently, to set aside one dimension of ownership is to disable one's ability to be critical about its aggregate state. Going forward, it is important that both legal and moral claims to ownership receive close attention, not only as they exist in the conventional model of dispute resolution, but also as they appear anew in the emergent discourse.

2.3 Ownership of Legal Wrongs in the Conventional Model

In furthering an understanding of ownership of conflict, the recognition of current ownership conditions can be useful in serving as a practical illustration of what ownership entails. Further, a review of the state of current distribution of

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[281] Frank Snare, "The Concept of Property" (1972) 9 American Philosophical Quarterly 200 at 200.

[282] See e.g. John Locke, "Essay Concerning the True Original Extent and End of Civil Government" (1690), reprinted as CB Macpherson (ed), *Second Treatise of Government* (Indianapolis: Hackett Publishing, 1980) at 19 ("every man has a *property* in his own *person*: this no body has any right to but himself").

[283] Given that moral ownership is not necessarily exclusive, it might be said that moral ownership ought to trigger legal ownership for those who have moral primacy.

ownership is necessary as a reference point for a critical exploration going forward. Referring back to the understanding above, ownership entails both legal and moral dimensions, and both of these must be considered here as well. Given the subjectivity involved in moral assessments of ownership, the brief review here will seek to assess moral ownership as that discerned from the legal system's own internal position; that is, through its own existing structural operation and justification. Accordingly, moral and legal ownership in the conventional model will be taken to be aligned and self-declared, if only due to centuries of its own self-assurance.

In considering legal wrongs in the conventional model, it has long been established that there can be said to be two "species" of wrongs at law, referred to here as civil and criminal wrongs, but also referred to generally as torts and crimes, or in a sense foreshadowing our investigation here, private wrongs and public wrongs.[284] Both of these species are of equal concern for our purpose, though in this exploration, it is useful to begin with examining the ownership of criminal wrongs. In doing so, the normatively loaded character of criminal wrongs serves to illuminate a number of normative considerations relevant to the ownership of legal wrongs more generally. Using these considerations as contrast, more can be discerned about civil wrongs through the very absence of the application of these justifications to non-criminal conflict. Accordingly, this examination begins with outlining the legal and moral ownership of crime.

2.3.1. Ownership of Criminal Wrongs in the Conventional Model

Legally, criminal conflicts are quite noticeably under state ownership. Though private individuals may play a key role in the detection and confirmation of criminal conflicts – through notifying the authorities or serving as witnesses – the legal rights

[284] William Blackstone, *Commentaries on the Laws of England In Four Books*, 5th ed v.3 (Oxford: Clarendon Press, 1773) at 2 [Blackstone, v.3]; It is also worth noting that though torts and civil wrongs are often used interchangeably, the 'civil wrong' designation can also refer to breach of trust and contract, Glanville Williams, *Learning the Law*, 10th ed (London: Stevens & Sons, 1978) at 12, and though our purposes here will be restricted to considering torts, some of the discussion may also be naturally applicable to other 'civil wrongs'.

to control these conflicts in line with our definition above are very much state-possessed.[285] The state seeks out criminal conflicts on its own initiative through public police forces, and though the reporting of crime by private citizens may assist in this endeavour, efforts of state detection are very much independent of this individual involvement.[286] Importantly, the decision to pursue the criminal wrong rests with the state "[i]n all but exceptional circumstances."[287] State prosecutors "are responsible for deciding *whether* a person should be charged with a criminal offence, and if so, *what that offence should be*."[288] In this way, the state not only chooses whether to pursue but also frames the conflict as it deems appropriate. Beyond this, the state's ownership operates more dynamically than merely through deciding whether to submit the conflict to court-administered legal process, as state actors have the power to enter into plea bargaining and come to agreements outside of formal processes and supervision.[289] In such a way, the state has ultimate discretion in how to proceed with any given conflict, whether by foregoing prosecution or addressing the wrong by formal or informal means.

In considering this state ownership of criminal wrongs, it is crucial to go beyond legal designation and consider as well those justifications giving rise to the state's moral ownership of crime. In order to do so, one must consider those designations assigned to the category of criminal wrongs as a body that make it

[285] SE Marshall & RA Duff, "Criminalization and Sharing Wrongs" (1998) 11 Can JL and Jurisprudence 7 at 15.
[286] *Ibid*.
[287] Matravers, supra n250 at 6.
[288] The Crown Prosecution Service (UK), "The Decision to Prosecute" <online: http://www.cps.gov.uk/victims_witnesses/resources/prosecution.html#a02> [emphasis added]; see also Marshall & Duff, *supra* n285 at 15 ("whether it is brought, and how far it proceeds, is up to the prosecuting authority").
[289] In Canada, see e.g. Department of Justice, "Plea Bargaining in Canada", <online: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3_3.html> (noting "there is still no formal process by means of which Canadian courts are required to scrutinize the contents of a plea bargain"); Though, regarding supervision, compare with U.S., Federal Rules of Criminal Procedure 11(e)(2) ("[T]he court may accept or reject the agreement"); United States Sentencing Guidelines § 6B1.2(a) ("In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges **...** the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing").

morally necessary for the state to intrude, rather than allow private individuals to have control. This involves giving attention to both the qualitative imagining of criminal wrongs as well as the response imagined to be necessitated by those qualities. Though this exercise could itself be the subject of a thesis, the purposes here require only a more general exploration. In this spirit, it is suggested that the state's moral ownership of crime – within the conventional model – rests on three separate but interrelated premises: (i) *viewing criminal wrongs as a matter of governance*, (ii) *viewing criminal wrongs as requiring 'true' justice*, and (iii) *viewing criminal sanctions as requiring the state's legitimacy*. In other words, it is these premises through which the state makes its moral claim to ownership.

First, state moral ownership might be understood to be the result of envisioning criminal wrongs as a matter of governance or representation – a premise evoked through the label of crime as "public wrongs."[290] Within the conventional model, the state maintains moral ownership of criminal conflicts in that "crime is considered to be an offence against society as a whole,"[291] and thus affecting the broader polity. Accompanying this interpretation is the principle that the state therefore ought to have ownership over "those kinds of wrongs which are matters of public concern, and which therefore require a collective response from the whole community."[292] The state, as representative and government of that broader community, is thus charged with its management. This notion is reflected in the assertion that the state "does not prosecute the case on behalf of the victim, but on behalf of the public."[293] Prosecutorial guidelines regularly contain explicit criteria to consider in deciding whether prosecution of an alleged offence is in the *public* interest; the attitude of the victim is merely one of many factors to consider, and

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[290] See e.g. William Blackstone, *Commentaries on the Laws of England*, 5th ed, vol. 4 "Of Public Wrongs" (Oxford: Clarendon Press, 1773) at 1.
[291] Department of Justice, Government of Canada, "Civil and Criminal Cases" <online: http://www.justice.gc.ca/eng/csj-sjc/just/08.html> [Gov't of Canada, "Civil and Criminal Cases"].
[292] Marshall & Duff, *supra* n285 at 7.
[293] Matravers, *supra* n250 at 6.

certainly not in a directive sense.[294] Indeed, this is further reflected in the fact that the "victim's consent is neither necessary nor sufficient for a prosecution to be brought."[295] Ultimately, as criminal wrongs are viewed as an offence that concerns the public as a whole, their management can be likened to public policy and governmental decision-making; the state must therefore be the one to control their resolution – not allowing private interests to govern public concerns.

Secondly, justification for the state's moral ownership of criminal conflict can be found in what might be perceived as the necessitation of 'true' justice for criminal wrongs. This notion might be related to what has been called an "instrumentalist" view of state control, envisioning the state as a more effective and assured means to a 'truly' just end.[296] Presuming the punitive aspect of criminal justice, the conventional model entails state ownership to ensure "that that those who engage in [criminal behaviour] are punished as they deserve."[297] Thus, ownership not only enables the state to ensure that *where punishment is deserved, it is assigned*, but also to ensure that *when punishment is assigned, it is that which is deserved*.

Within this justification is the rationale that "the state is more likely than other agents to determine accurately what a wrongdoer justly deserves"[298] or in other words, "better capable of determining the appropriate severity of sanctions."[299] In this way, the criminal law envisions a 'true' justice response for criminal wrongs, which the state is best placed or "most qualified" to determine.[300] Such a view stems from the idea that the state is more "deliberative and impartial" than private individuals or processes.[301] Explaining this rationale, Alon Harel notes that

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[294] See e.g. Public Prosecution Service of Canada, The Federal Prosecution Service Deskbook, Part V, at 15.3.2 (2005) <online: http://www.ppsc-sppc.gc.ca>.
[295] Simons, *supra* n4 at 719.
[296] Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions" (2008) 14 Legal Theory 113 at 118*ff*.
[297] RA Duff, *Trials and Punishments* (New York: Cambridge University Press, 1986) at 198.
[298] Harel, *supra* n296 at 113.
[299] *Ibid* at 118.
[300] *Ibid*, at 117 (referring to such responses as 'just' or 'appropriate').
[301] *Ibid*.

> "the state should be empowered to inflict sanctions on those who transgress the laws of nature because the state is less partial than alternative agents in its treatment of offenders and, consequently, less likely to inflict inappropriate sanctions. When individuals are called upon to inflict sanctions on their friends, they are likely to inflict sanctions that are too light. In other cases, motives of vengeance may induce individuals to inflict sanctions that are excessive."[302]

Evident in this view is the belief in a particular and singular response as 'just', as well as the moral necessitation of imposing that singular justice. To allow such wrongs to remain within the control of individuals would thus jeopardize justice through either allowing deserved sanction to go unapplied or an unjust sanction to be applied instead.

Finally, a third justification of state ownership, closely interrelated with the previous, is tied to the unique character of response envisioned for criminal wrongs – punishment.[303] As Marshall and Duff put simply, "crimes are punished: to ask what kinds of conduct should be criminalized is to ask...what kinds of conduct should attract punishment rather than merely formal censure or liability to pay compensation."[304] This recognition of criminal punishment as distinct in character from other legal 'remedies' thereby leads to another justification for state ownership. Criminal sanctions, as distinct from civil remedies, are viewed as the infliction of harm or pain upon an offender in a punitive spirit.[305] In other words, criminal punishment might be understood as a form of violence.

As violence, a response to criminal wrongs requires a certain appeal to legitimacy in order to retain its morality or justice. In this way, state ownership of criminal wrongs might be a corollary of Max Weber's interpretation of the state as the entity "that (successfully) claims the monopoly of the legitimate use of physical force."[306] This notion of moral legitimacy is evident in the conceptual distinction

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[302] Harel, *supra* n296 at 120 (discussing John Locke's largely adopted perspective).
[303] "Unique" insofar as punitive damages as a civil response are considered a derogation or an exception to classic tort law; See e.g. Simons, *supra* n4 at 719*ff*.
[304] Marshall & Duff, *supra* n285 at 17.
[305] See e.g. Harel *supra* n296 at 116 (following HLA Hart's characterization of criminal sanctions).
[306] Max Weber, "Politics as a Vocation" in Hans Heinrich Gerth & C Wright Mills (eds) *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958).

between punishment and mere revenge: the former being personally disinterested, principled, and appealing to some political authority.[307] As Binder indicates, "[t]o punish someone is not just to harm them, nor even just to harm them because of something they have done. It is to stake a claim to a certain kind of institutional authority."[308] This authority thus produces what might be considered "moral standing to punish."[309] To leave criminal conflict outside state ownership would leave them open to illegitimate response.[310] Accordingly, the conventional model maintains that in order for criminal sanctions to be moral or legitimate, it must be the result of the state's authority, and not left to private desire.

2.3.2 Ownership of Civil Wrongs in the Conventional Model

In stark contrast to their criminal counterparts explored above, civil wrongs are very much privately owned, that is, owned by those parties directly involved in the conflict. This is of course explicit in their traditional identification as "private wrongs."[311] This ownership, as suggested above, operates in both legal and moral dimensions. Legally, civil wrongs are controlled by private individuals from the earliest of stages. State police are not charged with the detection of torts, nor would they bring a reported tort to the law. In civil matters, "[t]he state does not impose liability on its own initiative. It does so [only] in response to a plaintiff's suit demanding that the defendant be so required."[312] Accordingly, any course of action in

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[307] See e.g. Leo Zaibert, "Punishment and Revenge" (2006) 25 Law and Philosophy 81 at 86*ff* (discussing Robert Nozick and others' attempt at a distinction); Guyora Binder, "Punishment Theory: Moral or Political?" (2002) 6 Buff Crim L Rev 1 (though Binder distinguishes between moral and political legitimacy, his political legitimacy may too be understood as a 'moral' legitimacy in that it stems from a claim that an act is proper according to the normative framework proposed by that political model).

[308] *Ibid* at 1.

[309] Stephen P Garvey, "Lifting the Veil on Punishment" (2004) 7 Buff Crim L Rev 443 at 456-457 (joining this moral standing to political legitimacy).

[310] Another theory holds that without the state adopting control of criminal sanctions, the individuals left to 'inflict' their own sanctions would no longer be sheltered from the "moral burden" of that violence: see generally Harel, *supra* n296.

[311] William Blackstone, v.3 *supra* n284; Gov't of Canada, "Civil and Criminal Cases" *supra* n291 (A more recent example, Canada's Department of Justice Website explains that "[a] civil case is another way of referring to a *private* case" [emphasis added]).

[312] Goldberg & Zipursky, *supra* n248 at 699.

respect to a civil wrong – formal or otherwise – comes at the voluntary initiation of a private individual involved, and only then. As Marshall and Duff indicate, this control continues throughout the entire process:

> "A 'civil' model puts the victim in charge. She is the complainant who initiates the proceedings against the person who (allegedly) wronged her; it is for her to carry the case through, or to drop it. This is not to say that the community has no role...But she is still in charge: it is for her to decide whether the case is brought and pursued, and whether the decision is enforced; there is no thought that she has a *duty* to bring a case. Moreover, the reasons why she might decide not to bring the case will remain private and could be quite arbitrary."[313]

Here, legal ownership over civil wrongs is quite evidently private.[314] The legal empowerments granted at law are thus merely *entitlements* to legal recourse if so desired, and there exists no obligation to bring forth a complaint of any civil wrong or even act on any judgement granted.[315]

This optional quality of civil wrongs is telling beyond legal ownership, and might be taken to give insight into moral ownership of civil wrongs as well. Distribution of the legal entitlements discussed above can be taken as indicative of their underlying moral counterpart. As Goldberg and Zipursky highlight, "only the defamed may sue for defamation, the battered for battery, the deceived for fraud, and so on. These statements actually mean something; they are not merely circular."[316] Implicit within this private ownership and its accompanying voluntariness is the notion that no significant public interests are engaged as to *require* public control over its outcome. Agreeing, Marshall and Duff suggest that those conflicts

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[313] Marshall & Duff, *supra* n285 at 15.

[314] As an aside, it is worth noting, in order to address the 'freedom to define the conflict' element of ownership mentioned above, that the plaintiff's restrictions to particular avenues of recourse within the civil court system – that is, particular arguments, evidence, and remedies – are collateral restrictions brought about by the voluntary choice of employing that system as a path of recourse. As Goldberg & Zipursky put it, these actions are "an attempt by the plaintiff to act against the defendant through the state" (*Ibid* at 739). The practical limitations of such a path of recourse (nor the practical limitations of foregoing that path) should not confuse the fact that it is but an option.

[315] Goldberg & Zipursky, *supra* n248 at 736 ("Tort law embodies the principle that one is *entitled to an avenue of recourse* against another who has committed a legal wrong against her" [emphasis added]); at 737 ("It may be that a plaintiff focused upon what the defendant 'deserved' would not sue, or would not execute on a judgment for all to which she was entitled."); and also at 739 ("The role of the state in a tort action is not to enforce a duty of the defendant's, but to empower a plaintiff with a claim.").

[316] Goldberg & Zipursky, *supra* n248 at 745.

that ought to rest within the civil law regime are "wrongs which are... properly the concern only of the private or individual victim."[317] Accordingly, civil wrongs can be understood in contrast to those 'public' criminal wrongs discussed above in that they do not entail governance. This can be taken to suggest that no particular response is *necessary* in the eyes of society. Should the parties wish to resolve the wrong on their own terms, such ought to be permitted. Should the parties seek formal legal redress, the state will be *prepared* to prescribe what is 'just,' however, this particular justice is not of such concern to society as to *require* it against the will of the parties. In this way, both legal and moral ownership of civil wrongs rests clearly with private individuals.

2.4 'Critical' Importance: Ownership as a Constitutional Issue

Going forward, it is necessary to situate the ownership of conflict within a broader political context in order to more fully understand its implications. Such an endeavour begins with considering the very basic conception of 'ownership'. The use of this conception is of course in the invocation of property *rights*, that is, the ability to assert one's rightful claim over some property. In other words, the notion of ownership serves to indicate legitimacy of possession and to delineate boundaries of interference by others. Ownership then, is inherently a relational concept, describing not only the relationship between an individual and property, but also relationships between individuals within a particular sphere.[318] In the regulation of these relationships, ownership functions by granting power to one individual within that sphere, first through the power to use one's property in a particular way, and similarly in the power to prevent others from exercising their own agency over that property.[319] Accordingly, beyond merely relational, ownership seems to be an

[317] Marshall & Duff, *supra* n285 at 7.

[318] Here 'sphere' refers to the realm of management of the property in question. It is helpful to think of management of property in this spatially limited sense, as the freedoms that accompany ownership are by no means absolute; the ownership of a gun, for example, does not permit it to be used in an illegal way.

[319] See e.g. Becky Mansfield, "Property, Markets, and Dispossession: The Western Alaska Community Development Quota as Neoliberalism, Social Justice, Both, and Neither" (2007) 39 Antipode 479 at 488

inherently *political* concept as well, regulating self-determination through assigning this power and its corresponding liberty.[320]

In looking at the distribution of ownership as it has been so far explored, a duality is evident: ownership of any given conflict lies with either the state or private individuals. In this way, the relationship governed through the assignment of legal ownership is that between the state and private citizens. Within this relationship, private citizens either assert their controlling entitlements to conflict resolution against their state, or it is the state that asserts its entitlements over its citizens. In this way, the ownership of conflict is recognizably a constitutional matter: a part of the "body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits."[321] Accordingly, the examination of legal ownership of conflict undertakes much more than an investigation of administrative differences, having at its core questions of great social and political significance. Private ownership can be understood as a site of liberty, and state ownership as intrusion into that liberty, either legitimate or illegitimate depending on the normative position from which it is viewed. In this way, a constitutional element is inherent in the (mis)appropriation of conflict with which Christie grappled.

In assessing this (il)legitimacy, the normative positions allowing for critique must obviously be exposed. The exploration above produced understandings of moral ownership wrought with their own philosophical underpinnings. In this constitutional perspective, positions of moral ownership might be seen as more than mere justification, instead taken to represent a political philosophy of sorts. As political philosophy, assertions of moral ownership, or at least those of a convincing nature, have use in both informing the constitutional design of governance, as well as

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(saying the "idea of ownership as *non-interference and individual control*...is the basis for many political and economic arguments about the importance of property" [emphasis added]).

[320] *Ibid* (acknowledging the notion of "ownership as freedom").

[321] David S Law, "Constitutions" (2010) in *The Oxford Handbook of Empirical Legal Research*, Peter Cane & Herbert Kritzer, eds (New York: Oxford University Press) 376-398 at 377.

critiquing that which deviates from their prescriptions. Moral ownership of conflict thus considers the validity of its legal counterpart, instigating ownership-as-a-tool-of-critique and the comparative consideration of legal and moral ownership discussed previously. Given ownership of conflict's constitutional importance, continual critique is evidently imperative.

As the starting point above, it was assumed that the conventional legal model was consistent in its assignment of moral and legal ownership in the creation of the criminal-civil distinction, and thus, according to that original normative position, had a legitimate legal distribution of ownership as well. As was noted in the first chapter, however, the normative position of the legal system has since been the subject of a moral and political challenge by the emergence of conflict's discourse. Accordingly, an evaluation of the state of moral ownership is required so as to keep the constitutional critique up to date.

2.4.1 In Search of a Constitutional Framework

Situated in reference to the above, the seemingly procedural question of when individuals are themselves permitted to resolve their own conflicts without resort to legal procedure and prescription becomes much more politically infused. In lieu of a mere procedural conflict, what can be seen is the competition between public and private views of justice; competition between a model of justice as the realization of social design and a model based on self-determination; competition between public and private ownership. As noted above, however, these competing normativities are not necessarily exclusive, just as – in the political understanding – governance and liberty compromise to co-exist; each having their place. In pursuing a further understanding of the emergence of conflict's discourse as well as its implications for the ownership of conflict, it is necessary to investigate this co-existence as it has so far been negotiated. Through this investigation, one can attempt to expose the current state of moral distribution as well as the principles that have so far directed the negotiation between normative fronts of justice.

Accordingly, in order to consider contemporary developments in a critical way and understand the potential impact of conflict's discourse, the project at hand requires an attempt to discern a political philosophy of sorts, or, in a more legal conception, a jurisprudence of ownership, of self-determination. In clarifying the rationale found within these developments, that rationale can be subject to greater scrutiny – either in its inherent defensibility or its consistency in application. By extension, discerning this political philosophy facilitates the ability to guide and critique the negotiation going forward. In considering the *experience* of the re-imagined 'conflicts' discussed in Chapter One – that is, where self-determination has been permitted and where it has been resisted – one can attempt this discernment. The next chapter proceeds with this in mind. For that reason, this thesis continues by exploring those situations in which individual self-determination has prospered, as well as where public visions of justice have been asserted. In doing so, the next chapter aspires to provide insight into changing moral ownership of conflict, and eventually, the corresponding implications for legal ownership.

CHAPTER 3

THE EXPERIENCE OF LEGAL WRONGS AS CONFLICT:

A JURISPRUDENCE OF SELF-DETERMINATION?

3.1 Experience as a Reflection of Moral Ownership

In the first chapter, attention was drawn to an emergent discourse, enmeshed in philosophical and social changes in the realm of dispute resolution, spanning both civil and criminal categorizations of legal wrongs. Within this emergence, legal wrongs have been re-imagined as interpersonal conflict, and understood in a more personalized sense: relational, subjectively constructed and more individually complex than a more generalized legal vision can account for. With this new perspective, stakeholders themselves have been envisioned as those most properly placed to resolve conflicts and fulfill their respective needs. Beyond that, understanding conflicts in this way has given rise to a new normative perspective which holds that affected parties ought to have increased control over those matters affecting them.

Reflecting on this in light of the theory of ownership outlined in Chapter Two, it is relatively clear that the normative stance of conflict's discourse can be interpreted as including a strong position on the moral ownership of legal wrongs. Within that discourse, it seems, moral ownership rests in the private sphere with those individuals most affected. One of the aims of this thesis, however, is not to simply explore ownership in the emerging discourse, but to understand its implications for the legal categorization of wrongs. In this regard, one cannot simply say that the legal order has remained unaffected, despite the fact that legal ownership has yet to be reorganized.

Instead, the exploration here must focus its attention toward moral ownership to detect the initial changes brought about by the emerging discourse's own moral assertions. To do so, this chapter observes the practical result of the encounter between the emerging discourse and the existing legal reality – that is, the legal community's relinquishment or restraint of legal wrongs as they are re-imagined as conflict. The particular 'experience' of conflicts within this encounter – their appraisal and subsequent treatment as either public or private – is then taken as evidencing a moral re-organization of conflicts. In other words, new attributions of moral ownership can be seen through the 'experience' of legal wrongs as they are taken out of their prior presumed legal designations and re-imagined as conflict.

3.2 Understanding 'Experience'

Through the above challenges from conflict's discourse, considerable political and legal changes have marked a shift toward the resolution of conflict by private individuals outside the prescription of state law and its agents. Through this shift toward privatization, the self-determination of individuals has been emphasized, consequently challenging law's position as the intermediary of disputes. With the growth of this trend, the socio-legal community has seen increased opportunity to engage with both theoretical and practical questions regarding the suitability of these re-imagined conflicts for self-determinative resolution. Legal wrongs which were once disposed of through standardized, public and legally-dictated court processes have now been thrust into what might be considered, in contemporary legal history at least, novel circumstances. In a very real sense, the dispute resolution field is learning as it goes.

As conflicts with both legally "private" and "public" designations alike have encountered this emergent discourse, ongoing assessments have had to be made regarding the capabilities of private individuals to properly resolve the variety of legal wrongs recognized in law. As well, questions regarding which conflicts ought to remain within the state domain have noticeably surfaced in doctrinal, academic, and

legislative arenas. When considered more generally, these events can be interpreted as an encounter between the emerging normativity of conflict's discourse and the conventional state-dominated socio-legal reality. As these two competing paradigms come into contact, an inevitable negotiation has taken place as it heads toward a new equilibrium. The abovementioned engagement – occurring on academic, doctrinal and policy levels – can thus be considered this 'contact' and its consequences as the results of this negotiation. The resulting summative picture of this negotiation is termed here the 'experience' of legal wrongs as conflict.

In examining this experience, general responses can be observed. As legal wrongs have been opened up to the possibility of private definition and resolution, the socio-legal community (at this point rooted in the public legal paradigm) has had to give serious consideration to whether individuals are capable of resolving 'legal' disputes. In light of a largely affirmative answer to those questions, it has had to decide what it is *willing* to relinquish to private resolution. The interaction of the socio-legal community with the emergent discourse has sparked varying responses. In some instances, the negotiative encounter has resulted in some conflicts being released from the public legal hold whereas with others that grasp has been maintained; interestingly, the negotiation has even resulted in that grasp taking hold in areas previously untouched. This diversity of response has occurred independent of conventional classification. As this chapter progresses, it will explore this experience of legal wrongs as conflict in both traditional civil and criminal categorizations, noticing those conflicts which have been more readily relinquished to private resolution as well as those which have been restrained. In doing so, a political classification of conflict will be sought, and a corresponding moral re-organization discerned.

Accordingly, this chapter will seek to examine the results of the advocacy of self-determination inherent in conflict's discourse. The exploration will seek to uncover how self-determinative conflict resolution has fared as both a legal and political endeavour: where it has been promoted, facilitated, constrained, and

prohibited by legislatures and courts. This experience is informative. Through re-assessing the management of these conflicts in light of this emergent paradigm, the confrontation of legal wrongs with this new normative order acts as a site for critical engagement with the conventional legal arrangement. At the same time, this contact allows for the conventional perspective to re-assert itself, establishing limitations for the emergent individualism. In essence, this collective experience signals a shift toward a new equilibrium for the division of public and private conflict resolution. In looking at the above developments and observing those areas of comfort and concern for the socio-legal community in regard to the relinquishment of conflict, insight can be gained into this new equilibrium, its arrangement of conflict, and the reasoning behind it.

Changes in treatment of both civil and criminal conflicts reflect changing perceptions and new realizations as to who ought to be granted control over conflict. Generally, the experience of legal wrongs as conflict – a product of the improvised negotiation between competing discourses – can be interpreted as evidencing an emerging *underlying normative framework*. In some cases, the resolution of conventionally-labeled 'private wrongs' has been constrained on account of their public relevance; in others, conventionally-labeled 'public wrongs' have been allowed to proceed successfully in private conflict resolution. In exploring these developments, we can gain a better understanding of the new normative framework being negotiated by the public and private models of justice. Once having done so, and in considering the understanding of conflict's discourse as it appeared in Chapter One, the implications of these collective developments on the status of moral ownership and the corresponding legal framework will be explored.

3.3 The Experience of Civil Wrongs as Conflict

3.3.1 An Emerging Public-Private Tension

Considering the conventional designation of civil wrongs as *private* wrongs, one might expect the relinquishment of civil conflict to be a politically fluid, perhaps

entirely natural process. As private individuals have always retained legal control of their conflict, the experience of civil wrongs as conflict might be predicted to be without resistance. Indeed, at first thought, the criminal sector with its history of state ownership seems a much more predictable site for contention. In looking at the way in which civil wrongs have encountered the practice of settlement however, this is not entirely the case. Though self-determination in regard to civil matters has largely been supported as it has come into contact with the legal framework, derogations have emerged as the legal community has sought to limit this self-determination in some instances. Accordingly, a public-private tension develops as public law begins to pull traditionally-private conflicts toward itself.

Considering the traditional understanding of civil wrongs as privately owned – both morally and legally – this newfound resistance to self-determinative resolution might seem unusual. In contrasting the practical effect of the conventional model of adjudication with that of private resolution, however, it is unsurprising that issues have emerged, or rather become more visible, with the latter's proliferation. In looking at the conventional model's true operation, that is, in the submission of conflict to court procedure, and the subsequent application of state law by a public judiciary, private and public ownership are largely indistinguishable.[322] In this way, though civil wrongs have been under private ownership, the de facto operation of ownership in this model obscures its more dynamic legal empowerment. Subsequently, as the dispute resolution "monopoly" of "state-based law and its institutions" has been eroded in both practice and perception, private ownership has become unobscured, and the legal community has had to confront the reality of what that might entail.[323] As Laurie Kratky Doré notes, "[t]his evolution in modem process

[322] Of course the civil plaintiff has control over how to argue the case and is recognized as the beneficiary of the judgement, but both the lines of argument as well as the outcome are decided according to public law.

[323] Otis & Reiter, *supra* n69 at 357; Indeed, the change in perception might be the dominant factor here. As 'formal' informal processes such as mediation gain prominence, the extra-legal resolution that had largely already been occurring is more noticeable and thus garners increased consideration; see e.g. Marc Galanter & Mia Cahill, "Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 Stan L Rev 1342 (giving a U.S. perspective: "For example, in the federal courts,

has created some wrenching tensions in our vision of the civil justice system."[324] Explaining, Doré writes that

> "[t]rial on the merits no longer holds center stage for lawyers who currently spend the great majority of their time engaging in pretrial activities such as discovery and motion practice. The norm of a public trial is giving way to the norm of private settlement... These changes in orientation ...from adjudication to settlement...have heightened the existing tension between the traditional party-centered view of civil litigation as a public service for private dispute resolution and the often conflicting perception of courts as "institutions expressive of and accountable to the public."[325]

Accordingly, through its practical experience, the legal community has begun to re-evaluate the 'private' nature of civil dispute resolution, and conflicting views of the civil justice function – public and private – have been accentuated.[326] Many commentators, believing the civil justice system to serve a public purpose beyond the satisfaction of individual disputants, have expressed concern in regard to the removal of conflicts from the assurances of public law.[327] It is here that the tension arises: an emerging discourse that calls for private self-determination encountering a system of civil law whose proponents are awakening to its supposedly broader, more public, role. As will be seen, however, the pulling force of this tension does not exist in equal magnitude across the range of civil wrongs; some conflicts are considered more publicly relevant than others.

As civil wrongs have been brought within conflict's discourse, the practical response from the legal community has been largely supportive of the self-determinative endeavour, stemming from the long-standing belief that civil wrongs are – and ought to be – private. As a general rule, self-determination has been facilitated and protected by the legal community. In exceptional instances, however, the renewed awareness and subsequent *use* of private ownership has sparked the

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the portion of cases that terminated in trials dropped from 11 percent in 1961 to 4 percent in 1991." Though this does demonstrate an increased frequency in extra-legal resolution, it also demonstrates that the use of legal processes was not previously the dominant model).

[324] Laurie Kratky Doré, "Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement" (1999) 74 Notre Dame L Rev 283 at 287 ["Secrecy by Consent"].

[325] *Ibid* at 287.

[326] *Ibid* at 297.

[327] See e.g. Fiss, *supra* n253.

legal community to seek measures that limit self-determination or regulate it through assuring adherence to its own standards.[328] Some of this regulation is directly related to the proliferation of self-determinative resolution, whereas some regulation pre-dates this resolution's modern surge but whose growing *relevance and application* corresponds to this proliferation.[329] In both cases, these measures seek to deal with the private dispute resolution embodied in conflict's discourse and thus serve our purposes here.

In looking at these exceptional manifestations of tension, and noting that they emerge in *particular* instances, public and private pull can be understood to be concentrated in differing 'locations' on the broader edifice of civil wrongs. Though public or private claims regarding civil justice are sometimes expressed in more absolute terms,[330] the actual strength of these claims and subsequent (in)activity occurs in regard to more specific or concentrated 'types' of conflict. In other words, the successes of private and public claims over conflict seem to occur in different regions of the law; certain conflicts seem to garner public concern, where others do not. With this, the either-or mentality toward the public or private quality of civil

[328] See below, e.g. "3.3.4.1 *Secret Settlements and Sunshine Laws: Staking a Public Claim in Private Conflict*".

[329] Sunshine statutes, for example, have emerged in response to the growing practice of settlements being used to conceal information, see Elizabeth E Spainhour, "Unsealing Settlement Agreements That Conceal Public Hazards" (2004) 82 NC L Rev 2155 at 2160*ff* (outlining sunshine legislation emerging in the 1990s and 2000s); Judicial review of class action settlements in the U.S., for example, pre-date the modern proliferation of private dispute resolution (Rule 23, Federal Rules of Civil Procedure, Notes of Advisory Committee on Rules – 1966 Amendment), but can seen to be increasingly relevant given these developments; see the appropriately titled Richard A Nagareda, *Mass Torts in a World of Settlement* (Chicago: The University of Chicago Press, 2007) at ix ("In casting mass torts today as a problem of dispute resolution, this book locates its subject matter within broader trends in civil litigation. With rare exception, the resolution of a plaintiff's tort claim will come by way of a settlement, not a trial.")

[330] See e.g. Fiss, *supra* n253 (who maintains a public pull toward civil disputes in a more general sense, though whose particular points of emphasis lend some weight to arguments found below); Galanter & Cahill, *supra* n323 at 1380 (referencing the "general effects produced by adjudication" as "pubic goods"); Luban, *supra* n247 (who similarly laments the loss of dispute resolution in a more diffuse way). For a comprehensive review of the more general "private" and "public" views of civil litigation, see Knutsen, *supra* n259. The concern here, however, is not with the promotion or opposition of private resolution in universal terms, but rather in the more selective and 'active' treatment of particular cases which allows for discernment of a rationale implicit in the overall developments.

conflicts – and by extension their appropriateness for private resolution – has been displaced by a more discriminatory approach.

This has seemingly occurred on both sides of the debate. David Luban, in his lament of the "Erosion of the Public Realm" asks *when* rather than *whether* settlement ought to be permitted.[331] Even Owen Fiss' firmly-placed "Against Settlement" focuses heavily (although not exclusively) on what might be considered atypical cases implicating public interest.[332] In general, those in opposition to the privatization of dispute resolution have chosen to focus their efforts on those regulating settlement in those particularly important areas. As Doré explains, "the argument has shifted away from one either 'for' or 'against' settlement to one focused upon the appropriate regulation, if any, of settlements."[333] Conversely, even the greatest proponents of private dispute resolution recognize the indefensibility of universal claims. Carrie Menkel-Meadow for one, felt compelled to qualify her "Philosophical and Democratic Defense of Settlement" with "(In Some Cases)."[334]

Presumably, these sites of increased tension differ characteristically in some way, and suggest an inner discord within the corpus of legally-private conflicts. As will be seen, this discord is largely of a political nature, indicative of a perception of especially relevant 'public' dimensions to certain 'private' conflicts. Accordingly, the public-private nature of civil wrongs can be understood to vary, with wrongs ranging from largely private to noticeably more public as those away from the negotiating table become more and more affected by the resolution. Knutsen elucidates this idea in discussing the public and private dimensions of civil justice, saying that they "are not exactly oppositional and exclusive, but instead operate on a continuum and may shift the blend of public and private depending upon the type of dispute examined."[335] In exploring the public dimension as it manifests itself in these

[331] Luban, *supra* n247 at 2620.
[332] See generally, Fiss, *supra* n253.
[333] Kratky Doré, "Secrecy By Consent," *supra* n324 at 294-295.
[334] Carrie MM, "Whose Dispute?" *supra* n8 at 2663.
[335] Knutsen, *supra* n259 at 948-950.

particularly 'public' strongholds toward the one end of that continuum, and considering them in contrast to those baseline conflicts where self-determination is supported at the other, the task of discerning an emergent normative classification will have begun.

3.3.2 Delineating the Boundaries of Self-Determination: Seeking a Jurisprudence of Settlement

In light of the exploration of private ownership of civil wrongs at the outset of this thesis, the ultimate starting point of their experience is freedom in a fairly absolute sense.[336] Given that the state neither searches out civil conflict in order to address it nor seeks to force its stakeholders to do so, the parties to such a conflict are of course free to proceed as they wish. Extra-legally, parties are – in both a technical and theoretical sense – free to resolve their conflicts in whatever way they so choose. Given, however, that our purpose here is to examine the interaction between this self-determination and the legal paradigm, it is necessary to leave this technical perspective behind. Instead, the perspective here must be that of the legal community. This isn't to say that civil wrongs ought to be considered as legal constructs within conventional procedure, but rather that they ought to be explored as they exist at the convergence of law and self-determination.

To do that, one must explore the way private resolutions are viewed by the law. In doing so, one can avoid adopting a singular perspective from either the legal or extra-legal model, instead viewing these models as they intersect. Accordingly, what is being sought here is a "jurisprudence of settlements."[337] This jurisprudence, however, would be incomplete if limited in definition to those common-law decisions of the judiciary; legislatures too, provide insight. Accordingly, the 'jurisprudence' ought here to be understood in a broader sense: as an inquiry into legal treatment

[336] For example, without themselves proceeding in an illegal way.
[337] Luban, *supra* n247 at 2620 ("Can anybody realistically continue to be against settlements? Is "for or against" really the issue at all, or has it become (was it always?) not *whether* to settle but *when?* What are the appropriate terms for evaluating a settlement? Is there a jurisprudence of settlements waiting to be invented?").

generally so as to understand the principles upon which that treatment is based.[338] Such an approach is in line with our search for an emerging normative framework underpinning these developments.

Though it is not possible within the scope of this paper to present an exhaustive review of the instances in which the law comes into contact with settlement, evidence will be drawn on here that seemingly highlights a general ethos found in common law jurisdictions.[339] As this chapter proceeds, it will, in a general way, explore the jurisprudence of settlement in those situations most relevant to an investigation of public and private ownership and thus those that best permit the discernment of an underlying framework. In this way, the exploration will be guided and necessarily limited to those paradigmatic elements of this jurisprudence. This is not to say that the picture will be inaccurate, however; those elements excluded are believed to neither add nor detract substantively in any significant fashion.[340] With this focus in mind, this section will first consider the general treatment of self-determinative resolutions in what might be considered standard instances, that is, typical resolutions between two parties of sound legal standing; in doing so, the treatment of private resolutions *as a general rule* can be deduced. Secondly, private resolutions will be considered in contexts that are ostensibly more public in nature: public hazards and mass torts. Through this, derogation from that general rule, in the name of broader interests can be contrasted.

[338] See e.g. *The Blackwell Dictionary of Political Science*, *sub verbo* "Jurispudence" <online: credoreference.com/entry/bkpolsci/jurisprudence> ("The study of legal theory and legal systems with the intention of understanding the principles upon which they are based").

[339] In this way, that which is covered can be considered as a broad representative picture; most of that which is not addressed here seems to agree in principle, and that which derogates is not of such weight as to render the general picture inaccurate.

[340] Those cases where the state itself (as a *public* entity) is either a plaintiff or defendant will not be addressed. These cases are indeed of a significantly distinct nature so as to make their consideration within the scope here impractical. It is believed, however, that due to their distinct nature, they do not detract from the analysis here.

3.3.3 Typical Experience of Private Conflict Resolution

In investigating legal contact with settlement, and thus discerning its jurisprudence, it is worth noting that there are typically two ways in which court involvement typically arises: first, where parties who wish to settle privately seek to dismiss an already-commenced legal action in order to do so, and secondly, where parties seek *legal enforcement* of privately-negotiated agreements.[341] This section therefore outlines both of these scenarios in their typical treatment.

3.3.3.1 The Freedom to Settle as a General Rule

As discussed in the previous chapter, civil wrongs are understood as privately owned, and the conventional civil justice system in place to deal with those wrongs is party-initiated. Accordingly, as there is no obligation to bring a civil wrong to the law in the first place, parties are free to resolve their conflicts without any resort to legal remedies. In line with the private ownership that entails great freedom outside the legal process, a healthy deference to that ownership is apparent in the treatment of those disputes within the legal process as well. In addition to the parties' freedom to resolve their conflicts without initially requesting the assistance of the court system, parties are – as a general rule – also free to resolve their conflicts privately once having entered the legal system. Sanford Weisburst puts this plainly:

> "It is a well-known fact that most litigation...ends in settlement rather than trial. Somewhat less attention is paid to the rules that govern the process of settlement. This should not be too surprising, given that the general rule is that there are no rules: parties to a lawsuit are free to settle without obtaining the court's approval."[342]

This general deference by the courts is essentially universal across common law jurisdictions.[343]

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[341] Spainhour, *supra* n329 at 2167.

[342] Sanford L Weisburst, "Judicial Review of Settlements and Consent Decrees: An Economic Analysis" (1999) 28 J Legal Stud 55 at 55.

[343] In Canada, *Courts of Justice Act*, RRO 1990, O Reg 231/13, s 23.01(1) ("A plaintiff may discontinue all or part of an action against any defendant"); In the United States, Fed R Civ P 41(a) ("[A]n action may be dismissed by the plaintiff without order of court").

Though demonstrative of the court's respect for parties' rights to settle, the act of allowing discontinuance offers little insight into the law's consideration of the terms of those settlements. Accordingly, the engagement of courts with settlements in their enforcement is much more informative, showing the degree to which that respect generally extends.

3.3.3.2 Enforcing Settlements: Public Respect for Private Resolutions as a General Rule

In the philosophy and practice of private conflict resolution outlined in the first chapter, self-determination by those parties involved was certainly a recurring element. More than that, though, it has been noted as the "hallmark"[344] of conflict resolution processes such as negotiation and mediation, and its "centrality...cannot be overstated."[345] It is through this self-determination that negotiated agreements are understood to be made as well as receive their legitimacy. In order for this self-determination to be meaningful, once an agreement has been reached, that agreement must be able to limit future acts of 'self-determination' – as do legal contracts.[346] It is with this understanding that the enforcement of valid[347] agreements in spite of later challenges can be understood to be 'supporting' self-determination, and in this light that we continue. Through looking at the jurisprudence of enforcement, as well as the instances in which private resolutions are set aside, it is evident that the ideal of self-determination is central to the jurisprudence of settlement.

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[344] Menkel-Meadow et al, *supra* n 89 at 391.

[345] Timothy Hedeen, "Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some Are More Voluntary than Others" (2005) Just Sys J 273 at 274.

[346] Within the common law, settlements have been regularly likened to contracts in both theory and practice. See e.g. Tex Civ Prac & Rem Code, §. 154.071(a) ("If the parties reach a settlement...the agreement is enforceable in the same manner as any other written contract."); *Robertson v. Walwynn Stodgell Cochrane Murray Ltd*. [1988] 24 BCLR. (2d) 385, 4 WWR 283 at para 4 ("A completed settlement agreement is the same as any other contract.") [*Robertson v Walwynn*].

[347] See below, "*3.3.3.2 Enforcing Settlements: Public Respect for Private Resolutions as a General Rule"*

In observing private resolutions as they come before courts, it is apparent that judiciaries have generally adopted a supportive stance toward agreements arrived at through self-determinative processes. Though having discretion in how to deal with private agreements, in the instances where such agreements have been challenged at a later date, courts have largely been pre-disposed toward their enforcement.[348] In Canada, for example, "a well-established policy in favour of upholding and enforcing settlements agreed upon by litigants, or potential litigants" has been noted.[349] Similarly, in the U.S., courts have declared that "public policy favors the enforcement of lawful settlement agreements" and in recognizing their legitimacy, "discourage litigants from attempting to void settlements resulting from [private processes]."[350] Given the importance of private settlement to the broader realm of conflict resolution, this policy of enforcement has been recognized by courts as essential to the latter's viability.[351]

More importantly – for the purposes here at least – courts have recognized the importance of adopting this position purely out of principle, that is, out of respect for the freedom of contract and the parties' rights of self-determination. Accordingly, it has been held that "[o]nce it has been conceded... that a settlement agreement was made with the knowledge and consent of the parties to the litigation, and where no ground is advanced for setting aside the agreement under general contract principles...then the court has no alternative, in the end, but to enforce the agreement."[352] Though subsequent judgements have been more upfront with the discretion that they believe they wield, courts have been extremely hesitant in its exercise. In order to have a settlement set aside, the party would bear a "heavy onus

[348] See e.g. *Courts of Justice Act*, RRO 1990, Reg 231/13 Rules of Civil Procedure r. 49.09 (as positive indication of judicial discretion).
[349] *Van Patter v. Tillomburg District Memorial Hospital*, (1999) 45 OR (3d) 223 (Ont CA.) at para 24.
[350] *Govia v Burnett* (2003) 45 V.I. 235 (Terr Ct St T and St J, 2003).
[351] *Malley v. Red River Valley Mutual Insurance Co.* 2010 Carswell Man 191 (Man QB) at para 7 ("In reality, most legal disputes are resolved by way of negotiated agreements between the parties. The enforceability of settlement agreements is essential to the settlement process.").
[352] *Robertson v Walwynn*, *supra* n346 at para 8.

of satisfying the court on compelling evidence."[353] Recently, the Ontario Court of Appeal declared the hesitance with which courts should interfere with settlement agreements, saying that "[t]he discretionary decision not to enforce a concluded settlement...should be reserved for those *rare* cases where *compelling* circumstances establish that the enforcement of the settlement is not in the interests of justice."[354]

Doctrinally however, the 'interests of justice' has not been equated with the court's perception of substantive justice. Given the respect for the self-determination inherent in private settlement, and its view that "the parties' sense of fairness...trumps other arguably applicable norms,"[355] courts as a general rule do not impose their own view of what is just. In such a way, settlements are not unenforceable due to their derogation from what otherwise would have been the remedy under law.[356] As James Fischer notes of the American context, "[t]he agreement to be enforced is the one reached by the parties, not one created by the courts" and further, "a judge is normally indifferent to the terms of a settlement."[357] The court's view of fairness then does not permit it to set aside a valid settlement. Interpreting Canadian precedent, Justice Sewell in *Roumanis v. Hill* concludes that "the court has no power to refuse to give effect to...a settlement because it considers it to be unjust."[358]

Those exceptional cases in which the courts have refused to enforce a settlement based on equitable premises or their "sense of justice" ought not to be viewed as indications of substantive interference, despite their consequences to that

[353] *Manko v. Ivonchuk* (1991), 71 Man R (2d) 67 (QB) at para 19; *Ibid* at para 20 (indicating a "presumption of validity" and bindingness).
[354] *Srebot v Srebot Farms Ltd*., 2013 ONCA 84 at para 6, 226 ACWS (3d) 92 [*Srebot Farms*].
[355] Menkel-Meadow et al, *supra* n 89 at 391.
[356] *Athabasca Realty Co. V Foster* (1982) 18 AltaLR (2d) 385 (Alta CA) at para 38 ("a settlement may not be avoided because the damages arising...is greater than expected. Where, for example, a party settles a claim for personal injuries and later finds he was injured more seriously than he thought, a settlement is binding").
[357] James M Fischer, "Enforcement of Settlements: A Survey" (1992) 27 Tort & Ins LJ 82 at 90.
[358] *Roumanis v. Hill* 2013 CarswellBC 1785 at para 48.

effect. Though using the language of fairness[359] in setting aside agreements, their willingness to do so apparently stemmed from procedural elements in the creation of those 'agreements'. Tracing the line of authority evoked, *Milios v. Zagas* refused enforcement on the basis of a miscommunication of acceptance;[360] *Royal Bank v. Central Canadian Industrial Inc.* did so over uncertainty regarding undue influence and economic duress;[361] *Srebot v. Srebot Farms Ltd.* interfered due to a party's apparent lack of understanding as to what he was agreeing to, as well as the mental state at the time of agreement.[362]

Though the resulting 'agreements' could be said to be unfair in their result, the impetus for interference – and thus perhaps the legitimacy of interference – was seemingly derived from the parties' inability to freely or consciously enter into the contract.[363] Indeed, in these cases the argument might be made that instead of setting aside agreements, the courts could have held that, absent free and informed consent, no 'agreement' was to be found. Despite any controversy[364] as to the *threshold* to be met – that is, the standard of will expected – in principle there is seemingly still agreement on the central idea that in order for a settlement to be enforceable, free and informed consent must be present.[365] In this way, the judicial

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[359] *Srebot Farms*, *supra* n354 (at para 76: "I find the settlement to be unreasonable and it would, in my view, be most unfair and a real injustice to the plaintiff were it to be enforced."); *Fox Estate v Stelmaszyk* (2003) CarswellOnt 2506 (at para 11: "It does not satisfy my sense of justice to enforce the settlement in those circumstances. Equity Favours the appellants."); *Royal Bank v Central Canadian Industrial* (2003) CarswellOnt 5214 (at para 15: "it does not satisfy our sense of justice to enforce the settlement in those circumstances") [Royal Bank].

[360] *Milios v Zagas* (1998) CarswellOnt 810 ONCA at para 18, 20.

[361] *Royal Bank, supra* n359 at paras. 11-12,15.

[362] *Srebot Farms*, *supra* n354 at para 77*ff*.

[363] Osborne JA in *Milios v. Zagas*, *supra* n358, a case often cited as authority for the discretion in setting aside settlements, explicitly situates the unreasonableness of the settlement as irrelevant (at para 18: "I will not comment further on the reasonableness of the settlement beyond noting that it represented a substantial compromise from the plaintiff's standpoint when measured against the judgments he held against the defendant or against the plaintiff's offer to settle for about $21,000. I think that the motions judge's conclusion that the settlement was reasonable is problematic; however, for purpose of my analysis I am prepared to accept it.")

[364] *Royal Bank*, *supra* n359 at 17 (Doherty JA dissenting, at para 23, requiring test to be met).

[365] See e.g. Randy E Barnett, "A Consent Theory of Contract" (1986) 86 Colum L Rev 269 at 270 (saying that "[c]onsent is the moral component that distinguishes valid from invalid transfers of alienable rights"); Brian Bix, "Consent in Contract Law" in *The Ethics of Consent: Theory and Practice*, Alan Wertheimer, Franklin G. Miller, eds., (New York: Oxford University Press, 2010) at 251 ("freedom of

hesitancy to interfere with self-determined resolutions remains intact, with these judgements mere seeking to ensure self-determination was in fact operative via free choice.

Further, judicial attention to unfairness through the doctrine of unconscionability in settlements, and interference into settlements on that basis, can be understood in this light as well. Besides having a high threshold to meet, a party seeking to have a settlement set aside on grounds of unconscionability must demonstrate the same inoperation of willful choice through an inability to competently negotiate.[366] Clarifying the test for unconscionability at common law and in equity, Côté JA in *Cain v Clarica Life Insurance Co.* reviewed the leading authorities and concluded that beyond requiring a "grossly unfair and improvident transaction," it was also necessary to demonstrate the "victim's lack of independent legal advice or other suitable advice," an "overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability," as well as the "other party's knowingly taking advantage of this vulnerability."[367] Accordingly, the doctrine of unconscionability appeals to procedural justice and the parties' ability to truly consent as well.

Central here, as with the above, is not whether the settlement is unfair, but instead whether the procedure which led to that settlement was unfair. Such an approach is thus consistent with general principles of will theory.[368] Accordingly, the jurisprudence of settlement outlined here falls in line with the court's ability to set aside contracts under "general contract principles, such as fraud, duress, lack of

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contract- an ideal by which there are obligations to the extent, but only to the extent, freely chosen by the parties")

[366] *Titus v. William F. Cooke Enterprises Inc.* 2007 CarswellOnt 5229 ONCA at para 36*ff* [*Titus*]

[367] *Cain v Clarica Life Insurance Co.* 2005 CarawellAlta 1871 Alta CA at para 32; *Titus supra* n366 (using the same test in Ontario's Court of Appeal).

[368] Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100 Columbia L Rev 94 at 115 (giving a summary explanation).

capacity, or mutual mistake,"[369] even if softened in standard by equity. What is important in observation is not the discernment of exact standards however; rather it is what the underlying principles indicate about judicial perspectives toward private resolutions. In this regard, it is seen here that courts have regularly set aside their own views of substantive justice and fairness in deference to that of the parties and have striven to give effect to party self-determination where it has been exercised. Accordingly, it ought to be noted that the respect for private resolution of conflict – in spite of where that resolution produces results that differ from the legal prescription – is the general rule within the jurisprudence of settlement. Any derogation thus ought be considered in contrast to this principle and given due attention.

3.3.4 Public Issues in Private Conflicts

3.3.4.1 Secret Settlements and Sunshine Laws: Staking a Public Claim in Private Conflict

As has been seen so far in looking at the traditional understanding of civil conflicts as private matters, disputing parties are considered themselves to be free to decide whether and how to resolve such conflicts. In accordance with this understanding, courts have lent their support in giving effect to those decisions arrived at through mutual agreement, and have been hesitant to invalidate the substantive agreements made by those parties. Though this ought to be seen as the general rule, it is not without exception. In looking the controversy over 'secret settlements,' a clear exception to this rule is illustrated, and the beginnings of a broader trend are hinted at. As Dore points out, "the controversy over litigation confidentiality figures prominently in [the] developing 'jurisprudence of settlement,"[370] and thus is imperative to include in the exploration here.

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[369] *Robertson v Walwyn*, *supra* n346 at para 8.

[370] Kratky Doré, "Secrecy by Consent," *supra* n324 at 295; *Ibid* at 299-300 ("Nowhere is the need to accommodate [public-private] competing interests more pressing than in the current debate concerning litigation confidentiality.")

As *private* resolutions rather than public adjudications, civil settlements can include agreements between the parties that their contents will remain confidential. Decisions to include such agreements can occur for a number of reasons. Plaintiffs may wish to protect their own privacy or "may be willing to agree to secrecy in exchange for greater consideration."[371] Conversely, "defendants may want to avoid exposing themselves to a flood of litigation by similarly situated plaintiffs who learn that the defendant may be willing to pay."[372] Through these agreements, information about these private conflicts, their origins as well as resolutions, remain out of the public eye. In line with the traditional understanding of civil disputes, "[c]ourts sanction these confidentiality agreements in order to promote the private settlement of disputes – a long-established public policy aimed at preserving the autonomy of litigants to resolve their own disputes as they wish."[373] Accordingly, the freedom to include these agreements can be understood as supported by "[t]raditional notions of freedom of contract."[374] In this traditional perspective, settlements and their terms can be considered "a private contractual matter between parties."[375]

However, as the model of dispute resolution has shifted from adjudication to private resolution, concerns about these "secret settlements" have emerged, particularly in the United States.[376] As Doré suggests, this can be linked to both the increased frequency of settlement as well as the emerging tension between corresponding public-private perspectives on the civil law.[377] She notes that "[s]hifts in the American procedural landscape and in our overall vision of civil litigation...have called [private contract] rationales into question and have suggested that, at least in

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[371] Emily Fiftal, "Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements" (2003) 54 Case Western Res L Rev 503 at 504 [Fiftal].
[372] *Ibid*.
[373] Kratky Doré, "Secrecy by Consent," *supra* n324 at 286.
[374] Spainhour, *supra* n329 at 2165.
[375] Fiftal, *supra* n371 at 504.
[376] Christopher R Drahozal & Laura J Hines "Secret Settlement Restrictions and Unintended Consequences" (2006) 54 U Kan L Rev 1457 at 1458 [Drahozal & Hines]; Though the United States represents the most developed *jurisprudence* in this area, concerns have emerged elsewhere as well, e.g. CBC News, "Scouts Canada sex settlements kept secret," October 24, 2011, <online: http://www.cbc.ca/news/canada/story/2011/10/23/scouts-canada-settlements-secrecy.html>.
[377] Kratky Doré, "Secrecy by Consent," *supra* n324 at 286.

some cases, party autonomy and the preference for settlement should yield to some greater interest supporting public access."[378] This 'greater interest' is apparent in looking at the potential consequences of these secret settlements and the nature of conflict that they involve.

As legal disputes have increasingly moved out of public fora and into private (and confidential) settings, the availability of information has followed– a development suggested as being problematic in some instances. Through the 1980s and 1990s, 'secret settlements' were implicated in "cases involving alleged public health hazards" such as asbestos, tobacco, vaccines, painkillers, and medical devices.[379] Some commentators have thus claimed that secret settlements in cases like these "often conceal information in which the public has an interest" in that the information kept private may otherwise "expose potential health and safety hazards."[380] A product liability example involving Firestone tires is illustrative:

> "In the Firestone litigation, for example, the recall of over fourteen million potentially dangerous tires and the subsequent congressional investigation into Firestone and Ford's alleged culpability *came eight years after the first of numerous product liability lawsuits* concerning a tire that has now been linked to over two hundred and fifty deaths in the United States alone. Many of those Firestone cases were kept secret under agreed protective orders, sealing orders, and confidential settlements."[381]

In light of events such as these, it has been thought that the interests in these conflicts go beyond those private parties at issue, and further extend to the broader public. Some commentators "argue that secret settlements permit harmful practices...to continue for longer than they would have continued were public access to information not restricted by the settlement agreement."[382] To the degree that these practices are perceived to conceal a broader risk to society, a public interest is thought to be present. Of course, not all settlements seem to carry such extensive

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[378] *Ibid*.
[379] Drahozal & Hines, *supra* n376 at 1458.
[380] Fiftal, *supra* n369 at 504-505.
[381] Laurie Kratky Doré, "Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements" (2004) 55 SC L Rev 791 at 792 [emphasis added] [Kratky Doré, "Settlement"].
[382] Drahozal & Hines, *supra* n376 at 1458.

implications, but those that do are thought to have raised concern over the freedom of parties to resolve their disputes in such a way.

In response to these perceived dangers, a "vigorous and heated debate"[383] has emerged as to whose interests are implicated in these disputes, to what extent the broader public has a stake in their resolution, and how to best accommodate those broader interests. As a consequence, legislatures in the United States have taken clear steps to prevent individuals from resolving their conflicts in this confidential manner.[384] Elizabeth Spainhour observes that "[a]s consideration and passage of settlement disclosure laws in state legislatures across the country illustrate, a movement is afoot to limit settlements that conceal dangers to the public."[385] As part of this movement, numerous state legislatures have proposed or enacted new – or amended existing – legislation in order to limit the freedom to include confidentiality agreements for conflicts in which the broader public is thought to have an interest. Upon review of American efforts in 2004, Spainhour noted that approximately twenty states had laws concerning settlement confidentiality.[386] Though sharing the same impetus, efforts to do so have varied in both form and scope. Approaches have ranged from allowing confidentiality agreements only when in the public interest[387] to rendering any agreements that conceal a public 'hazard' void and unenforceable as a matter of public policy.[388]

[383] Kratky Doré, "Settlement" *supra* n381 at 792.
[384] Spainhour, *supra* n329 at 2161 ("perceived threats to public health based on specific harmful outcomes resulting from secret settlements have contributed to the campaign for Sunshine in Litigation laws.")
[385] *Ibid* at 2157.
[386] *Ibid* at 2156.
[387] See e.g. Revised Code of Washington § 4.24.611(4)(b) ("Confidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest.")
[388] See e.g. La Code Civ Proc Ann. art. 1426(D) (West Supp. 2002) ("Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard, or any information which may be useful to members of the public in protecting themselves from injury that might result from a public hazard is null and shall be void and unenforceable as contrary to public policy").

The state of Florida, being the first to take the latter approach with its Sunshine in Litigation Act 1990,[389] represents one of the "farthest reaching efforts to regulate secrecy in litigation,"[390] and thus serves as a useful starting point for exploration.[391] Going beyond addressing court-ordered secrecy, Florida's statute states that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced."[392] With this legislation, the Florida legislature effectively interferes with the content of private resolutions, and does so in the name of public interest. In looking at this, it is worth drawing attention to two key elements that merit further exploration. These elements are also to be found in similar efforts outside the Florida legislation specifically.

First, it is important to recognize that through this legislation *a public claim has been staked in private conflict*, both in principle as well as practice. Through enacting legislation such as the one above, state legislatures have expressly communicated that the disputes engaged by these laws go beyond those interests conventionally attributed, and that these interests ought to be accommodated. North Carolina's proposed Bill is explicit about this re-consideration of these civil disputes in commenting on its motivation for addressing secret settlements:

> "Matters *of interest to the public health, safety, and welfare* are often the subject of private litigation in which representatives of the general public do not participate and which frequently are settled or resolved under circumstances in which matters of the greatest concern to the public interest are kept confidential from disclosure to the representatives of the public by agreement of the private litigants."[393]

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[389] Fla Stat Ann § 69.081 (2012) (originally Sunshine in Litigation Act, 1990 Fla. Laws ch. 90-20, § I (effective July 1, 1990)).
[390] Drahozal & Hines, *supra* n376 at 1477.
[391] *Ibid* (also recognizing Florida's mechanism as a "well-known regulatory response").
[392] Fla Stat Ann 69.081(4) (2012).
[393] *Limit Secrecy Orders*, Senate Bill 1071, Gen Assembly, 2001 Sess, §7C-2 (NC 2001) [emphasis added] [NC Bill].

Accordingly, the species of conflict addressed by efforts like the proposed bill are seen to be of particular relevance to broader segments of the population, beyond those direct parties involved. This perspective obviously differs from previous envisioning of civil wrongs as *private* wrongs.

In the Florida example, the language is broad enough to reach beyond those resolutions arrived at through public court processes, and seems to apply to private, out-of-court resolutions.[394] In this way, the reach of the legislation goes further than the scope of "in Litigation" that its title suggests, extending to agreements that theoretically need not have been the result of any legal process. This is true even if one defines 'litigation' to encompass pre-trial procedure such as discovery or any negotiation post-filing. Indeed, a "[p]rivate settlement may never come before [a] court at all if the parties agree to terms before the plaintiff files a claim," and Florida's legislation is sufficiently broad in this regard to reach these settlements.[395] Accordingly, secret settlements are prohibited even where they do not come into contact with the legal system in any way – a reach extending to even the most private of resolutions.

The significance of this prohibition ought to be emphasized here, and done so in contrast to the general jurisprudence from which it derogates. In doing so, one can see that developments such as these represent a truly "radical change in state approaches to dispute settlement."[396] Reflecting upon the previous discussion of dispute resolution as encompassing self-determination and freedom of contract, the general rule in regard to *private* matters – as civil disputes have traditionally been understood – is that "[p]arties are generally free to bind themselves as they see

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[394] This has been the popular reading of the legislation, but see Richard A Zitrin, "The Laudable South Carolina Rules Must Be Broadened" (2004) 55 SC L Rev 883 at 891 ("although the statute sounds broad enough to apply to unfiled settlements or even agreements to secretize discovery, no court has so ruled"); Such an approach is not limited to Florida, however; nearly identical wording has been used in Louisiana's sunshine law (La Code Civ Proc Ann art. 1426(D)), and California's unsuccessful Bills adopted a similar approach: see e.g. Fiftal *supra* n371 at 540.
[395] Spainhour, *supra* n329 at 2167.
[396] *Ibid* at 2156.

fit."[397] Beyond that, it is important to recognize that "freedom of contract is a time-honored tradition that [is] not cursorily set aside."[398] Accordingly, derogation from this norm ought to be given its due weight and be recognized as indicative of a change in the perception of these conflicts.

Further, it is worth noting here *the exceptionality of the conflicts at issue*. It is important to note for later analysis that these intrusions into traditional understandings of private conflict are not universal. The Florida legislature, as with others, sought to limit its prohibition of secret settlements to those concerning any 'public hazard' or similarly defined issue, recognizing the *unique* potential for danger in these disputes. In this way, legislatures have not sought to limit confidentiality generally, but rather the efforts here pertain to a select portion of settlements. More accurately, legislatures have sought to limit confidentiality pertaining to those conflicts with certain *characteristics* – affecting, or have the potential to affect, those beyond the specific dispute at issue. This might be obvious, but it is important to highlight nonetheless.

As defined in the Florida statute, a public hazard is defined as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is *likely* to cause injury."[399] Though "scant case law" and "limited legislative history" exists to interpret this in a specific way,[400] a general understanding is discernible from commentary. Fiftal argues that while "confidentiality should usually be respected" for *most* cases, "several categories of settled cases should be identified as uniquely important to the public."[401] Answering this, Fiftal states that "courts, legislatures, and scholars repeatedly identify the same fact patters as problematic – especially mass torts and product liability cases and

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[397] *Ibid* at 2165.
[398] *Ibid*.
[399] Fla Stat Ann §69.081(2) (2012) [emphasis added].
[400] Spainhour, *supra* n329 at 2158.
[401] Fiftal, *supra* n371 at 505-506.

sexual abuse cases."[402] California's proposed sunshine bill identified a similar target in speaking of cases involving harm allegedly "caused by a defective product, financial fraud, unfair insurance claims practice, or environmental hazard."[403] North Carolina's 2001 bill similarly identified harm caused by defective products, environmental hazards and financial fraud.[404] Though still relatively vague, a picture as to the sorts of conflicts targeted by these efforts is discernible; they involve sources of harm that affect, or could potentially affect, broader segments of the public due to the breadth or regularity of their harmfulness.

In considering these dimensions of the legislation's scope, one can see that the state has sought to limit the negotiative freedom of parties to disputes of a certain nature. Due to this legislation and others similar to it, agreements to keep secret certain information in which the public has an interest will not be enforced by the courts should they be requested to do so. In other words, these agreements would lack legal force in jurisdictions containing 'sunshine' legislation. Though, practically, settlements need not always be enforced, as later disagreement may never arise, it has been suggested that these prohibitions restrict the ability of counsel to accept such agreements in the first place.[405] The degree to which this is true in practice is subject to debate, particularly in light of the limited case law.

For the purposes here, however, it is sufficient to note the *intended* effect of this legislation, that is, to prohibit confidentiality agreements regarding certain disputes. Simply taken as intention, this represents more than a mere desire for openness in legal matters. In relation to an optional, party-initiated legal system, the

[402] *Ibid* at 550.
[403] An act to add Section 188 to the Code of Civil Procedure, relating to confidentiality. AB 36 § 2 (California, 2000); Fiftal, *supra* n369 at 541.
[404] NC Bill, *supra* n393.
[405] Spainhour, *supra* n329 at 2162 ("A statute that prohibits secret settlement agreements where there is a risk of public harm would effectively bar lawyers from accepting such settlements on behalf of their clients because a court could open and void such agreements. Making these settlements illegal would force lawyers to consider the interests of the public when considering settlement, thus furthering the safety goals that Sunshine laws address, albeit at the expense of the client who wants to settle.").

pre-filing, private resolutions of these privately-owned conflicts are no part of that legal system unless so decided by those parties. Through this legislation and others like it, state legislatures have asserted clear and deliberate claims over private conflicts – affairs that pre-1990 were outside the law's reach. In other words, this legislation can be understood as an act of staking a public claim in previously-imagined private conflict. Accordingly, sunshine legislation gives insight into a broader trend that suggests where private resolution takes place "in a context that significantly impacts public interests, there can be tension between the rule of law and party choice."[406]

3.3.4.2 Prima Facie Publicness: 'Mass' Torts, 'Class' Actions, and 'Aggregate' Settlements

Much like the exemplary 'public hazards' noted above, mass torts involve tortious wrongdoing that affects large numbers of individuals – at times involving tens of thousands, even millions.[407] These wrongs can, to varying degrees, involve geographic and temporal dispersion; though importantly, they present limited sets of factual variation.[408] Whether joined through class action or consolidation – both discussed below – individual cases within aggregate litigation are ultimately required to share a common question of law or fact.[409] The commonality inherent among individual claims within mass torts, however, goes beyond the way in which harm manifests: the unity found among individual claims has further relevance in terms of their resolution as well. As Nagareda points out, "[u]nlike tort claims arising from idiosyncratic events...individual mass tort suits are highly interdependent in value."[410] Indeed, as Hensler and Peterson point out, "the prospective value of many claims will

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[406] Menkel-Meadow et al, *supra* n89 at 391-392.

[407] See e.g. Roger C Cramton, "Individualized Justice, Mass Torts, and 'Settlement Class Actions': An Introduction" (1995) 80 Cornell L Rev 811 at 815 (identifying the "paradigm case of the traditional tort" as a vehicular accident involving two parties).

[408] Nagareda, *supra* n329 at viii, xii-xiii (Nagareda further distinguishes between mass torts, mass accidents and toxic torts; no such distinction is useful here. He does recognize, however, that "[a]ll involve torts of a mass scope. All are mass torts in a literal sense.").

[409] See e.g. Fed R of CivP, Rule 42(a) ("Consolidation"), Rule 23(a) ("Class Actions").

[410] Nagareda, *supra* n329 at xiii.

rise or fall sharply with a large plaintiff award, a defense verdict or even a signal discovery event or evidentiary decision in a single case that is part of the mass of pending claims."[411] In theory, this interdependence is one of correlation, in that "a large award in one case increases the value of other, similar mass tort claims;"[412] however, it can also mean that large awards to some can mean, in practice, an inability to collect for others.[413] Given the common source and manifestation of their injuries, as well as interdependency in resolution, those plaintiffs within aggregate contexts can be considered to have "*suffered a common wrong*,"[414] making mass torts more than "merely a collection of individual tort cases brought together by time and circumstance."[415]

Further, mass torts, as a genre of civil wrongs, can be considered to be relatively new and increasingly relevant problems for civil justice. As such, they present a difficult challenge for the traditional functioning and understanding of civil justice. Roger Cramton notes that the changing nature of the world which creates these harms is developing in tension with conventional legal conceptions:

> "In today's world, [...the] market economy encourages mass distribution of products of new, and perhaps untested, technology. Thousands of strangers may be injured by the dissemination and use of a single product. Mass exposure to these products or substances creates situations in which a large number of people believe...that the defendant's product caused their injuries. The resulting volume of litigation poses problems that threaten both the tort system's reliance on individual responsibility and the procedural system's reliance on party initiative and control."[416]

The difficulty in managing mass torts stems at least partly from the fact that their nature is novel to a system designed around those individual cases mentioned above. Of course, mass harms were unlikely to have been contemplated through the formative years of the civil justice system. Indeed, Hensler has noted that some

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[411] Deborah R Hensler & Mark A Peterson, "Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis" (1993) 59 Brook L Rev 961 at 967 [Hensler & Peterson].
[412] *Ibid* at 968.
[413] That is, due to bankruptcy proceedings or other failures of available resources.
[414] Ontario, Legislative Assembly, *Hansard*, 34th Parl, 2nd Sess, (July 12, 1990) (Hon. Mr. Scott) (discussing the implementation of class action law in Canada) [emphasis added].
[415] Linda S Mullenix, "Mass Torts as Public Law: A Paradigm Misplaced" (1994) 88 Nw U L Rev 579 at 581.
[416] Cramton, *supra* n407 at 815.

commentators have attributed the difficulty with mass torts "to a lack of fit between traditional civil procedure, with its reliance on individualized case treatment, and the demands imposed on courts by massive numbers of claims which, in practice, cannot be treated individually."[417]

Consequently, the legal community has increasingly turned to a variety of aggregative mechanisms with which to address these mass wrongs.[418] In line with trends toward private resolutions, these mechanisms are generally used to generate settlement at a larger scale rather than adjudicated decisions. Though these mass torts are clearly different than traditional torts, Richard Nagareda notes that "[a]s in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement."[419] Unlike settlement in traditional tort litigation however, mass settlement has been subject to constraint, often involving judicial supervision and control.

Accordingly, and building on the investigation of public constraint on private conflict discussed above, further (and perhaps more obvious) insight can be gained from exploring the law's interaction with settlement in the realm of aggregate litigation. Settlement in the context of more identifiable scenarios of large scale resolutions, such as mass torts, necessarily involves a higher concentration of interests and thus offers unique opportunity to observe the boundaries of resolution in relation to others. Having to address these limits in a practical manner, these scenarios also offer insight into the informative rationale sought here as well.

Further, it also provides insight into the nature of these resolutions, and similarly the conflicts themselves. As Knutsen notes, "it is useful to note that in aggregate litigation situations, such as mass torts or class actions, the balance between public and private may tip towards the public end of the spectrum. Aggregate litigation involves a more complex process and departs from the traditional

[417] Hensler & Peterson, *supra* n411 at 963.
[418] See e.g. *Ibid* at 1062.
[419] Nagareda, *supra* n327 at ix.

procedural landscape of the simple private law dispute."[420] In this way, the point at which trends of "collectivization"[421] meet the 'privatization' of dispute resolution offers an enlightening scenario for the observations sought here. Moreover, mass torts serve as a more definitive contrast to those paradigmatic tort cases involving one plaintiff, one defendant, and one alleged harm, and thus contribute to a more comprehensive survey of a jurisprudence sought here.[422]

3.3.4.2.1 Class Actions and a Legalist Perspective on "Absent Class Members"

Class Actions and a Divergence of Visions

In short, a class action is a legal device of aggregation whereby one or more members of a broader class with a claim that shares a common question of law or fact may sue on behalf of that class, acting as their representative.[423] Upon resolution of the action – whether by adjudication or settlement – the members of that class are, as a general rule, subsequently bound by that resolution.[424] As a *representative* action, the class members themselves effectively have little to no control over the proceedings, while some may not even be aware that proceedings are being conducted on their behalf.[425] Accordingly, class actions require that the representative adequately and fairly protect the interests of the class as a whole throughout the proceedings.[426] In other words, those representatives have a duty to protect the interests of what are referred to as "absent class members:" individuals who are "defined as...class member[s] but [are] not named in the lawsuit and [do] not

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[420] Knutsen, *supra* n259 at 949-950.

[421] David Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means" (1987) 62 Ind LJ 561 at 565 (referring to the "collectivization of claims for aggregative and averaged disposition").

[422] See e.g. Nagareda, *supra* n327 at vii (stating the typical tort can be understood as a "single, identified plaintiff with some sort of physical impairment sues the specific defendant she believes to have wrongfully caused that malady").

[423] See e.g. FRCP 23(a).

[424] Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Thomson Reuters, 2011) at 101.

[425] See e.g. Joseph F Rice & Nancy Worth Davis, "The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims" (1999) 50 South Carolina L Rev 405 at 418 ("Class actions permanently affect the rights of claimants who are absent or are unaware of the pending action").

[426] See Fed Rules Civ Proc 23(a)(4); *Class Proceedings Act,* RSO 1992, c 6 at 5(1)(e)(i) [*ONCPA*].

actively participate in the litigation."[427] Accordingly, the representative and subsequently protective nature of class actions are inherent.

Absent class members are brought into the legal grasp of class proceedings through judicial certification, empowered by statute.[428] In Canada, courts are instructed to certify class proceedings upon finding that "preferable procedure for the fair and efficient resolution of the common issues,"[429] and thus more ambiguous in the rationale. In the United States, Rule 23 of the Federal Rules of Civil Procedure provides internal distinctions with "types" of class proceedings permitted.[430] For the purposes here, it is worth noting one general distinction: that between those which permit members to "opt out" of the class and those that are mandatory and cannot be opted out of.[431] In terms of opt-out classes – found in Rule 23(b)(3) – courts may certify where "it may...be convenient and desirable depending upon the particular facts."[432] By allowing individual claimants to opt out, these class actions thus facilitate a more efficient management of mass actions while at least in theory preserving legal party autonomy.[433] Actions of this type, however, should not be thought of as merely a device for efficiency, as they can also serve other social purposes. As the court said in *Amchem Products, Inc v. Windsor*, with 23(b)(3) "the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[434]

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[427] Piché, *supra* n424 at 100.

[428] United States: Fed R Civ Proc at Rule 23, Canada: see e.g. *ONCPA*, *supra* n426 at s.29, *Class Proceedings Act*, RSBC 1996, c 50 at s.35 [*BCCPA*].

[429] *Ibid* at s. 4(1)(d); Ontario omits the "fair and efficient" wording.

[430] Fed R Civ Proc 23(b).

[431] *Ibid*, at Committee Notes on Rules - 2003 Amendment ("The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class.") <online: http://www.law.cornell.edu/rules/frcp/rule_23>.

[432] Fed R Civ P 1966 Amendment (discussing the 23(b)(3) classification).

[433] It is worth mentioning that opt-outs can be said to only exist in theory, as it may not be possible in practice, either through a lack of awareness of proceedings (above) or the inability of bringing one's own proceedings (see e.g. *Deposit Guaranty Bank v. Roper* (1980), 445 U.S. 326 at 339).

[434] 521 U.S. 591 at 617, (U.S.Pa 1997) (quoting Benjamin Kaplan, "A Prefatory Note" (1969) 10 BC Ind & Com L Rev 497 at 497) [internal quotations omitted].

The latter rationale of certification – found in Rule 23(b)(1) and (2) – is brought about where, by the very nature of the conflict, the interests of those outside the proceedings are necessarily affected through their interdependence with similar claims from other individuals.[435] Recognizing the potential interdependence of claims with class potential, the Advisory Committee on Rules explained the modern form of 23(b)(1)(B) in saying that "[i]n various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. [For example, this] is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims."[436] Accordingly, the authors recognized that the very nature of conflicts subject to class action themselves might practically affect others, with or without the legal effect of the class action device itself.

Beyond the mere procedural distinction, it is useful for the purposes here to recognize what might be understood as the conceptual distinction as it manifests itself in differing visions of the 'class'. The first designation, by permitting individuals to 'opt out' of the class, envisions the 'class' as the group bound together only through legal mechanism, rather than by shared characteristics or circumstance. By allowing similarly situated individuals to exclude themselves from the class, the 'class' is therefore limited to those participating in the legal mechanism, and thus defined through its shared legal status. In contrast, the second designation imposes a vision of the class as those individuals necessarily bound through practical and prospective interdependence. Through mandating legal membership on the basis of interdependence, the class is envisioned as that arising through an *inherent* relationship. Accordingly, 'absent' class members can be thought of in two different ways: as those legally bound by the resolution, and those – even without a legal connection – practically bound. Although both classes are legally defined, the nature of the class – as joined through theoretically-consensual mechanism versus through inherent relationship – is an important distinction. It is also worth briefly noting – for

[435] Fed R Civ P at 23(b)(1), especially 23(b)(1)(B).
[436] *Ibid*, Notes of Advisory Committee on Rules – 1966 Amendment.

the time being – that this distinction can also be understood in terms of the *impact* that any resolution might have on those members; that is, either a binding legal impact or a practical, non-legal impact due to the interrelated nature of the individuals' circumstances.

Public Supervision of Class Settlements

Mirroring the trend in conventional litigation, resolutions sought via the class action device generally take the form of a settlement rather than adjudication; moreover, class certifications are often sought for that sole purpose.[437] Unlike in the conventional settlements explored above, where proceedings can be dismissed without the permission of the court, a representative plaintiff who wishes to settle a class proceeding cannot do so without the permission of the court. In the United States, Rule 23(e) of the Federal Rules of Civil Procedure states that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised *only with the court's approval*."[438] Furthermore, at 23(e)(2) for example, the law requires that, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."[439] In Canada, parallel approval of settlement is also required.[440] Accordingly, private resolutions of class proceedings have no effect without substantive judicial approval, and representative plaintiffs are unable to resolve the class action in a way that the judiciary feels would be unfair.

Through this directed empowerment, courts are tasked with the supervision of all settlements arising through class actions. In considering the nature of class actions – in that they are representative and thus bind parties beyond those doing the negotiating – this supervision is necessary in order to protect those absent class

[437] See e.g. Piché, *supra* n424 at 33 ("The 'settlement class' is one kind of pre-certification settlement which presents a class approved strictly in view of negotiating, concluding and making a settlement agreement effective with the defendants. This kind of settlement has recently grown to be so popular its evolution has been characterized as 'meteoric'."); Cramton *supra* n407 at 823 (noting specific cases "in which the proposed class action settlement was filed on the same day as the class action")
[438] Fed R Civ P.
[439] *Ibid*.
[440] See e.g. *ONCPA*, *supra* n426 at s. 29; *BCCPA*, *supra* n428 at s. 35.

members. In amending Rule 23 in 2003, the Advisory Committee made this clear in saying that "[s]ettlement may be a desirable means of resolving a class action. But *court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.*"[441] Accordingly, court supervision is mandated in order to ensure the protection of others who will be affected by the resolution in question. As a U.S. district court indicated in *Grunin v. International House of Pancakes*, "[u]nder Rule 23(e) the...court acts as a fiduciary who must serve as a guardian of the rights of absent class members."[442]

Further efforts to ensure the objective fairness of settlements were made through the *Class Action Fairness Act of 2005* (CAFA).[443] To facilitate the "increased scrutiny of settlements,"[444] S. 1715 requires that defendants notify "appropriate" government officials and regulatory agencies of proposed settlements. In recognition of the broader social impact that these resolutions can have, and the value of considering resolution more contextually, this provision allows the Attorney-General and other regulatory officials "to examine and comment on the appropriateness of the proposed settlement."[445] These comments thus contribute to a more holistic public scrutiny of the private resolution of class actions.

Judicial Protection and a Threshold of Impact

As a starting point, it is worth noting that courts in the U.S. have shown preference for a vision of the 'class' which it must protect as those merely bound by law rather than effect. In practice, U.S. courts have adopted a legalist perspective toward their fiduciary role in regard to the protection of interests, focusing their concern on the protection of *legally* affected interests. In spite of the availability of mandatory class actions which permit the court to address the broader interests of a

[441] Fed R Civ P, Committee Notes on Rules – 2003 Amendment [emphasis added].
[442] *Grunin v. International House of Pancakes* 513 F.2d 114, 123 (8th Cir. 1975).
[443] Pub L 109–2, 28 USC 1.
[444] Donald Bisson et al, (eds), *Defending Class Actions in Canada* (Toronto: CCH Canadian Limited, 2011) at 326.
[445] *Ibid*.

‘practical’ class of individuals, the judiciary has shied away from addressing the indirect and practical effects of the mass conflicts subject to class action. Instead, those mechanisms which mandatorily deprive individuals of their legal right to sue have been treated with suspicion.

In *Ortiz v. Fibreboard Corp*[446] – the leading case on mandatory class actions – the U.S. Supreme court “cast doubt”[447] on their future, choosing instead to assert the importance of the civil justice system’s “deep-rooted historic tradition that everyone should have [their] own day in court.”[448] As David Rosenberg notes, this “’day in court’ concept implies that plaintiffs should have the freedom to opt out from a class action and to exercise individual control over the litigation.”[449] Ultimately, the judiciary has chosen to uphold the freedom for individuals to pursue their own individual settlements if they wish (and should they be able to), rather than show willingness to adopt a more communal approach to their resolution.

Accordingly, one can note that the judiciary prefers the purely legal vision of classes, and limits judicial supervision to those more mechanistic situations arising out of opt-outable class actions. Further, in considering the judicial approach to the protection of interests in opt-out class actions, one can see that class action jurisprudence demonstrates consistency in its preference for a legal view of the scope of interests to be protected. In looking at judicial treatment, one can clarify the limits and nature of judicial protection of interest, or in other words, identify a threshold of impact, up until which the court retains its duty to protect.

Given the justifications for judicial oversight above, it has been interpreted that the rationale behind requiring judicial approval is in response to the class action procedure’s unique ability to bind those unrepresented at the bargaining table. With

[446] 527 U.S. 815, 119 S.Ct. 2295, U.S.,1999 [*Ortiz*].
[447] Matthew C Stiegler, “The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After *Ortiz v. Fibreboard Corp*.” (2000) 78 NC L Rev 856 at 863; also at 877*ff*.
[448] *Ortiz*, *supra* n446 at 2315 (indirectly referencing 18 C Wright, A Miller, & E Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981))
[449] David Rosenberg, “Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases” (2002). 115 Harv L Rev 831 at 863.

this rationale, the protection of interests seemingly extends only to those bound *legally* by the settlement – that is, those remaining within the class.[450] Presumably, it does not require the judicial overseer to consider the broader interests of those outside the class. This issue was in part addressed in *In re Inter-op Hip Prosthesis Liability Litigation* – a case that is interesting to explore.[451] In *Inter-Op*, a U.S. federal district court was charged with the duty of considering a settlement between Sulzer Orthopedics, Inc. and a class of individuals who had been recipients of defective hip replacements.[452] In arriving at the settlement, negotiating parties took an "inventive" approach to ensuring that as few class members as possible would opt out by placing a six-year lien, in favour of the settling class, on the defendant's assets.[453] Consequently, those members who would decide to opt out of the settlement would, in effect, be blocked from bringing their own individual actions for that time, instead having to "wait in line behind class members for years before getting paid."[454]

Opponents urged the court to find that the settlement was not "adequate" under rule 23(e)(3) out of fear that "little or nothing would remain for opt-out claimants"[455] due to the exhaustion of funds available. The court, however, dismissed these objections and approved the settlement:

> "What these objectors fail to recognize is that 'opt-out' claimants not only opt out of the settlement, but opt out of the class as well. As long as a claimant's right to opt out remains intact...class counsel has no *further obligation to protect the interests of that claimant*. Indeed, the objectors would place an impossible and inherently irreconcilable obligation upon class counsel—to negotiate a class-wide settlement which is fair, adequate, and beneficial to its participants, while leaving *completely unaffected* the interests of those who would choose not to participate in it. The Court does not believe

[450] Given that those outside the class are left unaffected: *ONCPA*, *supra* n425 at s.29(3) ("A settlement of a class proceeding that is approved by the court binds all class members"); Fed R Civ Proc at Rule 23(e)(3) ("If the proposal would bind *class members*, the court may approve it only after..." [emphasis added]).
[451] 204 FRD 330, (ND Ohio, 2001) [*Inter-Op*].
[452] *Ibid* at 335.
[453] *Ibid* at 352, 355.
[454] Elizabeth Chamblee Burch, "Financiers as Monitors in Aggregate Litigation" (2012) 87 NYULR 1273 NYU L Rev 1273 at 1296.
[455] Nagareda, *supra* n329 at 157.

> that Rule 23 imposes any such burden on class counsel and does not believe 'adequacy', within the meaning of that Rule, is to be measured in such a fashion."[456]

Consequently, the court indicated that in assessing settlements under 23(e), those interests to be considered ought to be limited to those of the technical 'class' whose *legal* rights were affected through being bound within the settlement.

As Richard Nagareda explains, "[t]he district court's italics notwithstanding, the telling word here is 'interests'. What must remain 'completely unaffected' are not the economic 'interests' of [other] claimants but, rather, their pre-existing rights. One may encapsulate the distinction in terms of measures that merely affect the economic value of the right to sue and those that change the content of that right."[457] In such a way, the court in Inter-Op maintained that the legal rights of claimants are protected "as long as opt-out rights exist, *even if, as practical matter, an opt-out claimant would have little chance of actually collecting on an individual judgment.*"[458]

Though the court's rationale was sound, its application to the factual circumstances may not have been. What the court failed to recognize was the effect of the settlement on the rights – not just interests – of those who had opted out, in spite of their exit from the technical class. Though the liens were later dropped voluntarily, had the original settlement gone to the Court of Appeal as scheduled, it was predicted to fail on account of an interpretation that barring the ability to sue for a given period of time constituted the alteration of rights.[459] Nagareda suggests that the settlement did so by removing the parties' pre-existing rights "to attempt to leapfrog over other tort claimants in the race to obtain Sulzer's assets" – an impediment "created only by the class action itself.[460]

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[456] *Inter-Op*, *supra* n451 at para 15 [initial emphasis added].
[457] Nagareda, *supra* n329 at 157.
[458] *Inter-Op, supra* n451 at 355 [emphasis added] (discussing *In re Telectronics Pacing Systems, Inc*. 221 F. 3d 870 (6th Cir. 2000) at 881).
[459] Nagareda, *supra* n329 at 158 (discussing the Court of Appeals' commentary in granting a preliminary motion in which it "expressed serious doubts as to the legitimacy of the...settlement" [internal quotations omitted]).
[460] *Ibid* at 157.

It is important to recognize however, that in spite of its misapplication to the facts in the present case, the district court's rationale *in principle* remained valid. Accordingly, two related points might be gleaned from Inter-Op regarding the threshold of impact and thus the boundaries of self-determination. First, that in spite of mechanistic explanation for requiring judicial approval, the protection against infringing upon others does extend beyond the technical class itself to include legally-independent claimants. Secondly, what is made evident is that the threshold of impact in terms of 'severity' is that of *legal* rights rather than *practical* impact. In short the, one might understand the limits of impact not to be defined by the technical boundaries of a 'class', but instead as delineated by the reach of *legal consequence*. Accordingly, the court's guardianship of interests, and its understanding of 'absent class members', is limited to those whose *legal rights* – and not *practical interests* – are prejudiced.[461]

3.3.4.3 Moving Beyond the Mechanism: 'Quasi-Class Actions', Improvised Supervision, and a New Perspective

The Quasi-Class Action and Judicial Supervision

In scenarios where mass torts are not addressed through a class mechanism, they are nonetheless generally dealt with through other forms of aggregation not subject to judicial approval under 23(e).[462] In spite of the legal parameters for the

[461] For a parallel Canadian perspective, see *Coleman v. Bayer Inc*. 2004 CarswellOnt 1889 Ontario Superior Court of Justice at 36-37 (suggesting that the extent of interests to be protected are those of *res judicata* or a 'right to litigate') and 38 (questioning whether weakening the bargaining position of those outside a settlement is a "legitimate consideration").

[462] See generally Elizabeth J Cabraser, "The Class Action Counterreformation" (2005) 57 Stan L Rev 1475 (e.g. at 1478: "The counterreformation has begun. It is taking several forms. First is the path of least resistance, utilizing alternatives to traditional, formal class certification to accomplish at least some of its aggregative and preclusive advantages. This is done through adopting, and adapting, the joinder and aggregation alternatives that exist..."); See also Linda S Mullenix, "Dubious Doctrines: The Quasi-Class Action" (2011) 80 U Cin L Rev 389 at 422 ("MDL procedure rapidly has emerged in the twenty-first century as the preferred procedural umbrella under which to resolve aggregate litigation. Now, the Judicial Panel on Multidistrict Litigation almost immediately creates an MDL after the emergence of a defective products or pharmaceutical litigation.") ["Quasi"]; Jeremy Grabill, "Judicial Review of Private Mass Tort Settlements" (2011) 42 Seton Hall L Rev 123 at 125 (in terms of settlement as well, noting "the trend away from class action settlements and toward non-class aggregate settlements in mass tort litigation").

operation of the American federal Rule 23(e) – that is, for certified class actions – judicial supervision of mass settlements has emerged outside those technical parameters as well. In some situations, the class action practice of judicial involvement in, and review of, settlement has been extended to other mass settlements – arrived at through non-class aggregation – through their characterization as a "quasi-class action."[463] Under this label – "appearing with increasing...frequency in a spate of federal court decisions"[464] – a modern "trend" of approval and rejection of *non-class* mass settlement has emerged.[465]

Despite earlier usage, the doctrinal "vitality"[466] of the quasi-class action notion can largely be credited to Judge Jack Weinstein's usage in *In re Zyprexa Products Liability Litigation*.[467] Indeed, one commentator goes so far as to say that Judge Weinstein, "through sheer force of will and identical repetition in thirty-two *Zyprexa* orders and five other cases, may be credited with bullying the quasi-class action label into judicial consciousness."[468] In *Zyprexa*, Judge Weinstein presided over an aggregate litigation involving health complications arising out of the use of a prescription drug used to treat schizophrenia – litigation that ultimately concluded in the mass settlement of approximately 8,000 claims for $700 million.[469] Though recognizing that Rule 23(e) did not *technically* apply absent class certification, Judge Weinstein nonetheless asserted his jurisdiction over the settlement. In doing so, he stated that "[w]hile the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and *may be properly characterized as a quasi-class*

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[463] See e.g. *In re Zyprexa Products Liability Litigation*, 424 F Supp 2d 488 EDNY, 2006) (MDL No. 1596) [*In re Zyprexa*]; Jeremy Hays, "The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation" (2012) 67 NYU Ann Surv Am L 589 at 603*ff* (discussing the history of the use of the term).
[464] Mullenix, "Quasi", *supra* n462 at 389.
[465] Amanda Rothman, "Bringing An End to the Trend: Cutting Judicial 'Approval' and 'Rejection' Out of Non-Class Mass Settlement" (2011) 80 Fordham L Rev 319 at 335.
[466] Hays, *supra* n463 at 607.
[467] *In re Zyprexa, supra* n463.
[468] Mullenix, "Quasi" *supra* n462 at 392.
[469] *In re Zyprexa*, supra n463; Master Settlement Agreement at 6, *In re Zyprexa,* MDL No. 1596 (E.D.N.Y. Nov. 22, 2005), <online*:* http://investor.lilly.com/secfiling.cfm?filingID=950137-05-13258>.

action subject to general equitable powers of the court."[470] Though most obviously using these powers to adjust attorney fees, Weinstein did suggest changes to the initial settlement, later affirmatively approve the settlement, as well as appoint Special Settlement Masters to decide how the aggregate settlement would be distributed.[471]

Following suit, other notable[472] mass litigations and their resultant settlements have involved similar, and even more brazen, judicial behaviour. In the *In re Vioxx Products Liability Litigation*, litigation of allegations regarding a prescription painkiller taken by an estimated 20 million people was managed in a similar way.[473] Though affirmed as a "private agreement,"[474] the terms of the resultant $4.85 billion settlement were both "tweak[ed]"[475] as well as expressly approved.[476] In *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation*, a $240 million[477] settlement was reached with considerable judicial involvement.[478] Presiding Judge Frank ordered each side to confer with Judge Arthur Boylan regarding settlement, who "was active enough in the settlement process that the parties described him as the settlement's architect."[479] The eventual settlement was presented for Judge Frank's review, who recommended it while acknowledging "that his job was to make sure that all parties...received a fair outcome."[480]

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[470] *In re Zyprexa, supra* n463 at 491 [emphasis added].
[471] Rothman, *supra* n465 at 337.
[472] Indeed, the cases discussed here are repeatedly used as paradigmatic of quasi-class actions in academic discussion. See generally Charles Silver & Geoffrey P Miller, "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal" (2010) 63 Vand L Rev 107; Rothman, *supra* n464.
[473] *In re Vioxx Products Liability Litigation,* MDL No. 1657 (ED La) [Vioxx]; Rothman *supra* n464 at 340 ("The *Vioxx* MDL began in a similar fashion to *Zyprexa,* but went on to surpass *Zyprexa* in terms of the settlement size and the degree of judicial control.")
[474] Rothman, *supra* n465 at 341.
[475] Transcript of Status Conference Before the Hon. Eldon E. Fallon at 12, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Jan. 18, 2008) (unavailable to the author, but here as cited in Rothman at 341).
[476] Rothman, *supra* n465 at 341.
[477] See e.g. Silver & Miller, *supra* n472 at 107.
[478] MDL No. 05-1708 (D Minn).
[479] Rothman, *supra* n465 at 343 (internal quotations omitted).
[480] *Ibid*.

Going even further was Judge Hellerstein in *In re World Trade Center Disaster Site Litigation*, who indicated explicitly from the outset that he would review the fairness of any proposed settlement.[481] More specifically, "[h]e explained that he would evaluate whether the settlement was fair in both its 'aggregate size' and in the 'individual settlements' afforded to each claimant."[482] True to his word, when presented with an initial settlement, it was reviewed, and then rejected as inadequate;[483] after the settlement was adjusted and ultimately increased, Judge Hellerstein gave it his approval.[484] Throughout the process, the defendants repeatedly objected to this judicial control, but the protests that Judge Hellerstein lacked authority were dismissed.[485] Meanwhile, Judge Hellerstein has been explicit elsewhere that he knowingly did so absent clear statutory authority.[486]

This control, occurring outside the statutory empowerment of Rule 23, has been met with some harsh criticism for that very reason. As discussed previously, settlements outside those exceptional areas of state interference are free to be resolved between private parties at their will without judicial involvement. Given that even casual approval has in the past raised serious objection,[487] the judicial

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[481] Transcript of Status Conference at 19, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Jan. 25, 2010) (as cited in Rothman, *supra* n464 at 345).
[482] Rothman, *supra* n465 at 345.
[483] Alvin K Hellerstein, "Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims are Being Asserted" (2012) 45 Columbia J of Law and Social Problems 473 at 476.
[484] Order Approving Modified and Improved Agreement of Settlement, *In re World Trade Ctr. Disaster Site Litig*., Nos. 21 MC 100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. June 23, 2010) (as cited in Hellerstein, *ibid* at 476).
[485] Rothman, *supra* n465 at 348-349; Hellerstein, *supra* n482 at 476.
[486] Hellerstein, *supra* n483 at 477 ("Neither the Federal Rules of Civil Procedure nor any other rule or law specifically sets out the role of the court in a coordinated mass tort litigation. And there is no authority that explicitly calls for the court to condition approval of a mass settlement on fairness hearings or on compliance with judicially crafted procedural requirements").
[487] See e.g. Rothman, *supra* n465 at 334-335 ("If a judge does approve a settlement, while lacking the authority to do so, observers respond sternly. The Eighth Circuit elaborated on this point in *Gardiner v. A.H. Robins Co.,* a case that was part of the national litigation surrounding the Dalkon Shield intrauterine contraceptive device. The trial judge presiding over *Gardiner* wrote 'So Ordered' on the bottom of the parties' agreement dismissing a civil action in favor of settlement. This language turned the agreement into a court order; however, the judge lacked the authority to do this because the settlement was a private agreement. On appeal, the Eighth Circuit explained that the judge's action 'imposed a material condition on the parties' right to a stipulated dismissal.' This condition was

involvement above thus represents a true derogation from this general approach. Given this derogation and despite judicial claims of equitable empowerment, critics have viewed this judicial supervision as unauthorized and unsound.[488] Linda Mullenix has criticized the quasi-class action as a doctrinal "phantasm,"[489] ambiguously based on "broad policy rationales"[490] and "weak rule-based and precedential authority."[491] Going further with regard to the individual rights of the parties, she implores that "the judiciary ought to reject this doctrine as an *illegitimate expansion of judicial authority and a usurpation of the rule of law*."[492] This concern for inappropriate and illegitimate infringement upon party self-determination can be found in other commentaries as well. Amanda Rothman condemns quasi-class action practices as infringing upon party autonomy,[493] and asserts that "reviewing and then approving or rejecting a mass settlement absent class certification stretches the judiciary's power and stifles litigants' rights in mass actions."[494] In this way, judicial review under the quasi-class action doctrine has been flagged as a legally unsound intrusion upon the ownership rights of parties.

In addition to being unauthorized, substantive judicial review has also been described as unnecessary. As noted above, absent class certification, no claimants or potential claimants are involuntarily bound; that is, by *Inter-Op*'s standard, no claimants lose their *right* to sue. This distinction has been deemed central to the inapplicability of judicial empowerment. As Rothman points this out, "[a] class action settlement is subject to judicial approval because the settlement has the power to bind absent class members. In the interests of protecting these class members, a judge must verify that the settlement is 'fair, reasonable, and adequate'. The same

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inconsistent with the private nature of the settlement. Therefore, the appellate court in *Gardiner* deemed the approval improper and voided the trial judge's action.").

[488] See e.g. Rothman, *supra* n465 at 321, generally.

[489] Mullenix, "Quasi" *supra* n462 at 391.

[490] *Ibid* at 401.

[491] *Ibid* at 404.

[492] *Ibid* at 416.

[493] Rothman, *supra* n465 at 353 ("this practice removes claimant autonomy and damages the adversarial system").

[494] *Ibid* at 321.

concerns do not apply in a non-class mass settlement, because there are no absent class members."[495] Though this may be true from a mechanistic perspective, Elizabeth Chamblee, among others, notes that due to the size of conflicts, in practice "tort claimants have an attenuated attorney-client relationship with their lawyer and exercise little or no meaningful control over their case."[496] In addressing the fact that claimants in non-class settlements must themselves agree individually, she notes that "[i]ndividual consent to the settlement terms is illusory since claimants must choose between settlement and the cost of funding separate litigation against defendant corporations."[497] As noted above, this is not often an option in practice, as individuals lack negotiative weight.

Mass Torts and the Public Interest: A Different Envisioning of 'Absent Class Members'?

While, Chamblee's perspective sheds further light on the *practice* of conflict resolution in mass torts, it is particularly enlightening for the purposes here to consider the judicial reasoning for this supervision that reflects the *nature* of these conflicts: their implications for the broader public that is unrepresented at the negotiating table. Accordingly, whereas Rothman and others may be correct in the sense that non-class mass torts do not involve *legally*-defined 'absent class members', both the judiciary involved in the mass torts above as well as other commentators recognize that the particular nature of mass conflicts are such that their resolution has implications for those outside the court proceedings. Consequently, and in contrast to the *Inter-Op* ethos, those with affected and unrepresented interests – 'the public' – might be considered to be 'absent class members' by virtue of these recognized interests. In other words, if prepared to relinquish a purely legalist perspective, 'absent' class members might be found in the form of individuals outside the specific settlement who in actuality have a stake in the resolution.

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[495] *Ibid* at 350.
[496] L Elizabeth Chamblee, "Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements" (2004) 65 La L Rev 157 at 161.
[497] *Ibid* at 161, footnote21.

Given the size and reach of the litigations above, it is perhaps unsurprising that public interest would be invoked by the judiciary. Judge Weinstein in *Zyprexa* recognized the broader context in saying that resolutions "like the present one are an important tool for the protection of consumers in our modern corporate society."[498] Judge Hellerstein also referenced the litigation's implications for the public interest throughout the process.[499] Looking at the broader picture, he stated that "what we are about in a settlement of all these cases, investing so much time of the court, and involving so many people and invested with all the public involvement of public money and public activity, it just begs for judicial supervision."[500] However, in line with the ambiguity surrounding the judiciary's authority and its instigation, this public interest is necessarily left largely unexplained. Nonetheless, elaboration can be sought elsewhere. Weinstein, for example, as the greatest proponent of the quasi-class doctrine, can be looked to outside of the narrow judicial reasoning for further clarification. Weinstein himself has written at length on mass litigation, both before and after his in-court quasi-class action involvement.[501] In looking at his perspective as illustrated in these writings, further insight can be gained into the motivation behind this improvised judicial involvement, and, simultaneously, the unique nature of these mass conflicts.

Extrajudicially, Weinstein has written that with mass torts, "[w]e need to look *not only to the individual's hurt* but also to similar harm suffered by others in the community and suggested solutions for those who may be secondarily affected – including workers who may lose jobs if the business they work for is bankrupted." [502]

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[498] *In re Zyprexa*, supra n463 at 494.

[499] See e.g. Rothman, *supra* n465 at 345 (According to Judge Hellerstein, the extraordinary public interest and the limited funds available for the claimants demanded that there be "fairness proceedings.") and at 348, esp. footnote 270.

[500] WTC June Transcript at 47-48, 108 (as cited in Rothman, *supra* n465 at 348).

[501] See e.g. Jack B Weinstein, "Ethical Dilemmas in Mass Tort Litigation" (1994) 88 Nw U L Rev 469 ["Ethical Dilemmas"]; Jack B Weinstein, "An Introduction to Who's Who in Mass Toxic Torts" (1995) Cornell L Rev 845 ["Mass Toxic Torts"]; Jack B Weinstein, *Individual Justice in Mass Tort Litigation: The Effects of Class Actions, Consolidations, and Other Multiparty Devices* (Evanston: Northwestern University Press, 1995); Jack B Weinstein, "*Comments on Owen M Fiss, Against Settlement (1984)" (2009)* 78 Fordham L Rev 1265 ["Comments on Fiss"].

[502] Weinstein, "Ethical Dilemmas" *supra* n501 at 486 [emphasis added].

In such a way, public interest entails more than ensuring appropriate compensation, also involving a *balancing* of interests. Discussing consumer harm, Weinstein puts this succinctly in saying that "[o]ur courts and our legal structure exist to help these people, as well as to apportion loss among defendants, and to do it at a cost that does not destroy industries."[503] Similarly, he noted in an interview that "we do not want laws which are too onerous in providing compensation because then manufacturers will not develop new methods, pharmaceuticals and techniques."[504]

Likewise, Menkel-Meadow expands on this, saying that, when it comes to wrongs of this size, the degree to which defendants are held accountable has a "public" cost of "increased prices for hazardous goods, drugs, and other substances as the costs of damage awards are passed on to the consumer."[505] Due to the nature and extent of these wrongs, the resolution of mass torts necessarily involves broader policy decisions; moreover, the resolutions of these conflicts must consider the interactive relationship between giants of the corporate world and the public generally: their present and future role as a creator of wealth, innovation, but also – as demonstrated here – potential for mass harms.

Given the governance-like nature of these decisions, Weinstein and others have taken a contextual approach in reference to the absence of governmental action in these situations of mass harms. Weinstein sets the stage for judicial governance in saying that

> "Mass tort cases unfortunately do not involve the application of legislative schemes representing careful analysis of the policy problems presented. By their very nature, these cases involve unanticipated problems with *wide-ranging social and political ramifications*. A judge does not 'legislate from the bench' simply because he or she considers the broadest implications of his or her decisions in such a case. Judges not only may take such a view; *they must*."[506]

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[503] Weinstein, "Mass Toxic Torts" *supra* n501 at 846.

[504] "Class and Multi-Party Actions: An Interview of Honorable Jack B. Weinstein" (New York: May 6, 2010) at 38 <online:http://ssrn.com/abstract=1640796> [Weinstein Interview]; See also Hensler & Peterson, *supra* n411 at 961 (noting that the wave of litigation in the 1980s "frightened insurers from some markets, and manufacturers from research and development in some product lines.").

[505] Carrie Menkel-Meadow, "Ethics and the Settlements of Mass Torts: When the Rules Meet the Road" (1995) 80 Cornell L Rev 1159 at 1187.

[506] Weinstein, "Ethical Dilemmas," *supra* n501 at 541.

Naturally, these ramifications are equally as present when resolutions occur outside adjudication, and perhaps add credence to judicial supervision of settlements.

In this way, "[t]he judge cannot focus narrowly on the facts before the court, declining to take into account the relationship of those facts to the social realities beyond the courthouse door."[507] Rothman notes this awareness in Judge Hellerstein's rejection and approval of the *World Trade Center* settlement,

> "The September 11th Victim Compensation Fund...for which the claimants were ineligible because the Fund's time period had expired before their injuries manifested themselves, lurked in the background. Judge Hellerstein had urged Congress to renew the Fund, but Congress refused to do so. In the absence of the Fund, the judge set out to ensure that the amended settlement afforded claimants adequate relief."[508]

Similarly, Weinstein has said that in overseeing cases involving pharmaceuticals he "will consider the impact on society generally" while "keep[ing] in mind the fact that our federal drug administration is not as effective as it should be."[509] More actively, he has also written that "[g]iven the political failure to provide adequate protection, the courts have a failsafe, default obligation to provide constitutionally required protection of the public through deterrence against dangerous conduct and reasonable compensation to harmed individuals."[510]

Given the breadth of implications involved, a recurring theme is that of unrepresented interests at play. Accordingly, Weinstein recognizes the necessity of having someone to consider those unrepresented interests, as those involved in the resolution at hand could not be relied upon to do so – saying that "[i]n mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately."[511] Accordingly, Weinstein has written that "in mass tort cases,

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[507] *Ibid* at 540.
[508] Rothman, *supra* n465 at 348.
[509] "Weinstein Interview," *supra* n504 at 38.
[510] Weinstein, "Comments on Fiss," *supra* n501 at 1272.
[511] Weinstein, "Ethical Dilemmas," *supra* n501 at 540.

[judges] cannot and should not remain neutral and passive in the face of problems implicating the public interest."[512]

In such a way, in cases of these magnitudes, one must give consideration to the broader implications. Unlike the private parties at the negotiating table – representing limited interests – Weinstein indicates that the judiciary is able to address the broader conflict at hand:

> *"By transcending the narrow interests of the few, the judge can attempt to ensure that the settlement protects both the immediate and long-term interests of the many.* A judge can weigh factors *that may be of little or no interest to the litigants and their lawyers*, such as the protection of those who may be injured in the future, the long-term structural effect of the harm on the community, and the extent to which the poor and minorities may bear a disproportionately heavy burden."[513]

In this way, Weinstein makes it evident that, from his perspective, judicial supervision is necessitated by those unrepresented interests of the broader public – in both the present and future.[514]

With this perspective, Weinstein steps outside the pure legalist view and considers the *nature of the conflict in question* rather than the legal mechanism by which it is dealt with. In doing so, he states that the actual mechanism of aggregation is "of little significance in defining ethical responsibilities of judges and lawyers in mass torts settlements."[515] He notes that in respect to mass wrongs generally, "[o]bligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations."[516] In this way, a purely legal 'class' designation is irrelevant when one recognizes the interests implicated by mass torts themselves, rather than the action of legal mechanism.

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[512] *Ibid*.
[513] *Ibid* at 551 [emphasis added].
[514] See e.g. *Ibid* at 509 ("A humane communitarian ethic requires that future claimants be included in the community of those the courts recognize as harmed and in need... A system that willingly turns its back on injured members of the community, even though they may not yet have names and faces, is unlikely to maintain the public confidence. Our courts belong to all the people, not just those who arrive first at the courthouse door.")
[515] *Ibid* at 550.
[516] *Ibid* at 481.

Consequently, quasi-class action supervision might represent a more practical perspective than that offered by *Inter-Op*'s rigid class justification: one that moves away from a rigid rights-based legal framework, toward a more realistic *interest*-based philosophy. Further, it may also be indicative of a more comprehensive perspective, one that recognizes the entire breadth of interests at play, rather than merely those affected legally. This broader consideration fits closely with what Weinstein has referred to as having a "communitarian ethic,"[517] where the members of this 'community', given the breadth of implication, "are both inside and outside the courtroom"[518] (or 'both at and away from the bargaining table'). Consequently, mass torts – in that they may have serious implications for the public – require a more public view in their resolution. In such a way, "[c]ompensation to the *individual* is not the end-all of modem mass tort law,"[519] and serious consideration ought to be given to those affected. The distinction here then seems to be a recognition that in reality, the resolutions of mass torts, whether consolidated through class mechanisms or not, necessarily have unrepresented and 'absent' members.

<u>3.4 The Experience of Criminal Wrongs as Conflict</u>

3.4.1 Toward a More Complete Jurisprudence of Self-Determination

Turning our attention to the criminal stream of conflict's discourse, a similar endeavour of discernment must be undertaken to more fully realize this chapter's task. Unlike the investigation in the civil stream, however, the relinquishment of criminal conflict is recognized to have a different starting point – that is, criminal conflicts are conventionally under public ownership. Given this, the criminal stream of conflict's discourse and the privatization of criminal conflict resolution present a particularly direct and deliberate challenge to both the dominant public conception of crime as well as its consequent ownership. In this way, the encounter between conflicting paradigms leads to a more obvious public-private tension. In exploring the

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[517] *Ibid* at 541.
[518] *Ibid* at 542.
[519] *Ibid* at 486 [emphasis added].

results of this tension, the jurisprudence of self-determination is expanded to include criminal conflict. Accordingly, the more general inquiry into what 'conflicts' the legal community is willing to relinquish, and why, becomes more complete.

Comparable to the civil trends above, the criminal realm has not seen an even distribution of this willingness; instead it has been concentrated in regard to particular types[520] of criminal conflicts. Similar to Knutsen's commentary above, criminal conflicts might also be said to exist on a public-private continuum, with some more appropriate for private resolution than others. Thus, this section seeks to identify those areas of the criminal law where both private and public modes of conflict resolution have the strongest hold. To do this, an approach akin to that taken in regard to civil conflicts will be adopted: observing areas of particular public and private pull, and noting both the relinquishment of conflict as well as resistance to such. Though no analogous landmark 'Against *Criminal* Settlement' exists to embody an emergent resistance to the relinquishment of criminal conflicts, resistance is present nonetheless. In fact, resistance might even be considered endemic given the original position of conventional criminal justice. This resistance to privatization of the criminal law, it is worth making obvious, is necessarily passive: the criminal justice system resists these developments simply by continuing as it would otherwise. Consequently, in exploring the public-private tension within the criminal law, one must simply observe those conflicts which have or have not been relinquished to private resolution.

When presented in these general terms above, public and private resolution might be seen as relatively explicit; indeed, it is at times as simple as considering the types of offenses within private processes of resolution. However, further clarification of the approach is necessary in regard to two interrelated points before accepting this as so. First, a distinction must be made explicit in regard to restorative justice or negotiative processes generally, and private conflict resolution. Given the

[520] With the variations in offences, it is necessary to speak of broader areas of conflicts, e.g. 'misdemeanors' or 'minor property crimes'.

variance of processes within restorative justice, as well as the varying practical effect of those processes, it is important not to simply accept restorative processes as private conflict resolution. Though in theory all restorative endeavours are a form of conflict resolution in that they seek to resolve emotional and psychological conflicts, this is not so for the purposes here. Consistent with the exploration so far, attention paid here is to those processes which resolve conflicts which otherwise would have been dealt with through legal processes. Accordingly, dialogical processes which occur *in addition to* legal adjudication will not be considered as the private resolution of criminal conflicts. For example, Texas statutory guidance indicates that victim-offender mediation may be used in cases of murder, yet also states that VOM cannot have an effect on the sanctioning process of offenders.[521] Here, then, this would not be considered as the resolution of criminal conflict.

Secondly, it is worth making explicit that in a strictly *legal and technical sense*, private resolution of criminal conflict, whether through restorative processes or otherwise, remains under the umbrella of state control. Indeed, ultimately the decision to allow a specific conflict to proceed to private resolution rests with the state.[522] In order to see the reality of conflict resolution however – and to discern that which is sought here – it is necessary to forego pedanticism, at least initially. Though the broader public framework retains criminal conflicts within its possession, the release of conflicts from that framework nonetheless occurs, albeit at a secondary tier of discretionary public decision-making. In considering statutory guidance and the exercise of discretion from a practical perspective, the relinquishment of that control is evident in a very real sense. Beyond that, the control, once granted, holds legal weight of its own.

Given the ad hoc nature of this relinquishment, developments are not always as cohesive or standardized as an observer might wish. Moreover, the nature of

[521] Mark S Umbreit, Elizabeth Lightfoot & Johnathan Fier "Legislative Statutes on Victim Offender Mediation: A National Review" (2001) University of Minnesota Center for Restorative Justice & Peacemaking at 7.
[522] See discussion below.

discretionary decision-making with specific cases is only further complicated by the heterogeneous character of programs across, and even within, jurisdictions.[523] At the same time, it is recognized that developments in this area are ongoing, and thus not necessarily mature. In this way, a consideration of the relinquishment of criminal conflict must take a broadly inclusive perspective, considering data in a collective light. As well, perhaps disproportionate attention ought to be given to the more developed endeavours. Such a perspective will be adopted here, seeking to identify commonalities in developed areas that transcend technical differences. Fortunately (and informatively), despite the perhaps erratic *potential* of discretionary regulation, a relatively high degree of consistency can be found across programs and jurisdictions – at the very least in result. As a consequence, a general picture of the relinquishment of conflict can be discerned for the purposes here. This picture, as will be seen, demonstrates a strong trend toward ready – even systematic – relinquishment of certain criminal conflicts and the seemingly complete withholding of others.

3.4.2 Empowering Private Resolution of Public Wrongs

Though the imminent site of relinquishment is discretionary in nature, that discretion is both enabled and informed by positive legislative and policy measures on various levels. As a general arrangement within jurisdictions, broad authority for private decision-making with basic direction is granted through centralized law, with more specific authority and guidance appearing at more local levels. Though an implicit authority for diversion of criminal conflicts exists at both police and prosecutorial levels, these actors have seen their discretion informed by the more explicit statutory authorities.[524]

[523] See e.g. Bruce P Archibald, "Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy – A Modest Contribution for Criminal Law and Restorative Justice" (2008) 16 Cardozo L Int'l & Comp L 1 at 29 (Canada); Beale, Sara Sun. "Still Tough on Crime? Prospects for Restorative Justice in the United States" (2003) Utah LR 413 at 421 (US).

[524] See e.g. Van Ness, "Overview" *supra* n170 at 7 ("In general, the prosecutor's authority to divert a matter after charges have been filed appears to depend on the legal tradition of the country. In common law countries the prosecutor may continue to divert until the trial (and withdraw charges in

In Canada, the federally-established Criminal Code acts as a structural authority for private resolutions whereas more specific programs are often fleshed out at the provincial level.[525] Section 717 of the Criminal Code provides for offences to be diverted from the judicial system in a general sense, saying that "[a]lternative measures may be used to deal with a person alleged to have committed an offence;"[526] going on to qualify this authority to those measures that are "part of [an authorized] program."[527] Equivalent authority is granted for "extra-judicial sanctions" by the Youth Criminal Justice Act for offences involving young persons.[528] Given the general nature of the authority, the programs themselves as well as decisions regarding conflicts subject to them are often left to be developed at more proximate levels of authority.[529] The province of Nova Scotia, for example, has its own comprehensive diversion programs, complete with province-specific eligibility and guidance.[530]

Relatedly, in the United States, individual states themselves produce statutory authority for private resolutions. Consequently, the permission of private resolutions – or lack thereof[531] – through programs such as victim-offender mediation is state

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the event of a successful resolution) without the court's permission."); See e.g. Royal Canadian Mounted Police, Community, Contract, and Aboriginal Policing Services "Community Justice Forum Facilitator's Guide to the RCMP Learning Map" <online at http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/pdf/cjf-fjc.pdf> ("encouraging officers to use their discretion to refer cases to options like [Community Justice Forums] rather than operating within the framework of formal legislation").

[525] See e.g. Archibald *supra* n523 at 33 (discussing statutory authority and referring to "mandatory minimum statutory conditions").

[526] *Criminal Code*, RSC 1985, c C-46 (1st Supp) s. 717(1) [*Criminal Code*].

[527] *Ibid* at 717(1)(a) (with those programs being authorized by "the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province").

[528] *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 10(1)-10(2) [*YCJA*].

[529] See e.g. British Columbia's Criminal Justice Branch, Ministry of Attorney General, "Crown Counsel Policy Manual: Alternative Measures for Adult Offenders" (2010) <online: http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/ALT1-AlternativeMeasures-AdultOffenders.pdf> [BC Policy].

[530] See e.g. Nova Scotia Department of Justice, "Restorative Justice Program Protocol" (2007) , <online: http://www.gov.ns.ca/just/rj/documents/Restorative%20Justice%20Protocol%20Eng%20Web.pdf> [NS Protocol].

[531] See Umbreit, Lightfoot & Fier, *supra* n521 at 7 (pointing out that "Texas is alone in its statutory language saying that VOM should not be used in sentencing" and citing Texas Government Code S. 508.324 which states that "the pardons or paroles division... may not reward the person for participation by modifying conditions of the release or the person's level of supervision by granting any

dependent. A national review of U.S. statutes regarding victim-offender mediation, for example, demonstrated a continuum of legislative attention.[532] Broad authority thus varies from jurisdiction to jurisdiction. Alaska's law, for example, states that "[a] court...may permit the victim and the offender to submit a sentence for the court's review based upon a negotiated agreement... The Court may, with consent of the victim and the offender, impose the sentence that has been determined by the negotiated agreement."[533] Minnesota's statute permits the establishment of restorative justice programs generally – through collaboration of "community-based organization[s]" and "local government unit[s]" – that may, among other things, themselves "assign an appropriate sanction to the offender."[534] Under this broader framework of authority, further specifications occur at county levels.[535] Variance aside, most states' codes indicate specifically that victim-offender mediation to negotiate an agreement to submit "to the court for sentencing, or in itself [as] a sentencing alternative."[536]

Furthermore, the empowerment of private resolution has been reinforced through respecting those agreements arrived at. Ultimately, as noted above, the actuality of private resolution comes through the *implementation* of those resolutions in lieu of public prescriptions. In this way, empowerment of parties' agreements on the back end is also a necessary component of legal authorization. In the criminal context, where public prosecution operates as a counter to private resolution, respect for negotiated resolutions can be understood as the freedom to create one's own agreement, and preclusion of prosecution so long as the agreement is complied with. In terms of restriction on content of agreements, statutory guidance

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other benefit"); Texas Department of Criminal Justice, Victim Services Division, *Fiscal Year 2012 Annual Report* at 20 (describing their VOM program: "This program is not intended to have any bearing on the participating offender's status in the judicial, appellate or corrections systems").

[532] See generally Umbreit, Lightfoot & Fier, *supra* n521.

[533] Alaska Stat. § 12.55.011. (2012)

[534] Minnesota Stat. § 611A.775. (2012)

[535] See e.g. Audrey Evje & Robert C. Cushman, "Report to the California Legislature: A Summary of he Evaluations of Six California Victim Offender Reconciliation Programs" (2000) The Judicial Council of California Administrative Office of the Courts, Center for Families, Children & the Courts [Evje & Cushman].

[536] Umbreit, Lightfoot & Fier, *supra* n521 at 7.

is often silent on the matter, while in some instances general wording is used to allow for flexible, party-specific, or even "*unusual* paybacks."[537] Nova Scotia's protocol is explicit with this flexibility, listing a range of broad possible outcomes, one of which is "any other outcome agreed upon by the participants."[538] In at least one U.S. jurisdiction, courts are not even informed of the content when dismissing cases.[539]

In terms of respecting that content as a substitute for legal prescription, generally the inherent nature of diversion programs – that is, as *voluntary referrals by would-be prosecutors* – will prevent objections from arising post-agreement on the part of those would-be prosecutors. Accordingly, "[w]here the offender follows through in good faith" on whatever agreement is arrived at, "charges usually do not proceed."[540] In this way, jurisprudence on this area of private dispute resolution is scarce, as it is likely rarely needed. Canada's criminal code, however, does address the obligation of the court and lend legal weight to diversions post-agreement. At 717(4) it states that

> "[t]he use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, *but, if a charge is laid against that person in respect of that offence,*
>
> (a) where the court is satisfied...that the person has ***totally complied*** with the terms and conditions of the alternative measures, the court ***shall*** *dismiss the charge*; and
>
> (b) where the court is satisfied...that the person has ***partially complied*** with the terms and conditions of the alternative measures, the court ***may*** dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures."[541]

[537] Umbreit et al, *supra* n146 at 279 [emphasis added]; See e.g. Delaware Code, Title 11, Chapter 95 (silent on content).
[538] NS protocol, *supra* n530 at 14.
[539] Nicholas McGeorge, "North Carolina: Where Judges Encourage People to Avoid Trial & Go to Mediation" (2004) *Resolution* (RJC) at 7; However, it is worth noting that North Carolina's statute indicates that should the agreement be in writing, it would be enforceable (Supreme Court of North Carolina, Rules Implementing Mediation in Matters Pending in District Criminal Courts, rule 5B1 <online: http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/DCCRules_1-1-12.pdf>).
[540] Richard M Zubrycki, "Community-Based Alternatives to Incarceration in Canada" (2003) Resource Material Series No. 61 <online: http://www.unafei.or.jp/english/pdf/RS_No61/No61_12VE_Zubrycki.pdf> , at 107 [emphasis added].
[541] *Criminal Code, supra* n526 at 717(4) [Emphasis added]; *YCJA, supra* n528 at 10(5) (A parallel enactment for youth).

Accordingly, in Canadian jurisdictions, where offenses are diverted to private processes of resolution, those offenses can no longer be prosecuted as long as the agreement is complied with. Evidently, the court can also take a more lenient approach as well should the agreement be partially complied with.

In a similar vein, in *State v Pearson*, the Supreme Court of Minnesota was tasked with addressing the state's objection to a sentencing circle's resolution after it has agreed to divert a case of felony theft.[542] Though the Court of Appeals had concluded that a restorative justice program could not "assign a sanction that would be an improper sentence if imposed by the district court,"[543] the Supreme Court overturned that decision, holding that the state's "after-the-fact attempt to limit the discretion of the circle on restitution was improper."[544] Though acknowledging the state's ability to place limitations of the agreement initially, it indicated that it must do so "up front," as to "allow an after-the-fact objection to the authority of the sentencing circle would eviscerate the purposes of the restorative justice program."[545] Though this decision was based solely in reference to state-specific law, it does, along with the Canadian legislation, demonstrate the legal respect these agreements can receive.

3.4.3 Distinguishing Between 'Private' Public Wrongs and 'Public' Public Wrongs

With this authority, actors at various points within the criminal justice system are empowered to divert criminal conflicts from public adjudication to private processes of resolution. This empowerment, however, is not unfettered; rather, such authority comes with qualifications in various forms. Once authorized, the question becomes one of *which* conflicts ought to be relinquished. Commonly, broad statutory empowerment will leave eligibility to be developed on the ground;[546] however,

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[542] 637 N.W.2d 845 (Minn 2002)
[543] State v. Pearson, 609 N.W.2d 630 at 633. (Minn, 2000).
[544] *State v. Pearson*, 637 N.W. 2d 845 (Minn 2002).
[545] *Ibid*, at 849.
[546] See e.g. Delaware Code §. 9504 (Saying, very broadly that "[n]o offender shall be admitted to the program unless the Attorney General certifies that the offender is appropriate to the program,

authorization for diversion at both statutory and certainly program levels often comes with some degree of guidance for discerning which criminal conflicts are appropriate for private resolution, and conversely, those which are not. This guidance generally comes in terms of giving qualitative criteria for consideration before making a determination, but can also involve setting parameters for the use of discretion or through expressing presumptions one way or another regarding specific types of offences.[547]

As a whole, this guidance shapes the decisions as to what conflicts are appropriate for private resolution in lieu of the prescriptions of public law. In other words, this guidance and its use serves as the mechanism by which criminal conflicts are distinguished – classified into those that the legal community are willing to relinquish and those that they are not. In this way, it serves as a useful site of exploration for the purposes here. In exploring this guidance and its results, one can not only gain insight into which conflicts are relinquished, but also the rationale that informs the process of distinction. In this way, both the 'legal treatment' as well as 'the principles upon which that treatment is based' are discernible.[548] Exploring independent jurisdictions and programs inevitably produces a range of indications; however, common themes and – importantly – results are to be found. It is in these commonalities that the emergence of a new public-private equilibrium might be seen.

Weaving through statutory frameworks as well as program-specific eligibility, the predominant consideration for the appropriateness of private conflict resolution is the protection of the public. For example, the Canadian Criminal Code's section on alternative measures, which governs all subordinate decision-making, opens with this

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regardless of any criteria established under any program or this chapter."); Umbreit, Lightfoot & Fier, *supra* n521 at "Types of Offences" (indicating this as a common approach in their national survey).

[547] See e.g. NS Protocol, supra n530 (demonstrating both qualitative guidance as well as parameter setting); Compare Alaska Stat. S 12.55.011 ("may permit") with North Carolina S. 7A-38.5 (c) and (e) (indicating that it ought to be *encouraged*, as well as sets a *presumption in favour of mediation* for some offences).

[548] See discussion of jurisprudence above.

sentiment: "Alternative measures may be used to deal with a person alleged to have committed an offence *only if it is not inconsistent with the protection of society*."[549] Within the same section, this concern is seemingly reinforced in the requirement that "the person who is considering whether to use the measures *is satisfied that they would be appropriate, having regard to... the interests of society*."[550] Consequently, this stipulation and similar language can be found in guidance at more local levels[551] as well as in other legal jurisdictions.[552] In looking at guidance as a whole, this objective – whether explicit or implicit – largely seems to inform the remaining criteria for distinguishing those 'public wrongs' suitable for private resolution from those which are not.[553]

Explicit indications aside, this theme is seemingly implicit across the range of indications found in guidance. Present or future recidivism, for example, is often a factor of consideration in determining appropriateness for private resolution, apparently as a means of further calculating risk to the public beyond those at the bargaining table. In Canada's Youth Criminal Justice Act, "extrajudicial measures are *presumed* to be adequate" if the offender "has not previously been found guilty of an offence"[554] – a presumption that obviously operates in favour of first-time offenders.[555] This sentiment operates in more exclusive terms elsewhere. Eligibility for Nova Scotia's Adult Diversion program is dependent on having no "substantial"

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[549] *Criminal Code, supra* n526 at 717(1) [emphasis added].
[550] *Ibid* at 717(1)(b) [emphasis added].
[551] See e.g. NS Protocol, *supra* n530 at 3 (Indicating that the use of RJ must be "consistent with the protection of society"); BC Policy, *supra* n529 at 3 (considering whether "inconsistent with the protection of society or inappropriate having regard to the interests of society and of the victim").
[552] See e.g. Alaska Stat. 47.12.010 ("when consistent with the protection of the public").
[553] There are commonalities among statutory and program criteria which are not informed by this theme, but are not considered by the author to inform the consideration of ownership of conflict. For example, the principle that private resolutions ought to be voluntary for all parties involved is consistently found (see e.g. Burns Ind. Code Ann. § 35-40-6-5 (2002); North Carolina § 7A-38.5(e); Criminal Code of Canada 717(1)(c)), however, this is not taken to speak to whether or not parties *ought to be able to resolve a conflict themselves should they be willing*. In this vein, the discussion here surrounds the question: *when a complainant and defendant wish to resolve a criminal conflict themselves*, in what circumstances are they permitted? In line with the previous section's stance, these parties are taken to be of sound mind, and otherwise deemed capable of self-determination.
[554] *YCJA, supra* n528 at s. 4(c).
[555] *Ibid* at 4(d)(ii) (indicating however, that this does not preclude their involvement if having committed an offence previously).

record of "similar offences or recent criminal charge," as well as having "no previous referral to Adult Diversion in the past two years."[556] Similar provisions have been adopted elsewhere in Canada as well as across the United States.[557] Montana is particularly explicit yet general in this regard, specifying that VOM may only be used "for persons with a low future risk of violence" – however that be assessed.[558]

Another common approach found is that of developing inclusive or exclusive parameters for types of offences. In developing these parameters, guidance within legislation or program policy indicates more general dispositions toward broader groupings of offences. Such efforts operate through varying degrees of intensity, ranging from simply creating presumptions for or against,[559] to affirmatively limiting possible eligibility through inclusion or exclusion.[560] A common exclusion is violent offenses, particularly those of a serious nature.[561] Alaska, for one, excludes offenses against the person, first degree arson, and cases involving domestic violence; however, it leaves the remaining offenses to the discretion of the individuals in positions of authority.[562]

Nova Scotia, as another illustration, has adopted a structured approach in regard to classification of offenses for restorative treatment, adopting four offense levels which serve as "[a] controlling variable in relation to the exercise of discretion

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[556] Nova Scotia Justice, Correctional Services, Nova Scotia Adult Diversion Program, <online: http://www.gov.ns.ca/just/Corrections/_docs/AdultDiversion_000.pdf> at 1.

[557] See e.g. Paul McCold, "An Experiment in Police-based Restorative Justice: The Bethlehem (PA) Project" (2003) 4 Police Practice and Research 379 at 380 (discussing general eligibility) ["Bethlehem"]; Evje & Cushman, *supra* n535 at 33 (LA County's eligibility criteria including being "arrested for the first or second time for a nonviolent offense"); BC Policy, *supra* n529 at 2 ("Alternative measures should not ordinarily be considered where... the accused has recently participated in alternative measures or has recently been convicted of similar offences").

[558] Umbreit, Lightfoot & Fier, *supra* n521 at 7; Mont. Code Anno. § 2-15-2012 (describing its intent "to divert appropriate offenders who are at low risk for violence from incarceration to community programs").

[559] See e.g. *YCJA, supra* n528 at 4(c) (limiting presumptions in favour to non-violent offenses); North Carolina §. 7A-38.5(e) (creating presumptions in favour of misdemeanors: "shall refer...except for...").

[560] See e.g. Alaska Stat. §. 12.55.011 (excluding offenses against the person, first degree arson, and cases involving domestic violence); McCold, "Bethlehem" *supra* n557 at 380 (for example, not allowing assaults involving weapons).

[561] Umbreit, Lightfoot & Fier, *supra* n521 at 7 (esp. At Table 4).

[562] See e.g. Alaska Stat. § 12.55.011 ("may permit...for an offense *other than* a violation of..." [emphasis added]).

in the...program;"[563] in other words, serving as a "schematic regulatory framework."[564] Level 4 offenses, such as murder and indictable sexual offenses, are not permitted for diversion.[565] Level 3 offenses, such as aggravated assault, criminal negligence causing death and theft of more than $20,000 are permitted only at the court level after a finding of guilt, but possibly as a diversion from sentencing.[566] Level 2 and 1 offenses, comprising the majority of offenses, are eligible to be referred at any point, meaning the "police and Crown attorneys can refer the vast bulk of criminal and provincial offences to restorative justice as a matter of diversion from prosecution in appropriate cases."[567]

Some jurisdictions utilize a mixture of these options as well as others.[568] British Columbia, for example, uses a rather sophisticated combination of strategies. As its initial position, the "overriding principle is that, except where an offence is expressly excluded...alternative measures should be considered for all cases."[569] From there, BC policy lists offences that "must not be considered for alternative measures," which include offenses such as murder, attempted murder, aggravated assault and discharging a firearm with intent.[570] Beyond that, further offenses are listed that require approval from higher authority before being referred, limiting their use by indicating that "approvals may be granted only where exceptional circumstances exist so [not to be] inconsistent with the protection of society."[571] Such offenses include crimes against children and vulnerable youth, hate motivated offenses, and sexual offenses against adults.[572]

[563] Archibald, *supra* n523 at 35-36.
[564] *Ibid* at 37.
[565] *Ibid* at 35-36; NS Protocol, *supra* n530.
[566] Archibald, *supra* n522 at 35-36; NS Protocol, *supra* n530.
[567] Archibald, *supra* n522 at 36.
[568] See e.g. McCold, "Bethlehem," *supra* n557 at 380 (having some strict prohibitions, some requiring approval from higher levels of authority, etc.); BC policy, *supra* n529.
[569] *Ibid* at 2.
[570] *Ibid* at 3.
[571] *Ibid* at 3-4.
[572] *Ibid*.

This guidance, of course, still requires the use of discretion on a case-by-case basis. In this regard, British Columbia demonstrates specific reluctance toward private resolution where particular responses are thought to be required in order to protect the public, and are explicit about taking this into consideration in deciding whether relinquishment is appropriate. BC's Policy Manual makes this explicit in saying "[w]here, for example, a court prosecution is intended to result in the separation of a violent offender from society by a period of imprisonment or in the imposition of court supervised probation programs, alternative measures will likely be unsuitable."[573] This is again pointed out in regard to certain violent or sexual offences that may require ongoing psychological or behaviour therapies, saying that "[o]ffenders requiring treatment generally present a greater risk to public safety and an alternative measures agreement may not adequately protect the victim or the public."[574] In such a way, private resolutions are deemed to be inappropriate where conflicts require responses – for the sake of the public – that private parties themselves are unable or perhaps unwilling to negotiate.

Though characterized by a variety of guiding criteria or instruction, a general approach is nonetheless discernible from the bulk of the statutes and policies studied. The guiding principle, though manifesting itself in a variety of ways, is that of private dispute resolution being permitted where those outside the conflict lack a significant interest – where the conflict can properly be understood as between those negotiating parties. In other words, private resolution is permitted where others – 'the public' – would not be adversely affected by that resolution. Equally noticeable, as well as important to highlight for the purposes here, is the commonality amongst the results of this principled approach – in both its explicit indications as well as discretionary operation – despite the slight variance in paths taken. In this way, the end result of the investigation here is a relatively simple one.

[573] *Ibid* at 2.
[574] *Ibid* at 5-6.

As one might expect, those conflicts relinquished tend to be those with a more private impact, and of a lower severity as not to indicate a future danger to others. Across various programs spanning North America, similar types of crimes are consistently found to be privately addressed. Theft, burglary, assault, property damage, vandalism and other variations of the like are those most consistently found.[575] Umbreit and Greenwood's U.S. national survey provides further clarification, demonstrating that the most common offences referred are, in order of frequency, vandalism, minor assaults, theft and burglary.[576] Of course, programs are still yet experimenting with the boundaries of private resolution, but short of that boundary, there seems to be a relative consensus regarding the above. It is also worth briefly pointing out that that these conflicts are not simply those so minor that, despite their technical criminal status, would otherwise be dismissed anyhow as inconsequential.[577] Indeed, some guidance even makes explicit the fact that those conflicts referred to private resolution ought to be otherwise prosecutable.[578] In this

[575] See e.g. Jharna Chatterjee, "A Report on the Evaluation of RCMP Restorative Justice Initiative" (1999) <online: http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/restor-repara-chaterjee-eng.htm> ("the types of offences which are being commonly dealt with include theft, assault, vandalism, 'bullying', property damage...shoplifting, and breaking and entering"); Hughes & Mossman, *supra* n7 at 100 ("While victim-offender mediation may be employed for any crimes, they are more often used for 'petty' or minor property crimes or minor assaults and less frequently for serious crimes against the person"); Patrick M Gerkin, "Participation in Victim-Offender Mediation: Lessons Learned From Observations" (2009) 34 Crim Justice Rev 226 at 232 ("The BARJ center receives referrals for a wide array of criminal behavior; however, more than 60% of the cases processed are property crimes. The second leading cause of referral is for assaults"); Evje & Cushman, *supra* n535 at 66 (Santa Barbara: "Referrals can be either diversion or adjudicated cases. Most referrals are for misdemeanor property crimes, with an occasional felony") and 76 (Santa Clara: "The program will accept juveniles involved in property and nonproperty offenses, mainly vandalism (28 percent), burglary (18 percent), and assault and battery (17 percent)").

[576] Umbreit & Greenwood, *supra* n151 at 7.

[577] There have been, however, fears of a 'net-widening' impact through the use of restorative justice programs, where in addition to prosecutable conflicts, those so minor as to be left out of the criminal justice system are also included or are subject to (voluntary) sanctions otherwise avoidable; particularly with juvenile offences. See e.g. Christa Obold-Eshleman, "Victim's Rights and the Danger of Domestication of the Restorative Justice Paradigm" (2004) Notre Dam J L Ethics & Pub Pol'y 571 at 601.

[578] See e.g. *Criminal Code, supra* n526 *at* s. 717(1) ("(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and (g) the prosecution of the offence is not in any way barred at law"); BC Policy, *supra* n550 at 1 ("Prior to recommending alternative measures, Crown Counsel must be satisfied that there is *a substantial likelihood of conviction*") [emphasis added];

way, private resolution of criminal conflicts can be seen as a true relinquishment of otherwise-publicly-owned conflict.

3.4.4 North Carolina's Criminal Mediation: Wrongs Obscured?

> "We are in District Court 4 of Wake County, North Carolina. The judge has taken her seat. The district attorney addresses the people waiting for their cases to be heard. He concludes by saying that *'You can choose to go mediation. If you want to go to mediation, say so when your name is called.'* The judge then draws attention to mediation as a way in which both parties can get a better outcome than going to trial, where the judge decides the outcome and is bound by legal rules and precedents.
>
> At the front of the court with lawyers and administrators there sit several mediators waiting for cases to come to them. The District Attorney refers cases directly to a mediator, to whom she hands the court papers...detailing the charge/s. The two mediators meet immediately with both parties and tell them briefly – in about a minute – what mediation offers and ask whether they wish in principle to go ahead. If they say yes, they all go straightaway to a meeting room directly off the courtroom."[579]

In reading this excerpt from a firsthand account of a court experience, one might – absent mention of the district attorney – think it suggestive of a well-oiled court-annexed *civil* mediation program. Indeed, North Carolina's District Criminal Court Mediation Program presents itself as at the forefront of private resolution of criminal conflicts, both from a legal and systematic perspective, with some of its features modeled after civil counterparts.[580] In this way, it serves as a straightforward and progressive embodiment of that which has so far been explored, as well as an interesting jurisprudential representation – as both law and perspective – to have in mind going forward.

While the broader body of initiatives have so far been seen to be varied not only among but within jurisdictions, North Carolina has undertaken through legislative channels to "strengthen, formalize and standardize existing efforts to mediate misdemeanor criminal cases," as well as to "encourage judicial districts that

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[579] McGeorge, *supra* n539 at 7 (himself a court mediator in North Carolina).

[580] See The North Carolina Court System website, "District Criminal Court Mediation Program" <online: http://www.nccourts.org/Courts/CRS/Councils/DRC/District/Default.asp> [NC Mediation Program]; see also District Criminal Court Mediation Program, *Rules Implementing Mediation in Matters Pending in District Criminal Court* <online: http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/DCCRules_1-1-12.pdf> [DCCMP Rules].

[are] not mediating such disputes to do so."[581] As such, it represents not only a concerted effort to further the private resolution of 'public' wrongs, but also a strong example of a true systematic approach to that resolution. Through its efforts, the North Carolina court system employs a systematic relinquishment of public wrongs to those private individuals most directly affected. In doing this, the legislature not only develops a more facilitative model, but necessarily adopts an understanding of criminal conflicts that corresponds to their ready release. In both of these ways the program offers an interesting lens through which to see these conflicts and their private resolution.

In encouraging mediation in criminal conflicts, North Carolina's legislature found no reason to differentiate their approach from that toward civil actions. Indeed, with the exception of substituting the words 'civil' and 'criminal' and the addition of "and the district attorney," the statutory instructions for encouraging mediation of both criminal and civil offences, one after the other in the statute, are *identical*:

> "(c) Each chief district court judge and district attorney shall encourage mediation for any criminal district court action pending in the district when the judge and district attorney determine that mediation is an appropriate alternative.
>
> (d) Each chief district court judge shall encourage mediation for any civil district court action pending in the district when the judge determines that mediation is an appropriate alternative."[582]

In this way, a certain parallelism is evident in the general position toward both civil and criminal conflicts.

This stance is further evidenced in the language used throughout official criminal mediation program descriptions, as well as rules directing its procedure. Though the private resolution of criminal conflicts is certainly itself a drastic change from the conventional paradigm, programs can nonetheless remain coloured by conventional perceptions. This is evident in the retention of connotative criminal

[581] See NC Mediation Program, *supra* n580.
[582] North Carolina § 7A-38.5. (c) & (d).

labels: 'victim' and 'offender' mediation which addresses 'crimes' or 'offenses'. This is not so, however, with North Carolina's mediation program. Though of course differentiating itself as 'criminal' mediation, its literature consistently adopts the more neutral language of 'complainant', 'defendant', 'conflict' and 'dispute' – the official descriptions involved frame the entire endeavour as an interpersonal matter, without mention of traditional public injury.[583] Taken contextually, this ought not to be dismissed, but rather taken as reflective of a truly distinct perspective. The language of criminal law has long been considered a unique and significant element, signalling particular stigmatic colouring.[584] A shift away from this is indeed noteworthy.

As for ready relinquishment, the legislature felt it necessary to go beyond mere judicial encouragement with certain conflicts, choosing instead to create a *presumption* of referral to mediation. For all misdemeanors, relevant statute indicates that "each chief district court judge and district attorney *shall* refer any misdemeanor criminal action in district court that is generated by a citizen-initiated arrest warrant to the local mediation center for resolution" unless deemed inappropriate.[585] Accordingly, the legislature went beyond permitting mediation where it is appropriate, indicating that it ought to be instead the preferred site of resolution if an option. As a voluntary endeavour, and given practical accounts, the mediation of criminal misdemeanors is essentially up to the parties involved.[586] Moreover, the program exercises seemingly no control over the *content* of the mediated agreements that trigger the dismissal of the charges.[587] One mediator's

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[583] NC Mediation Program, supra n580.

[584] See e.g. Paul H Robinson, "The Criminal-Civil Distinction and the Utility of Desert" (1996) 76 NU L Rev 201 at 206 ("Criminal liability signals moral condemnation of the offender, while civil liability does not. *Our language reflects this view*. In the criminal context, we speak of a 'crime' rather than a 'violation' or 'breach,' and of 'punishment' rather than of 'remedy' or 'damages' or 'sanction'. The terms 'crime' and 'punishment' carry the implication of moral condemnation that the civil terms do not.") [emphasis added].

[585] North Carolina § 7A-38.5. (e) (presumably the element of 'citizen-initiated arrest warrants' is due to their necessarily inter-personal element and the ready availability of both parties).

[586] McGeorge, *supra* n539 at 7.

[587] *Ibid* (noting, however, that there is a limit of $15,000 for compensatory agreements in criminal mediations).

practical account indicates that "[i]f agreement has been reached...the court papers are returned to the district attorney with a note saying so and asking for the case to be dismissed. No details about the agreement are given to the district attorney or the judge. The judge then dismisses the case."[588]

Being at the forefront of developments in both its systematic approach as well as its general outlook, North Carolina's program serves as a clear and memorable representation of the relinquishment of criminal wrongs. Not only has it demonstrated an enthusiasm to relinquishing control over the determination of criminal conflicts, through the process it has also seemingly stripped those conflicts of the former perceptions which led to their differentiation. In this way, it bridges both the procedural as well as conceptual gap in the conventional distinction, and is useful to keep in mind going forward.

3.5 Shifting Moral Ownership, Reshuffling Categories in Practice?

In looking at the experience of legal wrongs broadly – that is, spanning civil and criminal wrongs incorporate – a tension between public and private claims over conflict resolution has been apparent. Ultimately, this tension has been indicative of competing public and private visions of conflict resolution and its end – justice. At one end, a public vision seeks to implement an objective justice and utilize resolution as a site of social design. At the other, the private vision seeks to permit the discovery of subjective and negotiated justice – a resolution for the sake of the dyad itself. As these two competing paradigms have encountered one another in the realm of conflict resolution, a negotiation has necessarily taken place. In simple(r) terms, the question of *whose* justice ought to be given normative primacy – that of public or private consideration – has been posed.

[588] *Ibid*; See also DCCMP Rules, *supra* n580 Rule 6.B.(5); State of North Carolina, The General Court Of Justice District Court Division, *Report of Mediator* Form, <online: http://www.nccourts.org/Forms/Documents/1068.pdf> (dismissal form required under Rule 6.B.5., merely requiring an indication that an agreement has been reached).

This negotiation, as has been seen, has not occurred in absolute terms. Instead, a more discriminatory approach has developed, focusing on the question of which conflicts ought to be subject to public or private resolution. Through this negotiation, the legal community has had to decide which conflicts it is willing to relinquish to private resolution. Accordingly, the result of the above negotiation has manifested itself in a demonstrated willingness or unwillingness to empower private parties to resolve certain conflicts. These dispositions, as explored above, tend to concentrate in particular types of conflicts. In effect, the legal community has had to sort through the mass of conflicts, irrespective of legal categorization, grouping conflicts into those that are appropriate for private resolution, and those that are not. Interestingly, public and private characterizations have developed independent of prior legal designation, and demonstrate both heterogeneity within, and parallelism across, conventional categorizations of wrongs. Though these dispositions may not be held universally, they do represent a general stance to a degree that warrants serious consideration.

With certain conflicts, of both civil and criminal designation, the legal community has demonstrated a general openness to relinquishment. The typical approach to paradigmatic civil disputes has been that of permitting and respecting private resolutions despite their substantive discord with the conception of justice held by the court and positive law.[589] Indeed, courts have interpreted the 'justice' in these contexts as a truly consented to private agreement.[590] Moreover, courts have largely interpreted their role in relation to such resolutions as that of dutiful enforcement.[591] A similar willingness of relinquishment is observable with a segment of conflicts of criminal designation. A trend toward positive legal empowerment of private resolution of these 'public' wrongs is discernible transjurisdictionally.[592] Despite a non-centralized approach to the relinquishment of these conflicts, a

[589] See above, "*3.3.3.2 Enforcing Settlements: Public Respect for Private Resolutions as a General Rule*"
[590] *Ibid*.
[591] See e.g. *Robertson v Walwynn*, *supra* n346.
[592] See above, "*3.4.3 Distinguishing Between 'Private' Public Wrongs and 'Public' Public Wrongs"*

consistency in disposition is found toward relatively minor interpersonal criminal conflicts such as property offences and assaults.[593] At the forefront of this development sits relinquishment so systematized and normalized that it is almost indistinguishable from court-annexed civil mediation programs.[594]

In contrast, the legal community has demonstrated a discomfort with private resolution in some contexts, and an altogether aversion to it in others. In the civil realm, constraint has been placed on private parties' ability to resolve their conflicts in a way that keep them confidential. Sunshine laws have staked a public claim in private conflicts not only practically, but also conceptually – indicating that conflicts involving 'public hazards' might not be as private as their civil designation suggests.[595] Further, inclinations toward aggregative mechanisms for mass tort resolution place both procedural and substantive constraints on private settlement. Despite perhaps internal philosophical justifications, a contextual perspective indicates both an increased public understanding of mass torts and subsequent suspicion toward their private resolution.[596] More starkly, in the criminal designation, trends towards privatized resolution are altogether resisted in those less frequent, but more serious criminal conflicts.

In considering these dispositions in reference to the legal designations of private and public wrongs, it is evident that conventional perceptions of wrongs may no longer be the status quo. While it is true that designations remain unaltered in a technical sense, the general jurisprudence outlined here indicates a difference in practice. While the paradigmatic tort has been affirmed as a conflict in which private parties are free to effect their own visions of justice, so too has the minor interpersonal criminal conflict. Unlike its tortious counterpart, however, this is a considerable change from its conventional understanding as a wrong committed

[593] *Ibid*.
[594] See above, *"3.4.4. North Carolina's Criminal Mediation: Wrongs Obscured?"*
[595] See above, *"3.3.4 Public Issues in Private Conflicts".*
[596] *Ibid*.

against the broader public, requiring a public resolution.[597] In this way, the conceptual challenge to the conventional legal construction can be understood to have been largely successful. Accordingly, this development can be interpreted as *a shift in the attribution of moral ownership*. These 'criminal' conflicts – to the extent of the jurisprudence outlined here – might thus belong in the moral province of private conflict.

In contrast, criminal conflicts outside the segment discussed above were withheld from private resolution – maintained in their conceptualization as a public concern requiring state intervention and a public vision of justice. Also brought under the constraints of a public consciousness was a segment of *civil* wrongs, identified by reference to their public qualities and similarly subject to considerations of public justice. This identification of 'public' hazards and 'mass' or 'class' conflicts is indicative of a perception distinguishable from their conventional legal interpretation as private wrongs. Accordingly, in a similar way to criminal conflicts, though in the opposite direction, a shift in the attribution of moral ownership might be discerned.

3.5.1 Principled Movement: A Philosophy Transcending Legal Categorization?

In looking at the corpus of legal wrongs in light of the above divisions, an internal heterogeneity of conflict, in moral terms, can thus be found in both civil and criminal categories. In its confrontation with the self-determinative call of conflict's discourse, the legal community has found 'classes' of conflicts in both categories over which it is both willing and unwilling to relinquish control. As a result, a sort of internal fracturing has taken place, with moral exchanges taking place in both directions, and ostensibly resulting in novel moral categorizations. The assessment of these conflicts and the subsequent moral reshuffling has not, however, occurred on an unprincipled basis. As part of the jurisprudence outlined here, an overarching or 'transcategorical' normative framework is also available for interpretation.

[597] See "*Ownership of Criminal Wrongs in the Conventional Model*".

In the experience of criminal wrongs, this was particularly explicit in both broad statute as well as more specific guidance at program level.[598] In assessing the 'appropriateness' of particular conflicts for private resolution, the guiding principle was that of protecting the public as a whole, and potential future victims more specifically.[599] This principle was constant despite differing approaches to its realization. Presumptions, exclusions, and specific identifications reflected this all arranged themselves according to assessments of harm, or more accurately, potential harm. Indeed, the less potential threat to others a conflict presented, the more of a presumption was granted in favour of private resolution.[600]

Through this, states and programs alike seemingly adopted a harm-based approach, with the appropriateness of private resolution centering on whether the resolution of the conflict presented potential harm to those *outside* dyadic conflict. Accordingly, private resolution was appropriate as long as the safety of the public was not dependent on its outcome. In other words, where others' interests were implicated – in that *particular* justice was necessary for their protection – private resolution was inappropriate. In such a way, where the public interest is at stake in a resolution, it might be said that state control is required in order to ensure an 'appropriate' resolution according to a more *public* vision of justice.

This approach is certainly worthy of note. It does not seek to impose a particular justice on 'the victim', or focus retrospectively on the stigmatic nature of 'criminal' conduct. Of course, these elements are undoubtedly present in criminal justice generally, but it is worth noting that the shifts occurring here demonstrated a clear focus on whether those outside the dyad would be affected; where they were not, the justicial content *within* the pair's resolution was not of interest to the state. Of course, this is a change from the previous philosophical position in which all

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[598] See "*Distinguishing Between 'Private' Public Wrongs and 'Public' Public Wrongs"* above.
[599] *Ibid*.
[600] *Ibid*.

stigmatic 'criminal' conduct was deemed to require state imposition of public justice.[601]

In considering shifts in the civil realm, a similar – if not parallel – rationale is evident. As a starting point, the typical response to settlement – respect[602] – might be taken as indicative of an assessment in line with conventional assessment, that civil wrongs are "wrongs which are... properly the concern only of the private or individual victim."[603] Public constraint on civil settlement, in contrast, can be seen to be triggered when, and to the extent that, a reassessment indicates otherwise. Those public interferences outlined above demonstrate this in their attempts at public protection.

In the governance of 'secret settlements', state interference is established in order to prevent information which might otherwise protect the public from remaining confidential.[604] In aggregate settlements, whether they are true or quasi-class actions, public supervision has operated explicitly in order to prevent harm to others' interests. In class actions, the material interests of those bound by the settlement are protected, while judges also protect the 'legal' interests of those outside the class.[605] In quasi-class actions, judicial supervision invokes a broader material consideration for the public at large – considering social and economic interests – while still operating under the same premise of protection.[606]

Accordingly, a general consistency in approach can be seen through the broader negotiation, spanning – and indifferent to – prior legal categorization. The principle might be said to be that to the extent that conflicts, regardless of legal designation, do not implicate the interests of those beyond the dyad, they are appropriate for private resolution. In other words, where the resolutions of conflicts

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[601] See above "*Ownership of Criminal Wrongs in the Conventional Model*".
[602] See above, "*Enforcing Settlements: Public Respect for Private Resolutions as a General Rule*".
[603] Marshall & Duff, *supra* n285 at 7.
[604] See above, "*Secret Settlements and Sunshine Laws: Staking a Public Claim in Private Conflict*"
[605] See above, *"Public Supervision of Class Settlements"*.
[606] See above, "*Mass Torts and Public Interest Justifications: A Different Envisioning of 'Absent Class Members'?*".

present the potential to harm those outside the negotiative process of resolution, the state ought to interfere to prevent that harm. One might succinctly characterize this normative position as reflecting a central tenet of Liberalism – often referred to as 'the harm principle'.[607] With this, John Stuart Mill established as the central directive principle of his political philosophy that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[608] In this way, the harm-based approach may indeed fit neatly – at least in principle – into a broader constitutional framework proposed by a liberal normative perspective. This principle then might be taken as a succinct representation of the normative framework underlying these shifts – and might serve as a guiding principle going forward.

Having identified this general approach, one gains a greater understanding of the moral shifts noted above. Indeed, its identification aids in elucidating the moral organization noted in practice, and outlines a general philosophy upon which moral ownership might be based. Applied to the practical groupings, one might assert that the paradigmatic tort and the minor crime occupy a shared moral category. Within the framework discerned here, this collection of conflicts is that whose implications are deemed to be limited to those immediate parties of the dyadic conflict, and thus appropriate for a private justice. Indeed, with these considerations, one is tempted to address this category – at least in a moral and practical sense – as *private wrongs*. Similarly, those conflicts in which a public interest has been seemingly identified are not those of convention. Both mass torts and more serious crimes are perhaps morally grouped within a categorization as those conflicts in which harm to the public must be considered – thus requiring state intervention and a public justice. Looking at the broader potential for harm latent in these conflicts, one might – again in a moral and practical sense – consider them as public conflicts, *public wrongs*.

[607] John Stuart Mill, *On Liberty* (1859) (New York: Penguin Group, 1974) at 68; see e.g. MacCormick *supra* n135 at 215.
[608] *Ibid*.

These moral designations are of course at odds with the traditional understandings of 'public' and 'private' wrongs; however, in surveying the broad, transcategorical negotiation between public and private discourses, this is seemingly the result. Consequently, one can discern that while the legal paradigm of classification may be yet unchanged by its encounter with conflict's discourse, the reality of dispute resolution has been. Given the understandings outlined here, perhaps the best way to express these changes is in asserting that these practical shifts are indicative of – to a significant extent – changes in the perception of moral ownership of conflict.

SUMMARY AND DISCUSSION

In exploring the ownership of conflict, this thesis has engaged with the question of what the organization of legal wrongs might look like in a new normative era. In doing so, it has sought to trace and interpret a number of developments as they have emerged from the past and consider them as they move forward into the future. Two distinct movements pertaining to distinct categories of legal wrongs were explored, and consequently interpreted as forming a single, transcategorical discourse. This discourse was seen to contain challenges to the dominant legal framework on both conceptual and political levels, re-imagining legal wrongs as conflicts and removing them from the determinations of the public legal mechanism. With the drastic changes triggered by this discourse, tensions were seen to develop between it and the existing legal reality; tensions that gave rise to the question of *who owns conflict*, and indirectly, the question of how conflicts ought to be organized.

To clarify these questions and develop a way of answering them, a theory of ownership was outlined, building on the notion of *conflicts as property*,[609] and noting the various senses in which one might 'own' that property. In the end, this resulted in a multi-level understanding of ownership with which the state of the law and its constitutional significance could be understood as well as critiqued. To understand the implications of the challenges presented by the emergent discourse, the aforementioned tensions between that discourse and the legal framework were explored on a practical, 'jurisprudential' level. The result of this was the discernment of a practical re-organization of conflict that differs considerably from the conventional legal organization. Through the lens of ownership, this was interpreted as a shift in the attribution of *moral* ownership, and a direct call to reassess the current legal organization of conflict.

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[609] Christie, *supra* n9.

From there, the implications of the developments outlined are of divergent possibilities. Irrespective of particular outcome, however, the future of these developments ought to be based on a certain degree of self-awareness. Such awareness inevitably relies on the clarification of those very developments, as well as an ability to interpret them in such a way as to prove informative. It is this endeavour, and not the prescription of that future, that this thesis has sought to contribute. However, while the above perspective and conclusions present considerable food for thought, there are a few remaining points that warrant brief discussion. While the full implications of this thesis are beyond the scope of this conclusion, a number of issues are worth being made clear in order to guide further consideration.

The Imminent Implications of a Moral Shift

Ultimately, the exploration above resulted in the conclusion that a shift in the distribution of moral ownership has occurred, and is still occurring. Characterizing this as a shift of course indicates that this distribution is no longer what it was in the past. This obviously warrants consideration, particularly in light of the relational nature of ownership outlined previously. As part of the theory of ownership developed in the second chapter, moral ownership was identified as a normative indicator as to where legal ownership *ought* to rest. In this way, moral ownership plays a central role in the ability to critique the state of the law, and by extension, the constitutional relationship between the state and its citizens. If moral ownership is truly misaligned with the current state of legal ownership, then that legal ownership ought to be deemed illegitimate. On one hand it could mean a lack of proper protection for those affected by an outcome; on the other, an unwarranted infringement of liberty. Accordingly, a shift in moral ownership could have serious implications, and should be given due weight.

As noted in the discussion of moral ownership, however, moral entitlements to rights of determination are not necessarily exclusive.[610] In many conflicts, both the

[610] See above, "*2.2.1 Law and Morality: Descriptive and Normative Ownership*"

individual parties to a conflict and the general public alike may have interests in the outcome, and might thus be deemed to have *some* moral ownership. However, to speak of either private parties or the public as 'having' moral ownership would be to indicate the primacy of that interest over others. Accordingly, a detection of some, even much, moral ownership might not in itself necessitate legal ownership.[611] The question is one of degree.

Are these moral shifts – still active – so far demonstrative of a change in moral ownership to the degree that legal ownership ought to be affected? This thesis, taking a descriptive approach, does not seek to argue one way or the other (though in some instances outlined here, it may not take much arguing[612]). Certainly, these shifts have occurred to a considerable degree, such that a change in distribution of legal ownership ought to be seriously considered in light of them. Further, with scrutiny, it does not seem farfetched that a change could be deemed necessary. Ultimately, however, this thesis leaves this to be scrutinized and, as a political assessment, weighed elsewhere.

This thesis does not leave those to consider this question completely unguided, however. Both through presenting wrongs as 'commensurable' conflicts and identifying a common basis for their treatment, conflicts have been placed within a single common framework. Accordingly, it is thus possible – and indeed necessary – to discuss them in common terms and standards. A common underlying rationale in their treatment so far, mimicking the harm principle, has been identified, and this ought to serve as guidance going forward. Identifying a guiding principle in terms of effect, and focusing a consideration of wrongs in terms of harm has elsewhere been deemed a "productive and positive process;"[613] and those already considering the

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[611] Consider the example of the victim of a serial rapist. Though clearly having considerable moral ownership over that conflict, the broader protection of future victims may indeed trump that ownership, thus assigning the public moral ownership for the sake of resolving the conflict in a way that balances the broader interests at stake.
[612] See e.g. above, discussion of North Carolina's Criminal Mediation.
[613] Paddy Hillyard & Steve Tombs, "From 'Crime' to Social Harm?" (2007) 48 Crime, Law and Social Change 9 at 17 (referring to the task of defining social harm).

social benefits of adopting a harm approach to wrongs might serve as a useful ally in this endeavour.[614]

As a starting point, it will be necessary to come to a more compatible understanding regarding what it means to say that an individual is affected by a particular conflict's resolution. The noted discord in defining harm,[615] that is, considering the legal reach of harm as opposed to the practical reach, or concern with harming legal rights rather than practical interests, must be addressed – both within current designations as well as transcending them. In this reassessment, we ought not to be so narrow-minded as to stay within purely legal perspectives and be bound by their prior designs. Surely innovation is not possible if the limits of imagination are those which the past system itself creates.

Though this thesis has sought to bring together, within one discussion, both criminal and civil realms of conflict resolution, this has not been without its difficulties. Currently, conceptualizations of 'concern' for those away from the negotiation table are not readily translatable between criminal and civil forums and are thus not subject to a consistent analysis. The dominant concern with 'legal' impact (despite its practical counterpart) in the civil law differs starkly from the concern with more practical dangers in the criminal law. Such double standards ought to be given serious consideration. Similarly, this discussion of course ought to include, *universally*, the notions of risk – largely framed in terms of deterrence or recidivism – that play prominently in criminal discussions but are, perhaps unfairly, less prominent in the civil realm.

Lastly, the discussion ought to take seriously the commensurability, in basic terms, of conflicts removed from their distinct legal constructs, and not remain of two minds. A serious benefit of considering wrongs through a collective, commensurate approach, as opposed to criteria which presuppose their distinction, is that they can of course be *relativized*. The legal community ought to give serious consideration to

[614] *Ibid* at 16*ff*.
[615] See e.g. the above discussion on differing understandings of 'absent class members'.

how legal wrongs can be seen in relation to one another – a little perspective might go a long way. A simple, though perhaps extreme example of this would be, in assessing the 'publicness' of conflict, comparing the threat of a mass tort implicating hundreds of millions of dollars, thousands of injuries, and possible unemployment for an entire corporation with a criminal act of vandalism resulting in damages of a few hundred dollars or less.

Evoking the earlier notions of public-private continuums also provides an opportunity for thought-provoking comparison. Both criminal and civil conflicts have been understood to exist on these continuums, and one might picture on the far lefts of these continuums those conflicts most private within each legal designation; on the rights, those most public. Placing these two separate continuums of conflict – criminal and civil – in relation to one another, how might they situate themselves? Would they neatly fit alongside one another, with criminal's left picking up where civil's right leaves off? Or might they overlap, with some interweaving taking place? In light of the example above and the whole of this paper, the latter seems more accurate. With this overlap, then, where might the public-private divide be drawn?

The Possibility of Change and the Preparation of the Legal Community

Whether or not these shifts in moral ownership have yet reached the degree that they necessitate a change in legal ownership is only part of the issue that the legal community must consider. More fundamentally, the legal community ought to first consider how it *could* respond should a redistribution of legal ownership be required. With or without the shifts noted here, the basic operation of the theory of ownership outlined in the second chapter indicates that, given their dependency on moral perceptions, that change in legal ownership is possible*, if not inevitable*. Whether or not these *particular* changes in moral perception require legal changes or not, the challenge posed, whether now or in the future, is that current categorizations of legal wrongs *are not immutable*. Accordingly, the legal community must be prepared to deal with possible shifts in legal ownership.

In line with the general themes of this thesis, there are two ways in which the legal community ought to be prepared to respond to called-for changes in legal ownership. The first is a *political* preparation: coming to terms with the fact that these designations are not static, and being *willing* to either relinquish that ownership or take it up. The second, and even more onerous, is that of *imaginative* or *conceptual* preparation.

As described at the outset of this thesis, ownership here has been noted as a political dimension of the organization of wrongs which, though corresponding to the current conceptual distinction between civil and criminal wrongs, is independent of the *conceptual understandings* of the wrongs within those distinct categories. Thus, to speak of the ownership of legal wrongs does not *necessarily* entail speaking of crimes and torts, rather, it is only to speak of legally recognizable conflicts. Because an assessment of ownership is independent of those particular conceptualizations, suggesting that legal ownership ought to be shifted one way or the other does not suggest that conflicts ought to be placed in the conceptual categories that currently correspond to those headings of ownership. A hypothetical illustration adds clarity: If a moral re-assessment deemed that mass torts ought to be publicly owned, it would not necessitate that they be conceptualized as crimes. Likewise, should misdemeanors be reassessed as rightfully privately owned, it does not necessitate that they be thought of as torts.

Worth repeating, the conceptualizations of crime and tort, previously used to assign ownership, contain more than that assignment. More than merely corresponding to ownership, these conceptions contain their own perspectives toward the events that bear their name. Each of these conceptions are but “one of the many ways to construct social reality”[616] and imply a number of pre-developed assessments about the event at issue, the ways in which it might be dealt, and the settings in which those assessments occur.[617] Of course, these implications ought not

[616] Hulsman, *supra* n4 at 71 (addressing the concept of ‘crime’).
[617] *Ibid*.

to be assigned by default, or for lack of imagination. Indeed, it seems inappropriate to assign particular conflicts to criminal status, with all its implications, simply in the name of state ownership.

Thus, the matter of conceptualization of wrongs is also at issue. The questions of ownership present more than a challenge to the arrangement of wrongs within the existing organizational framework; they present a challenge to the framework itself. In this way, the legal community ought to be prepared on a conceptual or imaginative level to re-organize legal wrongs – willing and able to part with past conceptions. These developments suggest a need, as well as a rare opportunity, to re-assess the conceptualizations of wrongs. The legal community ought to give serious consideration to this opportunity, rather than simply looking to apply already-available understandings. Abraham Maslow once noted – in memorable fashion – the limitations of this approach, saying that: "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[618] The criminal-civil organization of wrongs has been the conceptual hammer for centuries, and serious consideration ought to be given to whether or not we are forcing ourselves to see nails by failing to imagine other tools.

Indeed, these tools have been inherited from a distant past. In discussing the criminal-civil categorization through the medieval period, David Seipp says that "[w]e have the distinction now because they had it then and because lawyers rarely throw anything out."[619] Of course, the crime-tort understanding was developed in a social, moral and even physical environment very different than that which we find ourselves in today. It is doubtful, for example, that the legal world that adopted these tools at that time had in mind the burgeoning industry and technological innovations that have given rise to mass torts.[620] Even those harms with which that world was

[618] Abraham Maslow, *The Psychology of Science: A Reconnaissance* (New York: Harper & Row, 1966) at 15-16.
[619] Seipp, *supra* n3 at 87.
[620] The American Law Institute in their *Principles of the Law of Aggregate Litigation* (St. Paul, MN: American Law Institute Publishers, 2010), for example, notes at xiii that "the difficulties of reconciling

familiar are now, hundreds of years later, seen through a different moral and social lens. In this way, it is worth taking the opportunity to search out those conceptual tools which best suit modern social understandings and needs, rather than simply using those which have been inherited. Of course, the past does provide us with invaluable building blocks to use in the present; however, we ought not to allow those building blocks to form walls of such height that our view of the reality around us is obstructed.

The emergence of conflict's discourse presents a novel opportunity to peer beyond those walls. As a *development*, if offers a normative and political challenge that instigates the very questions explored here. Furthermore, as a *perspective*, it neutralizes previous conceptions and erodes previous distinctions, un-imagining these legal wrongs as to simply understand them as conflict. Consequently, it presents to the legal community a corpus of stripped, unorganized, and unnamed conflicts – free for re-assessment in light of the modern moral landscape. The question of how these conflicts ought to be organized is thus posed afresh. Responding bravely, and with ownership as a guiding framework, the answer to that question might understandably be different than it was five hundred years ago.

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the demands of mass society with the rights and procedures generated by a long legal tradition in what were often far simpler times." Concepts are easily added to this list.

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