REDUCING RECIDIVISM OF VIOLENT OFFENDERS THROUGH VICTIM-OFFENDER MEDIATION:
A FRESH START

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I. INTRODUCTION

A. “Tough on Crime”

The United States criminal justice system is in crisis. How might we, as a society, reduce the Nation’s alarming rates of crime and violence? The solution typically endorsed by the media and elected officials involves “cracking down” on crime. This notion has come to be known as the “Tough on Crime” movement, which includes the “War on Drugs,” initiated by President Richard Nixon in the early 1970s. This initiative rejects the idea that inadequate social conditions are the leading cause of criminality, but rather argues that the root cause lies in irresponsible decision-making, and highlights punishment as the principal response to crime through the enactment of policies such as Mandatory Sentencing, Three Strikes, and Zero Tolerance. However, the notion that “toughening up” serves to solve the problem of increasing crime rates is a perilous delusion because “[i]t is actually preventing us from solving the crime problem.” Indeed, there was a thirty percent increase in the reported crime rate three years after Nixon’s

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1 “When a defense lawyer or judge approaches the sentencing process by simply trying to determine how long a defendant’s term of imprisonment should be under the guidelines, the most important decision—whether the defendant should go to prison at all—has been skipped.” See J.P. Hanlon, Sean Hecker & David Gopstein, Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing, 24 CRIM. JUST. 26 (2010).


4 Lozoff, supra note 2.
initiation of the “Tough on Crime” movement,5 and the rate has been steadily increasing ever since.6 The effects of this movement are startling: “local, state and federal governments have all adopted and implemented these policies resulting in enormous increases in drug arrests, more punitive sentencing proposals, resurgence of the death penalty, departure from juvenile justice systems, and increased racial profiling and community surveillance.”7

B. Epidemic of Incarceration

A large segment of the American population has become disillusioned with the criminal justice system.8 One reason for such disappointment is the epidemic of incarceration. In recent decades, there has been a notable increase in prison admissions, the primary cause of which is the growing number of people sentenced to incarceration for drug crimes.9 The War on Drugs has devastated our Nation’s justice system, single-handedly creating the largest prison population in the world.10 This consequence is primarily due to the fact that the War on Drugs significantly influences whom is convicted and ultimately incarcerated. For example, this movement created a social landscape that contributes to disparate rates of arrests and convictions for society’s disenfranchised populations.11 Randolph N. Stone has described the criminal justice system as a dragnet:

It collects the ever growing numbers of neglected, uneducated, and unemployed people who face costly addictions and mistakenly view crime as their only alternative. The net will not hold. It is asked to bear not only the weight of social failures but also failures within the criminal justice system itself.12

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8 Myrna S. Raeder, Fundamental Change in Criminal Justice System May Be Closer Than We Think, 13 CRIM. JUST. 53 (1999).
9 James Austin et al., The Use of Incarceration in the United States, 10 CRITICAL CRIMINOLOGY 17, 21 (2000).
10 The Rise of the Modern “Tough on Crime” Movement, supra note 3, at 44.
11 Austin et al., supra note 9, at 24.
The criminal justice system as it currently stands approaches crime as having been committed against the State, as opposed to against the victim and the community at large. This results in the neglect of the victim in the criminal justice process. Their preferences and needs for closure are rarely taken into account when prosecuting and sentencing the perpetrators of the acts committed against them.

In the United States, the primary means of dealing with crime is through retribution, a system that focuses on incapacitation and seeks to achieve justice through the use of unilateral punishment. Yet, because the theory underlying such a system focuses on restoring “social order” through punishment, rather than modifying the behavior of the offender, retributive justice has been ineffective in its goal of reducing and deterring crime. As a consequence, our prisons are overcrowded and the needs of the victims and communities are left unsatisfied. The criminal justice system must change in ways that address human needs by concentrating on behavior modification rather than the simple imposition of punitive sanctions.

We, as a society, need to examine the possibility of increasing both the use and the scope of alternatives and modifications to incarceration. One such alternative is restorative justice, a theory of justice that emphasizes repairing harm. This approach empowers both victims and offenders by allowing them to collectively work to repair the harm that has been done. An offshoot of restorative justice is Victim Offender Mediation (“VOM”)—a practice that appreciates that crime is perpetrated against the people,

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18 Austin et al., supra note 9.
19 J.P. Hanlon et al., supra note 1.
21 Id.
and not just the State.\textsuperscript{22} Further, VOM addresses the needs of both victims and offenders by prioritizing the victim’s need for empowerment and emotional closure, while simultaneously fostering the offender’s sense of accountability by promoting understanding of the human dimension of their criminal actions.\textsuperscript{23} VOM programs have become increasingly popular since their inception in the 1970s—by 2000, more than 1200 VOM programs were functioning across the globe, from remote rural communities to large urban centers alike.\textsuperscript{24}

This Note will examine how VOM between victims and violent offenders improves the criminal justice system and reduces recidivism. The Note will propose that there is a better remedy for violent crime than punitive prison sentences absent genuine efforts to reform. In Section II, this Note will discuss the breakdown of the U.S. criminal justice system, particularly the excessive incarceration rate and the ineffectiveness of the current retributive scheme, followed by a history and overview of VOM. Next, it will discuss the issue of prison recidivism, how it affects our society on both a social and economic level, and the strengths and weaknesses of the classic model of VOM. In the final sections, the Note proposes that on the basis of VOM’s success with juvenile and non-violent offenders, as well as the established effect that forgiveness has on both emotional closure in victims and the development of empathy in offenders, the use of VOM in the context of violent crime is an appropriate means of reducing prison recidivism, thereby improving the broken state of the U.S. criminal justice system.

\section*{II. Background}

\subsection*{A. History of the Problematic United States Criminal Justice System}

The basic foundation of the criminal justice system has been called into question by many prominent legal figures, including the Nation’s Attorney General himself. In an August 2013 speech directed at the American Bar Association (“ABA”), Attorney General Eric Holder stated, “America’s legal system, we must face the

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\item \textsuperscript{22} Mark S. Umbreit, \textit{Mediation of Victim Offender Conflict}, 1988 \textit{J. Disp. Resol.}, 85 (1988).
\item \textsuperscript{23} Id. at 86.
\item \textsuperscript{24} O’Hara & Robbins, \textit{supra} note 17.
\end{enumerate}
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reality that, as it stands... is in too many respects broken.”25 It is impossible to pinpoint a single cause for this collapse, and it is difficult to argue with the idea that the system needs a complete overhaul. Given the severity of the damage, substantial growth cannot occur with a few limited changes to the system, nor will it occur overnight. Nevertheless, change is not impossible. The current state of the system cannot be used to discourage progress—slowly but surely it could be repaired and we could start with one significant issue: prison recidivism.

The following provides an overview of a number of the issues currently plaguing the U.S. criminal justice system.

1. The Incarceration Rate

The U.S. has profoundly increased the use of imprisonment as a means of reducing crime,26 creating the highest rate of incarceration in the world;27 with 716 in every 100,000 citizens behind bars, the rate of incarceration in the U.S. is five times greater than most industrialized nations.28 Although the U.S. only represents about five percent of the world’s population, it houses approximately twenty-five percent of the world’s inmates. Overall, the Department of Justice has reported approximately 2,026,596 individuals are incarcerated across all U.S. jurisdictions.29 This statistic includes “[s]tate and federal prisoners, 600,000 people in jail, 106,000 children in juvenile facilities, ... 2,300 adults held by the military, 18,000 in U.S. Territories, and 1,600 in Native American jails and detention facilities.”30 Yet, the adult prison population only represents a mere one-fifth of the total correctional body; in 2001, an additional 3.8 million persons were on probation, while approximately 713,000 were on parole, culminating in an estimated 6.3 million Americans—or one in every thirty-one adults—under at least one form of correctional custody—a profound increase from the one in every ninety-one adults documented in 1980.31 Thus, “[b]y

26 Austin et al., supra note 9.
29 Austin et al., supra note 9.
30 Id.
31 Id.
any definition, the correctional system is one of the largest and most pervasive social control systems in the United States today.\(^{32}\)

Furthermore, the epidemic of incarceration imposes significant monetary costs on society, roughly $24,000 per inmate annually. As the incarceration rate continues to increase as a result of racial demographics, mandatory sentencing laws, and the War on Drugs, imprisonment costs taxpayers approximately $63.4 billion a year.\(^{33}\)

2. Mandatory Sentencing Legislation

Efforts to reduce crime and mitigate the problem of repeat offense have led to a variety of legislative initiatives, including mandatory sentencing laws. These laws involve imposing prescribed sentences that purportedly attempt to fit the punishment to the crime.\(^{34}\) Further, these policies transfer sentencing discretion from neutral judges to adversarial prosecutors who are not trained in sentencing, and who may lack the incentive to ethically implement their discretion, because successful convictions under these laws may serve to further their careers.\(^{35}\)

Mandatory prison sentences are primarily justified on the idea that lawbreakers will learn that “punishment is certain and severe,” and thus that “crime does not pay.”\(^{36}\) Stated differently, it is assumed that the imposition of these sentences will deter future crime. Yet, mandatory sentencing legislation has not proven effective in reducing crime; “Chief Justice William Rehnquist has stated that these statutes are ‘perhaps a good example of the law of unintended consequences.’”\(^{37}\) Indeed, evidence demonstrates that on an annual basis, mandatory minimum sentences result in the long-term incarceration of thousands of low-level offenders who could

\(^{32}\) Id. at 19.


\(^{36}\) Gendreau et al., supra note 34, at 3.

be successfully sentenced to significantly shorter periods of time.\textsuperscript{38} Moreover, mandatory sentencing laws do not permit the consideration of external circumstances that affect an individual case, or factual differences between cases: \textsuperscript{39} “Congress sets the minimum punishment, and every judge must impose it on every offender who meets the statutory criteria, regardless of any other facts in the case.”

3. The Criminal Justice System’s Failure to Reduce Crime

Perhaps the most pervasive issue plaguing the criminal justice system is that retributive justice is an ineffective means of reducing crime. Retributive justice refers to a system that seeks justice through the use of punishment; courts impose a punishment, usually in the form of a prison sentence, and justice is believed to have been served once said punishment is enforced.\textsuperscript{41} As detailed above, the retributive justice method contributes to the overcrowded prison system from which ailments grow, such as violence and lack of offender services. Research demonstrates that restoration of justice, as opposed to behavior modification, is the primary motivation for retributive punishment.\textsuperscript{42} According to this theory, to restore social order, an offender must be punished in proportion to the gravity of the crime.\textsuperscript{43} Because the underlying motivation of imposing a system of retributive justice is “restoration” rather than behavior modification, retributive justice does not work to deter future crime.\textsuperscript{44} Such punishment is carried out in the form of higher rates of arrests and increasingly lengthy and severe prison sentences. However, “[i]f severe punishment and incarceration were effective, America would be one of the safest societies in the world.”\textsuperscript{45}

The criminal justice system as it currently stands does little to actually reform offenders, which is reflected by the fact that violent crime has not decreased in the past fifteen years.\textsuperscript{46} In stark con-

\textsuperscript{38} Id.
\textsuperscript{40} Vincent & Hofer, supra note 37, at 2.
\textsuperscript{41} Wenzel et al., supra note 15.
\textsuperscript{42} Carlsmith & Darley, supra note 16.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{46} Lozoff, supra note 2.
Contrast, there has been a six-fold increase in the incarceration rate in the last three decades.\textsuperscript{47} The idea that simply placing an individual in a cell and leaving him to rot has very little, if any, redeeming features, and does not serve to reduce the likelihood of future criminal activity.\textsuperscript{48} In fact, such individuals are likely to become repeat offenders; on average, approximately sixty-two percent recidivate within three years of release.\textsuperscript{49}

Recidivism is broadly defined as a return to criminal activity, whether as re-arrest, re-convict, or re-incarcerate.\textsuperscript{50} Recidivism analyses serve a critical societal role by allowing researchers to determine whether resources are being used efficiently and appropriately.\textsuperscript{51} Not surprisingly, these studies tend to report high rates of recidivism. One such study, conducted by the Bureau of Justice Statistics, tracked 404,638 prisoners across thirty states after their release from prison in 2005; the results demonstrated that within three years of release, approximately sixty-eight percent of released prisoners had been re-arrested, and about seventy-seven percent were re-arrested within five years of release.\textsuperscript{52} The results illustrate that incarceration alone does not truly reform criminals or deter them from committing future crimes. Needless to say, “[i]f the prison fails to reform, then it follows as a necessary logical inference that the present penal system, as a whole, fails in any major accomplishment of its declared purpose and objective.”\textsuperscript{53}

B. History of Victim-Offender Mediation

1. Restorative Justice

Restorative justice is a broad term used to refer to a variety of relatively novel techniques employed to achieve the traditional purposes of the criminal justice system—deterring future crime and reforming the offender.\textsuperscript{54} Rather than viewing crime as a violation

\textsuperscript{47} Barry Scheck, Four Reforms: For the Twenty-First Century, 96 JUDICATURE 323 (2013).
\textsuperscript{48} See Critical Criminal Justice Issues, supra note 39.
\textsuperscript{49} Lozoff, supra note 2.
\textsuperscript{50} Amy L. Soloman et al., Life After Lockup: Improving Reentry from Jail to the Community, URB. INST. (May 7, 2008), http://www.urban.org/uploadedpdf/411660_life_after_lockup.pdf.
\textsuperscript{51} Id.
\textsuperscript{52} Critical Criminal Justice Issues, supra note 39.
\textsuperscript{54} David Dolinko, Restorative Justice and the Justification of Punishment, 1 UTAH L. REV. 319 (2003).
against the State, subject to a punishment equivalent to the harm as determined by systematic rules, restorative justice conceives of crime as “[a] violation of people and relationships” requiring the reparation of harm, and of justice as a dynamic process involving “[t]he victim, the offender, and the community in a search for solutions which promote, repair, reconciliation, and reassurance.” Primary elements of a restorative approach to justice include, “[h]olding offenders accountable for their crimes, denouncing crime and providing meaningful consequences, restoring victims, rehabilitating and reintegrating offenders in the community, and providing enhanced community safety.”

2. What is Victim-Offender Mediation?

VOM is the oldest and most widely practiced expression of restorative justice. These programs allow interested victims to meet their offenders in safe and structured settings, guided by trained mediators. The philosophy behind VOM programs is that, with the support of a mediator, the victim and the offender can “[b]egin to resolve the conflict and to construct their own approach to achieving justice in the face of their particular crime.”

In contrast to the depersonalization experienced by both victims and offenders in the traditional approach to criminal justice, VOM operates in a way that recognizes that crime is fundamentally committed against real people—not just the State. Further, VOM mitigates the problems associated with the criminal justice system’s treatment of victims, specifically victims’ experiences of powerlessness and secondary victimization, and helps offenders understand and deal with the human element of the crime they

55 Id. at 319–20.
56 Id.
57 Raeder, supra note 8, at 53.
59 Umbreit, supra note 45.
61 Umbreit, supra note 22.
62 “Secondary victimization refers to behaviors and attitudes of social service providers that are “victim-blaming” and insensitive, and which traumatize victims of violence who are being served by these agencies.” See Priscilla Schulz, Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence, 14 VIOLENCE AND VICTIMS (2000).
committed, thereby addressing the needs of both victims and offenders;63 “[r]ather than placing the victim in a passive role and reinforcing an adversarial dynamic which often results in little emotional closure for the victim and little, if any, direct accountability by the offender . . . victim offender mediation facilitates a very active and personal process . . . .”64 This process confronts the emotions of the victim, and the guilt and shame of the offender, in the hopes of facilitating an interaction that allows the offender to express remorse and obtain forgiveness.65

3. Differing Models of VOM

Several factors have led to the development of a number of VOM models. The classic approach is the Social Work Case Development Model.66 While all VOM programs emphasize the importance of the mediator’s sensitivity, the social work model takes on a particularly therapeutic approach to mediation—the mediator works especially close with both parties to identify their emotional needs prior to the meeting.67 For victims this may involve seeking the services of a licensed therapist to address issues of trauma, for offenders this may mean examining how to most effectively and sensitively express their feelings about the crime.68 The primary pitfall of this model is that it is typically a long-lasting process and requires a significant time commitment, which acts as a deterrent for those who are looking for a quicker resolution.69

The time consideration in the aforementioned model has led to the development of the “Pure Mediation” model, an approach to VOM that eliminates the social work aspect of the previous model.70 In the pure model, a letter notifying the client of a referral, a brief description of the process and its underlying purpose, and the time assigned for mediation are sent to both the victim and the offender.71 The mediators have no contact with the parties

63 Umbreit, supra note 22.
64 Id. at 86.
65 Raeder, supra note 8.
67 See id.
68 Id.
69 Id.
70 Id.
71 Price, supra note 66.
prior to the mediation, and neither the victim nor the offender receives advance preparation.\footnote{Id.}

Supporters of this model argue that contact with the mediator prior to mediation may create unfair alliances that could negatively affect the mediator’s impartiality.\footnote{Id.} Critics have referred to this form of VOM as “settlement-driven,” as compared to the “relationship-driven” approach advanced in the social work model.\footnote{Id.} Such an approach to VOM can be quite effective in generating efficient settlements in the context of small claims, but it “[i]s not well-suited to addressing the higher values that are an integral part of the traditional [VOM] mission—healing the effects of crime and reforming offenders.”\footnote{Id.}

The newest approach to VOM is known as the Humanistic Mediation Model, which highlights the mediator’s role in empowering both parties to “[o]wn the conflict, discuss its full impact with each other, to assist each other in determining the most suitable resolution . . . and to recognize each other’s common humanity, despite the conflict.”\footnote{Price, supra note 66.}

4. Overview of the Process

In the vast majority of VOM programs, the mediator meets with both the victim and the offender separately in order to prepare both parties for the subsequent discourse.\footnote{Nugent, Williams & Umbreit, supra note 58.} The mediation session takes place following the individual meetings, and aims to create an environment that encourages those involved to engage in dialogue that permits both parties’ “emotional and informational” needs to be met.\footnote{Id.} Both the victim and the offender are given the space to express freely their feelings about the crime in a safe and structured environment, which promotes the offender’s accountability and the victim’s sense of closure by assisting both parties in coming to a mutual agreement about the specific steps the offender will take to rectify the harm.\footnote{Victim-Offender Mediation, supra note 60.}

VOM is broken down into four distinct phases: (1) intake; (2) preparation for mediation; (3) mediation; and (4) follow up.\footnote{Umbreit, supra note 22.} The
intake phase typically consists of three goals. The first is to accurately note information about both the victim and offender in accordance with specific intake forms, the second is to introduce the victim and offender through mail, and the third is to assign a mediator to the case. The preparation segment is characterized as the “getting them to the table” phase, and is thought to be highly significant in terms of the outcome of the session. In fact, if not delicately handled, there may not even be a mediation session. The mediation phase involves face-to-face conferencing between the victims and offenders, and the follow-up phase consists primarily of approval of a restitution plan and closing the case.

5. Preparing for Mediation

Perhaps the most crucial task the mediator must accomplish during the preparation phase is establishing genuine trust and rapport with both parties. This is accomplished through preliminary one-on-one conversations. Prior to engaging in any form of mediation, the mediator must first obtain voluntary participation from both parties, which typically involves addressing a series of questions regarding what VOM is, how it works, and its underlying purpose. The mediator must communicate empathically and without judgment to establish the trust necessary to facilitate a meeting in which both parties feel safe. Next, the mediator must determine whether the parties involved are suitable for mediation. This involves consulting with both the victim and the offender and learning about what happened from the perspective of both parties. Through discussion of the offense and addressing questions and concerns, the mediator can gauge the parties’ motivations and preparedness for communication. Generally, victims who are very frightened to speak with their offenders, or victims who primarily want to condemn their offenders are not considered good candi-
Similarly, an offender who does not admit to the offense or accept his or her guilt is not a suitable candidate for VOM.91 Despite the mediator’s efforts to establish trust and to prepare the parties for the confrontation, many VOM programs understand that few people are truly ready for what the mediation phase involves. The mediator is responsible for helping the parties identify what they need to move through the process as seamlessly as possible.92

6. Mediation Phase

Mediation will only proceed once the mediator has had separate contact with both parties and has assessed that they are both willing, appropriate candidates for VOM.93 The conference generally begins with a discussion of the facts and feelings about the crime.94 This represents a rare opportunity for the victim to ask questions and for the offender to learn about how his or her crime affected the victim. Many VOM programs will then place an emphasis on coming to a mutually satisfactory restitution agreement.95 Restitution is typically not considered a crucial aspect of VOM, but those models that incorporate such an objective into their process do so to represent “[a] tangible symbol of conflict resolution . . . .”96 Throughout the mediation, it is important to keep in mind that the goal of VOM is not one sided, but rather multifaceted:

The mediation session is not meant to be primarily a process to rehabilitate the offender. Nor is it meant to be primarily a victim assistance process. Instead, it is designed to address the needs of both victims and offenders in a manner which personalizes the process of justice by facilitating the empowerment of both parties to resolve the conflict at a community level.97

90 Price, supra note 66.
91 Id.
92 This might mean that the victim may benefit by first addressing issues of trauma with a therapist, or that an offender suffering from substance abuse issues may wish to complete a drug treatment program before facing the victim. See id.
93 Umbreit, supra note 22.
94 Id.
95 Id. at 90.
96 Id. at 91.
97 Id.
The word “recidivism” refers to a relapse into criminal activity and is a traditional measure often used to assess the long-term effect of incarceration. The rate of recidivism “[r]eflects the degree to which released inmates have been rehabilitated and the role correctional programs play in reintegrating prisoners into society.”

High rates of recidivism have profound public safety and economic implications. Moreover, high rates result in tremendous “[s]ocial costs to the communities and families of offenders, as well as the personal costs to the offenders themselves.”

Too many people are released from prison, reenter society, and subsequently reoffend. Studies conducted over the past three decades confirm that incarceration absent rehabilitative programs specifically intended to facilitate effective reentry actually increases one’s likelihood to reoffend. A reported 650,000 inmates are released from prison each year, and approximately sixty-five percent of this population will return to prison—“[t]his represents the fastest category of prison growth of all demographic groups.” Several significant collateral consequences are probable, including homicide, sexual assault, child abuse, and domestic violence, amongst others. In fact, a study conducted by the Justice Department following released inmates across fifteen states found that prisoners released in 1994 had been charged by 1997 with the following crimes: 2,900 homicides; 2,400 kidnappings; 2,400 rapes; 3,200 other sexual assaults; 21,200 robberies; 54,600 assaults; 13,900 other violent crimes; and over 200,000 car thefts, burglaries, and drugs and weapons offenses.

100 Id.
101 Id.
at 48.
102 Id.
at 49.
103 McKean & Ransford, supra note 99, at 8.
The years that inmates spend in prison provide society, as well as the justice system, with an opportunity to alter the behavior of released inmates. Rather than teaching inmates to become “career criminals,” the incarceration experience “[s]hould shift their preferences and values, so that they weigh more heavily the costs of crime on others relative to the benefits to them.” Ultimately, a meaningful reduction in prison recidivism can result not only in a significant improvement in public safety, but in successful “[r]eintegration of former prisoners into the labor force, families, communities, schools, and religious organizations.”

B. Limitations of VOM

Despite VOM’s mounting credibility as a successful Alternative Dispute Resolution (“ADR”) technique, some have criticized it as ineffective and disruptive to victims. Proponents of restorative justice suggest that the overriding goal of these techniques is the reparation of harm. Yet, skeptics criticize the plausibility of such an objective; they argue that some severe crimes “[i]nflict harms that cannot be ‘repaired’ or ‘set right’, with murder and manslaughter the prime examples. Moreover, can the harm inflicted on the victim of a brutal rape every truly be ‘repaired’ by anything the perpetrator may subsequently do?” In addition, they contend that victims interested in “repairing” harm can seek to do so by filing civil lawsuits separate and apart from the criminal justice system.

Critics also express concerns regarding possible victim exploitation. Some victim support organizations argue that VOM is less of an opportunity and more of an obligation for vulnerable victims who may feel coerced into participation. Skeptics fear that the face-to-face interaction inherent in VOM will transform

106 A “career criminal” sometimes known as the “revolving door” phenomenon, refers to a subset of offenders who, upon release, continue to chronically offend in career-type fashion. See Criminal Careers—Historical Background, L. Lib—AM. LAW & LEGAL INFO. (2015), http://law.jrank.org/pages/829/Criminal-Careers-Historical-background.html.
108 McKean & Ransford, supra note 99, at 8.
109 Dolinko, supra note 54, at 335.
110 Id.
111 Strang & Sherman, supra note 14, at 37–38.
victims “[f]rom ‘court fodder’ under the traditional court system, to ‘agents of offender rehabilitation’ under restorative justice . . . ”.\textsuperscript{112} Another significant concern centers on re-victimization, which has been noted in some VOM programs.\textsuperscript{113} Secondary victimization is more likely to occur in cases where the accused denies the offense, places blame on the victim, or shows no expression of remorse.\textsuperscript{114} Despite the validity of this concern, such a consequence can be avoided through careful assessment and screening of offenders during the “Preparing for Mediation” phase of the process; offenders who demonstrate a notable lack of remorse or regret should not be invited to mediate.\textsuperscript{115} Moreover, victims are frequently re-victimized by the detached and insignificant role they play in bringing their offenders to justice through the traditional criminal justice system. Insensitive institutional customs that place the needs of the system over those of the victims for whom they claim to serve violate victims in much the same way as the initial attack, “[t]he disregard of victims’ needs by providers can so closely mimic victims’ experiences at the hands of their assailants that secondary victimization is sometimes called ‘the second rape’ or ‘the second assault’.”\textsuperscript{116}

One must recognize that despite a mediator’s best efforts, the unpredictable nature of the human condition makes it impossible to completely eliminate all risk associated with participation in VOM.\textsuperscript{117} Establishing a safe, trusting, and non-judgmental relationship with both parties can help mitigate these risks.\textsuperscript{118}

C. Why Choose VOM?

Notwithstanding possible limitations, VOM’s demonstrated results indicate that the benefits far outweigh the consequences.\textsuperscript{119}

\textsuperscript{112} Id. at 37–38.
\textsuperscript{113} Price, supra note 66.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Schulz, supra note 62.
\textsuperscript{117} Price, supra note 66.
\textsuperscript{118} Id.
1. How the Victim Benefits from VOM

Contrary to popular opinion, many victims are utterly dissatisfied with the criminal justice system. See Jo-Anne M. Wemmers, Victims in the Crime Justice System (Kugler Publications, 1996); Strang & Sherman, supra note 14. Many assume that victims’ views are punitive, that they primarily seek vengeance from the justice process, and that their dissatisfaction with the justice system hinges on lenient criminal sentencing. However, surveys consistently demonstrate that most victims do not hold these opinions, but rather that their frustration is based on personal concerns. Specifically, victims of crime are becoming recognized as the neglected party in criminal justice proceedings, and are unhappy with:

[t]heir lack of a legitimate role in the processing of their cases . . . the lack of opportunity to be consulted about the progress of their cases, the lack of recognition of the emotional, as well as material, harm they have experienced, and the lack of fairness and respect they receive at the hands of the justice system as a whole.

Furthermore, victims themselves tend to be compassionate in their views on sentencing—although “[n]either their needs nor their preferences are usually taken into account in the prosecution and sentencing of offenders,” many victims have expressed openness to alternative forms of incarceration if they could play a legitimate role in the way their cases are dealt with. Victims report that a great source of frustration is the difficulty in obtaining information from law enforcement related to progression in their cases. It has been shown that the information victims are likely to receive is directly related to how valuable their information is to law enforcement. VOM provides victims with the opportunity to obtain information directly from their offenders, as well as to share their own stories of pain resulting from the crime. Additionally, victims are not given the opportunity to

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120 See Jo-Anne M. Wemmers, Victims in the Crime Justice System (Kugler Publications, 1996); Strang & Sherman, supra note 14.
121 Strang & Sherman, supra note 14.
122 Id.
123 Id. at 2–3.
124 Id. at 1.
125 Id. at 3.
126 Strang & Sherman, supra note 14, at 4.
127 For example, a study of 200 victims of violent crime found that satisfaction with treatment by law enforcement decreased over the course of the investigation when victims themselves were less likely to be able to provide valuable information. See Mike Maguire, Burglary in a Dwelling: The Offence, the Offender and the Victim 134–38 (1982).
128 Umbreit, Coates & Vos, supra note 98.
participate in traditional justice proceedings. Participation has been shown to promote emotional recovery and to reduce the sense of alienation that typically results from victims’ lack of control in the administration of justice.\textsuperscript{129}

In addition to material and physical harm, victims of even the most menial crimes may experience severe emotional and psychological consequences, including fear, anger, anxiety, shame, an increased sense of vulnerability and mistrust, and a perceived lack of safety.\textsuperscript{130} This is one of the most crucial aspects of victims’ dissatisfaction with the criminal justice system, as a simple sentence of incarceration does little to redress the emotional trauma that all victims suffer. Yet, “[e]vidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation.”\textsuperscript{131} If emotional repair is what victims value most, then VOM provides a significant opportunity for victim recovery. Face-to-face encounters with an offender in the safe and structured environment of VOM increase the likelihood of an apology being offered, which is typically seen as a fundamental element of restoration.\textsuperscript{132}

2. How the Offender Benefits from VOM

While the focus of VOM is often placed on the emotional restoration of the victim, offenders also stand to benefit greatly from the process. Offenders often report that these conferences are stressful, but the stress and shame of participating in VOM may play a necessary role in transformation and “[u]ltimately benefits the offender more than anyone.”\textsuperscript{133} When offenders participate in VOM, they are placed in an intimate face-to-face setting that forces them to confront and acknowledge the human dimension of their unlawful behavior, “[t]hat victims are real people, not just objects to be abused.”\textsuperscript{134} Offenders generally attempt to rationalize their criminal behavior, but VOM allows offenders to understand the very real impact their actions have on the lives of their victims.\textsuperscript{135} In addition to the development and recognition of empathy toward the victim, offenders have been shown to gain an increased sense

\textsuperscript{129} Strang & Sherman, supra note 14.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 22.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 37.
\textsuperscript{134} Umbreit, supra note 22.
\textsuperscript{135} See Umbreit, supra note 45.
of self-awareness, as well as increased awareness of the impact of their behavior.\textsuperscript{136}

More broadly, the genuine development of empathy and understanding can help offenders reintegrate into society and lead to a reduction in future criminal activity.\textsuperscript{137} Despite offenders’ interest in avoiding further punishment, the high rate of recidivism shows that re-socialization can be extremely challenging.\textsuperscript{138} Traditional punishment in the form of prison sentences forces offenders to adapt to new social norms; as a result of their crime and conviction, offenders change their attitudes and behavior to those which provide the most benefits to them while incarcerated.\textsuperscript{139} Although these behaviors vary from one offender to another, they often include isolating oneself or becoming violent.\textsuperscript{140} Even offenders who do not themselves become violent are exposed to violence in prisons and learn to accept it as part of a new norm.\textsuperscript{141} A number of cases reveal that offenders may be victimized themselves while incarcerated and exposed to physical, emotional, or sexual abuse.\textsuperscript{142} Upon an offender’s release from incarceration, he must quickly learn or re-learn acceptable behaviors of civilian life. VOM provides a means for offenders to re-learn acceptable norms through reciprocal dialogue in which victim and offender empathize with, and attempt to understand, one another.

Many offenders further find the stigma of incarceration difficult to manage. A stigma is a mark or brand that is indicative of a bearer’s low social position.\textsuperscript{143} Offenders often report stigma and rejection from family, friends, employers, and communities for having served a prison sentence.\textsuperscript{144} This stigma puts stressors on the offender and limits reintegration, which can lead to poor decision-making and the potential for future criminal behavior.\textsuperscript{145} The human dimension of VOM helps offenders confront their crime

\begin{itemize}
\item \textsuperscript{136} Id. \\
\item \textsuperscript{137} Id. \\
\item \textsuperscript{138} See Katarzyna Celinska, \textit{Volunteer Involvement in Ex-Offenders’ Readjustment: Reducing the Stigma of Imprisonment}, 30 J. Offender Rehab. 99 (2000). \\
\item \textsuperscript{140} Id. \\
\item \textsuperscript{141} Id. \\
\item \textsuperscript{143} Erdwyn H. Pfuhl Jr., \textit{The Deviance Process} 201 (Van Nostrand, 1980). \\
\item \textsuperscript{144} See Roger J. Homant & Daniel B. Kennedy, \textit{Attitudes Toward Ex-Offenders: A Comparison of Social Stigmas}, 10 J. Crim. Just. 383 (1982). \\
\item \textsuperscript{145} See Celinska, \textit{supra} note 138.
\end{itemize}
and offers an opportunity to gain real acceptance from victims and community members—something that incarceration does not principally seek to provide. Thus, VOM offers a substantial benefit to offenders by supporting them in successfully reintegrating into communities, and thereby reducing their likelihood to reoffend.

IV. Proposal

A. Implementing VOM with Violent Offenders to Reduce Prison Recidivism

VOM programs have steadily been gaining credibility with respect to non-violent offenses and crimes involving juvenile offenders, yet their use with violent offenders has not achieved widespread acceptance. In fact, the use of VOM in cases of violent crime is a hotly debated issue, “[t]he public and victims generally support the restorative justice model, but are very reluctant to accept it in cases of serious crime.”146 As previously discussed, many victim support groups’ resistance and criticism of VOM centers on the argument that certain severe crimes simply cannot be repaired, and that exposing the victims of such crimes to their offenders would produce a sense of violation or re-victimization.147 Criticisms also relate to how victims are recruited for participation in VOM—some victims have reported coercion and pressure to accept invitations to mediate, and certain VOM programs have failed as a result of inadequate and negligent assessment of the parties’ eligibility.148 Further, critics fear that some offenders have no genuine interest in reconciliation, “[o]ffenders are able to use restorative justice for all sorts of purposes: avoiding punishment, casting themselves in a better light, playing down their faults, even taking pride in their relationship with the victim.”149

These concerns are valid. However, the existence of challenges does not mean there is no place for VOM in the context of violent crime. Given the increase in the U.S. incarceration rate, it is apparent that the current system is failing and, therefore, alternative means of incarceration should be seriously explored. In ad-

147 Dolinko, *supra* note 54.
148 Gaudreault, *supra* note 146.
149 Id.
dition to the cruel and inhumane nature of incarceration, evidence supports that it simply does not lead to desistance from crime, nor does it deter future criminal activity.\textsuperscript{150} If reformation is taking place, it should be reflected in factual data about those subjected to such penal “treatment.”\textsuperscript{151} Yet, research consistently demonstrates high rates of recidivism among released prisoners.\textsuperscript{152} Given the success of VOM in the context of non-violent offense and delinquent youth, as well as the positive impact forgiveness has on offenders’ propensity to commit future crime, this Note advocates to extend the use of VOM to offenders convicted of violent felonies as a means of reducing prison recidivism.

VOM programs will reduce recidivism on the part of the offender by cultivating a sense of responsibility and humanizing the victims of the acts they perpetrated. VOM practiced in response to lower level offenses shares some similarities with the method proposed here, but it also has important differences. First, in contrast to VOM conducted with juvenile and non-violent offenders, mediation between a victim and a violent assailant should not replace criminal proceedings, but rather it should be carried out \textit{in addition to} the traditional administration of justice. Second, although VOM with lower level offenders certainly requires pre-mediation assessment and preparation, mediation in the context of a violent crime necessarily involves a significantly more thorough assessment of the parties’ eligibilities, as well as a more exhaustive preparation phase. Further, though not considered paramount, restitution agreements are often thought to be a useful element of VOM.\textsuperscript{153} Their importance diminishes further in VOM carried out between violent offenders and their victims—in this context, emotional growth for both parties takes priority over material reparation, and a lengthy prison sentence could constitute some form of restitution in combination with the development of genuine empathy and remorse. Finally, although the following will discuss VOM’s ability to reduce prison recidivism in violent offenders, it should be understood that VOM is not suggested for all violent criminals—psychopathic individuals are fundamentally unable to develop empathy,\textsuperscript{154} and are thus poor candidates for this type of work.

\begin{footnotesize}
\textsuperscript{151} Vold, \textit{supra} note 53, at 43.
\textsuperscript{152} See \textit{Critical Criminal Justice Issues, supra} note 39.
\textsuperscript{153} See Umbreit, \textit{supra} note 22.
\textsuperscript{154} “The brains of psychopaths have been found to have weak connections among the components of the brain’s emotional systems. These disconnects are responsible for the psychopath’s
B. Use of VOM with Non-Violent Offenders and Delinquent Youth

Since the inception of VOM, the victim-offender movement has gained considerable momentum, and its use with juvenile offenders and in connection to minor crimes has been the subject of dozens of studies across North America and the United Kingdom.\(^{155}\) With over thirty years of research data, there is a solid basis for concluding that the face-to-face dialogue inherent in VOM produces high rates of satisfaction in victims and offenders alike.\(^{156}\) In addition to client satisfaction, several studies examine VOM’s impact on recidivism of offenders in these categories. Mark S. Umbreit and colleagues conducted a meta-analysis of the available research to determine the relationship between VOM and the incidence of re-offense in delinquent youths—the results demonstrate that participation in VOM is associated with a lower likelihood of re-offense.\(^{157}\) In fact, as compared to the control groups, VOM participants were found to be as much as thirty percent less likely to commit a further offense.\(^{158}\) In a separate study of a similar nature, it was found that when participants did reoffend, their subsequent crimes were generally less serious.\(^{159}\)

A number of characteristics are associated with anti-social behaviors that frequently lead to the development of criminal activity, including age, gender, family structure, and level of education.\(^{160}\) Regardless of the severity of the crime or age of the offender, psychological studies consistently demonstrate that there is an “[i]nverse relationship between empathy and aggressive and anti-social behavior and that offenders frequently have low levels of empathy for their victims.”\(^{161}\) One explanation for VOM’s success in reducing recidivism in juvenile and non-violent offenders is that the face-to-face meeting engenders a sense of empathy for the inability to feel emotions deeply.” William Hirstein, *What is a Psychopath?*, PSYCHOL. TODAY (Jan. 30, 2013), https://www.psychologytoday.com/blog/mindmelding/201301/what-is-psychopath-0.

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155 Umbreit, *supra* note 45.
156 Umbreit, Coates & Vos, *supra* note 98.
158 See id. at 414.
159 *Id.*
161 *Id.* at 158.
victim—is what once a thing becomes a person, what was once an act becomes a crime. While the severity of anti-social behavior tends to increase with age, the aspects of VOM that function to foster this most essential element remain the same. Consequently, one can infer that it would similarly reduce the rate of recidivism in the context of violent crime by transforming offenders’ perception and recognition of victims.

C. Apologies, Forgiveness, and Remorse: Dan and Emily

It may seem inconceivable to critics of VOM that forgiveness and emotional restoration are possible in the context of a violent crime. Indeed, it is in part because of such criticisms that VOM has not yet gained widespread approval with this category of offense. Nonetheless, a small minority of victims has initiated mediation proceedings with their offenders with startling success. An example is the story of Emily and Dan. After a caregiver violently sexually assaulted Dan as a four-year-old child, he admittedly developed what he refers to as a “dangerous dark side” that made him a risk to women who bore a resemblance to his attacker. In addition to five other women, Emily became the target of Dan’s rage in an aggressive attack.

After several years of incarceration, Dan realized that he longed for answers about his own experience as a victim, and that without this information, “[h]e would never be free of the rage he felt related to his own childhood sexual victimization or of the deviance that had caused harm to so many and consumed the best years of his life.” With the help of prison staff and the encouragement of a fellow inmate who reported success with the program, Dan initiated VOM proceedings with Emily, who herself had been suffering from Posttraumatic Stress Disorder (“PTSD”). To both their surprise, what had begun as stressful and frightening be-

162 Id.
163 In one study, Umbreit collected feedback from juvenile offenders who stated, “I realized that the victim really got hurt and that made me feel really bad.” See Umbreit, supra note 45.
164 Nugent & Paddock, supra note 157, at 167.
165 See Gaudreault, supra note 146.
167 Id.
168 Id.
came a transformative experience.\textsuperscript{169} Dan reported, “[t]he power of it, it goes so deep . . . it almost makes your heart stop, when you’re forgiven for something you didn’t think you should be forgiven for.”\textsuperscript{170} Forgiveness is an excellent byproduct, but it should not be forced upon the victim—\textsuperscript{171} one must keep in mind that a victim’s willingness to participate does not necessarily equate a willingness to forgive. However, mediators should work to encourage a genuine apology from the offender. An apology is an “acknowledgement of the wrongfulness of an act, as well as an admission of responsibility. It demonstrates that the perpetrator is remorseful and repentant, and has a sense of being humbled.”\textsuperscript{172} Such an apology, one that is both sincere and heartfelt, is often the means to facilitating a natural course of forgiveness in the victim.\textsuperscript{173} When forgiveness is realized in connection with genuine accountability and remorse, it can have a powerful effect on the commission of future criminal activity.\textsuperscript{174} Promises made by offenders to their victims to refrain from future criminal behavior results in a notably lower incidence of re-offense:

No one, absolutely no one: not the judge, not the cops, not the prison system, no one, has more power than my victim to suggest I change my ways or to require things of me . . . and yet what motivates me is not some additional kind of coercion, but the gift of her grace and forgiveness.\textsuperscript{175}

Apologies and forgiveness significantly benefits victims in addition to offenders. Beyond the effect an apology may have regarding closure, proponents of VOM hypothesize that victims of all forms of crime may need to be able to forgive in order to achieve full emotional restoration, as forgiveness has the “power to release victims from the desire for punishment and revenge.”\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item Id.
  \item C. Harry Hui et al., The Impact of Post-Apology Behavioral Consistency on Victim’s Forgiveness Intention: A Study of Trust Violation Among Coworkers, 41 J. OF A PPLIED SOC. PSYCHOL. 1214 (2011).
  \item 2010 Annual Report: Victim-Offender Mediation Story, \textit{supra} note 166.
  \item Id.
  \item Strang & Sherman, \textit{supra} note 14, at 29.
\end{enumerate}
\end{footnotesize}
D. How VOM Leads to Desistance from Crime

As noted previously, one way VOM will reduce recidivism is through the offering of a sincere apology. The direct face-to-face communication involved in VOM increases the probability of such an offer and “[t]he expression of remorse and a genuine desire for reconciliation on the part of the offender is a significant predictor of offenders’ desistance from future offending.”  

Another basis for VOM’s proposed ability to reduce recidivism in violent offenders is the results from a 2010 study conducted by the Pennsylvania Department of Corrections. This study followed recent parolees and examined the characteristics in those who succeeded in a crime-free lifestyle as compared to those who failed. The results demonstrated that, amongst other factors, those who reoffended maintained a general lack of empathy, shifted blame and denied responsibility, failed to anticipate the long-term consequences of their behavior, and were more likely to maintain antisocial attitudes. These characteristics are “criminogenic factors,” which refers to a class of attitudes and behaviors that increase one’s likelihood of criminality. To effect long-lasting change in the realm of recidivism, it is imperative that programs aimed at behavior modification target these factors—programs that focus on non-criminogenic needs, such as physical abilities and creative expression, though reasonable in theory, are not effective in practice because they fail to target crime producing needs. VOM is specifically aimed at targeting criminogenic factors implicated in repeat offense, namely increasing empathy, promoting accountability, and recognition of the consequences of criminal actions.

The importance of VOM for violent offenders is compounded when considering how prisons actually enhance criminality. A large body of literature contends that prolonged incarceration “[d]estroys the psychological and emotional well-being of inmates.” VOM functions to harness and restore the offender as

177 Id. at 28.
179 Id.
181 Latessa, supra note 178.
182 Gendreau et al., supra note 34, at 7.
much as it does the victim. Furthermore, the exclusively punishing nature of the prison system as it stands only teaches an offender what not to do, “[i]f one punishes a behavior what is left to replace it? In the case of high-risk offenders, simply other antisocial skills.”\textsuperscript{183} Consequently, experts in punishment and behavior modification argue that the most effective way to encourage behavior change is not to suppress bad behaviors through punishment and control, but rather to shape good behaviors.\textsuperscript{184} VOM does precisely that, thereby contributing to sustained behavioral change and a reduction in prison recidivism.

V. Conclusion

Although widely accepted as a successful alternative to traditional incarceration with respect to non-violent offenses and crimes involving juvenile offenders, VOM with violent offenders has not yet achieved a similar level of approval. Critics argue the damage resulting from violent crimes simply cannot be repaired, and express concerns about exposing victims to the possibility of re-victimization. However, the rising incarceration rate illustrates that the traditional means of justice are failing in reducing the incidence of crime, and alternatives to incarceration should be seriously considered. This Note concludes that on the basis of the success VOM has achieved in the context of juvenile and non-violence offense, its use with violent offenders would be of a similar nature. Moreover, it concludes that as a result of genuine empathic growth on the part of the offender, VOM would reduce prison recidivism, thereby improving the United States criminal justice system.

\textsuperscript{183} Id. at 8.
\textsuperscript{184} Id.