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Mediating Theft

Kaitlyn E. Tucker

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MEDIATING THEFT

Kaitlyn E. Tucker*

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Crime is more than individual wrongdoing; it is relational. Crime creates moral imbalances and sends false moral messages. Remorse and apology can help right the moral balance, annul false moral messages by vindicating victims, and reconcile offenders to their victims and communities.¹

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1. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 90 (2004).

INTRODUCTION

On a sweltering July day nearly eighteen years ago, a group of adults gathered nervously around a u-shaped table in a small Minnesota town.² The group included an unusual mix of people: city representatives, a probation officer, liquor store employees, and a woman who pled guilty to stealing more than \$95,000. Yet, one purpose brought the unlikely group together—a planned conversation between an offender, Connie Eischens, and the victims of her criminal acts.³ This dialogue provided Connie with an opportunity to explain her actions to those who bore the brunt of the impact, as well as affording the victims the chance to describe how Connie's actions affected them. Despite the potential tension and apprehensions, the members of this conference resolved some of their conflicts. Over the span of half a dozen mediation conferences, "uneasiness [gave] way to understanding" as the "victims and defendant talk[ed] about their anger and remorse."⁴

Connie expressed her contrition to the others collected around the table. She stole somewhere between \$95,000 and \$120,000 from the municipal liquor store that she used to manage, and used the money to gamble in tribal casinos.⁵ Connie pled guilty to the crime in October 1994, and received treatment for her gambling addiction, wrote an apology to the town, and participated in the reparative conferences. This restorative sentence took the place of incarceration. By the end of the conferences, the group agreed that Connie would repay \$95,000.

Connie's story provides an example of "restorative justice" in practice, demonstrated through a method known as Victim-Offender Mediation (VOM).⁶ By the end of her mediation conferences, Connie made amends through this "face-to-face collaborati[on]."⁷ As a result, Connie had the opportunity to return to a life far more normal than many offenders ever receive.

A growing trend,⁸ restorative justice focuses on repairing the harm

2. See Robert Franklin, *City Uses 'Restorative Justice' with Woman who Stole to Gamble* (July 26, 1995), http://www.doc.state.mn.us/rj/documents/CityusesRJwithwomanwhostoletogamble_000.pdf (last visited Mar. 6, 2013). This introduction is a dramatic retelling of Mr. Franklin's article.

3. *Id.*

4. *Id.*

5. *Id.*

6. See Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 673 (2005) [hereinafter Reimund, *The Law and Restorative Justice*] ("[M]ost [Victim-offender mediation programs] follow a similar process by 'provid[ing] a safe place for dialogue among the involved parties,' usually facilitated by a trained community member.").

7. Franklin, *supra* note 2.

8. See Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue:*

crime causes.⁹ It encompasses a variety of techniques, all of which ultimately focus on “the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance.”¹⁰ Despite subtle differences in methodology, restorative justice as a whole hinges on using community stakeholders to help restore what has been lost, repair damage, and rehabilitate the offender. Specifically, the movement holds stakeholders’ decisions about restoring the offender, the victim, and the community as its central pillar.¹¹

VOM draws from civil alternative dispute resolution techniques¹² by incorporating mediation into a criminal justice setting. This process allows a convicted offender and the crime victim to come together and discuss the crime with the guidance of a third party mediator.¹³ Unlike mediation in the civil context, VOM places the victim and offender at the forefront of the endeavor while the mediator helps to facilitate a productive, curative dialogue.¹⁴

After more than forty years in modern practice,¹⁵ restorative justice needs a more prominent role in the American criminal justice system. Integrating more restorative practices into the current system easily accomplishes this goal. VOM, specifically, proves to be the best tool to move restorative justice into a more incorporated position in American

Impact, Opportunities, and Challenges in the Global Community, 36 WASH. U. J.L. & POL’Y 65, 67–69 (2011) (“Restorative justice policies and programs are developing throughout the United States. . . . [and] in many other parts of the world, including Australia, Canada, most European countries, Japan, China, Liberia, New Zealand, South Africa, several South American countries, South Korea, Russia and Ukraine.”).

9. See Hon. T. Bennett Burkemper, Jr. et al., *Restorative Justice in Missouri’s Juvenile System*, 63 J. MO. B. 128, 128 (2007) (“[T]he new lens [restorative justice] focuses on the harm to the victim and how to repair that harm. The offender takes responsibility for the harm he/she caused and makes amends. The community supports the victim while holding the offender accountable for the harm.”).

10. See Christa Obold-Eshleman, *Victims’ Rights and the Danger of Domestication of the Restorative Justice Program*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 571, 572 (2004).

11. See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. REV. 359, 376 (2005) (“[T]he core restorative justice principle is decision-making by parties with a stake in the offense, principally the victim and the offender.”).

12. See Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, 46 ADVOCATE 22 (2003) [hereinafter Reimund, *Mediation in Criminal Justice*].

13. *Id.* (“The mediation style advocated in victim offender meetings follows a humanistic model . . . [and is] dialogue-driven and relationship focused, grounded in healing and peacemaking.”).

14. *Id.* (“The model emphasizes empowerment of the parties and mutual recognition with the mediator assuming a non-directive role. This contrasts to traditional mediation where the mediator is in a directive role with a primary goal of settlement.”).

15. See W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 502 (2008) (“Although its roots are based in ancient traditions, the processes now associated with modern restorative justice only began to appear in the late 1970’s.”).

criminal justice. This technique encompasses the most essential of restorative justice's primary goals, such as:

- (1) Focus on the harms and consequent needs of the victims, as well as the communities' and the offenders';
- (2) Address the obligations that result from those harms (the obligations of the offenders, as well as the communities' and society's);
- (3) Use inclusive, collaborative processes;
- (4) Involve those with a legitimate stake in the situations, including victims, offenders, community members, and society; [and]
- (5) Seek to put right the wrongs.¹⁶

This Article argues that integrating VOM as a staple part of sentencing for adult offenders in non-violent theft cases¹⁷ provides the greatest advantages to all parties. Making this change helps to advance restorative justice as a viable, workable endeavor by highlighting so many of the movement's goals.¹⁸ Specifically, incorporating VOM as a standard sentencing component for non-violent theft crimes will afford each person with a stake in the incident to come together and potentially resolve the lingering harm. Should both parties to the VOM choose to do so, they will also have the ability to enter into agreements about restitution or other reparative acts. Beyond offering victims the opportunity to express hurt, anger, and confusion about the crime, offenders may also explain why the crime took place. This key piece of VOM serves dual purposes—to give victims understanding and to allow offenders to come to terms with why they committed the crime.

Part I provides a brief overview of restorative justice and VOM in America. Part II illustrates the need for VOM through comparing the problems inherent in America's retributive system to the solutions provided through restorative justice. Part III outlines the proposed VOM program, which will deal specifically with all non-violent theft crimes and adult offenders. This Part will argue that non-violent theft crimes would be ideal for VOM because of its unique effects, focus on victims, and ability to counterbalance systemic inequities. Part IV argues ways for federal and state courts to implement this program. Part V argues that, based on empirical evidence, this program provides a high likelihood for success. As a result, Theft VOM proves restorative justice's viability and legitimacy as an option in the American criminal justice system.

16. See Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, 29 VT. B.J. 39 (2003).

17. Such as Connie's.

18. *Id.*

I. RESTORATIVE JUSTICE

Restorative justice deviates from the traditional model of American criminal justice. Under the typical “retributive justice system,” juries or judges determine guilt¹⁹ and sentence those convicted.²⁰ Subsequently, the offender serves a sentence of incarceration before release.²¹ Despite the fact that victims suffer the physical or emotional harm of a crime, criminal punishment functions to repay a debt to society or the State with only marginal input from victims.²² Beyond ignoring the victims’ needs for restoration, this system also fails offenders and the greater community. Standard incarceration does little to generate offender accountability and even less to correct the causes of crime.²³

A. *The Broad Movement*

The term “restorative justice” encompasses a wide variety of concepts, techniques and methods, often making it difficult to identify a cohesive definition.²⁴ Further blurring the lines of this movement, each of the subdivisions within restorative justice differ only subtly from one another. Instead of well-developed boundaries and a widely accepted definition, restorative justice hinges on a unifying set of principles and goals.

Typically, the movement seeks to restore the offender, the victim, and the community.²⁵ Under the restorative model, these key players—often referred to as “stakeholders”—must come together “in search for

19. Or individuals charged with crimes plead guilty in exchange for softer sentences.

20. See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2195–96 (1993) (“[R]etributive justice [is] the formal processing of an individual who, because he broke the law, is prosecuted to determine guilt and is punished. Retributive justice, as a process, does not anticipate or welcome the direct involvement of the victim.”).

21. Capital sentencing and punishment is, of course, an exception to this serve-and-release model.

22. Mika, *supra* note 20, at 2195.

23. *Id.* (“The need of victims to be made whole, the need of offenders to be accountable and to responsibly restore fractured relationships, and the need of communities to confront the underlying causes of criminal conflict and be actively involved in creating justice are generally ignored in the retributive justice model in favor of an obsession with form, procedure, and process.”).

24. See John Braithwaite, *Narrative and “Compulsory Compassion,”* 31 LAW & SOC. INQUIRY 424–26 (2006) (“Critics of restorative justice (e.g., Ashworth 1998, von Hirsch et al. 2003) say that there is a certain incoherence about it compared to normatively precise theories of criminal justice like retributivism or deterrence. . . . Competing visions of what are good restorative practices are almost as diverse.”).

25. Lanni, *supra* note 11, at 359.

solutions which promote repair, reconciliation, and reassurance.”²⁶ Further, the movement places special emphasis on “the attempt to bring victims and offenders together in an inclusive encounter aiming at a consensual resolution of the prejudices caused by a crime.”²⁷ In terms of method, restorative justice frequently uses “levels” of stakeholders, directly dependent on the size of the greater “community.” VOM, for example, involves the offender, victim, and a mediator.²⁸ This may expand to family group conferencing, where the parties’ immediate family members join the mediation.²⁹ Finally, this may also increase to circle conferencing, which incorporates community members into the process as well.³⁰

Ultimately, restorative justice’s focus on “healing relationships, as opposed to balancing hurt with hurt”³¹ is an unequivocal paradigm shift from the view of crime and punishment under the traditional retributive model. Retributive justice removes the victim almost entirely from the equation, particularly because it considers crime a grievance against the *state* and not against the one who actually suffered harm.³² Restorative justice, on the other hand, contemplates that crime is “a violation of people and of interpersonal relationships.”³³

Though it has experienced a modern rebirth, restorative justice is not a new concept. Indigenous cultures the world over utilized restorative techniques or considered restorative values to deal with the aftermath of crime.³⁴ To that end, restorative justice has been the single most dominant

26. Obold-Eshleman, *supra* note 10, at 572.

27. See Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL’Y 91, 95 (2011).

28. See Tina S. Ipka, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL’Y 301, 308 (2007) (“The oldest and most common practice of restorative justice is the victim-offender conference, often called victim-offender mediation. This process involves bringing the victim and offender together to resolve their individual issues in reference to the crime committed.”).

29. *Id.* (“This practice enlarge[s] the circle of primary participants to include family members or other individuals significant to the parties directly involved.”).

30. *Id.* (“Circles expand the list of participants even further than family group conferencing. In this program, in addition to the victim, offender, and families of the victims, other community members take part in the restorative process.”).

31. See John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185 (2000) (“Healing relationships, as opposed to balancing hurt with hurt, is one core value of restorative justice.”).

32. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22 (“Since we evolved from [the British common law] legal system, crimes are seen as violations against the state and not against the individual victim.”).

33. Reimund, *The Law and Restorative Justice*, *supra* note 6, at 670.

34. See Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515 (2007) [hereinafter Umbreit et al., *Restorative Justice*].

criminal justice model in a historical context.³⁵ The 1970s ushered in the formal restorative justice movement,³⁶ though it remained a small part of the criminal justice system.³⁷ During the mid-1990s, the movement finally earned a place at the fringe of the American criminal justice mainstream,³⁸ used in instances of minor crime and with juvenile offenders.³⁹ Typically, states and local communities make individual decisions to use restorative justice in their criminal justice systems.⁴⁰

Not only did restorative justice take root in America, but across the world also.⁴¹ Japan, Australia, Canada, South Africa, South Korea, Russia, Ukraine, most of Europe, and some South American countries all boast restorative programs.⁴² Some countries use them to deal with even the most severe of crimes.⁴³ South Africans, for example, employed restorative justice in response to war crimes committed by individuals in political power.⁴⁴ Though other nations have incorporated the elements

Among these are many Native American tribes within the United States, the Aboriginal or First Nation people of Canada, the Maori in New Zealand, Native Hawaiians, African tribal councils, the Afghani practice of jirga, the Arab or Palestinian practice of Sulha, and many of the ancient Celtic practices found in the Brehon laws.

Id.; see also Ipka, *supra* note 28, at 307 (“The underlying principles of what is called restorative justice were present in early civilizations all over the globe.”).

35. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) [hereinafter Braithwaite, *Restorative Justice*] (“Restorative justice has been the dominant model of criminal justice throughout most of human history for all of the world’s peoples.”).

36. Walgrave, *supra* note 27, at 94.

37. Umbreit et al., *Restorative Justice*, *supra* note 34, at 519.

38. *Id.* at 520 (“The movement began to enter the mainstream in some local and state jurisdictions beginning in the mid-1990s.”).

39. Ipka, *supra* note 28, at 301 (“Restorative justice is a phrase that is known only in small, concentrated pockets of the United States and other parts of the world. It is well known in alternative dispute resolution circles and in juvenile courts.”).

40. Umbreit & Armour, *Restorative Justice and Dialogue*, *supra* note 8, at 67–68.

41. *Id.* at 69.

42. *Id.*

43. Walgrave, *supra* note 27, at 92 (“Currently, restorative justice practices are being implemented for an increasingly broad range of crimes, including the most serious ones, all over the world.”); see also MARK S. UMBREIT ET AL., VICTIMS OF SEVERE VIOLENCE IN DIALOGUE WITH THE OFFENDER: KEY PRINCIPLES, PRACTICES, OUTCOMES AND IMPLICATIONS, RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS 123 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2003); see also *Restorative Justice Around the World*, <http://www.restorativejustice.org/university-classroom/02world> (last visited Mar. 14, 2013) (“Restorative justice in Africa has been highlighted by recovery of indigenous justice practices, use of community service to address chronic prison overcrowding, national restorative responses to genocide and civil war, and the South African Truth and Reconciliation Commission.”).

44. Braithwaite, *Restorative Justice*, *supra* note 35, at 7 (“[Restorative justice is relevant]

of restorative justice in a widespread and systematic way, the American restorative justice movement remains relatively limited.⁴⁵ Restorative justice, however, maintains the potential to provide legitimate answers to the problems facing the system.⁴⁶

Despite widespread, success stories like Connie's, restorative justice faces steep criticism in the United States.⁴⁷ Public defenders and prosecutors alike raise concerns about due process for offenders and consistency in sentencing under a restorative regime.⁴⁸ The push towards retribution and incapacitation instills in the lay and legal public the notion that only the status quo can work.

B. Victim-Offender Mediation

Of restorative justice's plethora of techniques, VOM is the single most common method.⁴⁹ Across the world, there are more than 1300 programs in 18 countries utilizing VOM.⁵⁰ In America specifically, more courts have utilized VOM than any other restorative practice.⁵¹

to adult crime as well, including war crimes and crimes at the commanding heights of business power (as in corporate restorative justice) and political power (as in Archbishop Desmond Tutu's Truth and Reconciliation Commission in South Africa, which he explicitly sees as a restorative justice process)."); *see also* John Braithwaite et al., *Reconciliation, and Justice After War*, 27 OHIO ST. J. ON DISP. RESOL. 443 (2012).

45. Ipka, *supra* note 28, at 301.

46. Lanni, *supra* note 11, at 359–60.

[Restorative or Community justice emphasizes] the causes of crime, rehabilitating individuals, and repairing the harm caused by crime rather than punishing offenders according to tradition retributive or deterrent concerns. [These] initiatives are flourishing even as the mainstream criminal system faces a crisis of legitimacy in which an unprecedented number of citizens, many of them African American males, are incarcerated for long periods under a harsh and rigid regime that aspires to do little more than to incapacitate and warehouse offenders.

Id.

47. The "tough on crime" mentality predominant in America creates stark opposition to the goals of restorative justice. Additionally, some have raised concerns about participant voluntariness, due process, and the actual feasibility of restorative practices. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 24–25.

48. *See* Jan Peter Dembinski, *Restorative Justice in Vermont: Part Two*, 30 VT. B.J. 49, 49 (2004).

49. Reimund, *The Law and Restorative Justice*, *supra* note 6, at 673.

50. *See* MARK S. UMBREIT ET AL., *THE IMPACT OF VICTIM-OFFENDER MEDIATION: TWO DECADES OF RESEARCH IN RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION AND CIRCLES* 121–43 (Allison Morris & Gabrielle Maxwell eds., 2001).

51. Reimund, *The Law and Restorative Justice*, *supra* note 6, at 673 ("Of all the restorative justice processes, victim-offender mediation (VOM) has been in operation the longest – over twenty years.").

Despite this worldwide popularity, VOM remains a limited part of the American criminal justice system. The United States' predominant view of restorative justice transfers seamlessly to VOM, reserving the method almost exclusively for juveniles convicted of misdemeanors or non-violent crimes.⁵² Although a minority in America, successful programs featuring VOM with adult offenders for a wide range of crimes do exist.⁵³ America, however, does boast more than 400 programs that feature some form of VOM.⁵⁴

In barest terms, VOM serves to facilitate a conversation between a convicted criminal offender and the individual who sustained the injurious effects of that act.⁵⁵ Under ideal circumstances, however, VOM serves as a healing process for victims and offenders. Through this method, victims and offenders meet and "discuss how the crime has impacted their lives, discuss the physical, emotional, and financial impact of the crime, and receive answers to lingering questions about the crime and the offender."⁵⁶ It requires both offender and victim consent.⁵⁷

Though each individual program varies, the basic model for VOM follows a pattern:

1. An intake phase;
2. A preparation phase, during which the mediator meets with the victim and the offender individually; and
3. The victim-offender meeting, which includes an opening statement by the mediator, storytelling by the victim and offender, clarification of facts and feelings, reviewing victim losses, and a closing statement from the mediator.⁵⁸

Should the victim and offender choose to do so, they may discuss options for compensation and enter into a restitution agreement during the meeting.⁵⁹ Additionally, the individual meetings in phase two play a particularly important role in the process. This step provides the mediator

52. *Supra* text accompanying note 39; see also Reimund, *The Law and Restorative Justice*, *supra* note 6, at 676 ("[T]he majority of cases across the country that are referred to VOM involve misdemeanors, property crimes, and minor assaults – all committed by youthful offenders.").

53. Reimund, *The Law and Restorative Justice*, *supra* note 6, at 676 (Milwaukee and Des Moines both employ VOM for adult offenders, but they are in a minority).

54. *Id.* at 673 ("[VOM] is the most utilized model in the United States, accounting for almost 400 programs.").

55. Ipka, *supra* note 28, at 308 ("This process involves bringing the victim and the offender together to resolve their individual issues in reference to the crime committed.").

56. *Id.* at 309.

57. *Id.* ("It is important that both parties agree to participate in the process, for it cannot proceed successfully without consent from the key people involved.").

58. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22.

59. *Id.* at 23.

with the opportunity to both explain the program in a neutral setting and to build a rapport with each party.⁶⁰ A positive relationship between the mediator and each party helps facilitate genuine conversation and healing during the actual mediation.⁶¹

Despite the necessity and importance of the first two phases, the face-to-face meeting is the crux of VOM.⁶² This phase acts as the very embodiment of restorative justice's goal to "bring victims and offenders together in an inclusive encounter aiming at a consensual resolution of the prejudices caused by a crime."⁶³ The face-to-face meeting typically takes place in a neutral setting.⁶⁴ Typically, the victim and offender sit across from each other.⁶⁵ Following the mediator's opening comments, the victim and offender talk to each other.⁶⁶ First, the victim receives unlimited time to discuss the crime's impact with the offender.⁶⁷ Then, the offender has equal opportunity to tell his or her side of the story.⁶⁸ From there, victims may ask questions and delve deeper into why the crime took place at all.⁶⁹ Finally, the two parties may come to an agreement for restitution; however, this sometimes comes in the form of community service or other "creative alternatives," instead of financial restitution.⁷⁰

VOM differs from mediation in a civil setting in two key ways: the settlement and the mediator's role. The outcome sought drives the role of the mediator. In civil law circumstances, parties enter mediation in order to resolve a dispute that they cannot settle on their own.⁷¹ Due in large part to the parties' desire to come to a mutually acceptable agreement, a mediator in this context must take on a directive role.⁷² In VOM, however, the mediation "is dialogue-driven and relationship focused, grounded in healing and peacemaking."⁷³ Further, "the mediation of restitution is a means to an end, namely, the reconciliation of victim and offender and the restoration of interpersonal relationships damaged by

60. *Id.*

61. *Id.*

62. *Id.*

63. Walgrave, *supra* note 27, at 95.

64. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 23.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See Mark K. Schoenfeld, *Choosing ADR Practitioners: Some Philosophical Considerations*, 58 BENCH & B. MINN. 23 (2001).

72. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 23; see also Mark S. Umbreit, *Humanistic Mediation: A Transforming Journey of Peacemaking*, 14 MEDIATION Q. 201 (1997).

73. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22.

criminal conflict.”⁷⁴ Thus, the mediator must take on a non-directive role.⁷⁵ The mediator will establish the ground rules, initiate the dialogue, and then allow the victim and offender to talk.⁷⁶ After turning the mediation over to the parties, the mediator will remain involved, but may only respond if someone “get[s] stuck or indicate[s] a need for assistance.”⁷⁷

II. THE NEED FOR VOM

VOM is an ideal candidate to advance restorative justice in America particularly because it succinctly accomplishes the movement’s guiding values. The question as to whether America needs VOM remains. Currently, the criminal justice system faces criticism and still fails to account for victims adequately. VOM programs have tremendous potential to assist in correcting prison overcrowding, recidivism, and other controversial aspects of criminal sentencing and the justice system. Additionally, these programs give victims a new role to play—one that allows them to cope with the crime’s impact in a meaningful way.⁷⁸

A. Criticism of the Criminal Justice System

The American criminal justice system has come under scrutiny for a myriad of reasons, particularly related to the prison system.⁷⁹ Since the 1970s, America’s prison population has grown by 700%.⁸⁰ This increase outpaces both population growth and crime.⁸¹ To that end, the United States has only 5% of the world’s population, yet houses 25% of the world’s prison population.⁸² America leads the world in both absolute numbers and per capita rates for incarceration—more than China and

74. Mika, *supra* note 20, at 2195.

75. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 23.

76. *Id.*

77. *Id.*

78. Mika, *supra* note 20, at 2193 (“[A]mple evidence exists to affirm that victim-offender mediation has forged for itself an increasingly significant role and place as an alternative approach even within the continuum of largely conventional justice services.”).

79. See *The ACLU’s Problems with Mass Incarceration* [hereinafter *Problems with Mass Incarceration*], available at https://www.aclu.org/files/assets/massincarceration_problems.pdf (last visited Aug. 22, 2013) (“[O]ur criminal justice system is not doing a good job. It has failed one every count: public safety, fairness, and cost-effectiveness. Today, more Americans are deprived of their liberty than ever before – unfairly and unnecessarily, with no benefit to public safety.”).

80. See *id.*

81. *Id.*

82. *Id.*

Russia.⁸³

Further complicating the American race to incarcerate, the prison population boom disproportionately affects minority communities.⁸⁴ For African American males, the incarceration rate is 1 in 9.⁸⁵ This is higher than the incarceration rate for any other group of Americans.⁸⁶ Further, Latinos face incarceration at twice the rate of whites.⁸⁷ As a result, racial minorities comprise 60% of the prison population, despite their minority status in the general population.⁸⁸

The “get tough crime policies” that rose to prominence in the 1970s fuel mass incarceration.⁸⁹ Despite “hard on crime” initiatives and legislation and the overwhelming increase in incarceration, crime rates have not significantly decreased.⁹⁰ With only negligible decreases in crime and a high recidivism rate, it is clear that the system in place is not working. The bleakness created by these policies extends beyond the racially disparate impact and inefficiency. The United States, as a whole, spends exorbitant sums on the prison system.⁹¹ For example, the Bureau of Prisons requested \$6.9 billion for fiscal year 2013 for the federal prison system alone.⁹² According to the most recent figures, taxpayers spent \$39 billion total on prison systems in 40 states.⁹³ Finally, approximately one “out of every 15 state discretionary fund dollars” funds the prison system.⁹⁴

83. *Id.*

84. Mika, *supra* note 20, at 2193–94.

85. *See Problems with Mass Incarceration, supra* note 79.

86. *Id.*

87. *Id.*

88. *Id.*

89. Mika, *supra* note 20, at 2193 (“Get tough crime policies since the 1970s have fueled such expansion, including enforcement targeting such as the drug war, mandatory minimum incarcerative sentences, and restrictions on parole.”).

90. *Id.* at 2194 (“[D]espite the unparalleled growth and general punitiveness of the criminal justice system, and the manifold policies that animate its excesses, crime rates have not decreased appreciably, nor are citizens safer or more secure.”); *see also Problems with Mass Incarceration, supra* note 79.

91. *See Problems with Mass Incarceration, supra* note 79 (“Incarceration and related costs have quadrupled over the past 20 years and now account for a staggering 1 out of every 15 state discretionary fund dollars.”).

92. *See* Nancy La Vigne & Julie Samuels, *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions* (Dec. 2012), available at <http://www.urban.org/UploadedPDF/412693-The-Growth-an-Increasing-Cost-of-the-Federal-Prison-System.pdf> (last visited Aug. 23, 2013) (Ten states did not participate in the Vera Institute of Justice study that calculated taxpayer costs).

93. *See* Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (Jan. 2012, updated July 20, 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/http_www.vera.org_download_file=3495_the-price-of-prisons-updated.pdf (last visited Aug. 23, 2013).

94. *Problems with Mass Incarceration, supra* note 79.

These alarming mass incarceration trends ultimately “destabilize[] individuals, families and entire communities.”⁹⁵ Recidivism causes destabilization to continue, and the criminal justice system does little to prevent crime or rehabilitate the offender.⁹⁶ VOM programs can help counteract many of these issues.⁹⁷ Advocates of VOM point to the method’s ability to reduce crime and recidivism as justification for incorporating it into the criminal justice system.⁹⁸ Using VOM as a partial or complete replacement for prison sentences clearly aids in decreasing incarceration overpopulation and subsequent costs. Further, the technique helps to prevent offenders from rationalizing their wrongdoing and put criminal activity behind them.⁹⁹ This turns offenders into “instruments of healing rather than harm,” brings accountability into criminal justice, and can decrease recidivism.¹⁰⁰

B. *The Victim’s Role*

Further complicating the country’s punishment problems, the retributive model promulgated by the American criminal justice system “does not anticipate or welcome the direct involvement of the victim.”¹⁰¹ This is due in large part to the system’s view on crime, that it is a violation against the state and not against the victim.¹⁰² Thus, punishment serves to repay the debt to society created as a direct result of the crime.¹⁰³ The victim may act as a witness, but will likely have no further role at trial,¹⁰⁴ ultimately relegated to a minor role throughout the adjudication process.¹⁰⁵ The retributive model ignores the victims’ needs, particularly

95. *Id.*

96. *Id.* (“[M]ore than half of all people released from prison return within three years.”); see also Mika, *supra* note 20, at 2194 (“Criminal justice policies in the past twenty years reflect a reluctance to invest in prevention and services to address social problems that are known to be closely related to crime and delinquency, or in alternatives to incarceration.”).

97. Mika, *supra* note 20, at 2194 (“[P]roponents of victim-offender mediation in Europe and the United States have closely tied rationalizations for their program innovations to the failure of contemporary criminal justice policy” and “increasingly the public looks to alternative sentencing programs to assist in crime prevention and the rehabilitation of offenders, and to provide relief from the spiraling costs of crime control.”).

98. *Id.*

99. See Lynn S. Branham, *Plowing in Hope: A Three-Part Framework for Incorporating Restorative Justice into Sentencing and Correctional Systems*, 38 WM. MITCHELL L. REV. 1261, 1267–68 (2012).

100. *Id.* at 1268.

101. Mika, *supra* note 20, at 2195.

102. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22; see also *supra* Part I.A.

103. Mika, *supra* note 20, at 2195.

104. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22.

105. *Id.*

for emotional and physical restoration.¹⁰⁶ This instills “[f]rustration, pain, guilt, and alienation” in victims, and denies them the opportunity for catharsis.¹⁰⁷ Restorative justice, on the other hand, recognizes that crime is something “personal and social.”¹⁰⁸ As Howard Zehr summarily explains: “Crime 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, and reassurance.”¹⁰⁹

Because of this paradigm shift, justice models like VOM focus on victim reparation and “the victim and the injury suffered.”¹¹⁰ The opportunity to describe the damage caused by a crime and receive answers to lingering questions about that crime provides many victims with the feeling of catharsis.¹¹¹ It is in this unique way that VOM meets “the unrequited needs of victims struggling with the after-effects of crimes committed against them.”¹¹² Finally, VOM comes with an opportunity for multiple forms of reparations.¹¹³ This may come in the form of financial restoration or through one more alternative, such as community service,¹¹⁴ and further rounds out the degree to which VOM can restore victims.¹¹⁵

III. A NEW VOM PROGRAM

This Article argues that courts across America need to expand their restorative justice practices in order to counteract issues in the criminal justice system,¹¹⁶ as well as to account for victims’ needs. To meet this end, this Article proposes a new VOM program to focus on adult offenders in non-violent theft cases and their victims.¹¹⁷ Essentially, any crime in which one person taking the personal property of another in a

106. Mika, *supra* note 20, at 2195.

107. Bibas & Bierschbach, *supra* note 1, at 100.

108. Mika, *supra* note 20.

109. Reimund, *Mediation in Criminal Justice*, *supra* note 12, at 22 (quoting HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 178–79 (1990)).

110. See John O. Haley, *Beyond Retribution: An Integrated Approach to Restorative Justice*, 36 WASH. U. J.L. & POL’Y 1, 3 (2011).

111. *Id.* at 4.

112. Branham, *supra* note 99, at 1267.

113. Mika, *supra* note 20, at 2192 (“[T]he most tangible and obvious results of successful victim-offender mediation are restitution, and to a lesser degree, community service work.”).

114. *Id.*

115. See *infra* Part III.A.1.

116. *Supra* Part II.

117. The author selected non-violent theft crimes as a way to make using VOM for adult offenders more palatable to the conservative audience of her Sentencing Theory class. The author would personally prefer to see VOM utilized in a wide range of crimes.

non-violent manner qualifies for this proposed program ("Theft VOM").

Theft VOM will not override retributive sentences entirely. Instead, it must become an integrated part of the criminal justice system, blending restorative practices with incarceration. In order to prevent due process concerns, offenders must be found guilty by a court or plead guilty in order to participate in Theft VOM. The victim and offender must consent to the process.¹¹⁸ Because Theft VOM contemplates becoming part of the presumptively correct sentence in non-violent theft crimes, however, the program will function on an "opt-out" basis.¹¹⁹ Participating offenders need to put forth a good faith effort during Theft VOM as well.

Per the American Bar Association's VOM guidelines, Theft VOM requires confidentiality, in that statements made during the meeting are inadmissible in later proceedings.¹²⁰ Mediators must receive rigorous VOM training, and those who hold legal degrees will be preferred. Finally, successful completion of Theft VOM will entitle an offender to a reduction in prison sentence.

A. VOM and Non-Violent Theft Crimes

Because crime is both social and personal,¹²¹ it affects victims in an intense way that *requires* healing.¹²² In addition to the physical loss, crime creates feelings of violation, belittlement, and a panoply of other negative emotions.¹²³ Theft crimes, in particular, also involve physical property loss, be it a significant financial loss or a small one. The sense of violation or belittlement that accompanies crime takes on a unique aspect with theft crimes—sentimental loss. Beyond these value-based losses attached to the missing item or items, theft victims feel fear of re-victimization and a loss of security.

Because of these unique effects on victims, theft crimes present a rich opportunity for VOM. The face-to-face collaboration¹²⁴ provided through VOM allows victims to discuss the crime's emotional impact on their

118. Ipka, *supra* note 28, at 309.

119. *See infra* Part IV.B.

120. Umbreit et al., *Restorative Justice*, *supra* note 34, at 520 (The ABA officially endorsed VOM in 2004 and set forth guidelines for its development. In addition to confidentiality and inadmissibility at criminal and civil court proceedings, the ABA also requires participator consent and that offenders do not incur adverse repercussions for their participation.).

121. Mika, *supra* note 20, at 2195.

122. Bibas & Bierschbach, *supra* note 1, at 87 ("Remorse and apology should also loom large in the criminal arena, where victims' wounds are the greatest and need the most healing.").

123. *Id.* at 109 ("If you are mugged or your car is broken into, you are distressed not just because you lose money in your wallet or must pay to replace your radio. You likely feel violated and belittled by the perpetrator and his act.").

124. Franklin, *supra* note 2.

lives¹²⁵ and to find the answers to questions about the crime, such as why the offender stole in the first place. Offenders also have the opportunity to articulate their remorse during these confrontations with the very real and very human consequences of their illegal actions.¹²⁶ As Stephanos Bibas and Richard A. Bierschbach describe, VOM's "entire process can provide a starting point for forgiveness and reintegration."¹²⁷ With Theft VOM, offenders discover the monetary and emotional losses that occurred because of their behavior. This ultimately puts the human element back into the crime and its consequences, and prevents offenders from rationalizing their criminal behavior.¹²⁸

1. Theft VOM Highlights Victim Rights

Theft VOM can increase restorative justice's legitimacy by highlighting VOM's effects, generally, on crime victims. Within the criminal justice system's status quo, victims have one opportunity to address an offender: during sentencing.¹²⁹ This setup deprives the victim of any real opportunity to describe the crime's impact upon his or her life,¹³⁰ just as it denies the offender any legitimate way to express remorse.¹³¹

125. Bibas & Bierschbach, *supra* note 1, at 88 ("Victims, in return, can air their sorrows while expressing forgiveness to the wrongdoer."); *id.* at 100–01 ("Frustration, pain, guilt, and alienation replace potential for closure, relief, healing, and reconciliation.").

126. *Id.* at 115.

An offender "cannot simply rationalize the crime as being minor and harmless when a real person stands in front of him describing the physical and emotional pain directly flowing from his behavior." By humanizing the transgression and its consequences, face-to-face interaction can break down pride, fear, pain, anxiety, and other barriers to accepting responsibility and thus pave the way for genuine repentance.

Id.

127. *Id.*

128. Branham, *supra* note 99, at 1267.

129. Bibas & Bierschbach, *supra* note 1, at 99–100.

Despite recent dramatic increases in victims' rights, victims play minimal roles at sentencing. . . . Victims usually sit with the public behind the defendant while the judge evaluates the defendant's words and demeanor. At most, they read brief victim-impact statements or, more commonly, submit written statements before sentencing, which judges rarely read aloud.

Id.

130. *Id.* at 100 ("There is no victim-offender dialogue and no opportunity for face-to-face apology or expressions of contrition.").

131. *See supra* Part II.A.

Although the current system negatively affects offenders, its effect on victims is even more disturbing. Foregoing opportunities for victims to express their feelings or get answers to questions about the crime can keep victims from moving on with their lives. “Frustration, pain, guilt, and alienation replace the potential for closure, relief, healing, and reconciliation.”¹³² Restorative justice’s supporters argue that this tension detracts from some of criminal law’s main substantive goals.¹³³ This disparity furthers the “false message” that the victim is worth less than the offender,¹³⁴ which must be rectified in order to restore victims.

Theft VOM, conversely, provides the victims of theft with the unique opportunity to deal with these negative effects and convert them into opportunities for healing and moving forward. Where victims once had very limited, if any, chances to address the offender, victims who participate in Theft VOM engage in a dialogue with the offenders. During this dialogue, victims can ask questions. They have the opportunity to “learn why the crime happened, receive needed assurance that it was not their fault, [and] overcome their resentment.”¹³⁵ In essence, Theft VOM puts the focus back on the victim—the person or people who must bear the burdensome effects of the crime committed. In addition, this process “can provide a starting point for forgiveness”¹³⁶ and afford victims the chance to “reap the substantial social, psychological, and moral benefits”¹³⁷ that VOM offers.

The available empirical evidence indicates that victims appreciate the healing opportunities VOM provides.¹³⁸ Many of the individual studies utilized in the meta-analysis detailed in Part V reveal that VOM helps victims deal with psychological damage caused by crime.¹³⁹ This indicates that, in terms of meeting victims’ needs, VOM succeeds where

132. Bibas & Bierschbach, *supra* note 1, at 100–01.

133. *Id.* at 101; *see also id.* at 109–10 (“As [David Kahan] puts it, ‘The distinctive meaning of criminal wrongdoing is its denial of some important value, such as the victim’s moral worth.’”).

134. *Id.* at 110.

135. *Id.* at 115, 124 (“Victims can ask offenders why the crime happened, give voice to their wounds, and heal.”).

136. *Id.* at 115.

137. *Id.* at 100.

138. As discussed in *infra* Part V.

139. *Infra* Part V; *see also* Bibas & Bierschbach, *supra* note 1, at 115.

An offender “cannot simply rationalize the crime as being minor and harmless when a real person stands in front of him describing the physical and emotional pain directly flowing from his behavior.” By humanizing the transgression and its consequences, face-to-face interaction can break down pride, fear, pain, anxiety, and other barriers to accepting responsibility and thus pave the way for genuine repentance.

the retributive model fails and relegates victims to the periphery of the justice system.¹⁴⁰

2. Theft VOM as a Counterweight

Under the current system, defendants who offer up apologies during sentencing tend to receive reduced sentences.¹⁴¹ This occurs at both the federal and state levels.¹⁴² Conversely, defendants who do not express any kind of remorse may receive harsher sentences.¹⁴³ Problems with this system arise very quickly when defendants are discouraged from making public apologies for strategic reasons.¹⁴⁴ Beyond the strategic reasons keeping defendants from giving apologies, the procedures put in place to increase efficiency in criminal justice discourage remorse.¹⁴⁵ This situation sets up an automatic tension, leaving “criminal law in the uneasy position of judging offenders based on expressions it has done little to elicit or probe.”¹⁴⁶

Offenders currently experience an unbalanced form of criminal justice because judges—in addition to most of society—put such a premium on remorse while the system does little to allow for such expressions.¹⁴⁷ Theft VOM can counterbalance this inequity. Because it would be part of the presumptively correct sentence, the substantial majority of offenders

140. See generally Reimund, *Mediation in Criminal Justice*, *supra* note 12; *supra* Part II.B.

141. Bibas & Bierschbach, *supra* note 1, at 93 (“[T]he presence or absence of remorse, contrition, or apology can greatly help or hurt defendants.”).

142. *Id.*

In federal court, for example, judges reduce sentences by two or three levels for defendants who express contrition or remorse. At the high end of the Federal Sentencing Guidelines, this reduction can subtract years from a defendant’s sentence. . . . The effect is just as stark at the state level. In capital sentencing, according to one study, a defendant’s perceived remorse can significantly reduce the likelihood that a jury will impose the death penalty, especially for less vicious murders.

Id.

143. *Id.* at 92 (“[J]udges . . . cite defendants’ lack of remorse when imposing harsh sentences.”).

144. *Id.*

145. *Id.* at 100 (“Context and procedure, in short, discourage the expressions about which the criminal law cares.”); *id.* at 98 (“By the time of sentencing, criminal procedures have done little to encourage repentance, apology to victims, or coming to terms with one’s guilt.”).

146. *Id.* at 100; see also *id.* at 92 (“Judges, sentencing juries, the news media, and the public overwhelmingly weigh remorse heavily in disposing of criminal cases and assessing offenders as persons.”).

147. See *id.* at 92 (“Judges, sentencing juries, the news media, and the public overwhelmingly weigh remorse heavily in disposing of criminal cases and in assessing offenders as persons.”).

convicted of non-violent theft crimes would enter into VOM. Thus, the tendency to punish offenders in these cases more strictly or leniently based upon his or her statements at sentencing would cease. Sentencers would no longer have a need to reward apologies in the courtroom because they would take place in the confidential setting of VOM and all offenders who complete Theft VOM would receive a sentence reduction.

This would only correct the imbalance in non-violent theft crimes at first, as that is Theft VOM's scope. Nevertheless, Theft VOM establishes a solid foundation for expanding the technique to other crimes committed by adult offenders, which would extend this counterweight to many other offenses.¹⁴⁸

B. *Why VOM Integration?*

Many proponents of restorative justice believe its techniques should replace incarceration.¹⁴⁹ Taking a complete replacement approach to VOM, however, raises a number of serious concerns.¹⁵⁰ Some restorative justice critics point to the potential for self-incrimination as one of the movement's predominant problems because VOM encourages personal responsibility for crimes committed.¹⁵¹ Theft VOM counteracts this

148. The author's goal with Theft VOM is to showcase how successful restorative programs can be, in order to ultimately implement more of them for a wider variety of crimes.

149. Bibas & Bierschbach, *supra* note 1, at 103 ("Restorative justice, however, does not seek to reform criminal procedure to broaden and deepen the values served by criminal punishment. Instead, the restorative processes of remorse, apology, and reparation are supposed to be complete alternatives to punishment.").

150. The potential issues with VOM and restorative justice extend from constitutional concerns such as due process, self-incrimination, and lack of mediator training to general disbelief that anything outside of incarceration can work in America. Though extremely important, this Article will only deal with specific criticisms in a minimal way. For more information about the criticisms and concerns, see Braithwaite, *supra* note 35; Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not be Solely About Restoration*, 2003 UTAH L. REV. 439 (2003); Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211 (1999–2000); Dembinski, *supra* note 48; Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85 (2006); Dan M. Kahan, *What's Really Wrong With Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006); Obold-Eshleman, *supra* note 10; Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1 (2004); Reimund, *Mediation in Criminal Justice*, *supra* note 12; Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471 (2003); Malcolm Thorburn, *The Impossible Dreams and Modest Reality of Restorative Justice*, 30 QUEEN'S L.J. 863 (2005); Umbreit et al., *Restorative Justice*, *supra* note 34. This is by no means an exhaustive list of restorative justice's criticisms.

151. See Ikpa, *supra* note 28, at 311–12 ("Because restorative justice emphasizes acknowledgment of personal responsibility in the crime committed, it is inevitable that an admission of guilt will take place. What is problematic about the acknowledgement of responsibility is its propensity to violate the due process right against self-incrimination."); see also Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative*

criticism in two ways. First, imposing Theft VOM as a presumptively correct aspect of the sentence requires fact-finding and conviction at a trial or a guilty plea. To that end, using Theft VOM in conjunction with a prison sentence, offenders will not be encouraged to waive counsel or a trial for the sake of avoiding a more severe sentence.¹⁵² This removes potential for self-incrimination. Second, because Theft VOM employs the American Bar Association's guidelines, everything discussed in a VOM meeting is confidential and inadmissible in criminal and civil proceedings.¹⁵³ Removing many causes for concern through this integration allows restorative justice's goals to enhance the current criminal justice system without replacing incarceration entirely.¹⁵⁴ Further, the incorporation creates a much more holistic punishment process that includes an outlet for fundamental social interactions like remorse and apology¹⁵⁵ without forsaking procedural fairness.¹⁵⁶ Theft VOM broadens the focus "beyond the individual offender's badness to constructive measures to heal offenders, victims, and communities."¹⁵⁷

IV. IMPLEMENTING THEFT VOM

VOM, particularly for adults, lies outside the normal forms of punishment in America.¹⁵⁸ As a result, Theft VOM requires some degree of implementation in order to take effect. Federal courts have broader, easier to attain options for establishing this program, due in large part to

Justice, 52 STAN. L. REV. 751, 760 (2000) ("[B]ecause VOM pressures offenders to accept informal resolution of the charges against them and to waive representation by a lawyer, trial by jury, and the right to appeal, it would seem to stand on constitutionally questionable ground.").

152. Ipka, *supra* note 28, at 312 ("In a post-adjudicatory stage, this is not as problematic because the offender has already been found guilty.").

153. Mika, *supra* note 20, at 2195.

154. See Bibas & Bierschbach, *supra* note 1, at 91 ("Remorse and apology are not substitutes for punishment in most cases, as the restorative justice movement mistakenly contends. . . . Remorse and apology neither displace nor justify punishment, but, as functions of punishment, they can better complement and serve its goals."); *id.* at 89 ("Recently, academics have begun theorizing about incorporating moral education, healing, reconciliation, and victim vindication more directly into criminal law.").

155. *Id.* at 88 ("Remorse and apology could do much more than serve as gauges of an individual defendant's need for punishment. Remorse and apology are fundamentally about social interactions and relationships.").

156. *Id.* at 89 ("Unfortunately, criminal procedure is artificially divorced from these substantive values of the criminal law [like remorse and apology], focusing instead on accuracy, efficiency, and procedural fairness.").

157. *Id.* at 90.

158. Mika, *supra* note 20, at 2194 ("Where alternative programs or intermediate sanctions exist, they appear to only supplement probation, and do not substitute, in whole or in part, for incarceration. The total number of adult offenders served in alternative programs remains minuscule compared to the magnitude of arrests.").

current statutory and case law allowances. The U.S. sentencing statute¹⁵⁹ and the *United States v. Booker* decision¹⁶⁰ allow for Theft VOM. Incorporation at the state or local levels may require new legislation. Alternatively, authorizing judges to make restorative sentences presumptively correct would be the simplest solution.

A. Theft VOM at the Federal Level

1. The Sentencing Statute

The U.S. sentencing statute, 18 U.S.C.A. § 3553, enables each federal court to consider each one of the four purposes of punishment when sentencing offenders.¹⁶¹ Sentencers have the option to consider retribution,¹⁶² incapacitation,¹⁶³ deterrence,¹⁶⁴ and rehabilitation¹⁶⁵ when determining the punishment for a convicted offender.¹⁶⁶ In terms of rehabilitation, however, drafters wrote the subsection broadly, leaving room for a variety of programs.¹⁶⁷ Specifically, the statute grants courts the authority to “consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁶⁸ In particular, the “other correctional treatment” language

159. 18 U.S.C. § 3553 (2012).

160. See generally *United States v. Booker*, 543 U.S. 220, 260 (2005) (nullifying the provisions in the Federal Sentencing Act that made the guidelines mandatory. After this decision, trial courts gained the ability to reasonably alter the sentences within the federal sentencing guidelines. The Court had several options for resolving the conflicts between the Sentencing Act, the Federal Sentencing Guidelines, and the Sixth Amendment. Ultimately, the Court determined that the guidelines were not altogether unconstitutional, but that they must be considered advisory rather than mandatory. So long as judges use only the facts reviewed by juries to enhance or diminish a sentence, no Sixth Amendment violation has occurred.).

161. The purposes of punishment include retribution, deterrence, incapacitation, and rehabilitation.

162. Haley, *supra* note 110, at 3 (“Retribution in turn centers on the societal gravity offense, the “wrongfulness” of the act and the proportionality of the penalty.”).

163. *Id.* (“Incapacitation is equally offender oriented but applies sanctions designed solely to prevent repetition of criminal activity by physical restraint.”).

164. *Id.* (“Deterrence in contrast focuses on the offender and the potential for rational choice—that is, the capacity of the offender to weigh the risk of apprehension and penalty for particular criminal activity.”).

165. *Id.* (“[Rehabilitation] also centers on the individual offender but to be effective must also identify the causal factors for criminal behavior with correctional responses designed to correct the behavior and prevent future misconduct.”).

166. *Id.* The majority of punishments, however, follow retribution as a purpose.

167. See 18 U.S.C. § 3553 (2012). The statute allows the court to consider the “need for the sentence imposed . . . (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” *Id.*

168. *Id.*

contemplates treatment that allows offenders to discover why they committed the crime, thus preventing recidivism.¹⁶⁹

Because Theft VOM utilizes a dialogue designed to allow victims and offenders to discuss why the crime occurred in the first place,¹⁷⁰ offenders may have the opportunity to adjust their behavior after returning to their communities. This fits within the broad interpretation of the statute's "correctional treatment" language. Further, some academics claim that VOM, particularly through "remorse and apology," should "teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold."¹⁷¹ Each of these things get to the very heart of rehabilitation as a purpose of punishment and as the statute allows. Teaching lessons and dealing with the causes of crime both help to correct offender behavior. Additionally, these rehabilitative goals allow offenders to see the harm caused and repair it.¹⁷² It allows many "to put their wrongdoing behind them" and acknowledge the "real-life impact" of the crime.¹⁷³

2. The *Booker* Decision

The Supreme Court's decision in *Booker* also contemplates allowing Theft VOM.¹⁷⁴ After *Booker*, federal judges may use any facts reviewed by a jury to enhance or diminish a sentence beyond the sentencing guidelines without triggering a Sixth Amendment violation.¹⁷⁵ When originally created, the U.S. sentencing guidelines proscribed:

narrow, mandatory ranges of punishment based on the crime of conviction, the offender's prior criminal history, and a limited number of additional considerations, including facts that could substantially enhance an offender's sentence. The prosecutor need only prove such facts by a preponderance of the evidence to the sentencing judge, and the court would be bound to increase the punishment accordingly.¹⁷⁶

The *Booker* court declared this practice unconstitutional.¹⁷⁷

169. *Id.*

170. *Supra* Part III.A.1.

171. Bibas & Bierschbach, *supra* note 1, at 90.

172. *Id.* ("Remorse and apology would teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold.").

173. Branham, *supra* note 99, at 1267-68.

174. *See* *States v. Booker*, 543 U.S. 220, 268 (2005).

175. *See id.* at 268.

176. Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 787 (2006).

177. *See* *United States v. Booker*, 543 U.S. 220, 226 (2005); *see also* Luna & Poulson, *supra*

Particularly because *Booker* also held that the guidelines could not constitutionally be mandatory, some legal academics claim the decision “opens the door for new and progressive options beyond the confines of the United States Sentencing Guidelines, including the incorporation of restorative justice programs.”¹⁷⁸ Although the decision primarily removes the mandatory element of the Federal Sentencing Guidelines, it inadvertently allows judges to consider more than just “conviction rates and cumulative prison terms” when sentencing offenders.¹⁷⁹ Thus, there no longer exists a need for judges to follow the “will of prosecutors” or to and “impose ‘a stiff penalties on defendants who exercise their constitutional right to trial by jury.’”¹⁸⁰

According to Erik Luna and Barton Poulson, the language in the *Booker* decision allows for restorative purposes in punishment because it recognizes “the need to provide restitution” as a consideration at sentencing.¹⁸¹ Theft VOM contemplates restitution as a permissible, though not required, outcome of the meeting.¹⁸² The *Booker* dicta supports programs like Theft VOM through encouraging judges to impose sentences that “provide just punishment, afford adequate deterrence, [and] protect the public.”¹⁸³ Theft VOM, through its incorporation into the current system, creates a more holistic justice that blends remorse with procedural fairness.¹⁸⁴ Further, Theft VOM’s potential for rehabilitation and reducing recidivism¹⁸⁵ meet the aims of “adequate deterrence” and “protect[ing] the public.”¹⁸⁶

The U.S. Supreme Court currently places few limits on new allowances, which opens the door for incorporating restorative sentences such as Theft VOM at the federal level. This avenue for instituting Theft

note 176.

178. Luna & Poulson, *supra* note 176, at 796.

179. *Id.*

Because the Guidelines are no longer obligatory on the district court, judges are not bound to the will of prosecutors through their charging decisions and need not impose “a stiff penalty upon defendants who exercise their constitutional right to trial by jury.” As a result, there are no guaranteed sentences, possibly creating a different incentive structure for federal prosecutors, one that encourages them to think about considerations other than sheer conviction rates and cumulative prison terms.

Id.

180. *Id.*

181. *Id.*

182. *Supra* Part III.

183. Luna & Poulson, *supra* note 176, at 797.

184. Bibas & Bierschbach, *supra* note 1, at 89–90.

185. Branham, *supra* note 99, at 1289.

186. Luna & Poulson, *supra* note 176, at 797.

VOM is, however, theoretical.

B. Allowing Theft VOM at the State Level

Creating widespread acceptance for restorative justice practices by integrating Theft VOM is somewhat more problematic at the state level. While 18 U.S.C.A. § 3553 and *Booker* provide an excellent foundation for incorporating Theft VOM into the federal system, individual state and local courts do not necessarily have the same options under their governing laws. State and local governments may still incorporate Theft VOM; however, it would simply stem from state law sources instead of federal statutes and case law. States that have structures akin to federal statutes and case law have a pre-existing base for creating Theft VOM programs. States without that inherent structure have other options, such as judicial authorization.

1. Within Current Legislation

States with sentencing statutes similar to § 3553 have equal ability to integrate restorative justice techniques like Theft VOM for similar reasons.¹⁸⁷ Broad rehabilitation language contemplates any treatment that will correct an offender, unless otherwise limited. Other states may institute Theft VOM if their constitutions or sentencing statutes include reparative language. Vermont,¹⁸⁸ for example, enacted restorative justice programs statewide as a means to bring about the victim reparations delineated as a purpose of punishment in its constitution.¹⁸⁹ If language within state statutes, constitutions, or case law does not already provide a way to initiate Theft VOM, states could pass new legislation to allow for it.

2. Judicial Authorization

Authorizing judges to impose restorative sentences provides another possibility for instating Theft VOM as a nation-wide aspect of sentencing.¹⁹⁰ This works similarly to the way that *Booker* provides for restorative justice through allowing the federal judiciary to consider a

187. *Supra* note 167.

188. Dembinski, *supra* note 16 (“Restorative justice became the law and official policy of the State of Vermont on May, 24, 2000, under Title 28 VSA § 2a.”).

189. *Id.* at 41 (Vermont’s Constitution allows for “the reparation of injuries done to private persons” to be considered when sentencing offenders.).

190. Branham, *supra* note 99, at 1269 (“A primary step in integrating restorative justice into sentencing would be to authorize judges to impose what would be, in name, purpose, and content, “restorative sentences.”).

broad range of alternatives in sentencing.¹⁹¹ Ultimately, this avenue for institution urges for states to “adopt a presumption . . . that a ‘restorative sentence’ is the most appropriate one.”¹⁹² Further, this notion translates well for simply incorporating Theft VOM as an integral aspect of sentencing in non-violent theft cases. Though not conceptually complex, creating a presumption poses problems in its execution. Simply authorizing judges to impose restorative sentences or making restorative sentences a presumption in sentencing requires official action from a legislature or Supreme Court.

V. EMPIRICAL EVIDENCE OF SUCCESS

Researchers have conducted only a handful of empirical studies on VOM. Taking the available studies a step further, several of restorative justice’s proponents compiled the information into meta-analysis.¹⁹³ The meta-analysis paints a positive picture of restorative justice techniques, particularly VOM.¹⁹⁴

One meta-analysis study found that VOM is more effective than “traditional criminal justice” in multiple ways.¹⁹⁵ Both victims and offenders who participated in VOM found the criminal justice system to be fair.¹⁹⁶ Participation in VOM also increased victim and offender satisfaction in “the handling of their cases”¹⁹⁷ and increased belief in a fair outcome.¹⁹⁸ Another article cited similar statistics from a meta-analysis study—victims who entered into VOM with their respective

191. *Supra* Part IV.A.2.

192. Branham, *supra* note 99, at 1312.

193. See *Research and Statistics Division Methodological Series, The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (2001), http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rp01_1-dr01_1/rp01_1.pdf (last visited Mar. 22, 2013) (“Simply put, meta-analysis refers to an analysis of analyses. It is a statistical analysis of a collection of studies for the purposes of integrating the various and, often times, discrepant findings from a body of literature.”).

194. Bibas & Bierschbach, *supra* note 1, at 119 (“Empirical findings support the usefulness of this approach [VOM].”).

195. *Id.* at 131.

196. *Id.* (“82% of victims whose cases were handled in mediation believed that the criminal justice system was fair, versus 56% of those in court. Likewise, 91% of offenders whose cases were handled in mediation thought the criminal justice system was fair, versus 78% of those in court.”).

197. *Id.* at 131–32 (“The same meta-analysis found that 78% of victims in mediation were satisfied with the handling of their cases, versus 56% of victims in traditional court proceedings. Likewise, 84% of offenders in mediation were satisfied with the handling of their cases, versus 73% of offenders in court.”).

198. *Id.* at 132 (“Those in mediation are more likely to feel that the outcome was fair and satisfactory [–] 73% versus 54% of victims and 77% versus 67% of offenders.”).

offenders tended to be “less upset about crime,”¹⁹⁹ “be less afraid of re-victimization,”²⁰⁰ and experience a significantly increased chance of receiving compensation from offenders.²⁰¹ VOM research shows that “[a]s an empirical matter, then, it can be said that restorative justice outperforms standard court processes in facilitating the completion of reparations for the current offense and reducing the chance of future crime.”²⁰²

Though positive on its face, the meta-analysis and empirical research available on VOM provides only a limited look at the practice’s potential for success. The majority of the research focuses on VOM for juvenile offenders.²⁰³ Some studies, however, considered programs open to adult offenders, but usually as an addition to juvenile offenders. Some of the studies do not even disclose offender ages. In many of the available meta-analyses, age-specific breakdowns of each tested factor are not discussed.²⁰⁴ Additionally, most of the studies used in the various meta-analyses dealt with theft cases, at least in part. The majority focused on a wide range of misdemeanor and non-violent crime. As with information on age, very few of the studies delineated success rates by specific crimes. Despite these gaps in the current empirical research, meta-analysis of a various VOM programs indicates a high potential for success.²⁰⁵

The few studies focused on adults indicate similarly high success rates to the meta-analysis results. A Canadian study indicates that adult offenders’ victims found satisfaction with the VOM process.²⁰⁶ This

199. Luna & Poulson, *supra* note 176, at 800.

200. *Id.*

201. *Id.* (“Meta-analytic findings show that offenders who participate in restorative programs have substantially higher rates of completing their obligations (e.g., compensating victims for property damage) than do traditionally processed offenders.”).

202. *Id.* at 801.

203. Bibas & Bierschbach, *supra* note 1, at 133 (“One must read the data cautiously, because many of these studies focused on juveniles.”).

204. See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167 at 177 (2003) (“Unfortunately, none of the studies presented the data in a way that permitted subanalyses by participant characteristics [e.g., gender, age, and race/ethnicity] or case characteristics [e.g., category of crime].”).

205. *Id.* (“Overall, restorative justice practices substantially outperformed the court on almost every item for both victims and offenders.”).

206. See Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 FED. PROBATION, 33, 34 (1997).

A Canadian study (Perry, Lajeunesse, & Woods, 1987) found that 92 percent of people victimized by adult offenders who were involved in a mediation program in Winnipeg, Manitoba, were satisfied with the process. In a larger multi-site study of primarily adult programs in four Canadian provinces by Umbreit (1995a), 78 percent of victims indicated they were satisfied with the mediation

study only deals with satisfaction rates, leaving a number of other potential effectiveness measures untouched, yet it indicates great potential for Theft VOM.²⁰⁷ No research currently exists on whether or not the offender's age affects VOM success.²⁰⁸ Despite this lack of empirical evidence, the majority of America holds the belief that VOM can only be effective with juveniles.²⁰⁹

Widespread institutionalization of Theft VOM provides a unique opportunity for new empirical studies to test the success of adult programs. With the weight of the evidence indicating VOM's effectiveness and no evidence indicating that VOM for adult offenders cannot work,²¹⁰ there is little reason to avoid incorporating VOM into sentences for adults convicted of non-violent theft crimes.

CONCLUSION

Incorporating Theft VOM into the criminal justice system increases restorative justice's legitimacy and proves its viability as an option for America. Connie's story, detailed in the Introduction, highlights how victims and offenders can come together to resolve the issues and tensions left lingering in the wake of a crime. Although her VOM served as an alternative to incarceration, Connie's experience shows that positive benefits for the criminal justice system exist within restorative justice, particularly for non-violent theft crimes.

In terms of legitimacy, Theft VOM puts a focus on victims not currently present within the majority of criminal procedure. This paradigm shift offers victims a chance to discover why the crime took

process.

Id.

207. *Id.*

208. *Id.* ("[N]o research has examined the differential impact of mediation upon crime victims relative to whether the offender was a juvenile or an adult.").

209. *Id.* ("There have been many juvenile and criminal justice officials who have assumed that the victim-offender mediation process is most likely to be effective only with juvenile offenders. This is particularly true in North America, as evidenced by the relatively few mediation programs working with adult offenders.").

210. *Id.* at 39.

[T]he study lends strong support to greater use of the victim-offender mediation process with adult offenders. . . . The findings of victim satisfaction with the mediation process, independent of age of the offender, suggest that it is now time for the growing field of victim-offender mediation to develop more broadly within the context of the adult criminal justice system.

Id.

place and to explain how significantly the crime affected their lives. At the same time, offenders gain the opportunity see the human element of their actions. After a face-to-face encounter with the individual or individuals whom they hurt, offenders can no longer rationalize their behavior away as insignificant. Theft VOM highlights this healing dialogue and its potential for remorse and forgiveness for non-violent theft crimes. This also allows offenders who committed theft crimes, as well as the victims of these crimes, a unique opportunity to heal. Both victims and offenders who consent to Theft VOM can leave the process more satisfied while dealing with why the crime occurred in the first place.

With these benefits front and center in Theft VOM, restorative justice gains a stronger foothold in America. Although restorative purists may not find satisfaction with incorporating restorative techniques instead of replacing incarceration, this integration rounds out criminal punishment in a holistic way. This paradigm shift starts small with Theft VOM, but successful programs across the country will ultimately provide the base needed to expand restorative incorporation to more crimes.