(I CAN’T GET NO) SATISFACTION:¹
USING RESTORATIVE JUSTICE TO
SATISFY VICTIMS’ RIGHTS

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I. INTRODUCTION

"[I]t is obvious that sentencing is the most sensitive, and difficult, task that any judge is called upon to undertake."²

The responsibility of sentencing defendants is the most difficult task within the criminal justice system. As the Honorable Jed S. Rakoff noted above, a sentencing judge is faced with the role of taking a guilty defendant and determining what punishment her crime warrants. Incarceration? Probation? Time served? Each judge evaluates the specific offense’s characteristics, such as the number of victims, amount of loss, and violence of the offense, against the specific offender’s characteristics, such as family history, age, and military service.³ As part of this evaluation, the defendant, the Government, the Probation Office in the form of a Presentence Report, and the victims, provide statements in the form of letters or oral testimonials.⁴ Despite the volume and depth of input provided by the parties, the ultimate responsibility for determining a sentence rests with the judge. This, however, does not necessarily have to be the case for all defendants—nor should it be.

One type of sentencing model that is not utilized in the federal system is called restorative justice. In the federal system, a judge simply seeks input from the interested parties and then determines the sentence. Restorative justice, however, is a process that utilizes a facilitator in a defined community mediation that fully integrates

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¹ THE ROLLING STONES, (I Can’t Get No) Satisfaction, on OUT OF OUR HEADS (London Records 1965).
⁴ FED. R. CRIM. P. 32(i)(4).
the victims and the defendants into the sentencing process, thereby promoting reconciliation between the offender and the community. Howard Zeher, a restorative justice writer and philosopher, has nicely articulated the complex interplay between the existing criminal justice system and the theory of restorative justice. His explanation is that “[c]rime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”

However, the existing criminal justice system promotes an adversarial process whereby the offender faces the government, “and the abstract interest of the offender’s liberty against the state’s interest in societal security.” The process of restorative justice, as an alternative to traditional sentencing models, focuses on bringing the victim, the offender, the state, and the community together to find a mutually acceptable solution to the offense.

Within the existing sentencing scheme, there is a requirement under the Crime Victims Rights Act (“CVRA”) for victims to have a right to be “reasonably heard at any public proceeding.” Fulfillment of this requirement has sparked debate among federal district courts. Do victims have a right to full participation in the sentencing process, or is their participation solely at the discretion of the district judge?

This Note proposes that there should be an alternative sentencing model within the federal sentencing process that employs restorative justice as one way, alongside the traditional sentencing scheme, to satisfy the crime victim’s right to be “reasonably heard”.

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7 Id. at 573.
8 Id.
10 See Kenna v. U.S. Dist. Ct. for the Central Dist. of Cal., 435 F.3d 1011 (9th Cir. 2006) (holding the right to be “reasonably heard” included oral statements); In re W.R. Huff Asset Management Co., 409 F.3d 555, 563 (2d Cir. 2005) (holding it is within the district court’s discretion to grant relief for victims under the CVRA); United States v. Degenhardt, 405 F. Supp. 2d 1341 (D. Utah 2005) (holding that victims have a right under the CVRA to personally address the court); United States v. Marcello, 370 F. Supp. 2d 745, 747 (N.D. Ill 2005) (holding the right to be “reasonably heard” under the CVRA did not mandate oral statements).
11 See Degenhardt, 405 F. Supp. 2d at 1341.
12 See Marcello, 370 F. Supp. 2d at 747.
heard.” Implementation of this alternative model would also ensure that defendants, who have chosen to participate in the restorative justice process, are afforded an additional opportunity to seek forgiveness from their victims, which could lead to discovery of additional mitigating evidence that could factor into their sentences. This alternative sentencing model would begin during the pre-sentence investigation. Individuals would be identified using specified criteria, such as non-violent offender, willingness to participate, and showing remorse, and with court approval, the Probation Office could present defendants and victims who show a willingness to engage in a type of alternative mediation style sentencing model with this opportunity. The parties then would participate in an alternative sentencing model where alternative dispute resolution methods would be used to fashion a sentence that ideally would result in a stronger sense of justice for the victim, and the defendant accepting and taking responsibility for his or her crime.

The following sections provide the case for utilizing restorative justice in federal sentencing to satisfy crime victims’ rights by providing: an overview and review of the limitations of sentencing law in the federal system; a background on, and an explanation of, the debate regarding the CVRA; and an explanation of the background and benefits of restorative justice. Lastly, this Note proposes a procedure for integrating restorative justice into the federal system, as well as presents its associated challenges.

II. THE EVOLUTION OF MODERN SENTENCING LAW AND ITS LIMITATIONS

Sentencing reflects the way in which society views crimes and offenders. The rationales for sentencing can generally be grouped into one of the following categories: (1) to provide a deterrent effect on the offender or society in general; (2) to incapacitate offenders; (3) to rehabilitate offenders; or (4) to provide society retribution for offenses committed. Prior to the 1970s, most sentencing rationales were based on trying to provide rehabilitation of offenders. The purpose of rehabilitation is to attempt to correct and prevent future criminal behavior by offering the of-

14 ARTHUR W. CAMPBELL, LAW OF SENTENCING 17 (2d ed. 1991).
15 Id.
16 Id. at 22.
fender “skills, motivation, and employment opportunities that will reorient offenders toward socially productive behavior.” Since the late 1970s, however, most sentencing theories have been based on providing retribution for criminal activity. The central theme of retribution is that punishing offenders restores some sense of balance to society by looking backwards at the crime and determining the morally correct punishment.

Even with the changes in sentencing methodology, one consistent theme remained: each judge had discretion to fashion the sentence she thought was fair. This had the unintended consequence of creating a federal system of sentencing that was varied and inconsistent. To address this inconsistency, Congress attempted to provide guidance to federal judges. The Federal Sentencing Guidelines, first enacted in November 1987, had the primary purpose of providing the federal justice system with “honesty in sentencing” and reducing the “unjustifiably wide” sentencing disparity across the country. Even though under the holding of United States v. Booker, these guidelines now are not mandatory and only advisory, judges tend to abide by the guideline sentences. In fashioning a sentence, a judge is required to impose a sentence that is “sufficient, but not greater than necessary” to accomplish the sentencing goals established by the legislature.

The unintended consequence of the sentencing guidelines is that they create an overly simplistic system that may “seem fair when judged in the abstract from Washington [but] often seem[s] too harsh as applied in context to a particular case.” The function

17 Id. at 29.
18 Id. at 33.
19 Id. at 33–37.
24 United States v. Booker, 543 U.S. 220 (2005) (holding that the Guidelines are advisory only and can be treated as one factor to consider in sentencing).
of a judge in sentencing is to weigh all of the circumstances of each case and make a determination of a fair and just punishment. The purpose of this is to give judges extraordinary discretion when fashioning their sentences.

In the traditional ritual of sentencing, the judge pronounced not only a sentence, but society’s condemnation as well. The judge affirmed not only society’s need to punish, but also its right to do so. Central to that venerable ritual was the presiding judge’s exercise of informed discretion. The judge’s power to weigh all of the circumstances of the particular case and all of the purposes of criminal punishment represented an important acknowledgment of the moral personhood of the defendant and of the moral dimension of crime and punishment.

While the Supreme Court has rendered the Sentencing Guidelines “effectively advisory, requiring a sentencing court to consider Guidelines ranges, see § 3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see § 3553(a),” a sentencing judge still is limited in her ability to consider the moral culpability of the defendant before her because the Guidelines determine which factors are relevant and create specific calculations for each one. While judges are no longer limited to making “factual determinations and rudimentary arithmetic operations,” they are still bound by mandatory minimum sentences and a requirement to consider the Guidelines range.

This type of formulaic sentencing limits the impact a victim can have on the sentencing process. Obtaining a victim impact statement is merely a step in the formal and proscribed process of sentencing. Even when a victim provides a statement to the sentencing judge, the impact is inherently minor because judges are bound by the factors they can consider during sentencing. In imposing a sentence, a judge “must consider the Guidelines and all of the other factors listed in [18 U.S.C.] Section 3553(a).” Section 3553(a) directs judges to consider the circumstances surrounding

29 Id.
30 Id. at 1252.
31 Booker, 543 U.S. at 222.
32 Stith & Cabranes, supra note 28, at 1252.
33 Id.
34 Fed. R. Crim. P. 32.
36 United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).
the offense (which does include victim impact), the personal history of the defendant, the need to deter future criminal conduct, protect the public, and to provide the defendant with needed medical care.37 Judges also evaluate the need to provide restitution to the victim(s).38 Evaluation and consideration of the emotional and long term impact (beyond the financial impact) the crime has on the victim is therefore inherently limited and thus, the statements victims make during sentencing are hindered by the requirement that the judge sentence based on the Sentencing Guidelines and the factors listed in 3553(a).

The rationale behind the structure of sentencing is to allow an opportunity for the defendant to accept responsibility for his crime and for the victim to address its impact. There are even times where the victims “air their suffering and forgive.”39 Therefore, it is important for victim participation in the sentencing process because: “(1) [it permits] the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) [it requires] defendants to confront—in person and not just on paper—the human consequences of their illegal conduct; and (3) [it compels] courts to fully account in the sentencing process for the serious societal harms.”40 Interestingly, most victims do not seek harsher punishments,41 rather they seek participation in the justice system, and it is that participation that helps them in the healing process.42

In an effort to continue to improve the sentencing process and in response to outcry from crime victims rights advocates, Congress enacted the CVRA in 2004.43 The CVRA “provides victims of federal crimes with expansive rights to remedy their perceived exclusion from the criminal process.”44 The guidance from the Sentencing Guidelines intended to provide judges with uniformity

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42 Id.
44 Danielle Levine, Public Wrongs and Private Rights: Limiting the Victim’s Role in a System of Public Prosecution, 104 NW. U. L. REV. 335 (2010) (arguing that victims rights should be construed more narrowly in the federal system).
in sentencing,⁴⁵ and the CVRA was meant to provide a federally recognized voice to crime victims.⁴⁶ However, the depth of involvement that victims have in the federal system has resulted in an ongoing debate about how to satisfy a victim’s right to be “reasonably heard at any public proceeding”⁴⁷ as provided for in the CVRA. The argument is largely over whether the CVRA should be interpreted to allow all victims to make oral statements, or if the court has discretion to only allow written victim impact statements.

III. THE CRIME VICTIMS RIGHTS ACT BACKGROUND

Victims have largely been invisible in the sentencing and criminal justice processes. Traditionally, a crime was considered a “breach of the king’s peace,” where the king was the victim, and therefore, he could assume prosecution of the crime.⁴⁸ During the colonial era, the victims themselves were responsible for seeking prosecution against offenders.⁴⁹ The victim would have to investigate, arrest, file charges, and prosecute the offender himself in order to achieve justice.⁵⁰ Early in American and British history, this victim-centered prosecution model shifted to a public prosecution model.⁵¹ Essentially, “the Enlightenment shifted the focus of criminal prosecutions from serving the private interests of victims, to the greater societal interests of deterrence, rehabilitation, and retribution.”⁵² However, what was lost in this paradigm shift was the focus on the victim as a critical participant in the process.⁵³

During the 1970s, the Crime Victims Rights Movement developed in response to what advocates argued was an American justice system that had become “preoccupied with defendants’ rights to the exclusion of considering the legitimate interest of crime vic-

⁴⁹ Levine, supra note 44, at 338.
⁵⁰ Id.
⁵¹ Id.
⁵² Id. (citing Peggy M. Tobolowsky, Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999)).
⁵³ Id.
By 1982, in response to an increased public outcry for improved victims rights in the criminal justice process, President Ronald Reagan appointed the Task Force on Victims of Crime ("Task Force") to conduct public hearings and evaluate how the American justice system could better treat victims of crime.55 The Task Force found that the "justice system had 'lost the balance that has been the cornerstone of its wisdom' and recommended various reforms to expand the role of crime victims."56

One of the key recommendations the Task Force made was for legislation requiring victim impact statements to be included in all sentencing proceedings and pre-sentence reports presented to judges.57 This "statement was to contain information 'concerning all financial, social, psychological, and medical effects [of the crime] on the crime victim.'"58 Following several failed attempts to enact a constitutional amendment,59 Congress enacted the CVRA to ensure that all victims have a "right to be reasonably heard at any public proceeding."60 This new Act made "crime victims participants in the criminal justice process and command[ed] in sweeping terms that the courts . . . treat victims 'with fairness and with respect for the victims dignity and privacy.'"61

The CVRA provides all victims of federal crimes with the right to be present and heard at any public proceeding, including sentencing proceedings.62 In addition, the CVRA provides victims with the right to challenge any district court decision through a writ of mandamus.63 Typically a writ of mandamus is granted only in extraordinary cases where there is clear legal error or abuse of discretion.64 However, the language of the CVRA directs that each district court "shall take up and decide any motion asserting a vic-

56 Id.
57 Id.
58 Id. (quoting the OFFICE OF JUSTICE PROGRAMS, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, 33 (1982) (changes in original)).
59 Cassell, supra note 54, at 868.
61 Cassell, supra note 54, at 872 (quoting 18 U.S.C. § 3771(a)(8)(2006)).
tim’s right,“ which has the effect of requiring that every victim complaint be reviewed. Victims are to assert the motion for relief in the district court where the defendant is being prosecuted or, if there currently is no prosecution occurring, in the district court where the crime took place. If the district court denies the motion for relief, then the victim may seek appellate review through the writ of mandamus. The court of appeals has only seventy-two hours to review and decide on the writ. If the court of appeals also denies the petition for relief, the court must state the reasons for the denial in a clear written opinion.

The passage of the CVRA provides victims with a voice in the criminal justice process. The CVRA firmly establishes victims as “independent participants, distinct from the government, in the administration of criminal justice.” However, what is unclear is the scope of a victim’s right to be “reasonably heard” during sentencing. Since 2004, federal courts have attempted to interpret the scope of victim participation in the sentencing process.

IV. Scope of Victims’ Rights

A. Broad Interpretation of the Rights of Victims

The debate about the interpretation of the CVRA centers around whether a victim’s right to be “reasonably heard” textually

66 See Kenna, 435 F.3d at 1017; see also Huff, 409 F.3d at 562 (holding that a victim “seeking relief pursuant to the mandamus provision . . . need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus”).
68 Id.
69 Id.
70 Id.
72 Id.
73 See Kenna, 435 F.3d 1011 (holding that the right to be “reasonably heard” includes oral statements); In re W.R. Huff Asset Management Co., 409 F.3d 555, 563 (2d Cir. 2005) (holding it is within the district court’s discretion to grant relief for victims under the CVRA); United States v. Degenhardt, 405 F. Supp. 2d 1341 (D. Utah 2005) (holding that victims have a right under the CVRA to personally address the court); United States v. Marcello, 370 F. Supp. 2d 745, 747 (N.D. Ill 2005) (holding the right to be “reasonably heard” under the CVRA did not mandate oral statements).
affords victims broad rights within the judicial process, or if it limits a victim’s participation to what a judge considers “reasonable.” The text of the CVRA is that all victims have a “right to be reasonably heard at any public proceeding.” The majority interpretation contends that this means that victims are given full participatory rights during sentencing, subject only to the limitation that they are reasonably able to attend the sentencing. The reason for this is to ensure that each victim is not treated as an outsider, but rather is treated as “an independent participant in the proceedings.”

The broader interpretation is that “[t]he victims of crime . . . should be able to provide any information . . . directly to the court concerning the . . . sentencing of the accused.” Victims and the defendants should be treated equally to “effectuate other statutory aims: (1) to ensure that the district court doesn’t discount the impact of the crime on the victims, (2) to force the defendant to confront the human cost of his crime, and (3) to allow the victim ‘to regain a sense of dignity and respect rather than feeling powerless and ashamed.’”

When the interpretation of a federal statute is ambiguous, such as is the case surrounding the interpretation of “reasonably heard,” from a plain reading of the textual language, courts will look to legislative history for guidance. The CVRA question turns on whether the right can be satisfied by a written submission, such as a written victim impact statement, or if the drafters of the CVRA intended the right to enable a victim to make an oral statement in court. While use of legislative history for interpreting

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74 Degenhardt, 405 F. Supp. 2d at 1343 (holding that all crime victims have a right to be heard orally at sentencing and that it is not within the judge’s discretion to deny them this right. When enacting the CVRA, Congress intended for the CVRA to be a “‘broad and encompassing’ statutory victims’ bill of rights.”).
75 Marcello, 370 F. Supp. 2d at 746 (holding that oral statements made by victims are not a requirement under the CVRA and courts may satisfy the right to be reasonably heard by other means).
77 Degenhardt, 405 F. Supp. 2d at 1341.
78 Id. at 1343–44 (quoting 150 CONG. REC. S10, 911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl)).
80 Kenna, 435 F.3d at 1016 (quoting Jayne W. Barnard, Allocation for Victims of Economic Crimes, 77 NOTRE DAME L. REV. 39, 41 (2001)).
81 When a “question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.” Toibb v. Radloff, 501 U.S. 157, 162 (1991).
82 Degenhardt, 405 F. Supp. 2d at 1343.
statutes can be controversial, when, such as with the CVRA, statutes “can be read in various ways, ‘courts can appropriately refer to a statute’s legislative history to resolve statutory ambiguity.’”

The passage of the CVRA was largely bi-partisan in both the House and the Senate, and the views expressed on the floor were not contradicted. Therefore, the “floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views.” Given that there was no disagreement about the views expressed by the sponsors of the CVRA, it is reasonable to infer that the views expressed by the sponsors represent the views of the Senate. In a Ninth Circuit case that sought to interpret the CVRA, the Court quoted the floor statements made by the bill sponsor:

The victim’s right is to ‘be heard.’ The right to make an oral statement is conditioned on the victim’s presence in the courtroom . . . . [V]ictims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court . . . has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement . . . . The Committee does not intend that the right to be heard be limited to ‘written’ statements, because the victim may wish to communicate in other appropriate ways.

The arguments against a broad interpretation center around the inclusion of the word “reasonably” within the statutory language. However, proponents of a broad interpretation point out that the floor statements, in the Congressional Record, made by the sponsoring legislators are arguably clear regarding the inclusion and use of the term “reasonably.” Including the term “reasonably” within the statutory language was not intended to provide judges with discretion over whether to allow a victim the right to

83 Id. (internal citations omitted).
84 United States v. Cienfuegos, 462 F.3d 1160, 1165 (9th Cir. 2006); see also 150 CONG. REC. S10, 910 (daily ed. Oct. 9, 2005).
85 Kenna, 435 F.3d at 1015 (internal citations omitted).
86 Id. at 1016.
87 Id. (quoting S. REP. NO. 108-191, at 38 (2003) (emphasis added)).
88 Id. at 1019 (arguing that “the statutory standard of ‘reasonably heard’ may permit a district court to impose reasonable limitations on certain oral statements”).
address the court or not. The drafters of the CVRA even specifically stated the intention of the term was not to “provide any excuse for denying a victim the right to appear in person and directly address the court.” Rather, it was meant to provide judges with “alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceedings.” A victim may be unable to attend proceedings when they are incarcerated or due to monetary or other limitations. Therefore, in these cases, the drafters intended that “communication by the victim to the court is permitted by other reasonable means.”

B. Narrow Construction of Victims’ Rights

The competing interpretation of the CVRA is that the right of victims to be heard at sentencing should be evaluated under a test for reasonableness. Relying on a strict review of the statutory language, the court in *United States v. Marcello* found that the CVRA contains two elements: a reasonableness requirement and a legal term of art (the right to be “heard”) that, once combined, does not require admission of oral victim statements. Relying on the term “reasonable,” the court found that each district judge should evaluate the materiality and relevance of the victim’s statements and make a determination as to whether or not an oral statement is warranted. Next, the court found that the plain reading of the term of art “heard,” while in ordinary English does imply oral statements, in the courts it is a term of art that does not require oral presentations and can be satisfied by other means, including written submissions.

90 Id.
91 Id.
92 Id.
93 Marcello, 370 F. Supp. 2d at 746.
94 Id. at 750; see also *In re W.R. Huff Asset Management Co.*, 409 F.3d 555, 563 (2d Cir. 2005) (“[m]ost of the rights provided to crime victims under the CVRA require an assessment of ‘reasonableness.’ The district court is far better positioned to make these assessments and to determine what constitutes ‘a reasonable procedure’ for effecting these rights.”).
95 Marcello, 370 F. Supp. 2d at 749 (finding that “[w]hile the word ‘heard’ does imply oral presentation in ordinary English, it does not have that meaning in courts where it is a term of art”). The court relies on cases that find “reasonably heard” can be satisfied by submission of papers alone. See *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 894 (1st Cir. 1981). See also *Commodity Futures Trading Comm’n v. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981).
The court in *Marcello* did concede that in cases of sentencing (and prison release hearings), a victim’s statements will almost always be material and relevant.96 The court noted that, as a matter of policy, hearing from the victim is “wise”97 and given that, “in a moral sense, a [victim] is a party to the case. . . . [and] should always be given the opportunity to testify at all sentencing hearings and some bond hearings.”98 However, the court refused to extend this presumption to all cases.99 What is considered “reasonable” therefore should be at the discretion of the judge, and there exists no mandate for oral presentation to satisfy the right to be “reasonably heard” under the CVRA.100

Another interpretation that construes the CVRA narrowly relies on the functional perspective that victims are not a true “party” in the case; therefore, the victim’s role in the criminal process should be limited. Prosecution of a crime consists of essentially two parties: the defendant (and typically her attorney), and the representative of the government who is prosecuting the offender. In this sense, victims are not actual parties in the prosecution and, therefore, should not have the same or more rights than the named parties.101 Therefore, “while the CVRA mandates that judges listen to victims, it in no way dictates that judges must agree with their sentencing preferences.”102 In fact, the argument is that providing such expansive rights to victims, as afforded under the broader interpretation of the CVRA, could potentially prejudice the rights of the defendant by undermining traditional prosecutorial and judicial discretion.103 By giving victims the right to petition for a writ of mandamus, which has been interpreted by both the Second104 and Ninth105 Circuits, not by the traditionally high mandamus standard of review,106 but by the lower standard of

96 *Marcello*, 370 F. Supp. 2d at 750.
97 Id.
98 Id. at 746 n.2.
99 Id. at 748–50.
100 Id. at 750.
101 Levine, *supra* note 44, at 357.
102 Id.
103 Id.
104 See Huff, 409 F.3d at 563.
105 See Kenna, 435 F.3d at 1019.
106 Will v. United States, 389 U.S. 90, 95 (1967) (“While the courts have never confined themselves to an arbitrary and technical definition of ‘jurisdiction,’ it is clear that only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.”).
error of law or abuse of discretion, courts may feel unduly pressured by victim statements for fear of reversal on procedural grounds.

While the debate continues to be played out in the federal courts on these competing views of the CVRA, integrating a type of restorative justice into the federal sentencing methodology could satisfy both the arguments that the CVRA should be interpreted broadly and the narrower interpretation that the CVRA does not give an absolute right to make oral statements and that each district court should determine the scope of victim participation. Why and how this can be accomplished requires a brief and basic understanding of the historical origins of restorative justice, as well as a few of the types of restorative justice available. This Note provides an overview of the documented benefits of restorative justice and how it is currently being (or more accurately, not being) used in the federal criminal justice system.

V. Background on Restorative Justice

A. Restorative Justice: A Historical Context

Modern restorative justice originated from the aboriginal people in Canada and the Native Americans in the United States. In essence, the victims of the crime, the offenders, and sometimes other members of the community that were affected by the offense, participate in a facilitated negotiation to address crimes in the community. The affected parties meet and discuss the offense, and then collaborate on an appropriate sentence. All interested parties participate in a group discussion on how to address the particular crime and the sentence that should be imposed. This is all done with the hope of providing a sense of justice to the victim, to

107 See Huff, 409 F.3d at 563; Kenna, 435 F.3d at 1019.
108 Levine, supra note 44, at 357 (Because judges consider “a variety of factors, including victims’ interest, when sentencing a defendant . . . the traditional mandamus standard ensures that district judges do not feel pressured to comply with victims’ desires out of fear of reversal on procedural grounds.”).
110 Id.
111 Id.
112 Luna, supra note 5, at 3.
establish accountability, and to address the specific personal needs of the offender.\textsuperscript{113}

The goal of restorative justice is to be “both backward-looking—condemning the offense and uncovering its causes—and forward-looking—making amends with the victim and the general community while actively facilitating moral development and prosocial behavior in the offender.”\textsuperscript{114} Rather than focusing on the offense and making offenders pay for their crimes, the restorative justice model focuses on how offenders can give back to the society they have harmed, with the ultimate goal of achieving “accountability, healing, peace, and wholeness.”\textsuperscript{115}

There are, at a minimum, four types of restorative justice models.\textsuperscript{116} The typical models fall into one of the following categories: victim-offender mediation, community reparative boards, family group conferencing, and circle sentencing.\textsuperscript{117}

The first model—victim-offender mediation—is a process in which victims meet their offenders in a safe environment to participate in a mediated discussion.\textsuperscript{118} The mediator facilitates a discussion whereby the victim has the ability to tell the offender about the crime’s “physical, emotional, and financial impact; receive answers to lingering questions about the crime and the offender; and be directly involved in developing a restitution plan for the offender to pay back any financial debt to the victim.”\textsuperscript{119} Cases are referred by any of the parties (defense attorneys, judges, prosecution, etc.), and are usually initiated at the time of a guilty plea in court.\textsuperscript{120} The ultimate goals of the victim-offender mediation are to support the healing process of the victim, provide an offender

\begin{footnotes}
\item[113] Poulson, \textit{supra} note 109.
\item[117] See Bazemore & Umbreit, \textit{supra} note 116 (providing an evaluation of four restorative justice models and implications and conclusions for the juvenile justice system).
\item[118] Id.
\item[119] Id.
\item[120] Id.
\end{footnotes}
with insight into the impact of his offense, and develop a “mutually acceptable” plan for sentencing.\textsuperscript{121}

Community reparative boards represent the second model, and consist of a group of trained citizens who conduct public meetings designed to develop “sanction agreements with offenders, monitor compliance, and submit compliance reports to the court.”\textsuperscript{122} The board meets with the offender and discusses the offense and the consequences of the offense on the community. The board and the offender create a plan for sanctions to make reparations for the crime.\textsuperscript{123} The offender then completes his or her required plan during a specified period, and the involvement of the board then ends.\textsuperscript{124} The goal of these boards is to involve more citizens in the criminal justice system, provide an opportunity for victims to confront offenders about their crimes, allow offenders to take personal responsibility for their offenses, and to generate a meaningful plan for making reparations, all while reducing costly reliance on the formal justice system.\textsuperscript{125}

The third model is family group conferencing and requires the parties most affected by the offense (victim, family, friends, etc.), to gather and determine the best resolution.\textsuperscript{126} Each conference is facilitated by a mediator and begins by the offender describing the crime, and then the negatively affected parties describe how it impacted their lives.\textsuperscript{127} The goal of the family group conference is to provide additional members of the community with the ability to discuss the impact of the crime, increase the offender’s awareness of the impact of his or her behavior, create an opportunity for the offender to take responsibility for his or her actions, and to provide both the offender and the victim with a community support system.\textsuperscript{128}

The final model, circle sentencing, is a modern interpretation of the traditional sanctioning and healing practices of aboriginal people in Canada and Native Americans.\textsuperscript{129} As contrasted with the existing federal sentencing model, where each party makes a statement addressed to the judge, circle sentencing requires that the in-

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Bazemore & Umbreit, supra note 116.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Bazemore & Umbreit, supra note 116.
interested parties, from both the offenders’ and the victims’ sides, meet within the “circle” to have a multi-party discussion regarding the offense and its impact. The group identifies the necessary steps to focus on “healing all affected parties and prevent future crimes.” The process of circle sentencing is initiated when the offender applies to participate. Next there is a healing circle for the victim, a healing circle for the offender, a sentencing circle to develop the appropriate sentence, and then follow up circles to monitor the progress. The goal of circle sentencing is to promote healing for all parties, including the offender. It is designed to provide an opportunity for the offender to make amends and take responsibility for his or her offense, to address the underlying issues of the behavior, empower the victims, build a sense of community, and promote community values. Due to the time and labor intensive nature of circle sentencing, this model should not be used “extensively as a response to first offenders and minor crime.” This modern use of circle sentencing is how restorative justice could be implemented in the federal sentencing system.

B. Benefits of Restorative Justice

Sentencing Guidelines, and other “traditional” models of sentencing, have largely been a product of recent history. Throughout human history, the dominant method for addressing crime and punishment has been through the use of techniques similar to what we now call restorative justice. There is a reason the philosophy has been a driving force in the criminal system for so long. While the impact of restorative justice has been the focus of recent studies, its overall effect on the offender, the victim, and society at large seems to be positive.

130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
The studies conducted on restorative justice all show consistent benefits for the participants. Generally, a meta-analysis of the documented studies seems to suggest that those who participated in such a program were more likely to: believe the criminal justice system and the handling of their case was fair, believe they had an opportunity to tell their story, feel their opinion was adequately considered, think the judge or mediator was fair, feel the offender was held accountable, receive an apology or forgiveness, believe the outcome was fair, be satisfied with the outcome, believe the other party’s behavior improved, and were less likely to remain upset about the crime, and be less afraid of revictimization.

Interestingly, the most common and perhaps important output of the process is the satisfaction of all the participants and the continued adherence to the agreements by the offenders. In one particular study, 81% of the offenders participating in a restorative program completed their program requirements as compared to 57% of the offenders who were not in such a program. Another study that evaluated the amount of restitution collected from groups participating in restorative programs versus the traditional process showed that those who participated in a restorative program paid between 95% and 1000% more than those who did not. In fact, overall satisfaction with the programs studied scored well over 90% and was indicated as the strongest measure of success. In general, studies seem consistently positive and favorable for restorative programs.

C. Restorative Justice in the Federal System

Restorative, or alternative sentencing is rarely referenced in the federal system of justice. Its use is largely limited and unex-

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137 Id.
138 Poulson, supra note 109 (these findings stem from a meta-analysis of studies conducted on the documented benefits of global restorative justice programs).
140 Luna & Poulson, supra note 114, at 789 (citing Mark S. Umbreit & Robert Coates, Victim Offender Mediation: An Analysis of Programs in Four States of the U.S. (1992)).
142 Evje & Cushman, supra note 141.
plored by the federal courts. As of the writing of this Note, a brief review of federal cases shows that there are only approximately twenty-two federal cases that even mention “restorative justice” in their opinions, none of which discusses utilizing restorative programs as a possible alternative to sentencing.\textsuperscript{143} In one opinion, a District Judge cited a restorative justice pamphlet when discussing restitution for victims.\textsuperscript{144} Another opinion cited an instance when inmates involved in a Quaker restorative justice program were receiving payments,\textsuperscript{145} and most have no impact on criminal justice.\textsuperscript{146} In general, the theories of restorative justice are simply not referenced and not utilized by federal judges in the criminal sentencing process.

While the use of restorative justice is currently not common in the federal system, the use of victim-offender mediation is a growing trend in North America at the local level.\textsuperscript{147} In the 1970s, only a small number of programs even existed in the United States, but by the mid-1990s there were over three hundred.\textsuperscript{148} This represents a growing trend in both private community organizations and probation departments to develop such models to address the needs of juvenile and adult offenders.\textsuperscript{149} This growth in the use of restorative justice demonstrates a clear desire to improve and change the sentencing scheme.

VI. PROPOSED ALTERNATIVE SENTENCING PROCESS

A. Fulfillment of CVRA Interpretations

An alternative sentencing process using restorative justice could be integrated into the existing federal structure as one alternative to fulfilling the CVRA requirements. The use of alternative

\textsuperscript{143} E.g., United States v. Ferranti, 928 F. Supp. 206, 221 (E.D.N.Y. 1996) (the judge cited a restorative justice article in his discussion of restitution for victims).
\textsuperscript{144} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
sentencing would be consistent with, and in fact, supported by all interpretations of the CVRA.

The use of restorative justice would fulfill the broad interpretation of the CVRA because giving the victim an increased level of participation in the sentencing process supports the notion that a victim has a right to be an equal. Under this interpretation, a victim is supposed to be a full participant in the sentencing process, not an afterthought. During restorative justice conferencing, victims by nature are treated as a central and critical element in the process. Participation in a restorative conference would mean the defendant, the victim, and community members impacted by the crime would meet on equal ground to develop and implement a sentence that meets the needs of all of the parties. Rather than simply reading a victim impact statement to the court and having a judge dispense a sentence, a victim would be a fully functioning and critical element of the process. This would enable a victim to truly be treated as “an independent participant in the proceedings.”

The narrower interpretation of the CVRA supports the idea that sentencing judges have the discretion to determine what is “reasonable” and “appropriate” in each case. Therefore, if a particular sentencing judge finds that alternative sentencing would be appropriate and reasonable in a case, under the CVRA, he or she would have the discretion to allow it as a means to satisfy the right of a victim to be “reasonably heard.” The requirement that victims have an opportunity to be heard at sentencing is not the only procedural opportunity for restorative justice; restorative justice would also support the requirement that defendants have an opportunity to present mitigating evidence pursuant to Rule 32 of the Federal Rules of Criminal Procedure.

Under Rule 32, a defendant must be given an opportunity to present any mitigating evidence. A major benefit of alternative sentencing is the opportunity for the defendant to face the impact of his crime and apologize to victims and the community. The showing of remorse could be a significant mitigating factor that a

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150 See Degenhardt, 405 F. Supp. 2d 1341.
151 Bazemore & Umbreit, supra note 116.
153 Huff, 409 F.3d at 563.
154 Fed. R. Crim. P. 32(i)(4)(A)(ii) (“address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence”).
judge may consider when issuing a sentence. However, the current sentencing process, “[i]n many cases . . . inhibits rather than facilitates meaningful remorse and apology.” Even though society places remorse and apology as central elements of the criminal justice system, in an effort to increase efficiency in an overburdened system and ensure deterrence and punishment of crime, remorse and apology are largely forgotten, if not ignored entirely. The reasoning behind allowing a defendant to present mitigating factors during sentencing is to integrate this remorse into the sentencing proceeding and to allow a defendant an opportunity to speak on her own behalf. Who better than the defendant herself to convey any mitigating factors? The Supreme Court has found that the “Rule explicitly affords the defendant two rights: ‘to make a statement in his own behalf,’ and ‘to present any information in mitigation of punishment.’” Rule 32 requires that, before imposing a sentence, the judge must allow the defendant to “speak or present any information to mitigate the sentence.” Given that the focus of the current system is on efficiency, the only way to ensure remorse and apology from each defendant is to implement an alternative sentencing session.

Of course, not all defendants, not all victims, and not all crimes would be appropriate for this type of sentencing procedure because not every defendant and not every victim would be willing to participate in such a program, and voluntariness is a central element of restorative justice. A well-defined procedure would need to be implemented prior to full-scale adoption. The implementation of an alternative type structure could be identified in several ways: (1) the defendant herself could ask for alternative sentencing as a way to possibly seek out victim forgiveness, and thus use this as mitigating evidence, (2) the victim of a crime might ask for al-

155 18 U.S.C. § 3553(a) (2010) (“The court, in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant.”).
156 Bibas & Bierschbach, supra note 39, at 88 (“Surprisingly, however, remorse and apology play little role in criminal procedure. Our criminal justice system works as a speedy assembly line: It plea bargains cases efficiently and maximizes punishment for the limited resources available. This assembly line leaves little room for remorse and apology.”).
157 Id. at 96.
158 FED. R. CRIM. P. 32(i)(4)(A)(ii) (“address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence”).
159 Green v. United States, 365 U.S. 301, 304 (1961) (holding that before imposing a sentence, the court should give a defendant an opportunity to speak on his own behalf, rather than only allow the defendant’s attorney to speak).
alternative sentencing as one way to satisfy her right to be “reasonably heard” under the CVRA, and (3) the Probation Office, while conducting and writing its Pre-Sentence Report could evaluate ideal candidates for alternative sentencing and make a recommendation to the sentencing judge. Ideal situations would likely include defendants who exhibit remorse and demonstrate ability for rehabilitation and victims who are willing to forgive.

Implementation of a restorative justice program in the federal system would be fundamentally different than typical restorative justice programs because these programs are traditionally conducted on the state and local level, largely with juvenile offenders.161 Because drug-related prosecution in the federal system is increasing at the fastest rate compared to the prosecution of other crimes,162 implementation of a restorative justice program would naturally likely focus on drug-related offenses. Focusing on drug offenders would be an ideal emphasis for a federal restorative justice program. The cost for substance abuse in America, including crime-related costs, exceeds $600 billion annually.163 Implementing a restorative justice program in the federal system that focuses on drug-related offenses could potentially reduce the overall cost of drug-related offense crime prosecution and help the millions of Americans affected by drug addition. The victims in these drug offenses would likely include any friends and family members of the drug user who have been harmed by the offender’s drug abuse.

B. Procedural Implementation

Prior to instituting a sentence, the Probation Office must conduct an investigation and prepare a Pre-Sentence Report.164 As part of the investigation, the Probation Office interviews the defendant, the victim, or any other persons that might provide useful and relevant background information on the defendant.165 The goal of the Pre-Sentence Report is to provide the sentencing judge with all relevant information for sentencing to support the calculation of

161 Umbriet et al., supra note 147.
164 FED. R. CRIM. P. 32(c)–(f).
165 Id.
the appropriate sentencing range under the Sentencing Guidelines. Some of these relevant factors include evaluating any prior criminal background, family circumstances of the defendant, and impact on the victim. Given the depth of knowledge about the defendant and the victim, the Probation Office would be the best source for the initial identification of cases for alternative sentencing. The Probation Office is probably best positioned to know if the defendant is remorseful, to understand the impact of the crime, and determine if the opportunity exists for more in-depth sentencing proceedings.

After an initial identification of the appropriate defendant and victim, a judge would have to engage the parties to determine their willingness to participate in a private mediation. This creates a potential procedural barrier to implementation. One of the requirements of the CVRA is that a victim has a right to be heard at “any public proceeding” which would seem to require that victims speak at a public sentencing and thus, would preclude participation in an alternative sentencing structure, which by definition is supposed to be conducted in private between the mediator and the affected parties. Public trials, guaranteed by the Sixth Amendment ensured that the newly formed American justice system “helped citizens learn their rights and duties, bring relevant information to court, monitor government agents, prevent judicial corruption and favoritism, and check witness perjury.” However, voluntary participation in a private mediation generates none of these concerns, and the statutory language of the federal rule governing sentencing, as well as the legislative history behind the CVRA, would support a restorative justice paradigm.

Rule 32 of the Federal Rules of Criminal Procedure governs the procedures for sentencing and judgment in the federal courts. The Rule allows for an attorney for the government, a victim, and the defendant to speak directly with the sentencing judge. Another relevant key element of the Rule allows the court to hear statements made by the parties in-camera: “upon a party’s motion and for good cause, the court may hear in-camera

166 Id.
167 Id.
169 Poulson, supra note 109.
170 Bibas, supra note 41, at 920 (citation omitted).
171 FED. R. CRIM. P. 32.
172 FED. R. CRIM. P. 32(i)(4)(A)–(C).
any statement made under Rule 32(i)(4).” The Advisory Committee Notes commented that under the 2002 Amendments to Rule 32, the parties no longer must file a joint motion for an in-camera proceeding. Now any party, including a victim, may move for an in-camera statement. Therefore, a victim, a defendant, or counsel for the government may, for good cause, move for a private in-camera statement. This provision could allow a federal judge to accept a party’s motion for a privately mediated alternative sentencing procedure and still comply with the CVRA provision for a victim’s “right to be reasonably heard at any public proceeding,” as well as satisfy the procedure for sentencing under Rule 32.

The legislative considerations behind the CVRA were to ensure that the victim had rights in the sentencing process and therefore, had the “same rights as the other actors.” Thus, the legislative intent was not for the language to be construed to limit a victim’s rights to only a public proceeding. The CVRA was enacted to expand the role of a victim’s participation in the sentencing process, not to limit it. Because victims are full participants in the sentencing process, they may also move for an in-camera mediation with the court, just as any other party might. The Advisory Committee Notes state that, “any party may move (for good cause) that the court hear in-camera any statement—by a party or a victim—made under revised Rule 32(i)(4).” Therefore, this allows for any of the parties to be present during a private discussion with the judge, which would therefore procedurally allow for a private mediation with the parties, including the victim(s).

VII. Barriers to Alternative Sentencing

Perhaps the largest barriers to the implementation of an alternative model of sentencing are the Sentencing Guidelines themselves. The Guidelines were enacted to provide the federal justice
system with “honesty in sentencing”181 and reduce the “unjustifiably wide” sentencing disparity.182 Implementation of an alternative sentencing would likely add disparity to sentences done through a mediated process and those done through traditional means. However, sentencing is an extremely individual process. Each defendant is different and has a different family background, offense characteristics, and personality. Therefore, each defendant requires an individualized sentence based on her own needs. Restorative programs are inherently individualized and designed to address the specific needs of each offense and offender.183 Therefore, disparities in sentencing are an expected, and perhaps welcome, outcome.

Also, it is this rigidity of the Guidelines that has largely been criticized184 and thus modified in recent years with the CVRA and the Fair Sentencing Act.185 The Sentencing Guidelines arguably limit the ability of a judge to actually use judicial discretion. For example, “lengthy mandatory prison terms sweep reasonable, innovative, and promising alternatives to incarceration off the table at sentencing.”186 What can occur is “utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.”187 Unless judges are relieved from the mandatory minimum sentence requirement, judges will continue to be constrained and limited in their ability to fashion and utilize restorative justice programs. However, the recent modifications to the Sentencing Guidelines, even if moderate, do suggest a Congressional willingness to continue to improve the sentencing scheme. Therefore, to truly effectuate the intent of the Guidelines to provide justice, and in the vein of continuous improvement, alternative sentencing should be considered for certain individuals.

A second concern of alternative sentencing is the cost of implementation. As previously discussed, alternative sentencing is “often labor intensive and require[s] substantial investment of ci-

183 See Bazemore & Umbreit, supra note 116.
184 See Breyer, supra note 181, at 9; see also United States v. Booker, 543 U.S. 220 (2006).
185 Id.
zen time and effort.”\textsuperscript{188} This would be a major concern for an already overloaded federal court system. Therefore, alternative sentencing should not be used for all offenses or for all offenders.\textsuperscript{189} It would be important to identify which particular cases would most benefit by an alternative structure. Given the ongoing and documented satisfaction with restorative justice programs,\textsuperscript{190} while the initial costs of implementation would be high, theoretically the long-term effect of programs would reduce costs.

Third, the studies that promote the effectiveness of alternative sentencing have been met with criticism concerning accountability and accuracy.\textsuperscript{191} Critics of restorative justice argue that the entire system is without adequate supervision, measurement, and evaluation.\textsuperscript{192} Naturally, implementation of such a program within the federal system would require ongoing, measureable, and consistent evaluation, and implementation of a set of metrics that could tangibly measure outcomes and ensure accountability. A system without such metrics would not meet the high expectations of judges, defendants, victims, or the public, whose tax dollars are investing in the program.

Another argument from opponents of restorative justice programs would be that the restorative justice process inherently is inconsistent with the view that victims have traditional “rights.”\textsuperscript{193} The term “right” suggests that one party has an entitlement within the proceedings and thus promotes an adversarial system.\textsuperscript{194} When parties participate in a meaningful restorative justice program, they should leave their “labels” behind in order to be equals during the conferencing.\textsuperscript{195} No one specific person or group has, in the traditional sense, “rights.” Having victim impact statements and increased victim participation in the judicial process could be viewed as entirely inconsistent with the goals of restorative justice:

The effect of allowing information about the harm to the victim into the consideration of sentencing has the effect of changing the focus in the court from individualization of the offender to

\textsuperscript{188} Bazemore & Umbreit, \textit{supra} note 116.
\textsuperscript{189} Id.
\textsuperscript{190} See Umbreit \textit{et al.}, \textit{supra} note 136.
\textsuperscript{192} Id.
\textsuperscript{194} Id. at 592.
\textsuperscript{195} Id. at 583.
individualization of the victim. The Supreme Court in *Payne v. Tennessee* decided that the focus on individual emotional impact and characteristics of the victim was allowable in sentencing. This shift is not particularly helpful in light of the restorative goal of de-emphasizing individualism in favor of a broader relational understanding of crime.196

Implementation of a restorative program in the federal system would be met with significant procedural and substantive barriers. However, the documented and potential benefits of such a program should not deter at least a pilot case that could be implemented on a small scale and then refined and modified appropriately prior to large-scale implementation.

VIII. CONCLUSION

This Note seeks to provide a case for improving the sentencing model in the federal justice system by employing restorative justice. By utilizing an alternative sentencing scheme, victims, defendants, and the community might find a greater sense of justice and peace. Restorative justice would not completely replace the Sentencing Guidelines methodology; it would merely offer a way for a judge to gain valuable insight into particular defendants and be better equipped to offer a fair and just sentence.

The CVRA was passed to ensure that victims are considered as a critical element of the judicial process. Victims are not outsiders; they are key components that should have a realistic impact on the sentencing of defendants. The right to be reasonably heard has, in most cases, been satisfied by simply a statement made to a sentencing judge. However, there is an opportunity to satisfy this right to be heard by offering an alternative sentencing structure in particular cases.

Sentencing law is an ever-evolving part of the American criminal justice system. As a society, we are continuously striving to balance the interests of society, the victim, and the defendant. The Sentencing Guidelines, and the formality of a sentencing process, have significant benefits in the federal judicial system. The system provides clarity and fairness for defendants, while ensuring similar sentences across the country. However, what may have been lost in this system is the ability of a judge to truly “hear” what victims

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196 *Id.* at 595 (internal citations omitted).
and defendants have to say regarding the offense. Folding a restorative justice model into the already existing structure would only seek to provide an alternative to the rigidity of the model and offer significant potential benefits for defendants, victims, and the community.