USING CRIMINAL PUNISHMENT TO SERVE BOTH VICTIM AND SOCIAL NEEDS

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I
INTRODUCTION

The criminal offender often commits two distinct wrongs with each criminal act. First, the offender commits a wrong against the victim, who is left feeling both aggrieved and vulnerable. Second, the offender wrongs society by engaging in conduct that violates social norms, thereby undermining others' senses of personal security.[1] The two wrongs are often addressed in different ways, and an exclusive or even primary focus on one can interfere with effective redress of the other.

For example, "criminal justice" in early western legal systems often began with vigilante justice, which was left entirely to victims and their allies.[2] Even when the formal legal system was involved, victims were responsible for apprehending and punishing criminals. In the United States' early colonial period, victims actually paid sheriffs to make arrests, hired private attorneys to prosecute cases, and then paid jailers to incarcerate those transgressors who

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1. David Lerman describes the effects of crime on the community as a fear that leads to a kind of enervation:

> Crime can lead to a generalized fear by community members that they are going to be hurt, assaulted, or "ripped off." As people become fearful, they become more isolated and disconnected from one another. This feeling contributes to the weakening of bonds that weave a community together. Without strong communities, there is less informal social control, which is the strongest and healthiest way to prevent crime. The ripple effect of crimes are numerous. People lose the capacity to resolve disputes on their own. They choose to rely upon the "professionals[,]"[] and place a call for emergency assistance. They become more fearful of [each] other and, without the opportunity to engage in a proactive healing process, they might remain bitter and fearful.

David M. Lerman, *Forgiveness in the Criminal-Justice System*, 27 FORDHAM URB. L.J. 1663, 1664 (2000).

2. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938–39 (1985).

were unable to compensate the victim as required by the judgment.[3] Under this system, in which the onus to prosecute and the costs of punishment were borne by victims, pervasive underenforcement of the law often left social needs unsatisfied.

In recent decades, the criminal-justice pendulum has swung to the opposite extreme. Criminal law is often described as covering disputes between the offender and the state. Victims are not direct parties to criminal proceedings, they have no formal right to either initiate or terminate a criminal action, and they have no control over the punishment meted out to offenders. In this state-centric system, victim needs have been left unsatisfied, giving rise to a politically powerful victims' rights movement that has had success in giving victims rights of access to prosecutors and rights to be heard in the courtroom.[4]

In this article we propose changing the manner in which control rights over criminal sanctions are distributed. This modest change has the potential to increase victim well-being without interfering with social needs. Specifically, victims should have the right to determine whether an offender will serve the last ten to twenty percent of his prison term. The control right can do more than help restore a sense of victim empowerment: it will likely encourage voluntary victim–offender mediation (VOM), which has been demonstrated to assist the emotional healing process for victims while perhaps decreasing recidivism rates. Section II of this article briefly describes both recent victims' rights reform efforts and the recent rise in the use of VOM. Section III describes the proposal involving the distribution of control rights and possible objections to it.

II
RECONCILIATION BETWEEN VICTIMS AND OFFENDERS

A. The Victim's Role in Criminal Litigation

Criminal litigation is typically conceptualized as a dispute between an accused defendant and the state. Prosecutors act on behalf of the public to vindicate the loss of security and trust that results in a society with frequent, unpunished crimes. Victims have some input in the process by choosing to report crimes and exhibiting a desire to press charges, and their cooperation is very often necessary to successfully prosecute a criminal trial. Unfortunately, however, this influence is indirect and often not guaranteed. Although some prosecutors pay careful attention to victims' wishes in their charging decisions and during plea bargaining,[5] other prosecutors are much less inclusive of victims

3. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1254 (1994).

4. Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy and Review*, 2005 BYU L. REV. 255, 257–58.

5. Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 952–56 (1975) (discussing the influence a victim might have on a prosecutor's discretionary decision to charge a defendant or to engage in plea bargaining).

in their decisionmaking.[6] All too often, the state takes center stage while the victim sits backstage, neglected and waiting.

Crime victims have not meekly accepted their fate in the modern criminal-justice process, however. With the aid of law-enforcement officers and prosecutors, victims' rights groups have lobbied for larger law-enforcement budgets, longer prison sentences, an increased use of the death penalty, the abolition of parole, and the erosion of criminal defendants' procedural protections.[7] Most, if not all, of the states have reformed their criminal-justice systems in response to this advocacy, though the actual reforms are both more modest and more victim-focused than many of the reform efforts.[8] At least thirty-three states have passed constitutional amendments that grant victims a variety of rights, including the right to confer with prosecutors and the right to be notified, present, and heard at important pretrial, trial, and post-trial proceedings.[9] The federal Crime Victims' Rights Act also provides crime victims with the rights to be notified, to be present, and to be heard at important proceedings.[10]

Our proposal is in keeping with this trend toward greater recognition of victims' emotional needs. Specifically, some victims feel a strong desire for revenge and feel helpless without a more direct role in the process leading to the offender's punishment. Others feel unable to achieve emotional closure without more information about the crime, including how and why they were chosen for victimization. To serve both of these needs, victims should have control over a portion of the offender's criminal sentence, a reform that would, we hope, encourage offender participation in VOM.

B. Victim–Offender Mediation in the Shadows of Criminal Litigation

VOM has grown dramatically over the last two or three decades. By 2000, more than 1200 programs were operating worldwide. Today, VOM programs operate in small rural townships, large metropolitan areas, and everywhere in between.[11] Sometimes, in cases of lesser property crimes or first-time youth offenders, VOM programs enable the victim and offender to circumvent the criminal-justice system altogether.[12]

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6. *See* Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 701 (1999) (noting that most criminal cases are settled through plea bargaining that neither includes victims nor meets their needs).

7. *See* Robert Elias, *Which Victim Movement? The Politics of Victim Policy*, *in* VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 226, 229–47 (Arthur J. Lurigio, Wesley G. Skogan & Robert Carl Davis eds., 1990); *see also* Lynne Henderson, *Co-Opting Compassion: The Federal Victims' Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581 (1998) (describing the growth of crime-victim advocacy groups in the late 1970s and '80s).

8. Beloof, *supra* note 4, at 257–58.

9. *Id*. at 257, 265–68.

10. 18 U.S.C. § 3771 (2006).

11. Victim–Offender Mediation Association (VOMA), About Victim–Offender Mediation and Victim–Offender Dialogue, http://www.voma.org/abtvom.shtml (last visited Oct. 7, 2008).

12. Here, it is important to note that VOM should not be a replacement for adjudication in the

VOM is an important component of the restorative-justice movement, which attempts to treat crimes as conflicts between the victim, the offender, and the community. Restorative justice differs dramatically from the traditional criminal-justice system in many respects, but two differences are critically important for understanding VOM. First, restorative justice is predicated on the notion that conflict resolution surrounding criminal behavior should be cooperative rather than adversarial.[13] Second, the victim plays as important a role in restorative justice as do the offender and the community.[14] Restorative-justice advocates seek to enable the victim, the offender, and the community to jointly repair the harm done to the victim, to restore the relationship between victim and offender, and to reintegrate the offender into his community.[15]

VOM differs dramatically from program to program in sources of funding,[16] training of mediators,[17] types of offenses mediated,[18] case referral,[19] and specific case-management techniques.[20] But VOM programs are all similar with respect to their basic focus. All VOM programs invite the victim and the offender to participate in face-to-face discussions about the crime and its effect on the parties, particularly the victim. When VOM is successful, victims and offenders achieve understanding and closure, and offenders promise victims some form of reparations. Typically, reparations take the form of monetary compensation or services performed for the victim, community service, an apology, or some combination of these three.[21]

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case of violent crimes such as rape, assault, and murder. Mediation and reparation may serve as adequate recompense in situations of property crime, where tangible restitution may be calculated and paid and offenders present little physical danger to other members of the community in the future. However, the stakes change drastically when violent crimes have been committed, both in terms of the interests of justice and the emotional needs of the victim or, in cases of homicide, the victim's surviving friends and family.

13. *See* Carrie J. Petrucci, *Apology in the Criminal-Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 346–47 (2002) (describing the goals of the restorative-justice movement, and, in particular, the need to restore broken relationships through emotional healing).

14. *Id.*

15. *Id.*

16. Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal-Justice System*, 72 N.C. L. REV. 1479, 1485 (1994) ("While most programs are governed by private, nonprofit organizations working closely with the courts, a growing number of victim–offender mediation programs are established and operated by a governmental apparatus.").

17. *Id.* (stating that almost half of the programs rely on community volunteers).

18. *See* Brown, *supra* note 3, at 1262 (indicating that some programs focus on misdemeanors, some only handle felonies, many handle both, and a few handle violent crimes).

19. Programs differ in their criteria for case referral, but typically referrals to VOM are made by law-enforcement or criminal-court personnel at some point after the transgressor's arrest. *Id.* at 1263. However, some mediation centers do take referrals directly from the community rather than from criminal-justice personnel. Bakker, *supra* note 16, at 1486 (describing the differences between traditional VOM and mediation programs conducted by community dispute-settlement centers).

20. Brown, *supra* note 3, at 1262–66 (discussing several methods of conducting the mediation process).

21. Mark. S. Umbreit et al., *The Impact of Victim–Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31 (2001) (describing the forms of restitution that resulted from VOMs at four

Not surprisingly, the cases most commonly referred to VOM involve low-level property offenses,[22] juveniles,[23] and first offenders.[24] VOM works well in this setting. Victims of vandalism or petty theft may feel angry and violated, but busy prosecutors and case managers prefer to focus on more-serious crimes. Because these offenses are minor and the offenders typically young, victims feel comfortable confronting them with minimal mediator preparation. Moreover, the potential educative benefit to the offender is significant in cases involving small, first-time offenses and juvenile offenders. VOM forces young offenders to attach a human face to their misdeeds, and offenders are often willing to turn to socially and personally beneficial activities such as performing community service or attending school regularly in order to avoid the consequences of the criminal-justice system.[25]

With VOM's increasing popularity and the growing supply of trained mediators, states have increasingly expanded their VOM programs to cover more-serious crimes, as well as adult and repeat offenders.[26] As one VOM expert writes, "[T]here are signs of at least a subtle shift in the utilization of VOM . . . . [P]rograms are being asked to mediate crimes of increasing severity and complexity."[27] With more-serious crimes, though, VOM involves higher stakes for the victim and for the state. On one hand, the potential emotional

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program sites); *see also* Bakker, *supra* note 16, at 1489 n.84 (listing monetary restitution, community service, services performed for the victim, and simple apology among common victim demands during VOM). According to Mark Bakker, the victim offender mediation programs are characterized by the following factors:

> A) The program involves a face-to-face meeting, in the presence of a trained mediator, between an individual who has been victimized by crime and the perpetrator of that crime.
>
> B) The program operates in the context of the juvenile [and] criminal-justice systems rather than the civil court.
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> C) In addition to the likelihood of a restitution obligation, the program focuses at some level of intensity upon the need for reconciliation of the conflict ([that is], expression of feelings; greater understanding of the event and each other; closure).

Id. at 1484.

22. Brown, *supra* note 3, at 1262, n.59 ("Most common are cases of vandalism, burglary, or simple assault.").

23. *See* Mark Umbreit & Robert Coates, *The Impact of Mediating Victim–Offender Conflict: An Analysis of Programs in Three States*, 43 JUV. & FAM. CT. J. 21, 21–23 (1992) (stating that a majority of VOM programs focus primarily on juvenile offenders); Mark S. Umbreit, *Victim Offender Mediation and Judicial Leadership*, 69 JUDICATURE 202, 203 (1986) (stating that, in an Indiana program, juvenile offenders were present in approximately eighty percent of VOM cases).

24. ROBERT B. COATES & JOHN GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM–OFFENDER RECONCILIATION PROGRAMS 6 (1985) (Eighty-one percent of offenders in study had no prior convictions.).

25. James Cohen & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation, and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 240–41 (2004).

26. *See* Bakker, *supra* note 16, at 1485 ("Most programs serve juvenile offenders; others focus on adult offenders. The most common referrals involve property crimes such as vandalism and burglary, yet some programs have applied [VOM] techniques to more violent offenses, such as negligent homicide, armed robbery and rape.").

27. Umbreit et al., *supra* note 21, at 33 (internal quotation marks omitted).

benefits to VOM are much greater for victims of more-serious crimes: rape victims and family members of murder victims search desperately for some relief from their suffering. On the other hand, if VOM replaced the formal criminal-justice process for more-severe crimes, then the social needs of the community might be left unsatisfied, particularly if victims are too apt to forgive their offenders after mediation.

VOM typically involves purely voluntary participation,[28] although victims sometimes must participate in order to obtain reparations and offenders often cooperate initially only to circumvent criminal punishment.[29] Nonetheless, those victims and offenders who choose to participate report extraordinarily high satisfaction rates.[30] One study of mediations at four dispute-resolution sites in four different states found that ninety percent of victims and ninety-one percent of offenders reported being satisfied with the mediation outcome.[31] In part, the success of VOM turns on the fact that, unlike the criminal-justice process, the VOM process is humanized. Whereas the State occupies the central role in a criminal trial, the victim is central in VOM.[32] Mediators meet individually with both victim and offender, often several times,[33] before the actual mediation session. Their emotional receptivity and needs are explored, and all parties, particularly victims, feel that they have some control over the resolution of the case.[34]

Victims who are able to confront their transgressors through mediation are significantly less upset about the crime and less fearful of being revictimized as compared to victims who instead face the traditional criminal-justice process.[35] In post-mediation surveys, more than seventy-five percent of victims stated they thought it important to receive answers from the transgressor about what happened, to tell the transgressor how the crime affected them, to negotiate

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28. *Id.* at 30 (reporting that a majority of the victims studied refused to participate in VOM, "making it evident that participation is a highly self-selective process").

29. *Id.* at 31.

30. Umbreit et al., *supra* note 21, at 30 ("Expressions of satisfaction with VOM are consistently high for both victims and offenders across sites, cultures, and seriousness of offenses. Typically eight or nine out of ten participants report being satisfied with the process and with the resulting agreement.").

31. MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 75 (1994).

32. However, a common critique of the restorative-justice model is that it is too "offender-centric." GEORGE PAVLICH, GOVERNING PARADOXES OF RESTORATIVE JUSTICE 80 (2005). Pavlich writes, "[R]estorative governmentalities claim not to focus as much on the offender's guilt as on the harms that led them to commit crimes, the harm they generate as a result of the crime, and the harm they experience from so offending." *Id.*

33. For petty offenses, mediators often meet with the victim and transgressor only once prior to the mediation session. Mediation in cases involving severely violent behavior can entail eight to twelve months of case preparation. UMBREIT, *supra* note 31, at 161.

34. One coordinator met with a shooting victim more than sixty times. Bakker, *supra* note 16, at 1513 n.252 (citing Brook Larmer, *After Crime, Reconciliation*, CHRISTIAN SCI. MONITOR, June 24, 1981, at 1).

35. UMBREIT, *supra* note 31, at 71.

restitution, and to receive an apology.[36] Approximately ninety percent of offenders reported that the mediation was important to negotiate the terms of and pay restitution, to tell the victim what happened, and to apologize to the victim.[37]

Restorative-justice advocates claim that the traditional criminal-justice system creates more crime and more suffering than it deters, and, in any event, it is too expensive to sustain.[38] These reformers are working tirelessly to instead incorporate some variant of VOM into the handling of most criminal matters. However, the usefulness of VOM, either as an adjunct to or a substitute for incarceration, is still subject to debate. After all, a focus on "conflict resolution" seems at first grossly inadequate when applied to murder or other violent crimes, especially those perpetrated by strangers. Why would the victim in such cases want to "reconcile" her relationship with the offender or to "resolve" a conflict she did not willingly participate in? Yet, however involuntary the victim's participation in the events, the crime nevertheless establishes a relationship between the victim and the offender, and VOM can enable them to resolve it.[39] Along the way, VOM allows the victim to express the effects of the crime, and to seek an explanation and apology from the offender. Such gestures toward conflict resolution may satisfy a victim's needs to be heard and to receive an apology.

The fundamental premise of the restorative-justice movement seems unquestionably correct: the current criminal-justice system has done society a great disservice by defining crimes as primarily "public wrongs," wherein the state adopts the role of the victim while the individual victim becomes, at best, a representative of the state and, at worst, an irrelevant nuisance. Instead, "restorative justice theory postulates that criminal behavior is first a conflict between individuals. The person who was violated is the primary victim, and the State is a secondary victim."[40]

To the extent that VOM displaces traditional criminal proceedings, it transmutes the criminal matter into one susceptible to private dispute

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36. *Id.* at 72.

37. *Id.* at 73; *see also* Gordon Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCIENTIST 768, 783 (1998) ("[W]hat most victims want is quite unrelated to the law. It amounts more than anything else to three things: victims need to have people recognize how much trauma they have been through . . . . [T]hey want to find out what kind of person could have done such a thing, and why to them; and it really helps to hear that the offender is sorry—or that someone is sorry on his or her behalf.") (quoting B. Stuart, *Circle Sentencing: Turning Swords into Ploughshares*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 12 (B. Galaway & J. Hudson eds., 1996)).

38. *See generally* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 U.C.L.A. L. REV. 1727 (1999).

39. Martin Wright, *The Rights and Needs of Victims in the Criminal Justice Process*, *in* CRIME, VICTIMS, AND JUSTICE: ESSAYS ON PRINCIPLES AND PRACTICE 141, 146 (Hendrik Kaptein & Marijke Malsch eds., 2004).

40. UMBREIT, *supra* note 31, at 2; *see also* HOWARD ZEHR, CHANGING LENSES 150–52 (1990) (contrasting the current system's view that "crime violates the state and its laws" with the restorative-justice view that crime violates people and relationships).

settlement.[41] Nominally, the "community" plays a role in VOM, but, except in a very limited number of cases, resolution of the matter is left to victim and offender.[42] Because the state is often the source of referral cases to VOM, state actors perform a filtering role by determining which offenses and which offenders are most appropriate for mediation.[43] In addition, as a formal matter the prosecutor must sign off on the dismissal of criminal proceedings. For example, approximately twenty states have enacted compromise statutes, which authorize the dismissal of charges when the victim and offender have settled any civil dispute growing out of the conduct that is the basis for the criminal charge.[44] Typically these statutes are applicable only for minor offenses and require both that the victim be satisfied with and that the court or prosecutor consent to the dismissal of the charges.[45] In most states, however, prosecutors have the discretion to dismiss the charges in any case, and if restorative-justice advocates have their way, VOM and similar dispute-resolution proceedings will continue to grow as a substitute for conviction and consequent incarceration.

C. The Limits of Private Criminal-Dispute Resolution

Despite its promise, VOM is limited as a mechanism for private criminal-dispute resolution: prosecutors are both politically and pragmatically constrained from enabling the private settlement of more-serious offenses. Moreover, as a widespread substitute for incarceration, VOM has severe limitations. Jennifer Gerarda Brown points out that VOM can push victims to think about forgiveness before they are emotionally ready to resolve their negative feelings.[46] Moreover, offenders can get strong-armed into making unfair restitution promises because they fear the prison alternative.[47] VOM has also been criticized because mediation lacks many of the procedural protections present in the traditional criminal-justice system.[48] However, the relative infrequency of these problems is indicated by the extraordinarily high

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41. Some VOM occurs post-conviction. Brown, *supra* note 3, at 1264. Like Brown, we have little concern about post-conviction mediation, although our reasons differ. *Id.* at 1301–05.

42. *See* Brown, *supra* note 3, at 1292–95 (analyzing the undefined or nonexistent "community").

43. *Id.* at 1263.

44. Hall, *supra* note 5, at 972.

45. *Id.*

46. Brown, *supra* note 3, at 1273–81. Even restorative-justice pioneer Howard Zehr acknowledges that VOM may not be the answer in every situation, and it is no replacement for traditional "justice":

> The fear may be too great, even with support and assurances of safety. Power imbalances between parties may be too pronounced and impossible to overcome. The victim or the offender may be unwilling. The offense may be too heinous or the suffering too severe. One of the parties may be emotionally unstable. Direct contact between victim and offender can be extremely helpful, but justice cannot depend only on such direct interaction.

Zehr, *supra* note 40, at 206.

47. Brown, *supra* note 3, at 1281–91.

48. *Id.* at 1287–91. In particular, mediators strongly discourage the presence of lawyers at mediation sessions. Defendants might therefore reveal incriminating information at the mediation session. If mediation is unsuccessful, victims could reveal the incriminating statements to the prosecutor.

satisfaction levels reported by both victims and offenders.

More important is the slightly different and potentially more-frequent problem of victims' propensity to forgive too easily. Victims can be inclined to forgive offenders in the face of a heartfelt apology, even when the offender is likely to continue his wrongful behavior.[49] Moreover, when a victim forgives, she often sheds her resolve to inflict punishment. For those victims who both know their offenders and are strongly emotionally attached to them, their resulting blind sense of trust suggests that the victim may not objectively assess the situation and protect her own interests.[50] At the other extreme, when victims instead encounter strangers, they have less incentive to carefully scrutinize the sincerity of the offender's remorse or his commitment to mend his ways.

The problem of excessive forgiveness may be greater in the criminal context. The offenses are severe enough to be labeled "criminal," suggesting that the victim, society, or both presumably need protection from the offender. The victim's emotional trauma is likely more significant for criminal offenses than for noncriminal ones, and this increased trauma is more likely to cause some victims to search for a way to mitigate their suffering. Moreover, psychopaths make up a far larger proportion of the criminal population than of the society as a whole.[51] Psychopaths tend not to experience those emotions that commit the rest of us to moral behaviors.[52] As a result, psychopaths are more likely to engage in deceit than most others, so they are more likely to feign remorseful apologies.[53] This greater potential for the use and receptivity of strategic apology may partially explain why VOM has not yet been shown to significantly reduce recidivism rates.[54]

Public-safety concerns thus will undoubtedly trump any further expansion of VOM as a substitute for criminal punishment. At the same time, the benefits to victims from VOM are indisputable and often quite significant. Moreover, the more severe the offense, the greater the benefits to the victim of shedding suffering and anger and resuming a productive life in which they are capable of greater enjoyment. Presumably, these benefits are just as great for victims who are duped by offenders' insincerity, at least when the victim does not subject

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49. *See generally* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002).

50. This problem is particularly acute in the context of spousal abuse. *See generally* Caryl E. Rusbult & John M. Martz, *Remaining in an Abusive Relationship: An Investment-Model Analysis of Nonvoluntary Dependence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 558 (1995).

51. Robert Schopp et al., *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks*, 5 PSYCHOL. PUB. POL'Y & L. 120, 136 (1999).

52. Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 378 (2008).

53. Christopher J. Patrick, *Affective Processes in Psychopathy*, *in* EMOTION AND PSYCHOPATHOLOGY: BRIDGING AFFECTIVE AND CLINICAL SCIENCE 215, 219 (Jonathan Rottenberg & Sheri L. Johnson eds., 2007) (listing deceitful personality style as a diagnostic factor).

54. VOM advocates instead must settle for the claims that (1) overall, VOM is no less-viable an option for recidivism reduction than is the traditional criminal-justice process; and (2) juveniles who participate in VOM seem to be faring better than those who do not participate.

herself to further victimization. To the extent that the criminal-justice system can satisfy any victim's emotional needs—whether those associated with retribution or with forgiveness—without imposing external costs, overall benefits increase.

III
A PROPOSAL: VICTIM CONTROL OVER SENTENCING

A victim should be able to have meaningful input into the length of the offender's sentence if she wishes to exert her influence. The primary purpose of the control right is to provide a carrot that encourages offenders to participate in victim–offender mediation. By encouraging mediation, the proposal allows more victims to achieve forgiveness or emotional closure, as well as the consequent benefits. However, by combining aspects of both restorative justice and the traditional criminal process, the proposal contains ingredients that could serve all of victims' emotional needs, whether retaliatory, forgiving, or neither.

The proposal is both simple and value-neutral regarding appropriate sentence levels:

> When an offender is convicted and sentenced to serve time in prison, ten to twenty percent of the jail term should be handed over to the victim to impose or forgive as she chooses. If a victim decides not to exercise her control rights, then the offender will serve his full term (or be released when indicated by the parole board).

By keeping the victim's portion of the prison term relatively low, this proposal will not interfere with the state's primary goals of deterrence, incapacitation, reform, and rehabilitation. And by offering the victim the opportunity to partially control sentencing, the proposal provides an incentive for the offender to reconcile with the victim. Reconciliation in such cases does not mean, however, that the victim and offender will restore or establish an ongoing relationship with one another, especially in cases of violent crimes and those perpetrated by strangers. Rather, reconciliation will occur when the offender is able to offer an apology and explanation to the victim, and the victim is able to have her questions answered.

A. Victim Sentence Control and Reconciliation Efforts

The state's interests are no doubt legitimate and important. The state endeavors to serve the ends of deterrence, incapacitation, retribution, and rehabilitation while economizing on the costs of criminal punishment. At the same time, the defendant's procedural protections need preserving, and unjustified disparities in the system's responsiveness to victims must be minimized if not completely eliminated. If carefully crafted, the proposal can accommodate these goals while affording the victim an active and direct role in the process of criminal punishment.

As has been demonstrated in the context of less-serious crimes,[55] victims given the option to exercise some influence over the outcome of the criminal-justice process report greater satisfaction with that process and are better able to replace anger, fear, and bitterness with optimism for the future.[56] Unfortunately, though, victims' only official roles are to testify and, in some crimes, to submit victim-impact statements. Although the victim-as-witness role is an active one, it is of limited emotional utility to the victim because, in those exceedingly few cases that actually are tried, prosecutors typically reduce the victim's testimony to a script from which emotional content has been essentially expunged. Victims can sometimes express their emotions by submitting victim-impact statements. But, in addition to the problems described by Susan Bandes in this issue,[57] sentencers can, and sometimes must, disregard these statements, especially those expressing extreme emotions. To the extent that the statements are taken seriously by the sentencers, relatively highly educated, wealthy, articulate, and expressive victims are likely to influence the sentence to a much greater extent than are other, less-articulate victims.[58] Sentences can thus express disparities having little to do with either the culpability of the defendant or the emotional impact of the defendant's actions on or the needs of the victim.

Victim preference also can be taken into account informally in the context of a number of decisions made throughout the criminal-justice process. Police and prosecutors can accept the victim's input in the process of making decisions about arrest, charge, bail, plea-bargaining, trial, and the proposed sentence. Unfortunately, prosecutors differ markedly in their responsiveness to victims, and a majority of the victims polled report dissatisfaction with the prosecutor's attitude toward them.[59] There is also evidence indicating that police and prosecutors who do endeavor to take victim preferences into account end up disparately accommodating certain victims, depending, again, upon the victim's status, wealth, race, sex, age, and their ability to express themselves.[60]

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55. *See supra* text accompanying notes 22–25.

56. *See supra* text accompanying notes 30–37.

> [H]ow society reacts to one's victimization can be seen by one as an indication of *how valuable* society takes one to be, which in turn can be viewed as an indication of how valuable one really is . . . . Of course a victim wants her assailant punished insofar as that punishment is one form of her defense against future crime. But she also wants her assailant punished by society in a way that is properly expressive of what she takes her value to be.

Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 141 (Jeffrie G. Murphy & Jean Hampton eds., 1988). By participating in sentencing, the victim gains control of that value judgment for herself. Once the victim is in control of a portion of the sentence, the connection between a harsh sentence and the victim's self-worth could disappear.

57. Susan Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (Spring 2009).

58. Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 257–60 (1991).

59. Lerman, *supra* note 1, at 1670 (discussing how pressure on prosecutors to convict causes prosecutors to distance themselves from victims).

60. Hall, *supra* note 5, at 984.

Moreover, the victim's input in the process is not only informal but also at least two or three steps removed from the actual outcome of the case. Victims must work with police officers and prosecutors, hoping that these officials will act on the victims' behalf. But the sentencing decision is often rendered months later and influenced by dozens of factors having nothing to do with the victim or her preferences.[61] Whether or not the sentence imposed corresponds with the victim's sense of justice, the victim eventually learns that the process and its ultimate sentence serve the state's ends rather than her own.[62]

Giving the victim control over a portion of the sentence may be a novel proposal, but it is not a radical one. In fact, prosecutors often pay careful attention to the desires of a victim's family members in capital-punishment cases, and many place the decision about whether to seek the death penalty in the hands of the family.[63] If a decision as important as life or death can be given to the victim's family, why not the decision of nine or ten years, or of eighteen or twenty years?

Under this proposal, a retaliatory victim enjoys the satisfaction of knowing that the last few weeks, months, or even years of a convict's jail term will be served only because the victim has opted to make him serve the full sentence (or to not participate in VOM). This sense of empowerment no doubt helps to alleviate the victim's feelings of anger, fear, and helplessness. Moreover, turning the controls over to the victim empowers all victims equally, regardless of race, sex, age, wealth, social status, or articulateness. Coupled with the current trend toward increasing the sentences of those offenders who prey on the vulnerable,[64] placing a large, symbolic club in the hands of the victim might help protect future vulnerable individuals from criminal victimization.

But the largest potential value of this proposal does not lie not in enabling retaliatory victims to impose suffering on their offenders. Rather, it is to encourage offenders to reconcile with their victims. Such reconciliation could take the form of an apology and explanation of what happened, or it could lead to the restoration of a previous relationship. This is not to propose that victims of violent offenses or survivors of homicide should push themselves to "forgive" and to establish or repair relationships shattered by violent crime. At all times, the victims are given the option to refuse participation in VOM, and trained mediators would never permit participation in VOM by victims who are not ready to proceed.

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61. *See* Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518–19 (1982) (discussing the alienation that a victim experiences as a result of a complete loss of control over the criminal matter).

62. *Id.*

63. *See* Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313, 321 (2008) (survey finding prosecutors commonly cited victims' families' desires as important factors in decisions to seek the death penalty).

64. *Sentencing Guidelines*, 37 ANN. REV. CRIM. PROC. 667, 683 n.2077 (2008) (examining existing sentencing guidelines and noting a trend towards lengthier sentences for perpetrators of violent crimes).

For all of its claimed potential faults, VOM seems to assist the victim's healing process in a profound way. Victim empowerment is part of mediation success.[65] Many victims report that playing an active role in determining the transgressor's punishment and engaging in mediation makes it easier to release their anger, fear, and frustration. Moreover, the focus in mediation is more positive than when victims present impact statements: it is on finding a positive means of addressing the victim's emotional trauma—not simply reiterating the negative impact of the offense. Victims often walk into mediation hoping to force the offender to accept a punishment. They very often also present demands for reparations. At the end of the VOM process, however, what victims really value is the apology, the expression of remorse, and the understanding that only the VOM process could have provided them. Thus, unlike victim-impact statements, the VOM process can transform a desire for retaliation into forgiveness, even when the victim walks into VOM disinclined to forgive.

Even though many victims will choose not to participate in VOM or other reconciliation efforts,[66] promoting the option, especially in conjunction with the right to control a portion of sentencing, could significantly help influence those victims who do choose to participate. Victims of crimes who seek mediation with their offenders, for example, "report feelings of relief, a greater sense of closure, and gratitude for not being forgotten and unheard."[67] The benefits are hard to quantify, but, surely, giving a victim back her sense of security and belonging, her peace of mind, her comfort, and her trust in others has great value. Victims of violent crimes seem to agree because, despite the burgeoning number of VOM centers in several states today, the number of victims seeking to meet with violent offenders far exceeds the resources available to accommodate these victims' desires.[68] Given the significance of these benefits, states should consider devoting greater resources to VOM centers.

VOM centers have been successful in obtaining offenders' initial cooperation because offenders hope thereby to avoid criminal conviction and prison. Under this proposal, however, VOM's carrot is much less weighty because dismissal of criminal proceedings is not an option. Nevertheless, offenders who seek early release from prison have some incentive to meet with their victims. Even if the carrot is relatively small, those offenders who are otherwise inclined to apologize to their victims will now have another reason to overcome their feelings of shame and fear of stepping forward. In other words, to the extent that an offender truly feels remorse, but whose urge to apologize

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65. Responding to surveys, victims who participated in VOM stated, "'I felt I was able to make decisions rather than the system making them for me'"; "'In mediation . . . you could deal with the offender, instead of the cops taking him away'"; "'I am the one who decided the restitution.'" UMBREIT, *supra* note 31, at 94.

66. A meta-study of VOM found that, across programs, forty to sixty percent of those offered an opportunity to participate in VOM refused. Umbreit et al., *supra* note 21, at 30.

67. *Id.* at 33.

68. *Id.*

is counteracted by shame, a potential sentence reduction may be sufficient inducement to break this equipoise in favor of the apology.

Because the mediation process offers so much to suffering victims, the state should provide all victims and offenders with access to VOM programs. It may well be that a few victims are duped into believing the sincerity of an offender's feigned remorse, but so long as the victim believes the remorse is genuine, she can enjoy significant psychological benefits. The state, in its official capacity, can guard against the harms to society from victim duping by empowering the victim with say over only a limited portion of the sentence. As long as the portion in the victim's control is small enough that the goals of retribution, deterrence, and incapacitation can be served even when the victim chooses to forgive, duped victims will not pose a problem that the state need address. To the extent that these concerns are justified, the victim's control over the sentence might instead be a lever that merely triggers parole eligibility (in states with parole boards).

B. Complications and Objections Considered

Giving victims control over offenders' prison-release dates could create problems for the criminal-justice process. And if, in addition, the proposal ultimately accomplished little, its costs would be unjustified. Several possible complications and objections laid out below are worth considering and addressing, but, on balance, some level of experimentation still seems worthwhile.

Objection 1: The proposal won't be effective because VOM that occurs after conviction and sentencing might be too late to make a real difference.

Under this proposal, VOM is unlikely to occur until after conviction and sentencing. From the victim's perspective, this delay actually might be beneficial. Quick apologies are most effective after small slights, but victims of severe offenses seem more ready to forgive only after several months or even years have passed. Studies of post-conviction mediation indicate that apologies are still accepted long after adjudication.[69]

The psychological effect of delay on the offenders is less well understood, however. Offenders often have difficulty accepting their transgressions.[70] They have a tendency to deny, minimize, and rationalize the harms they have caused. The question then becomes whether these psychological defense mechanisms become stronger or weaker as time passes. If they become stronger, then fewer defendants will be in a position to effectively communicate remorse and apology. If they become weaker, then giving effective apologies should become easier over time. More research on this question is recommended.

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69. Petrucci, *supra* note 13, at 344.

70. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2502–03 (2004).

Objection 2: Many states still have parole boards. Would the victim's preferences trump the board's determination about whether to parole the defendant?

The easiest way to handle this difficulty is to give the victim control over only ten to twenty percent of the offender's pre-parole eligibility. A convicted felon eligible for parole after five years would then be eligible after four to four-and-a-half years if the victim forgave her portion of the offender's sentence. Earlier parole eligibility would not guarantee an early release, however, because the parole board would have to take into account other factors—such as behavior in prison—to serve the state's deterrence and incapacitation goals.

Objection 3: This proposal is supposedly value-neutral, but it appears to be shaving time off current prison sentences. Why should law-and-order constituencies swallow the reduced sentences?

First, states could incorporate this proposal gradually, starting with nonviolent offenses such as theft or fraud. They should then carefully study the effect of this change on crime rates and in victim-satisfaction reports. Current sentences, no matter how high, add very little to marginal deterrence and incapacitation, so it might well be possible to hand control over a portion of the sentence to the victim without significantly affecting the state's goals. Moreover, from an ex ante, deterrence perspective, an offender who cannot forecast whether his victim will increase or decrease the sentence, or even choose to participate in sentence execution, is unlikely to alter his criminal behavior as a result of this reform. To the extent that the proposed reform generates concerns about sentence reduction, or if studies show that the reform's potentially shorter sentences increase crime rates, the sentencing reforms could be coupled with an increase in the default prison term to offset concerns regarding early release of offenders.

Objection 4: Under the proposal, two different offenders who have engaged in the same conduct and have similarly displayed their remorse might be treated differently. Can this disparity be justified?

It is true that, if this proposal were implemented, different criminals could end up being treated somewhat differently for the same criminal conduct and the same displays of remorse.[71] This disparity is problematic only when either the state is fully responsible for it or the victim is directly involved as an advocate in a criminal proceeding. When the victim's role in a criminal prosecution is indirect, offenders who commit intentional transgressions run the risk that their victims will turn out to have a strongly retaliative disposition. Reporting crimes, assisting investigations, testifying, and submitting impact statements are all costly to victims. Retaliative victims are more willing to expend greater effort to achieve conviction and punishment. Nothing in our

71. *Cf.* Hall, *supra* note 58, at 258–60 (criticizing laws that permit submission of sentence recommendations by crime victims because they can result in similarly situated defendants receiving disparate sentences).

principles of criminal justice suggests that these disparities are impermissible.

The victim's direct role in our proposed reform could have the effect of treating offenders disparately, but this disparity reflects a legitimate concern of the justice system: that victims' emotional needs be accommodated. Although the state has some responsibility to curb the excesses of individual efforts to retaliate, it is not clear that it has a responsibility to render the victim's ability to retaliate completely impotent.[72] The State would simply prescribe the reasonable range of punishment for each offender and allow the victim to determine whether the offender serves the lower or the higher end of that range. The victim's retaliatory option is carefully constrained and designed to encourage victim forgiveness, when feasible. If prosecutors can allow a victim's family to choose between life and death in death-penalty cases, surely this proposal can withstand scrutiny.

Objection 5: If remorse is difficult to feign, then innocent convicts will be relatively unable to convince victims that they are remorseful. Under the proposal, then, innocent convicts will end up serving longer sentences than guilty ones. Isn't that unacceptable?

This disparity already exists in criminal sentencing. Judges do not give credit for acceptance of responsibility when a convict proclaims his innocence. Parole boards are more likely to grant parole when an offender appears genuinely remorseful. One possible solution to this difficulty is to turn the determination of the defendant's remorse over to the victim. Such a solution at least ensures that remorse determinations by multiple observers are not compounding one another. Unfortunately, it seems to be part of human nature that observers will consider perceived remorse when making judgments about culpability. Even if victims were to control the determination of remorse, sentencers and parole boards would be unlikely to ignore their own gut reactions regarding the defendant's recognition and acceptance of responsibility and consequent regret. This proposal likely magnifies the innocent convict's disadvantage.

It is not clear that this problem, however real and unfortunate, should be addressed with sentencing policy, however. The real source of the injustice is the conviction of the innocent defendant. The problem of innocent conviction threatens to grow if legislatures respond to victim demands by eroding the defendant's procedural protections. By shifting the focus of victim accommodation to sentence control and away from procedural reforms, innocent convicts might serve longer sentences, but fewer innocent defendants would be convicted in the first place. On balance, the injustice to innocent defendants likely would be minimized.

Objection 6: How can the proposal account for cases in which victims are not clearly identified? What about cases with multiple victims? And what about

72. *See* Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 78 (2001) ("[I]t is not at all illegitimate to provide a forum for victims to seek retributional punishment for their offenders, so long as the system is designed to moderate that impulse.").

cases where the victim has died or is incapacitated?

In some cases it is difficult to identify clearly the most direct victim of a crime. A computer programmer can send an e-mail virus to millions of computers causing damage across the globe. In that case, there certainly are victims, but it is difficult to identify any one as having special standing to control the programmer's sentence. When a very large number of stranger victims are harmed and the criminal behavior is summed up in a single criminal count, it may be practically infeasible to turn over control of the sentence. In these cases, the offender will not be able to benefit from victim forgiveness, and the sentencer might want to take that into account.

Often an offender who has victimized several people will be convicted of several counts of a crime—mail fraud, for example—in which each instance of victimization constitutes a separate count in the conviction. If the offender is sentenced to a particular jail term for each count, then presumably each victim—each of whom could separately decide whether to participate in VOM—could determine whether to forgive a portion of the sentence for that particular count.

When a victim is incapacitated or dies before making a determination about the execution of her portion of the sentence, the state could select another to impose or forgive a portion of the offender's sentence on the victim's behalf. Close family members must cope with their own pain and suffering, and their wounds are deeper when the victim was killed or incapacitated as a result of the offense. These family members stand to benefit from VOM, as well as from the sense of empowerment that comes with the control right. In the context of homicide or aggravated battery, it therefore makes sense to pass the control right to family members. In other contexts, however, it might seem inappropriate to delegate a manifestation of the power of forgiveness to anyone other than the victim.

For similar reasons, the family members of a deceased or incapacitated victim are permitted to submit victim-impact statements at sentencing. Although victim-impact testimony is limited by rules regarding representation rights, reflecting a concern for judicial economy and potential jury prejudice, these rules typically also give judges discretion to allow the submission or presentation of victim-impact statements by more than one family member.[73]

Assignment of control rights, by contrast, would require execution by a single family member. For minor victims, the victim's parents or legal guardian should exercise the control right whenever possible. Otherwise, control should be given to a grandparent who expresses a desire to make the decision regarding sentence execution. If multiple grandparents wish to control the execution of the sentence, the judge should appoint a single representative but encourage the grandparents to attempt to achieve consensus prior to exercising

73. *See, e.g.,* FED. R. CRIM. P. 32(i)(4)(B)–(C) (directing the court to allow *any* victim to be reasonably heard, but granting the court discretion to limit the testimony in the case of multiple victims).

the control right. In the case of an adult victim, the decision should be granted first to the victim's spouse, second to one of the victim's children (as representing any others), and third to the victim's parents. States could debate whether it makes sense to extend the assignment of the control right to adult siblings of the victim if none of these relatives is available and willing to exercise that right. Sentence-execution rights probably should not extend beyond the family members mentioned, however, because more-distantly related relatives are less likely to have experienced the trauma of the offense and thus would be less likely to experience as strong an emotional benefit from possessing that right. Because the right carries the potential of vigilantism, it should be granted only to the limited number of people who are likely to glean substantial emotional benefits from its exercise.

Objection 7: When would control rights be exercised? Would the victim make a decision about participation at the time of sentencing, when the sentence nears its end, or somewhere in between? When would VOM occur?

The timing of the exercise of control rights is crucial. On the one hand, if the victim is required to make a decision immediately after trial about her offender's sentence, the effects of recent trauma may cloud the victim's judgment or add to the effects of the crime. On the other hand, delaying the decision until the sentence nears its end may prolong the sense of victimization and helplessness, and may subject the victim to outside pressures and judgments about her nature, whether forgiving or vengeful. The anticipation of making the sentencing decision would keep the offense alive for the victim as she deliberates her decision for what could be years.[74]

If possible, any implementation of this proposal should provide the victim the opportunity to participate in a VOM program or to opt out of participation as early as possible. But a victim who does not feel ready to make a determination about participation soon after criminal conviction should be permitted to defer her decision until a later date.

IV
CONCLUSION

At the same time that the victims' rights movement has empowered victims in the criminal-justice system, VOM has expanded to replace the criminal-justice system for many low-level offenses. To promote VOM, and to serve victim desires for a more active role in determining an offender's ultimate punishment, we propose that states give victims the option to control a relatively small portion of the offender's sentence. Specifically, the victim would be granted an option to allow the offender out of prison (or eligible for parole)

74. *See* Ybo Buruma, *Doubts on the Upsurge of the Victim's Role in Criminal Law*, *in* CRIME, VICTIMS AND JUSTICE: ESSAYS ON PRINCIPLES AND PRACTICE, *supra* note 39, at 10 (considering the effect of "prolonged helplessness" on victims or family members of victims who must wait a period of time before confronting the offender).

earlier than the court-imposed sentence would permit. This more-active role could serve both victim and social needs by empowering the victim in ways that enable her to move forward while enabling society to capitalize on the benefits of VOM, including the potential for reduced recidivism rates.