A Call for Mediation Casebooks

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Abstract

A victim-offender mediation (VOM) using circles of support is the paradigm case for observing community norms of justice, punishment, restitution, and proportionality. Modern US juridical practice lacks effective means to assess and apply community norms. We therefore advocate the assembly and dissemination of mediation casebooks to guide judges, juries, and private arbiters in setting terms of punishment and/or restitution.

Introduction

Private arbitration has become more common over the past 50 years in the US, returning from historical obscurity. Dispute resolution projects have been launched in virtually all major US cities. One of the earliest modern dispute resolution projects was launched by the American Arbitration Association in Philadelphia in 1969.[1] By 1984, Fiss could write of the burgeoning field: "This movement is the subject of a new professional journal, a newly formed section of the American Association of Law Schools, and several well-funded institutes. It has even received its own acronym—ADR (Alternative Dispute Resolution)."[2]

Arbitration is likely to keep growing in scope and number of cases. Notably, Guillory proposes[3] a franchise-able business model for subscription security which would provide private patrol and investigation of crimes, leading to widespread use of mediation and/or arbitration between victims and offenders to secure restitution for victims. We raise the concern that private victim-offender arbitration is challenged to reflect community norms. The best answer, we think, lies in the creation of mediation casebooks. We will proceed thusly:

1. Mediation Is Optimal Dispute Resolution
2. Arbitration and Community Norms
3. Modern US Juridical Practice
4. Community Norms In Modern US Juridical Practice
5. Historical Practices And Community Norms
6. Call For Mediation Casebooks

[1] BRUCE BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 216 (1990).
[2] Owen M. Fiss, *Against Settlement* 93 YALE L.J. 1073, 1073 (1984).
[3] Gil Guillory, Marketing Subscription-Based Patrol And Restitution, unpublished manuscript presented at the Austrian Scholars Conference, March 2009, available online at http://sites.google.com/site/gilguillory/ (accessed 3/9/10)

Mediation is Optimal Dispute Resolution

In conflict resolution, the process of mediation tends to produce the best outcomes. This strong claim is grounded in classical welfare economics, is buttressed by the fact that the participants have private knowledge not possessed by outsiders, and is further supported by state-of-the-art mediation practice that best addresses problems such as shame, potential verbal re-victimization, power imbalances, and balancing the concerns of primary and secondary stakeholders.

Mediation is a process of conflict resolution, treating any type of conflict, from international relations to divorce custody. Victim-offender mediation is a sub-specialty within mediation practice, and upon which we focus here. Victim-offender mediations treat cases of personal torts or crimes, such as murder, rape, robbery, assault, battery, theft, or fraud. The mediation is "run" by a disinterested and neutral party, sometimes one person, sometimes two. The mediator follows a facilitation model. Facilitation models differ, suggesting everything from who should be invited, to seating arrangements, to who is allowed to speak in what order, to how follow-up will be conducted, etc. One facilitation model is that of Goodman.[4] Regardless of which facilitation model is favored, they all follow a similar three-step approach. The first step of *exploration* examines the conflict from each individual perspective, consequences of the offense, and issues still on the table, such as lingering shame, fears and questions, and open questions of proper retribution, restitution, and justice. The second step of *transition* involves sharing of information and, ideally, a coming to terms by all of the parties to the concerns and issues of all other parties. The third step of *agreement* is the formation of a contract for future action to effect justice and settle the matter with finality. Each of these steps have nuanced sub-steps which may involve deciding when people should be asked to speak or, in some cases, cut off; whether a sub-conference with one side of the conflict is appropriate; and how best to handle such crises as the victim being blamed. All this is best handled by well-trained and experienced mediators.

The participants in victim-offender mediation are critical for proper decision-making. The victim(s) and offender(s) are obviously essential attendees. If the victim is deceased, then a survivor, usually the spouse, is nominated as the primary stakeholder. According to our favored facilitation model[5], each of these primary stakeholders is then at liberty to nominate one or more support people, determined entirely by the primary stakeholders. In the case of a victim, nominees might be friends, family, co-workers, fellow church members -- whomever is close and will lend the victim moral support to face his offender. In the case of an offender, nominees might be parents, relatives, a coach, a teacher -- again, whomever will provide support for such a stressful encounter. The practice of drawing in "communities of care" around each primary stakeholder originated in modern victim-offender mediation practice with the introduction of the *New Zealand Children, Young Persons and Their Families Act 1989*, to create an alternative system of justice for youths which bears resemblance to Maori indigenous practices.

When all of these stakeholders are present, then they (i) fully discuss the tort and its consequences, and (ii) focus on the justice of the matter and the concerns they have for both the victim and the offender. This "community of care" is then in the best position possible to consider what agreements are likely to be fulfilled or not, which agreements are likely to cause comfort to the victim, and which are likely to result in the offender reintegrating into the community, reversing his moral disengagement, and developing morally. The community of care has private community knowledge that is to some degree inaccessible to outsiders: knowledge about the life and personality of the disputants, their dispositions

[4] ALLAN H. GOODMAN, BASIC SKILLS FOR THE NEW MEDIATOR (2nd ed. 2005)
[5] CHARLES K. B. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL (2003)

and abilities, their life projects, etc. Relatedly, mediation agreements are open to innovation without substantial criticism. Mediators often marvel at the creative terms that disputants agree to over the course of mediation.

Since all parties must consent to the agreement, the outcome is Pareto optimal, informed and constrained by the standards of justice of the primary stakeholders and their nominated communities of care. If a party suggests adding or replacing a provision of the agreement and at least one party sees an improvement but others are indifferent, then the suggestion will be implemented. At the point that terms are too favorable for one primary stakeholder or another, the terms will be modified until consent is unanimous. Further, the outcome is a strong Pareto optimum, since all relevant issues or concerns have been aired by the parties and are therefore "on the table" for listing and considering.

Nonetheless, there are limitations to what might be called the global optimality of a mediation agreement. In particular, the standards of justice of the parties may be aberrant, such that they do not reflect the standards of the wider community. We could imagine a community of care being too harsh or too lenient on an offender – each of these would be non-optimal outcomes from the perspective of the wider community. The agreement would still be Pareto optimal for the parties to the agreement. Another limitation is in the severity of punishments that could be "on the table". While punishments as severe as retributive spearing[6] have been consented to in New Zealand mediations, it is unlikely that punishments such as mutilation or death would be voluntarily agreed to by a primary stakeholder. This may be viewed as an advantage or disadvantage, depending upon one's view of retributive punishment.

An important feature of mediation, for better or worse, is that an abstract conception of the rules of justice need not be articulable by any of the parties. Instead, the parties come to the table with whatever conceptions of justice they have formed, be they extensively reflective or visceral, intuitive, and inchoate. This is viewed by the opponents of mediated settlements as among its worst flaws. Fiss writes:[7]

> Justice Rather Than Peace
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> The dispute-resolution story [as presented by its exponents] makes settlement [mediation] appear as a perfect substitute for judgment…by reducing the social function of the lawsuit to one of resolving private disputes…
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> In my view, however, the purpose of adjudication should be understood in broader terms. [State] adjudication uses public resources, and employs … public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

Fiss performs the neat trick of implicitly claiming that state adjudication renders justice (by the title of his section) while the substance of his claim is tautological: that state adjudication conforms to the values of judges and juries who have been selected via a political process and are empowered to interpret, re-interpret, and interpolate meanings from key authoritative texts which have been written by a political process. As any voter clearly sees upon reflection, selection of judges and legislators and

[6] So-called "ritual spearing" is an element of traditional Maori justice. Do not let the adjective "ritual" mislead. These are proceedings in which the victim or his assign, at an appointed time and place, in the presence of witnesses, pierces the thigh of the offender with a spear, causing a significant wound.

[7] Fiss, *supra* note 2, 1085.

the resultant impacts upon legislation and case decisions is rarely foreseen by, and only very weakly related to acts by, the general voting public: moneyed interests exert a much greater influence. Fiss wants to claim that state adjudication delivers justice in accordance with community norms, but this claim is weak precisely because the ability of the community to influence the state system is weak.

Fiss also glosses over the important point that there is no single community. There are many communities: professional, geographic, ethnic, religious, etc. Just as we wouldn't want to apply American standards of justice in France, or vice versa, it is improper to impose the heavy hand of mainstream community standards to sub-communities where different norms prevail. Sub-communities might have different standards regarding the extent of punishment vs. restitution, the propriety of certain types of remedies (e.g., direct community service from offender to victim), the appropriate fora for tendering apologies (e.g., church, school, professional association), etc.

Lastly, we might also mention that there is much to be said in favor of peace:

> Peace is the father of all things. What alone enables mankind to advance and distinguishes man from the animals is social cooperation. It is labor alone that is productive: it creates wealth and therewith lays the outward foundations for the inward flowering of man.[8]

Victim-offender mediation, as presented here, seems to offer the best chance to balance community concerns of justice, proportionality, retribution, punishment, restitution, and peace. Those who participate are interested, members of the relevant communities, and know and understand the disputants. While they are not trained in the law, it has been argued that this is not necessary for a fair understanding of the basic principles of justice.[9] The freedom of innovation in the mediation process implies that all conceivable terms will be considered and implemented where the community of care agrees that they will serve the balanced ends listed above.

Another important fact is that not all disputes can be mediated to unanimous agreement. When the parties cannot settle the matter, they can appeal to an arbiter to settle the dispute. We now turn to arbitration.

[8] LUDWIG VON MISES, LIBERALISM: IN THE CLASSICAL TRADITION 23 (1927).

[9] *See* LYSANDER SPOONER, NATURAL LAW §4 (1882). "Men living in contact with each other, and having intercourse together, cannot avoid learning natural law, to a very great extent, even if they would. The dealings of men with men, their separate possessions and their individual wants, and the disposition of every man to demand, and insist upon, whatever he believes to be his due, and to resent and resist all invasions of what he believes to be his rights, are continually forcing upon their minds the questions, Is this act just? or is it unjust? Is this thing mine? or is it his? And these are questions of natural law; questions which, in regard to the great mass of cases, are answered alike by the human mind everywhere."

Arbitration and Community Norms

The process of arbitration cannot claim the mantle of optimal outcome that mediation rightfully does. The arbiter's job requires three tricky things among several: a theory of justice, an understanding of community norms to render decisions, and full possession of the facts of the case. In each of these categories, arbitration is disadvantaged vis-à-vis mediation when graded against the standard of Pareto optimality.

It is no secret that there are competing theories of justice. Some theories of justice rule out punishment.[10] Most theories rule out particular types of punishment. Some theories stipulate minimum punishments, others stipulate maximum punishments. Some theories emphasize the past (so-called "desert" theories) while others emphasize the future (focusing on deterrence and/or rehabilitation). Some theories suggest that offenders need to perform service or make payment to the victim. Other theories suggest that such service or payment should be made to the community at large. Most people have eclectic views that are an amalgam of many of these perspectives. This is not a call for moral relativism. The question at hand is what an arbiter should use as his theory of justice: his own theory (to thine own self be true), that of the disputants (if they might agree on such things), that of the sub-communities which the disputants inhabit, or the mainstream view of the community at large?

We think the answer to this question is that the arbiter should study theories of justice and apply his best understanding of it. But, of course, arbiters on a market are chosen by disputants, and so to some extent, this seeming problem solves itself. Disputants will try to pick arbiters that hold theories of justice that accord with their own. But disputants often have incomplete, inchoate theories of justice, and selection criteria along this line of inquiry are bound to be imperfect. So, it is inevitable that the arbiter applies a theory of justice that is not quite in alignment with the theories of justice of the disputants.

At this point, we might remind the reader that voters, in choosing judges by ballot, are in a very poor position to choose a judge whose theory of justice is somehow representative of the community at

[10] It is particularly prevalent among libertarians and practitioners of Restorative Justice to favor restitution and reject punishment, or at least retribution (private punishment "owed" to the victim / "just deserts" / "getting even"). We regard this as incorrect, and find Barton's argument persuasive, from CHARLES K. B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 93 (1999):

1. Humans are innately social beings who can flourish and achieve their full humanity and potential in terms of moral and spiritual maturity, only in society.
2. A human society is a moral community.
3. A moral community is such that its members are mature, morally responsible individuals who hold one another accountable for wrongs to fellow members and to the common good.
4. To hold persons responsible and accountable for wrongs to fellow members and to the common good is to consider them liable for blame and punishment for such wrongs, independently of functionalist and instrumental considerations, such as expressing disapproval or deterrence—though obviously such considerations are not irrelevant to impositions of punishment.
5. To consider persons liable for blame and punishment for wrongs independently of functionalist and instrumental considerations is morally to accept retribution.

Using this explanation as part of an argument, there are two conclusions which follow:

6. Human individuals can flourish and achieve their full humanity, including moral maturity, only if they morally accept retribution and retributive liability for their wrongful actions.
7. Since individual flourishing and the achievement of one's full humanity, including moral maturity, are good things worthy of being pursued, retributive punishment within the limits set by the principles of justice is also a morally good thing which may be pursued and, unless contra-indicated by countervailing instrumental and functionalist considerations, or by the appropriateness of mercy and forgiveness, ought to be pursued.

large. Typically, voters in the US have the choice of 2 candidates for a judgeship. Each judge represents a bundle of juridical views, many of which are encapsulated in vapid sound-bites, such as "tough on crime", "strict constructionist", or "smart on crime". Disputants have a much better chance of having their case heard by an arbiter with juridical views close to their own if they directly choose the arbiter, rather than rely on the proverbial roll of the dice that the state court system affords.

The second tricky element that the arbiter must address is having an understanding of community norms to render decisions. For instance, suppose the arbiter is hearing a victim-offender case of rape. All the facts have been heard. The possible gamut of sanctions is endless. Even within the seemingly simple theory of justice as pure restitution, the core problem arises:

> How might restitution awards be determined? The measurable part of damages are relatively straight-forward and modern courts (private and public) have a great deal of experience in determining awards for measurable harms in property, contract, and tort cases. More significant is the question of how to determine the so-called "punitive" or unmeasurable damages portion of restitution reflecting the harms associated with the invasion of a person's property rights. Non-measurability means that setting such damages is an inexact exercise, of course. Determining damages on a case-by-case basis would initially involve very high transactions costs, including those associated with "hold-out" problems. However, as suggested above, standardized rules creating victims' property rights to restitution payments perceived to be "fair" by members of the community would, in all likelihood, be established through precedent; they have in historical and primitive legal systems that were restitutive, at any rate.[11]

Benson sidesteps a crucial issue: *how* did such rules evolve historically? Saying that they were established through precedent is too vague. We will leave the answer to this historical question to a later section of the paper. Having a good modern answer to this question – how does the arbiter take the pulse of the community's norms? – is the key to providing arbitration that meets community norms. Our answer to this question is the production and distribution of mediation casebooks, where arbiters can read the agreed-to terms of settlement in mediation cases. As the cases pile up, they will form a picture of the community standards of punishment, restitution – indeed, all aspects of justice, including theories of justice.

Community norms vary geographically, they change as mores change, they change in response to changes in prosperity, levels of crime, advances in technology, etc. In Arab countries, mutilation is an acceptable sanction for theft. In the US, mutilation is now considered beyond the pale. As medical technology advances at an increasing rate, we might face situations like this:

Assume a market for body parts from healthy living people develops. A thief steals a large sum of money, spends it, and is unable to repay what he owes. A body part from the thief would provide compensation for what he stole. If removing the body part is not fatal or life-threatening (say, removal of one kidney), does the victim have a claim on that body part if it can provide the compensation owed?[12] The answer is ethically difficult. However, with mediation casebooks at the arbiter's disposal, his decision is made easier. Multiple thefts will have been settled by mediation. If mediation casebooks showed that compensation from sales of donated organs was commonly agreed to in cases of destitution, then arbitrators would have a good basis upon which to make such a determination, clearly informed by community standards. If no such sales were voluntarily agreed to, then the arbiter would

[11] Bruce L. Benson, *Restitution in Theory and Practice* 12 JOURNAL OF LIBERTARIAN STUDIES 75, 80 (1996).
[12] Thanks to Paul Edwards for this hypothetical scenario.

likewise have a good basis upon which to reject that remedy. Note that in this model of the diffusion of norms of justice, the innovative and ethically difficult sanctions are first suggested and adopted in the context of mediation, where decisions are unanimous. Only after a pattern of practice emerges is it then imposed by an arbiter.

Having suggested that community norms are best transmitted by mediation casebooks, we re-examine a problem raised earlier. The standards of justice of the disputants may be aberrant, such that they do not reflect the standards of the wider community. In such a case, is justice better served by applying the standards of the sub-community or those of the wider community? The arbiter, having read mediation casebooks, will have a better sense of the standards of the wider community and would likely have difficulty discerning the aberrant standards of the disputants. Even if the arbiter could discern the aberrant standards of the disputants, his decisions should be defensible by reference to community norms, as found in mediation casebooks – otherwise the decisions will appear capricious. For these reasons, we expect that arbiters well read in mediation casebooks would hew to standards of the larger community.

We now come to the last tricky element for the arbiter: full possession of the facts of the case. The problem is well-stated by Goodman:

> The reality of arbitration from the parties' perspective is that ***the parties will always know more about the dispute than an arbitrator ever will***. They have lived with the situation until it evolved into a dispute. Even when the time arrives to make an award, the arbitrator may still know less than the parties know. In any situation involving advocacy, the trier of fact is left with the "spin" that the parties place on the facts. Even so, if the arbitrator has performed the duties of the position well, and taken appropriate steps to control the process so that the necessary information is submitted by the parties, the arbitrator can arrive at a reasoned, supportable decision.[13]

Despite the arbitrator's efforts, he cannot escape the Hayekian knowledge problem. The ideal situation would be if the arbiter could be in possession of all relevant knowledge. But this cannot be. The Hayekian knowledge problem is "a problem of the utilization of knowledge which is not given to anyone in its totality".[14] This knowledge can be classified into two realms: personal and local knowledge. Personal knowledge is "the knowledge unique to particular persons of their personal perception, of their personal preferences, needs, and desires, of their personal abilities, and of their personal opportunities".[15] An example in the context of dispute resolution would be that the victim would be satisfied with a heartfelt apology and demonstrated contrition by the offender. It is not in the interest of the victim to reveal this in arbitration, since it might encourage a more lenient decision. Other elements of personal knowledge may be considered irrelevant, or simply not asked, or tacit and inarticulable. Local knowledge is the public knowledge known to only a local community of people. An example in the context of dispute resolution would be that the offender's father is exceptionally supportive and will likely ensure that the offender lives up to the terms of an arbiter's decision. It is not in the interest of the offender to reveal this in arbitration, since it might encourage a harsher decision.

Unlike the case of mediation, in arbitration the process does not engage the full set of knowledge held by the disputants and their communities of care. Indeed, arbitration does not even usually ask for

[13] ALLAN H. GOODMAN, BASIC SKILLS FOR THE NEW ARBITRATOR 17 (2nd ed., 2004) (emphasis in original).
[14] F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. R. 519, 519 (1945).
[15] RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 31 (1998).

comment or testimony from secondary stakeholders, and certainly does not ask their opinion of what the sanctions should be, how effective they will be in serving the many ends of justice, peace, restoration, moral re-engagement, etc. For these reasons, the quality and extent of knowledge used to render decisions/terms is greater in mediation than in arbitration.

We have seen in this section that arbitration cannot claim to be Pareto optimal, and falls short of mediation on at least three counts: the arbiter's theory of justice cannot match that of the disputants, the arbiter's understanding of community norms can only be had through the institution of mediation casebooks but the norms may not be those of the disputants, and the full possession of the facts of the case – meaning the collection of all facts, personal knowledge, and local knowledge for the disputants and their communities – is not possible or even approachable in arbitration.

We now examine modern US juridical practice and then critique it in the subsequent section.

Modern US Juridical Practice

At the root of every adjudication is a dispute. Under the United States Constitution, the "judicial power [extends] to all Cases in Law and Equity . . . [and] Controversies"[16] and is vested in the Supreme Court and inferior federal courts.[17] These few words hide a wealth of complexity. Only cases and controversies are justiciable; what, exactly, constitutes one or the other is the subject of an entire body of literature and legal scholarship reaching back nearly to the founding of the nation. Fortunately, only a gloss on the subject is necessary for this paper.[18]

According to Chief Justice Hughes,

> [a] justiciable controversy is . . . distinguished from a difference of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[19]

In order for a case to be justiciable, it must first be ripe and concrete, that is to say there must be an actual dispute that has already erupted over an existing set of facts and relationships. It is insufficient that a dispute may arise in the future over some hypothetical set of facts.[20] Next, the parties who bring the suit must actually have standing to do so. The plaintiff must be "among the injured, for it is this requirement that gives a litigant a direct stake in the case or controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders."[21] Next, the case must not be moot; the plaintiff's interest must exist at the beginning of the litigation and persist throughout. "In a sense, [the doctrine of mootness] is an amalgam of ripeness and standing—the suit may be pursued only if there is an actual controversy in which plaintiff still has a personal stake" throughout the contest.[22] Finally, the parties plaintiff and defendant must actually have antagonistic interests and desire to assert them; feigned or collusive cases are not appropriate for adjudication.[23]

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[16] U.S. Const. art. III, § 2.

[17] *Id.* art. III, § 1.

[18] For a more thorough discussion of the subject, *see* CHARLES ALAN WRIGHT AND MARY KAY KANE, LAW OF FEDERAL COURTS §§ 12-14 (6th ed. 2002).

[19] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-1 (1937) (citations omitted).

[20] *See, e.g., United Public Workers v. Mitchell*, 330 U.S. 75 (1947), in which federal employees challenged the validity of the Hatch Act, which prohibited federal employees from participating in political campaigns. Most of the plaintiffs had not actually violated the Act; they merely sought a declaration of the constitutional boundaries of their regulation. Since the Court could "only speculate as to the kinds of political activity the appellants desire[d] to engage in or as to the contents of their proposed public statements or the circumstances of their publication[, it reasoned that i]t would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other." *Id.* at 90.

[21] *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

[22] RICHARD L. MARCUS ET AL., CIVIL PROCEDURE 94 (4th ed. 2005).

[23] *See, e.g., United States v. Johnson*, 319 U.S. 302 (1943), in which case the plaintiff filed a lawsuit alleging that his landlord charged rent in excess of the maximum amount fixed by rent control regulation. The United States moved to have the lawsuit dismissed as collusive; the Court granted the motion, finding that the apartment owner paid to have and had had the lawsuit filed in the name of a friendly tenant so that the landlord might have an opportunity to contest the constitutionality of the regulation. The court reasoned that "[s]uch a suit is collusive because it is not in any real sense

The above discussion applies directly only to disputes arising under federal jurisdiction.[24] The states each have their own justiciability rules, and the particulars of these rules vary considerably from state to state. However, state courts generally apply the above concepts when deciding whether or not they will hear and adjudicate a given case.

Once there exists a justiciable controversy, a party—normally the aggrieved party—applies to a tribunal for its judgment. The determination of which court is the appropriate one to apply to and the procedure for making that application vary between jurisdictions. Normally, the plaintiff submits a complaint or petition to the appropriate court detailing the facts of the case (including any loss or injury he has suffered), the grounds on which relief is sought, and the relief that he requests. For example, after an automobile accident, the innocent party might file a petition alleging that he sustained a neck injury and damage to his vehicle when the defendant's automobile collided with his on a given date, asserting that the defendant was negligent in the operation of his vehicle, and praying that the court award him compensation for his injuries. After all relevant parties are notified of the pending lawsuit, the court hears testimony and receives evidence into the record on the allegations contained in the petition.

After the trial, the court renders its judgment by applying the law to the facts of the case at bar. But what is the law, how does the judge find it, and where did it come from? In American courtrooms, the court must first determine which law applies: federal or a state's law. Certain matters mix issues of state and federal law, and occasionally both state and federal law cover a given situation. Additionally, if state law applies, which state's law governs is sometimes unclear if the subject of the litigation crosses state lines. Unraveling these questions is far beyond the scope of this work.[25] Suffice it to say, for this discussion, that judges decide in which body of law to find the rules applicable to the cases they are charged with deciding.

Within that body of law there are two principal types of law: enacted law and case law. Enacted law are specific rules passed by a legislative body to govern the conduct of the people within a given jurisdiction. Enacted law also embraces regulations promulgated by administrative bodies under a delegation of authority from the legislature. Everyone is familiar with enacted laws, as they touch nearly every facet of our daily lives. Speed limits, the prohibition of murder, and marriage are all subjects of enacted laws. In addition to the commonplace examples above, enacted law also governs the entire process of enforcing rights, from the rules of court procedure through what evidence is admissible at trial.

It even defines, in certain cases, when a person is entitled to compensation and in what way he may seek it from certain defendants. For example, the Louisiana Products Liability Act[26] ("LPLA") "establishes the exclusive theories of liability for manufacturers for damage caused by their products. A claimant may not recover from a manufacturer for damage caused by a product on the basis of any

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adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *Id.* at 305 (citations omitted).

[24] *See* Wright, *supra* note 3, § 7 for an overview of federal courts as courts of limited jurisdiction. Most states are courts of general jurisdiction; *viz.*, state courts are presumed to have jurisdiction over a given dispute unless it can be shown to be otherwise.

[25] For an overview of determining the applicable law, *see* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 4.1-4.8 (4th ed. 2005).

[26] LA. REV. STAT. ANN. §§ 9:2800.51-2800.60 (2009).

theory of liability that is not set forth in this Chapter."[27] In simpler terms, this means that a plaintiff who is injured by a defective product *must* sue the manufacturer under the LPLA; he may not recover on a claim in tort under a standard negligence theory.[28]

Enacted law also authorizes punitive damage awards for certain cases. Punitive or exemplary damages are those "given to the plaintiff over and above the full compensation for the injuries [he sustained], for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."[29] Conduct punished by punitive damages is almost invariably intentional and is often surrounded by "circumstances of aggravation or outrage, such as spite, 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard for the interests of others that the conduct may be called wilful [sic] or wanton."[30] For example, under Louisiana law, if an insurer's failure to tender payment for an insured loss within thirty days of receiving proof of that loss "is found to be arbitrary, capricious, or without probable cause," the insurer shall be subjected "to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured."[31]

Conversely, enacted law also limits the amount of money certain classes of defendants can be forced to pay. For example, in a medical malpractice action in Louisiana, the "total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits . . . [is limited to] five hundred thousand dollars plus interest and cost[s]."[32]

Despite its breadth and depth, enacted law is far from neither comprehensive nor entirely consistent. Behind all of the legislature's best-laid plans and in all of the cracks between their words lie countless judgments. The judiciary is charged with interpreting and applying the laws passed by the legislature. Judges, however, are not limited to shepherding the statutes; judges also make laws of their own. The resulting body of judge-made rules and statutory interpretation is called case law and forms the core of the common law tradition. To understand case law and how it comes to be, we must first examine the parts of a judgment.

A judgment is, very simply, the "court's final determination of the rights and obligations of the parties in a case."[33] A judgment is often accompanied by an opinion, which is the "court's written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta."[34] The "principle or rule of law on which a court's decision is founded"[35] is the *ratio decidendi* ("reason for deciding") of that case and lends a given case its precedential value, as will be discussed below. A *ratio decidendi* is a rule of law indispensable to the outcome of the case. On the other hand, language that is present in the opinion but not crucial to the decision reached is *obiter dictum* ("something said in passing") and is without precedential value.[36]

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[27] *Id.* § 9:2800.52.

[28] *See* LA. CIV. CODE ANN. art. 2315 (2009).

[29] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 9 (5th ed. 1984).

[30] *Id.* at 9-10.

[31] LA. REV. STAT. ANN. § 22:1892(B)(1) (2009).

[32] *Id.* § 40:1299.42(B)(1) (2009).

[33] BLACK'S LAW DICTIONARY 858 (8th ed. 2004).

[34] *Id.* at 1125.

[35] *Id.* at 1291.

[36] *Id.* at 1102.

For example, if in deciding a case involving a collision between two red vehicles the court posits the rule that "motorists who are involved in the collision of cars of the same color share the fault equally" and finds both motorists equally at fault, that is the *ratio decidendi* of the case. If he states later in his opinion, "Had Mr. Smith been driving a blue car, I would have found him to bear the entire fault for this accident," that statement is *obiter dictum*, because Mr. Smith was driving a red car and, therefore, what would have happened had he been driving a blue car is irrelevant to the decision that was reached. A future court cannot validly cite his opinion to support the proposition that "the driver of a blue car in an accident bears the entire fault for the collision."

What precedential value a judicial decision or opinion has has changed significantly throughout history. At its core, precedent is the notion that courts ought to decide similar cases similarly. But why? Different theorists and commentators have given reasons over centuries, and all parts of the common law's system of precedent has come under attack frequently. Sir Edward Coke, one of the greatest jurists of the 17th century wrote, "[N]ay[,] the common law itself is nothing else but reason."[37]

Thomas Hobbes agreed, up to a point. For him, law "is not 'philosophy'—that is, its dictates are not indefinitely disputable, nor are its doctrines always open to reconsideration and reformulation—rather, law consists of commands or prohibitions the contents of which are (intended to be) indisputable (*Dialogue*, p.69). 'It is not Wisdom, but Authority that makes a Law' (*Dialogue*, p.55)."[38] Hobbes agreed with Coke that the law was reason but insisted that it was the reason of the commonwealth, i.e. that of the sovereign.[39] Hobbes's view set the stage for a positivist conception of precedent. All law comes from the sovereign, but "[w]here the law is silent, where there is no directly declared will of the sovereign, judges are authorized to declare law in his name, doing so, of course, in the course of adjudicating particular cases."[40] Note that this conception recognizes judicial precedent largely as gap-filling and not necessarily as creating new standalone legislation from the bench.

Jeremy Bentham built on Hobbes's theory. He argued that judicial decisions formed the rules for social interaction and that deference ought to be given to them because they had been established. The rules "are 'authoritative' in the sense that (i) the immediate reason for following the rule rests on the fact that the matter in question was *decided*, . . . and (ii) the rule dictates a certain course of action and precludes . . . further practical deliberation about the propriety of the action in question."[41] According to the positivist position, precedent gives certainty and predictability to social interaction, which, in turn, gives significant utilitarian benefits.

The story does not end with the positivists, however. The traditional conception of precedent roots the authority of common law precedent in its long-term general use and acceptance. In the view of Sir Matthew Hale and other proponents of the traditional conception of precedent, "both the *meaning* or normative content and the *authority* of the precedential case rest on its being recognized as an integral part of the collective experience (or 'wisdom') of the community, of which the law [and especially the reports of cases] is the repository. Legal precedent is simply the formal memory of the people."[42] Unlike the positivist view, in which the authority of precedent rests on the reasonableness of

[37] SIR EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND § 138 (13th ed. 1774).

[38] Gerald Postema, *Some Roots of Our Notion of Precedent* 11, *in* PRECEDENT IN LAW (Laurence Goldstein, ed. 1987) (citing THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS (J. Cropsey, ed. 1971)).

[39] *Id.* at 12.

[40] *Id.* at 13.

[41] *Id.* at 15.

[42] *Id.* at 16

submitting to the law regardless of the reasonableness of the laws themselves, the traditional view sees the authority of precedent as flowing from "(1) a sense of the historical appropriateness of the precedent and of the body of law as a whole, and (2) the belief that its component decisions are the products of a disciplined process of reasoning and reflection on common experience."[43]

Neither theory is necessarily mutually exclusive, and unions and amalgams of the two competing views emerged over the years. David Hume, for one, developed a conception that Postema dubs the conventionalist conception of precedent. In short, Hume argued that, although a great deal of ancient laws still in force can be traced to no source but human imagination and "are 'without sufficient reason' *in themselves*, they 'justly become sufficient reason[s]' for conforming to certain patterns of social behavior."[44] This conception shares elements with both the positivist and traditional conceptions of precedent and authority. In the positivist vein, Hume argues that justice and the law ought to promote coordination and orderly social interaction and derive their authority from doing so.[45] On the other hand (and in the traditional camp), these rules are created "through careful working out of shared understandings of common practices. What is common is not a set of general rules, but a mutually recognized and widely practised [sic] process of reasoning from the particulars of common life."[46]

The debate over precedent still flares up from time to time today. Regardless of the theoretical underpinnings, judges and practitioners have arrived at some practical consensus. The core of our conception of precedent is the legal maxim *stare decisis et non quieta movere*, or "to stand by previous decisions and not to disturb settled matters."[47] The maxim is usually shortened to simply *stare decisis*. In the American application of *stare decisis*, courts are required to follow the precedent of certain courts.

> Precedent becomes 'binding authority' on a court if the precedent case was decided by that court or a higher court in the same jurisdiction. If precedents exist that are binding authority on the particular point of law then those precedents constrain a judge to decide a pending case according to the rules laid down by the earlier decisions or to repudiate the decisions.[48]

As stated earlier, only the *ratio decidendi* of a given case has precedential value. Most opinions do not explicitly state the *ratio decidendi* for a particular point of law; thus, an advocate or a judge seeking to use the case as precedent will often have to synthesize the *ratio* from the case. This gives a great deal of flexibility to precedent.

Since no two cases are exactly alike, the precedential scope of a case can be increased or decreased a great deal by exactly how the *ratio decidendi* of the case is stated. For example,[49] if a judge finds that a person was falsely imprisoned when he was confined to the corner of a room by a snarling black and white pit bull, the color of the dog is irrelevant to the *ratio decidendi*. However, the breed of the dog may be relevant, as the plaintiff is probably more scared of a pit bull than of a chihuahua. The *ratio* could be stated narrowly, as in "a growling pit bull preventing a person's exit constitutes confinement for purposes of a false imprisonment claim." On the other hand, the *ratio* could be expanded to say, "a household pet between a person and the exit constitutes confinement for

[43] *Id.* at 16-7.

[44] *Id.* at 26.

[45] *Id.* at 31.

[46] *Id.*

[47] BLACK'S LAW DICTIONARY 1759 (8th ed.2004).

[48] HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 10 (4th ed. 2003).

[49] Adapted from *Id.* at 16.

purposes of a false imprisonment claim." Both expressions describe the facts, but the second formulation makes a guinea pig an impromptu jailer. The formulation of the *ratio decidendi* of a case is an important legal skill, and courts often have a great deal of leeway in enunciating the precedent for which a given case stands.

Once the *ratio* has been discovered, the court then compares the precedent to the case at bar. If the cases are similar enough that the precedent should bind the court, the two cases are analogized and the precedent is applied. If the cases are different enough that the court wishes to avoid applying the previous precedent, the court will distinguish the facts of the two cases and give the reasons why the precedent should not apply.

Some precedent is not binding; these cases are sometimes treated as persuasive authority. Despite this, courts may still consider nonbinding cases' reasoning. If a nonbinding opinion—from a court in another jurisdiction, for example—is particularly well reasoned, a court may decide to adopt its *ratio decidendi* and follow it as persuasive authority. However, a source of binding authority that is contrary to persuasive trumps the latter. *Obiter dictum*, described above, is often used as a source of persuasive authority.

Once the factfinder—either a judge or a jury under judge supervision, depending on the specifics of the case and the rules of the jurisdiction in which the lawsuit is brought—determines that a defendant is at fault for the injury to the plaintiff and owes him compensation, he must determine the amount of damages to award. The most common type of damages awarded are compensatory, i.e., the amount of payment required to place the plaintiff in a position as close as possible to that which he occupied before being injured. Compensatory damages are divided into two subcategories: general damages and specific damages. Specific damages "are those which either must be specially pled or have a 'ready market value,' i.e., the amount of the damage supposedly can be determined with relative certainty."[50] For example, in a lawsuit over a car collision, the amount of money a plaintiff spent on medical treatment as a result of the accident would be properly awarded as special damages. Special damages, because of their nature, are relatively easy to calculate.

On the other hand, "[g]eneral damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty. These include pain and suffering, mental anguish, and loss of enjoyment of life."[51] Because the injuries to be compensated by general damage are often nebulous, factfinders have a great deal of of discretion in determining how much a plaintiff is entitled to. However, years of practice have resulted in a few damage award aids.

First, practitioners in at least one jurisdiction have compiled what they call quantum books. The books generally cover all the reported decisions for a particular jurisdiction and summarize the relevant facts of the cases, the plaintiff's injuries, the amount awarded for which injuries, and whether a judge or a jury made the award. Cases are grouped by type of injury. For example, in *Eason's Louisiana Quantum Book* reported cases including headaches and concussions are grouped together in one chapter, and soft tissue injuries of the neck and back are grouped together in another. An excerpt from the arm injury section is below.

$37,50

soft tissue injuries of six months; lacerated arm; headaches

Jury. A sixty-three year old woman incurred soft tissue injuries of six months in duration, a bump on her head, a laceration on her left arm requiring three stitches and a knee injury after an auto accident. She was

[50] FRANK MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 7.02 (2nd ed. 2004).

[51] *Id.*

> violently thrown in her car suffering the laceration to her arm, developing headaches, bruises and six months of pain from the whiplash. The jury awarded her $25,00 in physical pain & suffering, $7,500 in mental pain & suffering, $5,000 for loss of enjoyment of life, and $5,000 in medical expenses. *Millican v. Ponds*, 99 1052 (La. App. 1 Cir. 6/23/00);762 So.2d 1188.[52]

In this case, a jury awarded $37,500 in general damages to the plaintiff for three types of injury and $5,000 in specific damages for her medical expenses. The book also lists any subsequent alteration of the awards by the trial court or an appellate court.

The amounts awarded by a previous factfinder in a similar case help the factfinder in a later case decide what certain injuries are worth. However, they do not operate as precedent since the facts of each case are entirely unique to that lawsuit and a determination of actual damages is a question entirely of fact.

Courts also use expert witnesses to assist them in determining a plaintiff's damages. Most witnesses are fact witnesses, i.e., witnesses who may normally testify only to what they have seen themselves. Expert witnesses, because of their expertise in one or more fields, are allowed to testify as to their opinion on subjects within their field. As a result, expert witnesses may testify about things that have not yet happened, e.g., the likelihood that a plaintiff will need medical care in the future and how much it will cost. Determining future consequences of an injury is very important, because judgments cannot generally be changed after they are rendered. Thus, if a court fails to grant a plaintiff an award for his future medical expenses in its judgment, that plaintiff cannot have them added to the judgment in the future.

In cases decided by a jury, the judge overseeing the trial has the authority to modify the jury's award under certain circumstances. If the court finds that the verdict returned by the jury is unlawfully high, the court may reduce the award to an appropriate amount. This process is called remittitur, and—at least in federal courts—the plaintiff must be given the option of having a new jury trial instead of accepting the reduced award in order to avoid running foul of the provisions of the seventh amendment.[53] Conversely, some courts may increase an impermissibly low jury award; this device is called additur. Additur is not available in federal courts, but it is available in certain state courts.[54] Finally, after a certain period in which the parties may appeal the decision, the judgment becomes final and may not normally be disturbed ever again.

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[52] EASON'S LOUISIANA QUANTUM BOOK, 319 (Jamie H. Eason & Tobin J. Eason eds., 2008).

[53] *See* Friedenthal, *supra* note 10, at 595-7. The seventh amendment reads, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United State, than according to the rules of the common law."

[54] *See* Friedenthal, *supra* note 10, at 596-7. The reasons for this are rooted in common law tradition and the differences between state and federal constitutions.

Community Norms in Modern US Juridical Practice

In setting damages and sentences, judges and juries operate in a subjective world with little to guide them that is truly informed by broad community standards. Of course, judges and juries take into account a very large range of circumstances in making their decisions: offense seriousness, offender characteristics, victim characteristics, courtroom conduct of all parties, desert, deterrence, punishment, rehabilitation, etc.

The narrow distinction seems to be that jurors and judges agree on the basic scale of justice, degree of blameworthiness, but this does not translate into consistency of sentences or damages. Regarding juries: "This theme of shared moral evaluations but lack of consensus on the legal threshold for liability, followed by erratic dollar awards, is the most general message of the present research."[55] Regarding judges, large interjurisdictional[56] and even larger intrajurisdictional[57] sentencing disparities have been documented.

Witnessing the variability among judges, and buttressed by concerns about sex and race discrimination, starting in the mid-1970's and continuing to present, legislatures undertook a series of measures now broadly called "the sentencing reform movement".[58] At first, the indeterminate sentence was attacked, where the judge was empowered to give a minimum and maximum sentence, and the parole board determined the date of release. These arrangements were severely criticized on a number of grounds, and so reforms were undertaken to pass in many jurisdictions sentencing guidelines or "grids" which boxed in minimum and maximum sentences for offenses, with complex rules to add or remove time based on aggravating or mitigating circumstances, but within these sometimes very tight constraints judges were again empowered to give determinate sentences. However, various formulas for time off for good behavior and other sentence modification methods persist. Later, mandatory minimum sentences became the rage among legislatures for particular offenses (e.g., drug crimes, gun offenses), as well as related "three-strikes-you're-out" and "truth-in-sentencing" laws. The patchwork of laws that constrain the judge and second-guess him are many and varied, and nothing like a description of an "American approach" to sentencing is possible today. The judge's discretion has been greatly boxed in.

However, as noted above, the sentencing reform movement has not solved the problem of intrajurisdictional sentencing disparities. The reason that these reforms have not, is that they have not addressed the root issue. As explained above, the judge is placed in the difficult position of being the public voice of community norms without substantive guidance. The sentencing guidelines are arbitrary and biased, being decided by a legislative elite. The box that judges have been placed in

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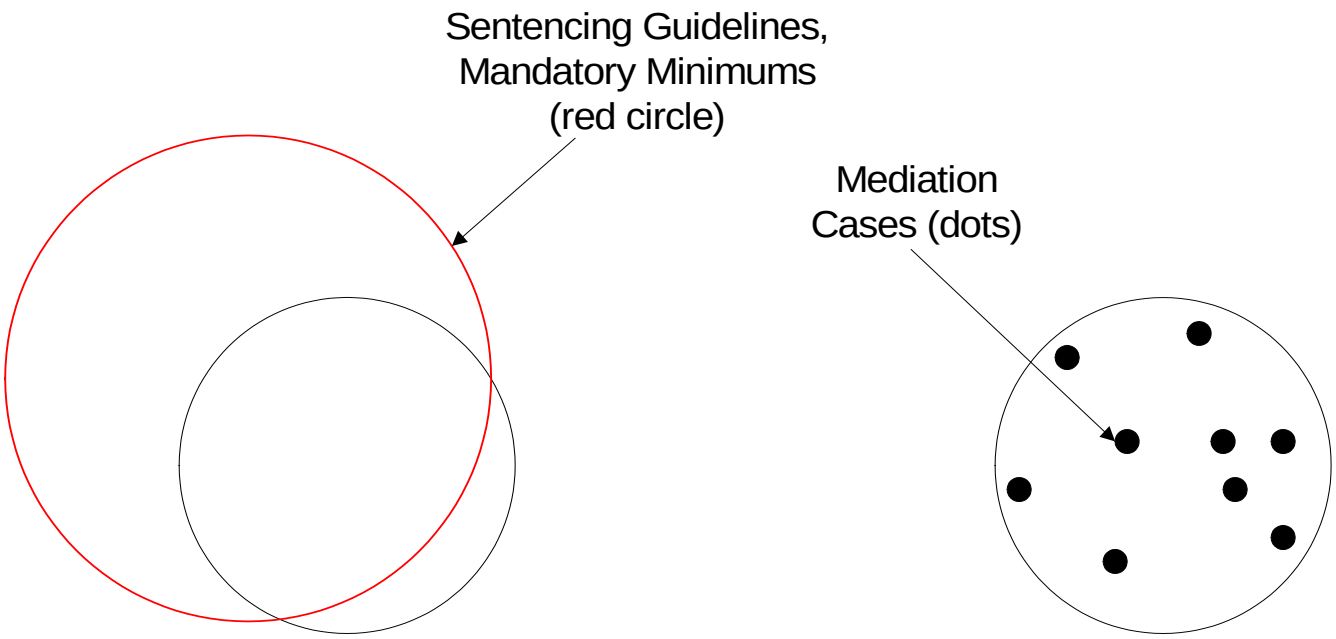
[55] CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 25 (2002).

[56] CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 131 (2009). A comparison of sentencing decisions of judges in three Pennsylvania counties revealed "…'stiff, retributive sentences were reserved mostly for the serious violent and drug trafficking offenses' in the urban county. In the suburban county, on the other hand, there was 'a strong consensus in favor of tougher sentencing standards that reflected an emphasis on deterrence, just deserts, and incapacitation goals' ". Generally, interjurisdictional disparities are the least troublesome philosophically, since community norms vary geographically. (citations omitted)

[57] *Id.* at 134. A 1978 study of 90 judges in Pennsylvania found "that more than half of the judges imposed sentences that were more than 10 percent harsher or more lenient than the mean, 16 judges were at least 30 percent harsher than average, and one judge…imposed sentences that were nearly twice as harsh…" A 1998 study of 12 judges in Illinois for similar cases (all were for possession of narcotics with at least one prior felony conviction) showed that average incarceration rate given by the 12 judges for cases of this type varied from 73.2% to 100%, and average sentence varied from 44.3 to 55.8 months. Looking only at the simple possession cases, the average conviction rates meted out by judges varied from 37.5% to 90%, and the average incarceration rate varied from 14.5 to 42.0 months. (citations omitted)

[58] *Id.*, chapter 6.

constrains their sights, but there is no bull's-eye on the paper. We visually represent the problem, and the difference that mediation casebooks could make, in this way:



Hit the Center of the Black Circle!
On the left, you must choose a point within the red circle.
On the right, the dots are clustered near the bulls-eye.
In each case, you cannot see the black circle of justice.
Which job is easier?

But judges have fared much better than juries. Judges perform their duties day in and day out, but jury service is often the first time that jurors have had to seriously grapple with legal concepts such as liability, negligence, punitive damages, and the philosophical grounds on which they rest, such as desert, punishment, deterrence, and restitution. As painstakingly studied and tabulated, civil jury punitive damage awards in the US are highly variable and unpredictable. Much of this research has been carried out by empirical testing of hypothetical cases on groups of subjects in simulated, jury-like conditions.

Are jurors' dollar awards predictable? "When asked to translate their [fairly consistent] intent to punish into a dollar award, jurors' judgments become erratic and unpredictable. They are only about 18% consistent."[59] Does deliberation by a group of jurors overcome individual biases and produce more just and more predictable verdicts? "Deliberating juries increased both the severity and unpredictability of awards compared with individual predeliberation assessments. When punitive damages were awarded, over 27% of juries awarded as much or more than any individual juror had awarded predeliberation, and 83% of awards were above the median individual juror's award."[60]

Are jurors influenced by the amount requested by the plaintiff? "All respondents were given the exact same case except for the amount of punitive damages requested by the plaintiff's lawyer. Half the respondents were given $X and the other half, $3X. Even though they were told that lawyers'

[59] *See* Sunstein, *supra* note 55, at ch. 2.
[60] *Id.* at ch. 3.

arguments are not evidence and can be ignored, jurors who received the higher request awarded 2.5 times as much as those getting the lower request."[61]

Local plaintiffs get more.[62]

One study conclusion that Austrian economists might find amusing: "Large awards against defendants because they were unlikely to be punished are viewed as unfair by 3/4 of participating University of Chicago law students, all of whom were schooled in the theory of optimal deterrence."[63]

Plaintiffs "whose injuries appear to be of roughly equal severity and who sustained them in a similar manner may walk away from a jury trial with vastly different sums of money." And large scale studies of products liability, medical malpractice, and tort cases in general have all documented this variability.[64]

Also in the case of juries, "tort reform" legislation has been passed to attempt to curtail the variability of awards and especially very high awards by juries. However, these laws do not address the root problem and often have unintended or opposite effects. For instance, psychologists have discovered the *anchoring and adjustment heuristic*:

> Suppose that a juror deems reasonable a damage award in the range $100,000 -- $200,000. Further suppose that a cap [a legislative limit on damage award] is located at the upper end of a range of acceptable responses (e.g., $200,000). In this situation, damage awards would, on average, be assimilated toward the anchor and would be larger than awards made in the absence of a cap…If, on the other hand, the cap is equivalent to an amount that the juror deems objectionable (e.g., an exorbitantly high number, say $2 million), then the cap would have the opposite effect, causing jurors to reduce their awards.[65]

So, setting a reasonably tight schedule of caps on damage awards would actually *raise* damage awards. What about barring juries from punitive damages? "[R]ecent studies show[ed] that jurors who did not have the opportunity to award punitive damages inflated their compensatory damage awards."[66]

What about "blindfolding" juries, to limit the information they receive so they are not biased? "Evidence from archival studies, posttrial interviews, and mock jury experiments has indicated that jurors and juries consider some factors about which they were blindfolded, even though they are expected not to."[67]

This paper is not the place to extensively address and evaluate tort reforms such as capping damage awards, providing guidance to jurors in the form of damages schedules or matrices, bifurcating the evidence in certain civil trials, clarifying the instructions provided to the jury, requiring that some or all of a damage award be paid to the state, or removing punitive damage decisions entirely from the hands of the jury and giving them over to judges. Instead, we will note in passing that it appears from a large

[61] *Id.* at ch. 4.
[62] *Id.* at ch. 4.
[63] *Id.* at ch. 8.
[64] EDIE GREENE AND BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 24 (2003) (citations omitted).
[65] *Id.* at 150-1 (citations omitted).
[66] *Id.* at 159 (citations omitted).
[67] *Id.* at 169 (citations omitted).

literature review that: caps are a mixed bag but mainly problematic; damage schedules provide less variability but are arbitrary as explained many times in this paper; bifurcation can reduce findings of liability and reduce awards to some extent in some circumstances but whether this is just cannot be judged from empirical studies; jury instructions about aspects of the law tend to be salutary; when punitive damage awards by law go to state coffers, jurors choose lower punitive awards citing the propriety of restitution, restoration, and retribution; and it is unclear whether judges or juries are more consistent with their punitive damage decisions.[68]

Psychologists lament that "our understanding of how people translate an individual's misfortune into a monetary value is rudimentary and elusive" and "unpredictability and randomness in jury awards has alarmed professionals and laypeople alike".[69]

Since 1991, Lawyers Research Publishing Company has been publishing a comprehensive compendium of awards and liability rulings made in Louisiana courts. These casebooks allow attorneys, judges, and claims personnel easy access to the latest decisions of judges and juries. A typical entry is produced below.[70]

$37,500

soft tissue injuries of six months; lacerated arm; headaches

Jury. A sixty-three year old woman incurred soft tissue injuries of six months in duration, a bump on her head, a laceration on her left arm requiring three stitches and a knee injury after an auto accident. She was violently thrown in her car suffering the laceration to her arm, developing headaches, bruises and six months of pain from the whiplash. The jury awarded her $25,000 in physical pain & suffering, $7,500 in mental pain & suffering, $5,000 for loss of enjoyment of life, and $5,000 in medical expenses. *Millican v. Ponds*, 99 1052 (La. App. 1 Cir. 6/23/00); 762 So.2d 1188.

While the form of these quantum award books are admirable, and their use allows the legal system in Louisiana to produce substantially consistent awards, they are built on the knowledge problems and difficulties faced by juries – indeed, faced by all arbiters – as outlined in section 2 of this paper. What is needed today is a new type of quantum award book: one founded on the bedrock of mediated agreements.

As it turns out, though, historical societies dealt with this problem in a slightly different way.

[68] *Id.* at ch. 9.
[69] *Id.* at ch. 10.
[70] Reproduced from book sample available at http://www.lawyersresearch.com/quantum.htm (accessed 3/9/10).

Historical Practices And Community Norms

Unlike the modern US system, many historical juridical systems incorporated strong community norm feedback mechanisms.

Among the oldest documented systems of dispute resolution are those of the ancient Greek city states.[71] Public arbitration of disputes before some assembly of countrymen seems to have been the customary law out of which grew practices that are better documented. Certainly by the time of Homer's stories, public arbitration was before a formal assembly. However, public arbitration was regarded as a last resort. "All the sources [Roebuck exhaustively surveyed Greek texts, inscriptions, and papyri from 700 BC to 30 BC] speak with one voice: reconciliation was the best solution for all disputes and one which was expected of upright and reasonable parties."[72]

Parties typically chose an arbitrator who knew both parties, the *koinos*. Sometimes multiple arbitrators were chosen, one from each side and then also a *koinos*. There was a clear conceptual distinction between mediation and arbitration. Mediation was the preferred outcome, but if mediation failed then the parties could agree to enter arbitration by the taking of oaths before witnesses. In this setting, the arbitrators might ask questions of the disputants and witnesses and suggest equitable settlements or applications of customary law. The witnesses might react and interject. A crowd might form, especially if oaths have been made, since the making of oaths was usually done in a traditional place. "A distinguishing virtue of the Greeks, as far as the sources can be relied on, is that they could and did talk and argue – using rhetoric as well as reason – about everything that mattered to them."[73] As the dispute was mediated or arbitrated, the arbitrators might have the direct commentary of those assembled. Consider this description of an archaic public arbitration on the artwork adorning Achilles's replacement shield, made by Hephaestus:

> [Hephaestus] had made two beautiful cities of human folk. In the first there were weddings and parties, and they were leading brides from their women's quarters through the town under blazing torches, to the loud noise of the wedding hymn. The young people were dancing, spinning round, to the sound of flutes and lyres; and the women were standing at their front doors, watching the spectacle.
>
> Men were crowded together in an assembly. A dispute had been stirred up there, and two men were disputing about the reconciliation-payment for a man who had been killed. One was pleading all to be yielded, pointing it out to the citizens [the proposed payment – perhaps cattle], but the other refused to accept anything. Both men had put it to a knowing-one to reach an end. And men, supporters of each side, were cheering on both of them, so marshals were restraining the crowd. The elders sat on polished stones in a sacred circle and one after another took the speaking-staff of the shouting marshals in their hand and adjudicated. Two gold talents lay in the midst of them, to be given to the one among them who spoke the straightest judgment.[74]

[71] DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001). This exceptional work of scholarship is daunting but rewarding. The reader should be aware of his accessible concluding section on pages 347-360.
[72] *Id*. at 351.
[73] *Id*. at 359.
[74] HOMER, ILIAD, *supra* note 71, at 18.497-508.

Private arbitration in ancient Greek culture may have been a paid service or at least a traditional offering was made to the arbitrator,[75] and the two gold talents above are probably the arbitration payment.

If the parties failed to reconcile in mediation and could not find an arbiter to whom they were both willing to submit, the matter could be taken to public arbitration, where *dikasts* sat in judgment. Roebuck explains:

> [Instead of translating,] I have transliterated *dikast*. I chose [this] method in this case because any other choice of a single English word would be so misleading as to ruin any chance of communicating to the reader, classicists sometimes I suspect as well as arbitrators, what a *dikast* was and did. A *dikast* is anyone who sits in judgment. There were no judges in any part of archaic or classical Greece with sufficient of the attributes of what a judge means to a modern reader. Judges with a few of the characteristics of a modern judge appear only in Hellenistic times [323 BC to 146 BC]. Those who translate *dikastes* as 'judge' find themselves constrained in other contexts to translate the same word, either anachronistically, as 'juror'; but there were none of them, either.
>
> Any citizen became a *dikast* when he sat in a session of a *dikasterion*, which is usually translated 'court'. But that translation also gives a false impression and transliteration would be preferred. The Greeks did not concern themselves with the separation of powers. The citizens of a Greek democratic city-state met not only to hear cases and judge them but to legislate and to take executive decisions at the highest level, such as matters of war and peace. Every Athenian adult who qualified be being male, born free and of a father who was a citizen and a mother who was a citizen's daughter, was expected to discharge his duties as a member of the assembly. On reaching thirty years of age, he was eligible to be chosen by lot as a member of the various tribunals called *dikasteria*. The function of *dikast* was a cherished duty of a citizen, who might feel so strongly about it that he insisted on being buried with his *dikast*'s identity token, the *pinakion*, in his hand.[76]

This brief sketch of ancient Greek dispute resolution brings home two points. Firstly, every citizen was involved, through lot, in public arbitration. Secondly, private arbitrators were first and foremost mediators. The private arbitrators most likely had extensive experience with the norms of mediated settlements, and so their judgments when they acted as arbitrators were well-informed by community norms. The dikasteria, by contrast, were large tribunals which administered community norms directly.

Having now sketched these facts, we are now ready to better understand Plato, who made a claim very much the same as the claim we make in this paper, when he wrote:

> Any city would be a non-city if it did not have properly established *dikasteria*. … The matter in dispute between [parties] has to be made clear by each side. The passage of time and slow and repeated examination help to identify the issues. So the first requirement is for the parties to come before neighbors and friends who have most knowledge of the matters in dispute…

[75] HESIOD, WORKS AND DAYS, 30-42 ("the gift-eating basileis [man of high rank appealed to in arbitration]").
[76] Roebuck, *supra* note 71, at 28-9.

> Therefore the most authoritative *dikasterion* shall be that which both parties set up themselves for themselves, choosing [the *dikasts*] by mutual agreement.[77]

The ancient Greek system of law greatly influenced the Roman System of law, which formed the basis of Western law. Recognizing that the scope of this paper is modest, we will make only a few observations about the Roman system before leaving this section. Firstly, as Leoni observed:

> Everybody today pays lip service to the Romans no less than to the English for their legal wisdom. Very few realize, however, what this wisdom consisted in, that is, how independent of legislation those systems were in so far as the ordinary life of the people was concerned, and consequently how great the sphere of individual freedom was both in Rome and in England during the very centuries when their respective legal systems were most flourishing and successful. One even wonders why anyone still studies the history of Roman or of English law if this essential fact about both is to remain largely forgotten or simply ignored.
>
> Both the Romans and the English shared the idea that the law is something to be discovered more than to be enacted and that nobody is so powerful in his society as to be in a position to identify his own will with the law of the land. The task of "discovering" the law was entrusted in their countries to the jurisconsults and to the judges, respectively—two categories of people who are comparable, at least to a certain extent, to the scientific experts of today. This fact appears the more striking when we consider that Roman magistrates, on the one hand, and the British Parliament, on the other, had, and the latter still has, in principle, almost despotic powers over the citizens.
>
> For centuries, even on the Continent, legal tradition was far from gravitating around legislation. The adoption of Justinian's Corpus Juris in the Continental countries resulted in a peculiar activity on the part of the jurists, whose task it was once again to find out what the law was, and this, to a great extent, independently of the will of the rulers of each country. Thus, Continental law was called, quite appropriately, "lawyers' law" (Juristenrecht) and never lost this character, not even under the absolutist regimes preceding the French Revolution. Even the new era of legislation at the beginning of the nineteenth century began with the very modest idea of reassessing and restating lawyers' law by rewriting it afresh in the codes, but not in the least by subverting it through them. Legislation was intended chiefly as a compilation of past rulings, and its advocates used to stress precisely its advantages as an unequivocal and clear-cut abridgment as compared with the rather chaotic mass of individual legal works on the part of the lawyers. As a parallel phenomenon, written constitutions were adopted on the Continent primarily as a way of putting into black and white the series of principles already laid down piece-meal by English judges as far as the English constitution had been concerned. In the nineteenth-century Continental countries both codes and constitutions were conceived as means of expressing the law as something that was by no means identical with the contingent will of the people who were enacting these codes and constitutions.
>
> In the meanwhile, the increasing importance of legislation in the Anglo-Saxon countries had chiefly the same function and corresponded to the same idea, namely, that of restating and epitomizing the existing law as it had been elaborated by the courts down through the centuries.

[77] PLATO, THE LAWS 6.766, *supra* note 71, at 167.

We think it important to emphasize that what we understand as the accumulated wisdom of legal rules was made by judges, but who were these judges? Roebuck explains:

> Until well into [Roman] imperial times there were no professional judges in Rome. In all civil matters, the state deputed respected citizens, sometimes from a panel, to act as adjudicators on its behalf. No body of professional expertise could be created and passed on so long as it was a crime to accept payment of any kind for performing the duties of judex or arbiter. …
>
> Nobody could be forced to act as arbiter. But that was the proper response, indeed the civic duty, all things being equal, of every Roman citizen. …
>
> The past is often easier to understand if we can rid our minds of assumptions that things are always getting fairer and more efficient. There is no evidence that the citizens of Rome and others who lived within its empire found fault with the systems available to them of dealing with their civil claims. They seem to have been satisfied with them, and took their speed, cheapness, efficiency and finality for granted. The law and the legal system changed slowly. For centuries there were no formal courts to which citizens could turn for the recovery of ordinary civil claims but why should they want to? Even when the state set up courts with professional judges, citizens continued to use arbitration…[78]

The period of Classical Roman law, during which time famous Roman jurists lived and wrote (e.g., Gaius, Ulpian, and Papinianus), from 82 BC to about 250 AD, is widely regarded as the time in which Roman legal scholarship reached its highest degree of perfection. An under-appreciated fact is that these jurists (judex) were also active as private arbitrators (arbiters). Due to the strict requirements of justice and legislated compensatory damages, sometimes private arbitration was preferred. Here Cicero pleads before a judex:

> A certain sum of money was owed to you, which is claimed now before a judex, in which a promise was made of the additional one third required by legislation. Here, if you have claimed one sesterces more than is owing to you, you have lost your case, because a iudicium (the decision of a judex) is one thing, arbitration is another. A iudicium is for a certain sum, arbitration for an uncertain. We come before the iudicium with the expectation that we shall either win or lose the whole amount in question; we go to arbitration on the understanding that we shall end up neither with nothing nor as much as we asked for. The very words of the formula are proof of this. What is the formula before a judex? Direct, hard, simple: 'If it appears that 50,000 sesterces are due.' Unless the claimant can prove that 50,000 sesterces are due, to the penny, he loses the case. What is it in an arbitration? Mild, moderate: 'As much should be awarded as is the more fair and proper.' That man admits he is asking for more than is owed to him but says that he will be more than satisfied with whatever he gets from the arbitrator. So one has confidence in his case, the other has not. …
>
> You have been before the arbitrator for the same amount you are now claiming before the judex. Other people, when they see that their case before the judex is falling to pieces, run off to an arbitrator. But this fellow has the cheek to move from arbitrator to judex![79]

[78] DEREK ROEBUCK, ROMAN ARBITRATION (2004)193-195.
[79] *Id.* at 161 (translation of Cicero, For Quintus Roscius Comic Actor 4.10-15).

Even if Cicero did not say so, we know that even after court fees had been paid, some disputants wished to revert to arbitration, and the judge hearing the case sought to hear it as arbitrator. We know this because the Justinian Digest tells us it is forbidden:

> The Lex Julia prohibits a judex from accepting appointment as arbiter in a matter in which he is judex and from ordering that the matter be referred to him as arbiter *ex compromisso*. If he renders an award no claim for the penalty must be allowed.[80]

As in the case of modern mediations, and what we know of Greek arbitrations, private Roman arbitrations were probably often mediated or negotiated settlements. Roebuck reports:

> Gagos and van Minnen have collected 41 papyri that relate in some way to the settlement of disputes [within the Roman Empire]. They have classified them as arbitrated, mediated, negotiated and otherwise disposed of, with some unable to be classified because the papyrus is not complete. They find that one was arbitrated by an official, three by private arbitrators, eleven mediated, eight negotiated, leaving 18 whose method of determination is unknowable.[81]

Let us now string together a fine line of reasoning on Roman Law. There were a great number of disputes handled privately, many of which were mediated or negotiated. The men who mediated those disputes were, by and large, also the men who practiced law as advocates and who sat as judices. And so, those same men had in their personal experience a repository of cases settled by mediation that informed them regarding community norms.

We regard it as quite reasonable to claim that the greatest legal traditions in the Western world were built upon the bedrocks of mediation and private arbitration.

[80] DIGEST 4.8.9.2, *supra* note 78, at 142.
[81] Roebuck, *supra* note 71, at 5

Call For Victim-Offender Mediation Casebooks

Our modern world of hyper-specialization results in the tragedy of modern judges being appointed to the bench that have virtually no knowledge of community norms. Modern judges "[are] not trained at all" for "the solemn work of sentencing".[82] How can we change this?

Casebooks, as advocated here, elucidate community standards of justice, restitution, punishment, retribution, mercy, service to community and victim, etc. – all aspects of restorative justice. Casebooks such as these answer questions that cannot be answered in any other way.

Extant mediation casebooks, such as Erickson and Erickson's[83] or Dowell's compilation[84] focus on using narratives of cases to introduce and teach mediation, to improve mediator skills, and for other purposes, such as inspiration. By way of contrast, we call for the creation of casebooks that will be a window into the facts of the case, what terms were agreed to and, where possible, why the terms were agreed to. More than anything, they will resemble judge and jury award casebooks such as those we have critiqued above,[85] but since they stem from mediations, they are a much better measure of community norms. We intend that these casebooks be used in exactly the same way as judge and jury award casebooks: for judges and arbiters to use as a guide in the awarding of remedies.

We expect that VOM casebooks will divide the table of contents into categories of torts such as: rape, theft, motor vehicle theft, burglary, vandalism, assault and battery, with possible subcategories for types of injuries sustained. Only mediations that end with an agreement will be listed.

[82] Marvin Frankel, *Lawlessness in Sentencing*, 41 University of Cincinnati L.Rev. 1, 1-54 (as quoted in Spohn, *supra* note 56, at 229).
[83] STEPHEN K. ERICKSON AND MARILYN S. MCKNIGHT ERICKSON, FAMILY MEDIATION CASEBOOK: THEORY AND PROCESS (1988).
[84] Amy Dowell, Medley of Mediation Stories, unpublished compilation, available at http://voma.org/docs/Medley_of_Mediation_Stories.doc (accessed 3/9/10).
[85] For example, JAMIE H. EASON AND TOBIN J. EASON, EASON'S LOUISIANA QUANTUM BOOK (2008)

To close this paper, we suggest a sample entry:

Mediator(s): John Apple of Apple Mediation
Mediated: Houston, Texas, February 2010
Victim(s): Jake, 20-yr-old male college student
Offender(s): Murray, 22-yr-old male welder
Victim Circle: Bob, 20-yr-old college roommate of Jake; Martha, mother of Jake
Offender Circle: Tom, father of Murray; Cindy, wife of Murray
Incident Description: In January 2010 at Lone Star Bar, Jake and Murray, strangers, played a "pick-up" game of pool with a $10 wager. Dispute about the fairness of play escalated into a physical fight. Murray sustained minimal injuries, but Jake's injuries included a dislocated shoulder, a broken nose, and a chipped tooth.
Issues Raised by Victim Side: permanent chip in tooth and nose bump; Murray started fight; medical bills totaling $5325; painful rehabilitation; missing school and poor academic performance as result of injuries will add a semester to his schooling; apology sought; afraid to go to Lone Star Bar; afraid of blue collar buddies of Murray
Issues Raised by Offender Side: regret and contrition; Murray just demoted at work; Murray has violent temper
Terms of Agreement: Murray will pay Jake $17,250 enumerated as: $5325 for medical bills, $3525 for tuition, and $8400 for disfigurement. Murray will take an anger management course and supply proof of completion to Jake by end of June 2010 or pay him an additional $1500. Murray apologized verbally, Jake accepted.
Comments: Fear issues raised by victim side subsided over course of mediation and did not appear to be a factor in the terms of agreement.