NOTE

RESTITUTION, REHABILITATION, PREVENTION, AND TRANSFORMATION: VICTIM-OFFENDER MEDIATION FOR FIRST-TIME NON-VIOLENT YOUTHFUL OFFENDERS

I. INTRODUCTION

"Youthful predators," "teen killers," "young thugs"—these are terms commonly used in the media and political discourse to describe today's juvenile offenders.[1] Such characterizations foster a perception that youth crime is out of control, and that the best way to rein it in is to "get tough" on juvenile offenders and to treat them as adult criminals. In this regard, punishment, deterrence, and community protection are stressed, and restitution, rehabilitation, and prevention are, unfortunately, largely ignored.[2]

That "punitive zeitgeist"[3] has resulted in increasing incarceration of youthful offenders, not only for violent crimes, but for lower-level offenses as well.[4] Even though juvenile crime today is at its lowest level

1. Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, A.B.A Network, *at* http://www.abanet.org/crimjust/juvjus/12-4hmmjp.html (last visited Apr. 8, 2001).

2. *See* Craig Hemmens et al., *The Rhetoric of Juvenile Justice Reform*, 18 QUINNIPIAC L. REV. 661, 661 (1999). This "get tough" attitude is reflected in federal bills proposed in 1997 and 1999, neither of which have become law. *See infra* note 82; *see also* Roger J. R. Levesque & Alan J. Tomkins, *Revisioning Juvenile Justice: Implications of the New Child Protection Movement*, 48 WASH U. J. URB. & CONTEMP. L. 87, 95 (1995) (citing "public misperceptions of violent youth").

3. Levesque & Tomkins, *supra* note 2, at 93, 95 (decrying the overriding desire to punish that "prevails in the current fight against crime").

4. *See* AMNESTY INT'L, BETRAYING THE YOUNG: CHILDREN IN THE U.S. JUSTICE SYSTEM pt. III(2) (1998), *available at* http://www.web.amnesty.org/ai.nsf/index (last visited Apr. 8, 2001) (showing that over half the 50,000 children in twenty-eight state juvenile correction systems are first-time property and drug offenders); DIV. OF REHABILITATIVE SERVS., N.Y. STATE OFFICE OF CHILD AND FAMILY SERVICES, 1998 ANNUAL REPORT 39 (2000) [hereinafter 1998 ANNUAL REPORT]; *see also* Lauren Terrazzano, *Crackdown on Kids: Juveniles Receiving Longer Time for Less Serious Crimes*, NEWSDAY (Nassau), Nov. 30, 2000, at A7 [hereinafter *Crackdown on Kids*].

since 1980, youth are being incarcerated in greater numbers than ever.[5] This, in turn, has led to over-crowded, dangerously understaffed, poorly maintained juvenile facilities, as well as more frequent placement of children in adult jails.[6] Youthful offenders routinely emerge from incarceration less prepared for adult life and more likely to recidivate.[7] Juveniles who are discharged or placed on probation are at greater risk for future incarceration because they rarely are provided with the services that will help to prevent them from re-offending.[8]

A current crisis in the juvenile justice systems of Nassau and Suffolk Counties, in Long Island, New York, which officials have accurately noted "mirror[] what is happening elsewhere" in the country,[9] forcefully illustrates the impact of increased incarceration of youthful offenders. The Nassau County Juvenile Detention Center, one of seven county-run facilities in New York overseen by the State, has repeatedly

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5. *See* David Westphal, *Juvenile Crime Is Falling, Rapidly; But Public Believes Youth Crime Is Still on Increase*, NEWS TRIBUNE (Tacoma), Dec. 12, 1999, at A1 (noting that despite a 30% reduction in juvenile crime since 1994, there has been "a rush of tough-on-crime initiatives that sent more juveniles to adult court, put more metal detectors in the nation's schools and resulted in dozens of new curfews across the country"); *see also Crackdown on Kids*, *supra* note 4 (noting that family court judges on Long Island "offer little explanation for the upward trend in juvenile detention placements, other than to say they believe crimes have gotten more serious in recent years").

6. *See* AMNESTY INT'L, *supra* note 4, pt. III(1) (noting that between 1986 and 1995, the number of children being held in secure facilities increased by more than 30%); *see also* Kristin Choo, *Minor Hardships: Jailing Youths as Adults Is Gaining Ground—And So Are Its Critics*, A.B.A. J., Sept. 2000, at 20 (detailing appalling conditions of children being held in the Baltimore City Detention Center, an adult facility, as described in HUMAN RIGHTS WATCH, NO MINOR MATTER: CHILDREN IN MARYLAND'S JAILS (1999)); Lauren Terrazzano, *A System Overload: Nassau's Juvenile Detention Center Fails State Standards*, NEWSDAY (Nassau), Aug. 31, 2000, at A5 [hereinafter *System Overload*] (noting that the difficulties experienced by Nassau County's juvenile facility exemplify a "crisis" in New York State's juvenile justice system, "which has too few beds to accommodate the number of children being placed in it").

7. *See* Choo, *supra* note 6, at 20 (quoting Human Rights Watch attorney Michael Bocherek as saying that incarceration "neither reduce[s] crime nor lead[s] to rehabilitation[.] But [it] often do[es] lead to serious abuses."). Youths "held in adult facilities are nearly eight times more likely to commit suicide, twice as likely to be physically assaulted, and five times more likely to be sexually assaulted." *Id.* at 21; *see also* HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, COURT CAREERS OF JUVENILE OFFENDERS viii (1988) (noting that recidivism rates increase each time a juvenile offender is referred to the court system).

8. *See* Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601(a)(4) (1994) (listing the congressional findings that compelled the legislation, including "understaffed, overcrowded juvenile courts, prosecutorial and public defender offices, [and] probation services" and "inadequately trained staff" that "are not able to provide individualized justice or effective help"). Amnesty International quotes a Georgia juvenile court judge as saying, "I really have only two major choices. I can place these kids in incarceration, where they will learn to become better criminals, or I can send them home on probation, back to where they got in trouble in the first place." AMNESTY INT'L, *supra* note 4, pt. III(2).

9. *System Overload*, *supra* note 6.

failed inspections for fire code violations and unsanitary conditions.[10] It is presently staffed at "[d]angerously low" levels by often poorly trained workers.[11] Suffolk County has no juvenile detention center.[12] Authorities have been forced to place juvenile offenders in adult jails and substandard buildings, or transport them to juvenile facilities in other communities at a projected cost to the county of $1.5 million in the year 2000 (money that could be spent on a more effective juvenile justice system for Suffolk County).[13] Suffolk County's options were limited further when Nassau County terminated its contract to provide beds for Suffolk juvenile offenders.[14] The Suffolk County legislature recently passed a proposal to construct the county's own juvenile detention facility, but voters throughout Suffolk have been determined to keep the facility out of their communities, fearing lower property values and increased criminal incidents.[15] Yet, juveniles continue to be incarcerated for less serious crimes and for longer periods of time.[16]

The general history of the national juvenile justice system reflects an underlying tension between punitive and rehabilitative treatment of juvenile offenders.[17] That tension fosters, over time, policy shifts back

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10. *See id.*

11. *Id.*; *see also* Lauren Terrazzano, *Who's Guarding the Children?: Staff at Nassau Juvenile Center Overworked, Undertrained*, NEWSDAY (Nassau), Dec. 31, 2000, at A7 [hereinafter *Who's Guarding the Children*] (revealing that, in addition to being overworked, underpaid, and inadequately trained, one-quarter of the people most responsible for guarding children in the Nassau County Juvenile Detection Center have "questionable criminal backgrounds").

12. *See* Lauren Terrazzano, *Struggle for Center in Suffolk: Lawmakers to Vote on Bill Establishing Site Selection*, NEWSDAY (Nassau), Aug. 31, 2000, at A5 [hereinafter *Struggle for Center*].

13. *See id.*; *see also* Lauren Terrazzano, *Illegal Lockups: Suffolk's Housing of Youth Offenders Violates State Laws*, NEWSDAY (Nassau), June 16, 2000, at A5.

14. *See Struggle for Center*, *supra* note 12.

15. *See id.*; *see also "Those Fields Will Stay There": Islip Supervisor Pledges Not to Sell Central Islip Youth Baseball Fields*, NEWSDAY (Suffolk), Oct. 15, 2000, at G17. Legislator Steve Levy (D-Holbrook) told residents they "had to be vigilant" that the new juvenile detention center should not be placed in Central Islip, claiming that "we only want positive developments there. . . . Not to say that it's dangerous. . . . It's just psychological. It would be best suited elsewhere." *Id.* The site for the new Suffolk County detention center was finally chosen in November 2000. *See* Lauren Terrazzano, *Site for New Detention Center Chosen*, NEWSDAY (Nassau), Nov. 30, 2000, at A33. The thirty-two bed facility will be built on eleven acres in Yaphank, at a projected cost to taxpayers of $8.7 million. *See id.*

16. *See Crackdown on Kids*, *supra* note 4.

17. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997) (contrasting the "traditional" juvenile court, which views "errant youth as childlike, psychologically troubled, and malleable," with the system following reforms of the 1970s and 1980s, which viewed children "as less culpable than adults, but not as blameless children").

and forth from one focus to the other.[18] Despite the uncertain tenor of juvenile justice policy, the majority of Americans "still believe in the efficacy of the traditional juvenile justice system with its emphasis on prevention, treatment, and rehabilitation, and they reject the retributive thrust of a punishment-centered system."[19]

This Note argues for a consistent rehabilitative approach to deal with first-time, non-violent youthful offenders, and also advocates considering the needs of the victims of juvenile crime. Victims of juvenile crime are largely forgotten in adjudicative processes,[20] especially in juvenile court proceedings where privacy protection concerns dominate.[21] Today, an increasingly visible victims' rights movement in the United States has focused attention on the vital role victims can, and should, have in the disposition of those who have injured them.[22]

One of the most promising alternatives to juvenile incarceration that can provide the necessary rehabilitative element, but which also addresses the needs of victims, is victim-offender mediation ("VOM").[23] VOM is based on the principles of restorative justice and involves a process that engages offenders, victims, and communities to deal with juvenile crime.[24] Through VOM, youthful offenders have an opportunity

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18. *See id*.

19. Robert E. Shepherd, Jr., *What Does the Public Really Want?*, A.B.A. Network, *at* http://www.abanet.org/crimjust/juvjus/cjpublic.html (last visited Apr. 8, 2001).

20. *See* MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 196 (1994) ("Victims often feel powerless and vulnerable. Some even feel twice victimized, first by the offender and then by an uncaring criminal justice system that doesn't have time for them."). *See also* Daniel W. Van Ness, *Restorative Justice and International Human Rights*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 17, 24 (Burt Galaway & Joe Hudson eds., 1996) ("Virtually every facet of the criminal justice system works to reduce victims . . . to passive participants. . . . Victims are not parties of interest in criminal cases. . . . Thus, they have very limited control over what occurs and no responsibility to initiate particular phases of the process.").

21. *See, e.g.*, N.Y. FAM. CT. ACT § 381.2-.3 (McKinney 1999) (mandating that both family court and police records with respect to juvenile offenders remain confidential).

22. *See* Terry Carter, *Righting Victims' Rights: Activists Seek Cause-of-Action Clauses for Noncompliance*, A.B.A. J., Dec. 2000, at 24; *see also infra* notes 91-92 and accompanying text.

23. *See* UMBREIT, *supra* note 20, at 2. Victim-offender mediation ("VOM") is a conflict resolution technique in which victim and offender meet, with the assistance of a mediator, to address informational and emotional issues surrounding the crime and then determine together a plan for mutually agreeable restitution. *See id.*; *see also* STELLA P. HUGHES & ANNE L. SCHNEIDER, U.S. DEP'T OF JUSTICE, VICTIM-OFFENDER MEDIATION IN THE JUVENILE JUSTICE SYSTEM 1 (1990).

24. Restorative justice, a philosophy derived from ancient and traditional methods of dealing with criminal behavior, is based on the theory that "[t]he overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crime." Van Ness, *supra* note 20, at 23. Restorative justice stands in stark contrast to the more familiar philosophy of retributive justice, which consists primarily of vengeance and punishment. For a historical and

to take responsibility for their crimes, to make appropriate reparations, and to emerge from the process better able to become "active and productive citizens."[25] Victims, as essential participants in the process, receive meaningful restitution for their losses and may regain a sense of control over their lives.[26] If VOM works as intended, youth will tend to commit fewer crimes, victims may feel less victimized, and the overall quality of life in communities is likely to be significantly improved.[27] In this sense, the ultimate beneficiary of VOM is the community as a whole because public safety is enhanced at "the lowest possible cost using the least restrictive level of supervision possible."[28]

This Note proposes that communities such as Nassau and Suffolk Counties should use VOM at the local level as the process of choice with first-time youthful offenders who commit low-level crimes. For such programs to be effective, local governments, with the aid of state and federal funds, must put VOM mechanisms in place and consistently encourage their use for low-level crimes committed by first-time offenders, contingent upon the victims' willingness to participate. More broadly, prosecutors and family court judges should also consider VOM as one option among a range of alternatives to incarceration in other juvenile offender cases, such as violent crime and drug offenses.[29]

Part II of this Note explains the history and philosophy underlying restorative justice theory and VOM, with special emphasis on the transformative model of mediation. Part III examines existing federal, state, and local laws that allow for, and in many cases encourage, the use

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philosophical overview, see generally JIM CONSEDINE, RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME (1994); HOWARD ZEHR, A NEW FOCUS FOR CRIME AND JUSTICE: CHANGING LENSES: (1990).

25. Hemmens et al., *supra* note 2, at 668.

26. *See* UMBREIT, *supra* note 20, at 196; Hemmens et al., *supra* note 2, at 668.

27. *See* Hemmens et al., *supra* note 2, at 668 ("Victims and communities are empowered as active participants and become focal points of reparation and restitution."); *see also* PETER FRIEVALDS, U.S. DEP'T OF JUSTICE, BALANCED AND RESTORATIVE JUSTICE PROJECT (BARJ) 1 (1996) (asserting that restorative justice programs, including victim-offender mediation, "can improve the quality of life in communities by engaging offenders to work on community improvement projects as part of [their] accountability and competency development").

28. Hemmens et al., *supra* note 2, at 668.

29. Although this Note focuses only on VOM for non-violent offenses, VOM does have valuable implications for youth convicted of violent and drug offenses as well. First, by removing a significant number of children from the prison and court systems, scant resources can be freed up to better serve the needs of more serious juvenile offenders. *See infra* note 87 and accompanying text for a discussion of detention diversion. Second, there is no reason why VOM cannot also be used with violent offenders or in conjunction with drug treatment programs, although these applications are outside the scope of this Note. *See, e.g.*, Caren L. Flaten, *Victim-Offender Mediation: Application with Serious Offenses Committed by Juveniles*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 20, at 387, 388.

of VOM. Part IV assesses and responds to the criticisms of VOM and other restorative justice programs. This Note concludes in Part V that VOM should be a vital component of a juvenile justice system, because it serves an educative, rehabilitative, and ultimately preventive function for the juvenile offender while giving victims a needed voice in the criminal process.

II. THE HISTORY AND PHILOSOPHY UNDERLYING RESTORATIVE JUSTICE THEORY AND VICTIM-OFFENDER MEDIATION

A. Restorative Justice

Restorative justice is an ancient concept.[30] Grounded in religious and indigenous traditions, restorative justice deals with criminal

30. *See* CONSEDINE, *supra* note 24, at 12, 79-156 (discussing Maori, Celtic, and Biblical origins of restorative justice principles). For example, New Zealand's Children, Young Persons & Their Families Act of 1989 is expressly based on principles drawn from indigenous Maori notions of justice. *See* Children, Young Persons and Their Families Act, 1989 (N.Z.) [hereinafter CYPF]; Donna Durie-Hall & Joan Metge, *Kua Tutū Te Puehu, Kia Mau: Máori Aspirations and Family Law*, *in* FAMILY LAW POLICY IN NEW ZEALAND 54, 59 (Mark Henaghan & Bill Atkin eds., 1992). In the mid-nineteenth century, early Western settlers in New Zealand observed that the Maori practiced a sophisticated justice system that "sought compensation rather than punishment for the injury or crime," and "that the friendly involvement of a stranger in their quarrels was never taken amiss . . . and it often enabled a peaceful settlement." CONSEDINE, *supra* note 24, at 87. Hearings were held "to investigate the matter and try to restore the balance that had been disturbed." *Id.* The victim's interests "were central to the administration of justice," and could even be passed down from generation to generation. *Id.* at 88.

Similarly, ancient Celtic legal traditions in Ireland, which were ultimately "destroyed and replaced with the harsh retributive system" of the British conquerors, was also based on a restorative philosophy. *Id.* at 133. "Reconciliation, reparation and healing, along with mercy and forgiveness, [were] the hallmarks of [the] practical application" of the Celtic laws, which "discouraged revenge and retaliation and permitted capital punishment only as a last resort." *Id.* at 141-42. The ultimate aim of the Celtic justice system was "to restore to wellbeing the victim and the community." *Id.* at 145-46.

With respect to Judeo-Christian Biblical justice, Consedine and others—notably Howard Zehr and scripture scholar Herman Bianchi—point out that a misreading of the Old and New Testaments has resulted in the current Western notion of "God as a punishing High Court judge-type figure who hovers over our everyday activities like an eye-in-the-sky policeman." Rather, the message of the scriptures is one of "restitution and restoration, not vengeance and punishment," focusing not so much on individual transgressions as on the "future health and well being" of the community. *Id.* at 148-49; *see also* Herman Bianchi, *A Biblical Vision of Justice*, *in* NEW PERSPECTIVES ON CRIME AND JUSTICE 3 (1984); ZEHR, *supra* note 24, at 133.

In the United States and Canada, numerous programs have been instituted to deal with Native American youth that are based on traditional Native American principles of justice. *See, e.g.*, Curt Taylor Griffiths & Ron Hamilton, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 20, at 175, 180; Marianne O. Nielsen, *A Comparison of Developmental Ideologies: Navajo Nation*

behavior in ways that are responsive to the offender, the victim, and the community as a whole.[31]

Restorative justice is characterized by the following three principles: First, crime is not, as is often wrongly assumed, primarily an offense against the state. Rather, it is a "conflict between individuals resulting in injuries to victims, communities and the offenders themselves; only secondarily is it lawbreaking."[32] Second, the overall aim of the criminal justice process should be to make peace between the parties, repair the harm caused by crime, and not to be obsessively concerned about punishment for punishment's sake.[33] Finally, the criminal justice process should not be "dominated by the government" to the exclusion of victims, communities, and the offenders themselves.[34] Through these guiding principles, restorative justice suggests "a philosophy that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness and mercy."[35]

Restorative justice potentially has several advantages over traditional criminal justice practice.[36] First, restorative justice inherently builds on an offender's positive qualities and abilities, rather than only on his offense, and enhances offender accountability and an understanding of the consequences of criminal behavior.[37] Second, it

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Peacemaker Courts and Canadian Native Justice Committees, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 20, at 207, 208.

31. *See* Van Ness, *supra* note 20, at 23. In its modern form, restorative justice was initially proposed for use in the criminal justice system by practitioners of VOM in civil disputes. Their advocacy was based on observations that both victims and offenders expressed "satisfaction with mediated as opposed to adjudicated justice." *Id.* They also drew parallels to more ancient forms of justice in concluding that "while crime does involve lawbreaking, it more importantly causes injuries to victims, the community, and even offenders themselves and . . . these injuries have been largely neglected by the criminal justice system." *Id*.

32. *Id*. Injuries to victims are self-evident; they would not be victims if they had not suffered some kind of injury. A community is injured when "its order, its common values, and the confidence of its members in its strength and safety are challenged and eroded." *Id.* And an offender experiences both "contributing" and "resulting" injuries. A contributing injury is one that existed prior to and may have prompted the crime; the resulting injury comes about in the aftermath of the crime. *See id.* at 23-24.

33. *See id.* at 23.

34. *Id.*

35. CONSEDINE, *supra* note 24, at 11.

36. *See id.*; FREIVALDS, *supra* note 27, at 1; Martin Wright, *Victim-Offender Mediation as a Step Towards a Restorative System of Justice*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION 525, 529 (Heinz Messmer & Hans-Uwe Otto eds., 1992) [hereinafter RESTORATIVE JUSTICE ON TRIAL].

37. *See* Wright, *supra* note 36, at 529.

involves offenders directly in deciding how to make amends for their crimes, rather than relegating them to being "the passive objects of punishment," thereby more effectively internalizing the costs and effects of their actions.[38] Third, it increases the likelihood that a youthful offender may ultimately "earn reacceptance in the community" by, *inter alia*, inviting community members to serve as mediators between victims and offenders, and proposing acts of reparation that will benefit the community as a whole.[39] Fourth, by confronting the youthful offender face to face, victims are able to convey their outrage and pain, and also their compassion, and thus can begin to heal the harm caused by juvenile crime.[40]

VOM is the most common form of restorative justice in use today.[41] While it has been used with both juveniles and adults,[42] it has proven to be especially effective with juveniles.[43] Scholars and practitioners have given restorative justice and VOM increased attention since the early

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38. *Id.*; *see also U.N. Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*, U.N. GAOR, 45th Sess., 68th mtg., art. I, IV, U.N. Doc. A/RES/45/112 (1990) [hereinafter *Riyadh Guidelines*] (emphasizing that juveniles should be active partners within society and should not be "mere objects of socialization or control").

39. Wright, *supra* note 36, at 529-30.

40. *See id.* at 530; *see also* UMBREIT, *supra* note 20, at 197.

41. *See* HUGHES & SCHNEIDER, *supra* note 23, at 1, 15. VOM has also been called victim-offender reconciliation. Other restorative justice models include sentencing circles (a group effort by victims, judges, police, and prosecutors to tailor the sentence to the offender); victim impact panels (used by victims and community groups to inform the judge about the harm an offender has caused); and community conferencing (a hybrid of VMO and sentencing circles). *See* James Walsh, *Restorative Justice Program in Minneapolis Showing Results*, STAR TRIBUNE (Minneapolis), Feb. 16, 2000, at B1. New Zealand's Children, Young Persons and Their Families Act employs a form of VOM called family-group conferences ("FGC"). *See* CYPF, *supra* note 30, §§ 245-71; Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 298-319 (1999) (recommending the use of FGCs, as practiced in New Zealand, for juvenile property offenders in the United States); *see also infra* note 180 and accompanying text for a discussion of FGCs for status offenders.

42. *See* HUGHES & SCHNEIDER, *supra* note 23, at 1. In Vermont, for example, the statute mandating VOM is designated for adult offenders only. *See* VT. STAT. ANN. tit. 28, § 910 (Supp. 2000). *But see infra* note 45 for states that provide for VOM in their juvenile delinquency statutes.

43. *See* HUGHES & SCHNEIDER, *supra* note 23, at 1; Frank A. Orlando, *Mediation Involving Children in the U.S.: Legal and Ethical Conflicts: A Policy Discussion and Research Questions*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 333, 333 ("[M]ediation has become more common within family and juvenile court systems across the country as a means to reduce swelling caseloads and . . . to achieve more consensus for the resolution of disputes.") The flexibility and discretion that family court judges have in sentencing juveniles provide an ideal opportunity for using victim-offender programs. "The more freedom there is for waiving prosecutions and for suspending convictions and/or sentence[s]," the better the chances for VOM to succeed. Martti Grönfors, *Mediation—A Romantic Ideal or a Workable Alternative*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 419, 421.

1990s.[44] A small number of states now include VOM in their statutory schemes,[45] and VOM is widely used, in one form or another, in communities throughout the United States.[46] There has been a clear mandate for such programs from the federal government.[47]

Restorative justice and VOM are also consistent with hard and soft international instruments that reflect an inexorable movement toward a universal embrace of a non-retributive approach to juvenile crime by the family of nations as a matter of international law. This approach is reflected in such instruments as the United Nations Convention on the Rights of the Child and Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[48] The domestic law of many countries other than the United States has embraced restorative justice. For example, New Zealand now mandates in its laws a restorative justice approach at the national level for all juvenile offenders.[49] Restorative

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44. *See generally* CONSEDINE, *supra* note 24; UMBREIT, *supra* note 20; ZEHR *supra* note 24. The development of the Balanced and Restorative Justice Project ("BARJ") and Umbreit's seminal work both occurred in 1992; Zehr and Consedine wrote their groundbreaking books in 1990 and 1995, respectively.

45. States that expressly provide for VOM programs in their juvenile delinquency statutes include Arkansas, Colorado, Delaware, Illinois, Montana, Tennessee, and Wisconsin. *See* ARK. CODE ANN. § 9-31-404 (Michie Supp. 1999); COLO. REV. STAT. ANN. § 19-2-102 (West Supp. 2000); DEL. CODE ANN., tit. 11, § 9501 (Supp. 2000); 705 ILL. COMP. STAT. ANN. 405/5-310 (West 1999); MONT. CODE ANN. § 41-5-1304 (1999); TENN. CODE ANN. § 16-20-101 (1994); WIS. STAT. ANN. § 938.34(5r) (1999).

46. *See* HUGHES & SCHNEIDER, *supra* note 23, at 15.

47. *See infra* notes 81-92 and accompanying text.

48. *See U.N. Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (1989) [hereinafter *Convention on the Rights of the Child*]; *Riyadh Guidelines*, *supra* note 38. These documents are a testament to the serious attention being paid worldwide to abuses of the rights of children, including the need to reform juvenile justice systems. The use of incarceration is condemned except as a last resort and for the shortest possible duration. *See Convention on the Rights of the Child*, *supra*, art. 37(b) ("No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort* and for the shortest appropriate period of time.") (emphasis added). This language is echoed in the *Riyadh Guidelines*: "The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance." *Riyadh Guidelines*, *supra* note 38, art. V ¶ 46.

Both documents also emphasize that communities, victims, and offenders should participate more fully in the disposition and prevention of juvenile crime. *See Convention on the Rights of the Child*, *supra*, art. 12 (asserting that a "child who is capable of forming his or her own views" has a "right to express those views freely in all matters affecting [him or her]," including the right to be heard in judicial and administrative proceedings); *Riyadh Guidelines*, *supra* note 38, art. I ¶ 3 (stating that "[y]oung persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control").

49. *See* CYPF, *supra* note 30, § 281(1); Durie-Hall & Metge, *supra* note 30, at 54; Cunha, *supra* note 41, at 285.

justice and VOM programs are used locally in many countries in Europe and Asia, including Japan, Germany, Great Britain, Italy, and the Scandinavian nations.[50]

B. Victim-Offender Mediation

As a dispute-resolution mechanism, mediation is "directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement . . . or simply because the parties have been helped to a new and more perceptive understanding of one another's problems."[51] The mediation process, as generally described, is comprised of six components: "(1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to these issues (6) which are acceptable to the parties."[52] The mediation process does not impose rules on the parties, but rather helps them to "achieve a new and shared perception of their relationship . . . that will redirect their attitudes and dispositions toward one another."[53]

VOM is designed to restore power to the parties affected by crime—the offenders, the victims, and members of the community-instead of leaving the disposition of offenders solely in the hands of juvenile justice authorities. When community members defer to criminal justice "experts" who they believe "can scientifically prescribe solutions to the crime problem," they run the risk of overlooking "the

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50. *See, e.g.*, Roger Bullock et al., *Applying Restitutive Justice to Young Offenders: Observations from the United Kingdom*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 367, 368 (stating that a restitutive justice system, which would include mediation, should "be welcomed"); Sturla Falck, *The Norwegian Community Mediation Centers at a Crossroads*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 131, 133-34 (describing the ten-year impact of an experimental mediation program addressed to youth crime); John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 105, 105, 119 (noting a marked difference between "Japan's postwar success and the United States' failure in efforts to reduce crime and its awesome social and material costs," and attributing it primarily to the fact that "[v]ictim restitution and pardon are . . . critical elements of the process of criminal justice in Japan"); Hans-Jürgen Kerner et al., *Implementation and Acceptance of Victim-Offender Mediation Programs in the Federal Republic of Germany: A Survey of Criminal Justice Institutions*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 29, 31 (observing that German juvenile penal law "has always been more open to the idea of compensation and conflict settlement").

51. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971).

52. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88 (1981).

53. Fuller, *supra* note 51, at 325.

preventive obligations which are fundamentally in their own hands."[54] For this reason, VOM requires offenders and victims to take "active problem-solving roles that focus upon the restoration of material and psychological losses to individuals and the community" as a result of criminal behavior.[55] The victim and offender meet with each other, on a voluntary basis and in the presence of a trained mediator, to work toward "empowering victims in their search for closure and healing; impress upon the offender the human impact of their behavior; and promote restitution to the victim."[56]

Assessments of VOM programs reveal that juvenile offenders who go through the mediation process tend to commit fewer and less serious crimes than offenders who are dealt with through standard procedures.[57] Victims are also more likely to receive actual restitution.[58] Furthermore, the mediation system operates at a substantially lower cost than criminal proceedings and subsequent institutionalization.[59]

The real untapped value of VOM, however, may be its substantial potential to transform the participants.[60] By empowering both victims and offenders and encouraging the recognition of each other's humanity,

54. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 6 (1989).

55. UMBREIT, *supra* note 20, at 2; *see also* Grönfors, *supra* note 43, at 419-20 ("The aim in face-to-face mediation is to clarify the nature of the dispute . . . and find, together with the direct disputants, a solution that satisfies both parties.").

56. UMBREIT, *supra* note 20, at 2.

57. *See id.* at 115-18; Mark S. Umbreit, *Mediating Victim-Offender Conflict: From Single-Site to Multi-Site Analysis in the U.S.*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 431, 438-39 [hereinafter *Victim-Offender Conflict*]. Umbreit's research confirms prior studies showing that VOM results in "[h]igh levels of client satisfaction and perceptions of fairness" and "reducing recidivism among juvenile offenders." *Id.* at 431-32; *see also* Anne L. Schneider, *Restitution and Recidivism Rates of Juvenile Offenders: Results From Four Experimental Studies*, 24 CRIMINOLOGY 533, 538-39, 547 (1986) (citing a Washington, D.C. VOM program whose participants had lower recidivism rates than offenders receiving probation alone).

58. *See* UMBREIT, *supra* note 20, at 109; *Victim-Offender Conflict*, *supra* note 57, at 439 ("[O]ffenders who negotiated restitution agreements with their victims through a process of mediation were considerably more likely to actually complete their restitution obligation than similar offenders who were ordered by the court to pay a set amount of restitution."). In Umbreit's Minneapolis study, 69% of offenders in a VOM program paid restitution, compared to 54% who did not go through the mediation process. *See id.* at 440. In Albuquerque, the numbers were even more remarkable: 86% of offenders paid full restitution following VOM compared to 57% of the non-mediation offenders. *See id.*

59. *See* UMBREIT, *supra* note 20, at 181-82.

60. *See* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 264 (1996) (noting that a "major premise" of the mediation process is that it "ha[s] the potential to generate transformative effects, and that these effects are highly valuable for the parties and for society"); *see also Restorative Justice: An Interview with Jim Consedine*, AMERICA, Feb. 26, 2000, at 7, 9 (quoting Consedine's assertion that the free participation of both victims and offenders in the VOM process is "[t]he key to lasting growth and change").

VOM optimally results in moral growth, or transformation, by "integrat[ing] strength of self and compassion for others."[61] Transformative mediation serves a vital "public value" not often addressed in the literature, in that it can "provid[e] a moral and political education for citizens, in responsibility for themselves and respect for others."[62] It "would contribute powerfully—incrementally and over time—to the transformation of individuals from fearful, defensive, and self-centered beings into confident, empathetic, and considerate beings, and to the transformation of society from a shaky truce between enemies into a strong network of allies."[63] That sort of outcome, of course, would contribute significantly to crime prevention.

The transformation model of VOM has not been widely discussed in the field, and has been viewed by some as "too idealistic and impractical,"[64] yet, it resonates with people and underlies the entire

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61. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 230 (1994). In this "transformative" model of mediation, the parties are helped to

> strengthen their own capacity to handle adverse circumstances of all kinds, not only in the immediate case but in future situations. Participants . . . gain[] a greater sense of self-respect, self-reliance, and self-confidence. This has been called the *empowerment* dimension of the mediation process.
>
> In addition, the private, nonjudgmental character of mediation can provide disputants a nonthreatening opportunity to explain and humanize themselves to one another . . . to help individuals strengthen their inherent capacity for relating with concern to the problems of others. Mediation has thus engendered, even between parties who start out as fierce adversaries, acknowledgment and concern for each other as fellow human beings. This has been called the *recognition* dimension of the mediation process.

Id. at 20.

62. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 12 (1989) [hereinafter *Imaginary Conversation*]. Proponents emphasize that this goal "can only be realized in mediation." *Id.*

63. BUSH & FOLGER, *supra* note 61, at 20-21. Bush has also noted the "special powers" of mediation to "restor[e] to the individual a sense of his own value and that of his fellow man in the face of an increasingly alienating and isolating social context." Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 270-71 (1989) [hereinafter *Mediator's Role*].

64. BUSH & FOLGER, *supra* note 61, at 21-22. The more common formulation of the mediation process has been variously called "settlement based" or "transactional," and reflects an overriding desire on the part of the mediator to reach an optimal settlement. *See id.* at 16-18, 55-77; *see also* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 470 (Deborah M. Kolb et al. eds., 1994) (noting that "getting agreements that work is the overriding goal that drives [mediators'] activities"). *But see* Mickey Meece, *The Very Model of Conciliation*, N.Y. TIMES, Sept. 6, 2000, at C1 (describing a transformative mediation program, called REDRESS, adopted by the U.S. Postal Service to deal with employee complaints that would traditionally have been handled by the Equal Employment Opportunity Commission). Widely considered to be "one of the most ambitious experiments in dispute resolution in American corporate history," the results of the REDRESS mediation program have been "spectacular": In its first twenty-two months, 80% of the 17,645 informal disputes

practice of mediation.[65] At its heart is true moral and spiritual growth in two areas of human behavior—strength of self and relation to others-that have been accurately characterized as "compassionate strength."[66]

The achievement of compassionate strength is not an easy process because of its bare exposure of emotions, accusations, fears, shame, and true contrition.[67] For VOM to be most effective, it should be "the product of individual effort to change and refine a natural reaction that tends toward either weakness or selfishness or both."[68] It should not only "protect us from the worst in each other but also to help us find and enact the best in ourselves."[69] Transformative mediation helps to move the participants from a destructive way of dealing with each other to constructive efforts to design solutions to the problem at hand. It also lays the groundwork for the parties to modify their future behavior and beliefs.[70]

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handled through REDRESS were resolved satisfactorily. *Id.* According to one of the Postal Service attorneys who proposed the REDRESS program, "It's not a magic pill, but . . . I've never seen anything that has such a potential for change." *Id.* at C6.

65. *See* BUSH & FOLGER, *supra* note 61, at 229. This transformative potential is "linked to a coherent view of human nature and society" that Bush and Folger call "the Relational worldview." *Id.*; *see also Imaginary Conversation*, *supra* note 62, at 13-14 (distinguishing between an individualist worldview, wherein "the freedom of the individual to accomplish his own self-fulfillment . . . is the highest value in the social enterprise," and a relational worldview, wherein the highest social values are "going beyond self-interest" to achieve concern for others and seeking "a common good beyond any private vision of the good").

There is evidence that society is slowly shifting to a relational worldview as "a matter of conscious choice." BUSH & FOLGER, *supra* note 61, at 229. This is perhaps best, if simplistically, exemplified in contemporary culture by the popularity of Oprah Winfrey. *See* John R. Hill & Dolf Zillmann, *The Oprahization of America: Sympathetic Crime Talk and Leniency*, 43 J. BROADCASTING & ELECTRONIC MEDIA 67, 67 (1999) (noting that an increasing compassion for criminals shown by jurors might be attributable to media influence and "a growing understanding of motives that could explain transgressive actions").

66. BUSH & FOLGER, *supra* note 61, at 230. "Strength of self" and "relation to others" are each highly desirable in themselves, but when possessed individually they "tend[] to be partial or even extreme," and therefore need to be tempered by the other. *Id.* at 231. "For example, the individual strength that stands up to adversity is admirable, but it loses that quality if it is not accompanied by a concern for something beyond self." *Id.* Alternatively, "selfless devotion that involves not just the transcendence but the loss or degradation of self also loses its estimable quality." *Id.*

67. *See* UMBREIT, *supra* note 20, at 197.

68. BUSH & FOLGER, *supra* note 61, at 233. "[T]he value of transformation means . . . attaining a genuinely good form of human conduct, compassionate strength, by the required exercise of moral effort on an individual's part to transform him- or herself from a state of weakness and/or selfishness to one of strength and compassion." *Id.* at 234.

69. *Id*. at 244.

70. *See* Robert A. Baruch Bush, "*What Do We Need a Mediator For*?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 27-28 (noting that the most important values mediation provides are both "an increased level of party participation in and control over decisions" and an improvement in "the character and quality of the communication that occurs

One of the primary goals of the juvenile justice system, therefore, must be to provide this opportunity for moral growth and development—both for victims, as people who have felt vulnerable and violated, and for adolescent offenders, who are at a developmental stage in their lives when the consequences of their youthful transgressions can, and should, serve an educative function.[71]

C. What Do Victims Want?

"The essence of most crime is harm done . . . . If crime consists of harm done, then the task of justice in response to crime is *undoing that harm*."[72] Forms of redress include restitution,[73] compensation,[74] retribution,[75] and forgiveness.[76] Research from various countries,

between the parties as human beings") (emphasis omitted). Mediation makes it possible for both victim and offender "to find more positive ways of regarding each other, despite serious disagreement." *Id.* at 29. The mediator's role is not to guarantee a fair agreement, or even any agreement, but to "guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment." *Mediator's Role*, *supra* note 63, at 272; *see also* Meece, *supra* note 64, at C6 (quoting Cynthia J. Hallberlin, a REDRESS program founder, as saying that transformative mediation not only "solve[s] the problem at hand, but . . . help[s] the parties communicate more effectively in the future").

71. "Adolescence is a naturally occurring time of transition, a period when changes happen that affect the experience of self and relationships with others." Carol Gilligan, *Prologue: Adolescent Development Reconsidered*, *in* MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION viii (Carol Gilligan et al. eds., 1988). Criminal activity in adolescents often "reflects a relatively typical inclination to engage in antisocial behavior during this developmental stage—a tendency that desists with maturity." Scott & Grisso, *supra* note 17, at 139; *see also* Gordon Trasler, *Some Cautions for the Biological Approach to Crime Causation*, *in* THE CAUSES OF CRIME: NEW BIOLOGICAL APPROACHES 7, 8, 11 (Sarnoff A. Mednick et al. eds., 1987) (noting that occasional lawbreaking "is so widespread that it must be regarded as a normal feature of adolescence" and that these "occasional" offenders will "cease to do so when they reach adulthood"). Over fifty years ago, the Supreme Court recognized this "period of great instability which the crisis of adolescence produces." Haley v. Ohio, 332 U.S. 596, 599 (1948).

72. Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 551, 552 (emphasis added).

73. The victim receives some material good or service to replace or renew what has been damaged (i.e., stolen goods replaced, broken windows repaired, with the offender footing the bill). *See id.* at 552.

74. Where it is not possible to actually restore or replace what was damaged (i.e., physical harm or irreplaceable goods), the offender can still address the victim's needs through some form of compensation, either in the form of money or services. *See id.* at 552-53.

75. Retribution is the most common notion of how criminals are dealt with in criminal justice systems. It consists of "balancing the scales of justice" by "inflicting an appropriate level of harm on the offender rather than rebuilding the victim." *Id.* at 553.

76. "It is ironic that forgiveness receives so little attention in criminological and psychological literature, given its prominent role in human relationships." *Id.* Forgiveness essentially entails "cancelling the debt," usually "after an admission of wrongdoing or

including the United States, indicates that "people are not as geared toward retribution as conventional wisdom might hold. Both victims and the general public desire a broader range of approaches to justice than the criminal justice system typically offers."[77]

What victims want in terms of a disposition depends on the type of harm done, the characteristics of the offender, and the nature of the relationship, if any, between the offender and the victim.[78] Retribution alone is "simply too costly to allow it to be a prevalent response."[79] There must be a serious reconsideration of how to achieve "a full experience of justice for victims, offenders, and society."[80] When implemented effectively, VOM promises such an experience.

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demonstration of remorse." *Id.* Interestingly, the concept of rehabilitation can be seen as "a form of conditional forgiveness . . . if you satisfactorily demonstrate that you have changed your ways and are not about to do this again, then we do not require anything further from you." *Id.*

77. *Id.* at 555; s*ee* Martin Wright, *What the Public Wants*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 264, 264 (Martin Wright & Burt Galaway eds., 1989) [hereinafter MEDIATION AND CRIMINAL JUSTICE] ("People want an adequate response, but not necessarily a punitive one.") (citation omitted); *see also* Imho Bae, *A Survey on Public Acceptance of Restitution as an Alternative to Incarceration for Property Offenders in Hennepin County, Minnesota, U.S.A.*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 291, 292 (noting that "there has been a misunderstanding" among criminal justice officials and policy makers that "the general public wants harsher sentences," since numerous researchers have found that "the general public is not especially punitive, rather they stress more rehabilitation") (citations omitted). Bae's survey found that both the general public and former "crime victim[s] [had a] favorable attitude toward restitution as an alternative legal sanction for property offenders," including a strong belief that offenders should pay the victim directly instead of through the state or community. Bae, *supra*, at 304.

78. *See* Peachey, *supra* note 72, at 554; *see also* Bae, *supra* note 77, at 292 ("Restitution may not be severe enough for offenders who commit personal crimes such as rape, manslaughter, assault, or armed robbery, but it is generally considered to be appropriate for nonviolent [and property] offenders."). In general, the greater the value of the damaged item, the greater the demand for retribution. For instance, damage to "symbolic resources or goods," such as a person's reputation or an irreplaceable heirloom, usually calls for retribution. Damage to "concrete resources," on the other hand, favors restitution or compensation. *See* Peachey, *supra* note 72, at 554. Victims who attribute the offender's behavior to "external or temporary stresses and pressures" are often satisfied with reparation. *Id.* If remorse is demonstrated, forgiveness may be a viable option. *See id.* "The strongest desire for retribution" arises where there is a "casual relationship with the offender" because "the victim sees the offense as having been targeted specifically at himself or herself . . . [y]et there is not a close enough emotional bond to produce a strong concern for the offender's welfare." *Id.* Juvenile crimes are often committed against people with whom the offender is acquainted. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS & VICTIMS: 1999 NATIONAL REPORT 26-27 (1999).

79. Peachey, *supra* note 72, at 556.

80. *Id.* at 555. Some critics question why victims would choose VOM. *See* Helen Reeves, *The Victim Support Perspective*, *in* MEDIATION AND CRIMINAL JUSTICE, *supra* note 77, at 44, 45 (quoting a letter to a newspaper that stated, "'If I have just been burgled, the last thing I want is to have the grinning crook brought round to my door by some do-gooding social worker'"). Yet, victims are willing to participate in VOM programs, most commonly because they want to "find out more about the offender and why he or she did it." *Id.* at 52. In many cases, the victim knows the

III. THE LEGISLATIVE BASIS FOR RESTORATIVE JUSTICE

A. Federal Law

1. Juvenile Justice and Delinquency Prevention Act of 1974

The Juvenile Justice and Delinquency Prevention Act ("JJDPA") of 1974[81] was enacted by Congress "to provide the necessary resources, leadership, and coordination . . . to develop and conduct effective programs to prevent delinquency, to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives to institutionalization."[82] The Act "focuses principally on programmatic concerns, rather than individual legal rights," with an "overall philosophy of providing states and localities considerable latitude in designing their own programs."[83] It established the Office of Juvenile

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offender, and "a. . . meeting in a controlled setting could reduce the possibility of fear or retaliation." *Id.* at 47. It has also been suggested that victims might "appreciate an opportunity to put their negative experience to positive use by helping the offender to recognize the harm he or she has done in the hope of preventing further crimes." *Id.*

Newsday columnist Ed Lowe describes the desires of one victim of a young hit-and-run driver:

> She wanted to see him, once, face to face. She wanted him to know how close he came to destroying her family and those of her friends. She wanted to hear an apology. But because of the way the case wound its way through the legal system, she never did.

Ed Lowe, *A Lucky Family, an Immaculate Reception*, NEWSDAY (Nassau), Nov. 26, 2000, at G5.

81. 42 U.S.C. §§ 5601-5633 (1994).

82. 42 U.S.C. § 5602(b). The Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDPA") was subsequently refined, but not significantly altered, by amendments in 1980, 1984, and 1992. *See id.* However, in the past decade there have been two significant attempts to toughen up the federal stance on juvenile crime, calling for stricter punishments to "promote accountability" and allowing for more youths to be prosecuted as adults. *See* Juvenile Crime Control and Delinquency Act of 1997, H.R. 1818, 105th Cong. (1997); Juvenile Justice Reform Act. of 1999, H.R. 1501, 106th Cong. § 254 (1999).

The Juvenile Crime Control and Delinquency Act of 1997 was passed by the House of Representatives to amend the JJDPA in response to "a dramatic increase in juvenile delinquency, particularly violent crime." H.R. 1818, 105th Cong. § 101(a)(1) (1997). It called for "a two-track common sense approach" emphasizing prevention and accountability. *Id.* § 101(a)(2). The bill also proposed to re-designate the Office of Juvenile Justice and Delinquency Prevention as the Office of Crime Control and Delinquency Prevention and to eliminate the Coordinating Council on Juvenile Justice and Delinquency Prevention reflecting a shift in emphasis from justice for juveniles to control of juveniles. *See* H.R. 1818, 105th Cong. §§ 104, 106 (1997). The bill died in the Senate Judiciary Committee, however, which prompted another attempt by "get tough" proponents in 1999 to dismantle the JJDPA with the Juvenile Justice Reform Act of 1999. *See* H.R. 1501, 106th Cong. § 254 (1999). This bill, even more harsh in its stance than the 1997 version, is destined for stalemate due to the inclusion of strict gun control amendments. *See Hot Bills*, 32 NAT'L J. 1686 (2000).

83. ROBERT W. MCCULLOH, U.S. DEP'T OF JUSTICE, 4 A COMPARATIVE ANALYSIS OF JUVENILE JUSTICE STANDARDS AND JJDP ACT 60-61 (1982).

Justice and Delinquency Prevention ("OJJDP") to perform research, disseminate information, and provide training and technical assistance to the states in their implementation of juvenile justice programs.[84] Under the JJDPA, states are authorized to allocate federal funding to local governments that have been proactive in dealing with juvenile delinquency.[85]

Among the programs established under the auspices of the OJJDP are the Balanced and Restorative Justice Project ("BARJ")[86] and the Detention Diversion Advocacy Program ("DDAP").[87] The OJJDP has

84. *See* 42 U.S.C. § 5611(a). The Office of Juvenile Justive and Delinquency Prevention ("OJJDP") was established within the Department of Justice, under the authority of the attorney general. There are seven components to the OJJDP: (1) research and program development; (2) training and technical assistance; (3) state relations and assistance; (4) information dissemination to states, localities, and the public; (5) federal programs; (6) missing and exploited children; and (7) the Special Emphasis Division, which provides discretionary funds to address special problems, such as chronic offenders, disparities in racial representation in juvenile detention facilities, and community-based sanctions. *See* SHAY BILCHIK, U.S. DEP'T OF JUSTICE, MATRIX OF COMMUNITY-BASED INITIATIVES: PROGRAM SUMMARY (1995). The JJDPA also established the Coordinating Council on Juvenile Justice and Delinquency Prevention, whose function is "to coordinate all Federal juvenile delinquency programs (in cooperation with state and local juvenile justice programs)." 42 U.S.C. § 5616(c)(1) (1994). A "Federal juvenile delinquency program" is defined as "any juvenile delinquency program which is conducted, directly or indirectly, or is assisted by any Federal department or agency, including any program funded under this chapter." 42 U.S.C. § 5603(2) (1994).

85. *See* 42 U.S.C. § 5633(a)-(h). Grant programs under the JJDPA are designed "to increase the capacity of State and local governments and public and private agencies to conduct effective juvenile justice and delinquency prevention and rehabilitation programs." 42 U.S.C. § 5602(b)(4).

86. The BARJ project grew out of the OJJDP's Juvenile Restitution, Education, Specialized Training, and Technical Assistance Program ("RESTTA"). *See* FREIVALDS, *supra* note 27, at 1. RESTTA was initiated in 1992 with the express goals of "allow[ing] juvenile justice systems and agencies to improve their capacity to protect the community[,] . . . enabl[ing] offenders to become competent and productive citizens." GORDON BAZEMORE & MARK S. UMBREIT, U.S. DEP'T OF JUSTICE, BALANCED AND RESTORATIVE JUSTICE 1 (1994). While this is arguably a goal of all juvenile justice programs, RESTTA proposed the BARJ project as a model based in large part on the restorative justice philosophy, shifting the focus from institutionalization and putative "rehabilitation" programs to "developing balanced, community-based systems . . . designed to meet the challenge of using restorative sanctions and processes (such as community service, victim involvement, mediation, and restitution) . . . as catalysts for change in the juvenile justice system." *Id.* In addition, BARJ "underscores the importance of the victim (individual or community) in the justice process and requires the offender to actively pursue restoration of the victim by paying restitution, performing community service, or both." FREIVALDS, *supra* note 27, at 1.

87. Detention diversion attempts to keep young offenders out of secure facilities and is based on the assumption that "processing certain youth through the juvenile justice system may do more harm than good" and may "actually perpetuate delinquency by processing cases of children and youth whose misbehavior might be remedied more appropriately in informal settings within the community." Randall G. Shelden, *Detention Diversion Advocacy: An Evaluation*, OJJDP JUV. JUST. BULL. 1-2 (1999). The Detention Diversion Advocacy Program ("DDAP") also aims to "ameliorate the problem of overburdened juvenile courts and overcrowded corrections institutions . . . so that [they] can focus on more serious offenders." *Id*.

also focused its attention on assisting states and localities with juvenile restitution[88] and VOM programs.[89]

2. Victims' Rights and Restitution Act of 1990

An equally important incentive for VOM programs is the potential to give victims a greater opportunity for participation in juvenile justice proceedings. There has been an increasing realization that, in handing over their disputes to the state, victims have been left out of the process.[90] The Victims' Rights and Restitution Act of 1990[91] was enacted in response to this increased sensitivity to victims, and legislators clearly envisaged victims playing a more "advisory" role in determining an offender's disposition.[92]

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88. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, LIABILITY & LEGAL ISSUES IN JUVENILE RESTITUTION 1 (1990) (examining the legal implications of using monetary restitution and unpaid community service as "alternative dispositions" in state and local juvenile justice programs); MARLENE THORNTON ET AL., U.S. DEP'T OF JUSTICE, JUVENILE RESTITUTION MANAGEMENT AUDIT 3 (1989) (providing a detailed questionnaire for assessing the philosophy, procedure, evaluation, staffing, and support components of juvenile restitution programs).

89. *See* Robert W. Sweet, Jr., *Foreword*, *in* HUGHES & SCHNEIDER, *supra* note 23, at iii ("Although victim-offender mediation is a relatively new practice in juvenile justice, it is a particularly apt one [because] . . . [w]hen young offenders face the person they have harmed and work out a way to make amends, they take an important step toward responsible adulthood.").

90. *See* UMBREIT, *supra* note 20, at 196; Van Ness, *supra* note 20, at 24.

91. 42 U.S.C. § 10606(a), (b)(1) (1994) (mandating that all "[o]fficers and employees" of U.S. law enforcement agencies, including the Department of Justice, "shall make their best efforts to see that victims of crime are accorded" certain rights, including "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy").

92. *See id.* Congress intended that "the States should make every effort to adopt" the goals of the Victims of Crime Bill of Rights, which include "a statutorily designated advisory role in decisions involving prosecutorial discretion, such as the decision to plea-bargain" and a right to "be compensated for the damage resulting from the crime to the fullest extent possible by the person convicted of the crime." Pub. L. No. 101-647, § 506, 104 Stat. 4820, 4822 (1990) (codified with significant changes in language at 42 U.S.C. §§ 10601, 10606).

The victims' rights movement gained credibility during the 1980s, boosted by the Reagan administration's Task Force on Victims of Crime, and culminated in the Victims of Crime Bill of Rights and the Victims' Rights and Restitution Act. *See* President's Remarks on Signing Exec. Order No. 12360 Establishing the President's Task Force on Victims of Crime, 1 PUB. PAPERS 507-08 (Apr. 23, 1982). The Task Force's 1992 report recommended a constitutional amendment in an effort to "institutionaliz[e] victims' rights." Carter, *supra* note 22, at 26. Since that time, while prosecutors have become more sensitive to the needs of victims, courts have been more slow to respond. *See id*. Victims' rights advocates argue that a wholesale "change in the culture of the legal profession and the criminal justice system" is necessary in order to give victims a greater voice. *Id.*

To date, the focus of victims' rights advocates has been on state legislation, using the states as "laboratories before making the big push to amend the U.S. Constitution." *Id.* at 25. Thirty-two states currently have enacted victims' rights constitutional amendments. New York is not one of them. *See id.* at 24-25.

The essential and active involvement of the victim is what makes VOM so unique in the disposition of juvenile crime.[93] Crime victims who have participated in VOM programs have expressed a high degree of satisfaction with the process, as well as a concomitant reduction in fear and anxiety.[94] Ultimately, victim-offender mediation gives victims a greater sense of control over circumstances that ordinarily would leave them feeling powerless and vulnerable.[95]

B. New York State Law

There is no restorative justice mechanism currently in place under New York State law. However, there are sections within New York State's Family Court Act[96] that may allow for its inclusion. Except in designated felony cases, the disposition of a juvenile delinquent must constitute "the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community."[97]

Under current New York State sentencing rules, juvenile offenders convicted of anything above a Class D Felony receive mandatory prison sentences.[98] All other offenses permit "additional dispositions."[99] VOM is perhaps best suited for this second category of offenses, especially with first-time offenders who have committed crimes against property.[100]

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93. *See* UMBREIT, *supra* note 20, at 5; HUGHES & SCHNEIDER, *supra* note 23, at 1 (noting that VOM is "designed to provide victim [sic] a greater voice in the justice process").

94. *See* UMBREIT, *supra* note 20, at 154. In Umbreit's comprehensive study (the results of which were consistent with numerous prior assessments), 79% of victims felt "very high levels" of satisfaction, and 83% believed the mediation process had been fair. In addition, following VOM only 10% of victims feared a subsequent incident, compared to 25% prior to mediation. *See id.*

95. *See id.* at 155-56.

96. N.Y. FAM. CT. ACT §§ 301.1, 352.2, 353.1 (McKinney 1999 & Supp. 2001).

97. *Id.* § 352.2(2)(a).

98. *See* NEW YORK SENTENCE CHARTS, CHART IV: ALTERNATIVE DISPOSITIONS FOR MISDEMEANORS, VIOLATIONS AND TRAFFIC INFRACTIONS (McKinney 2001). Class A felonies include arson, murder and attempted murder, and most drug offenses. Class B felonies include weapons possession and use, grand larceny, robbery, and rape. Class C felonies include vehicular manslaughter, criminal possession of stolen property, and burglary. Class D felonies include computer tampering, forgery, obscenity, and lesser degrees of larceny, drug sales and possession, and sexual assault. Class E felonies include criminal nuisance, menacing, perjury, and criminally negligent homicide. This list is illustrative, but by no means comprehensive. *See* NEW YORK SENTENCE CHARTS, CHART XI: LIST OF ALL PENAL LAW OFFENSES AND THEIR CLASSIFICATIONS (McKinney 2001).

99. NEW YORK SENTENCE CHARTS, CHART V: JUVENILE AND YOUTHFUL OFFENDERS (McKinney 2001). Additional dispositions include straight probation, intermittent imprisonment, conditional discharge, probation plus a fine, or restitution/reparation. *See id*.

100. But see *supra* note 29 and accompanying text, for a discussion of VOM's applicability to other offenses.

Statistics show that recidivism rates increase with each subsequent offense,[101] and between a third and a half of all crimes committed by juveniles are property crimes.[102] A successful VOM program will not only have a lasting impact on community building and juvenile crime reduction and prevention,[103] but it could considerably reduce the institutionalized juvenile population.[104]

A disposition of conditional discharge provides an ideal opportunity to use VOM, since the family court judge has the discretion to impose the conditions upon which discharge is granted.[105] According to New York State sentencing guidelines, any Class E felony or lesser offense committed by a juvenile offender allows conditional discharge as a permissible disposition.[106] Moreover, for felony youthful offenders, "the sentence to be imposed shall be the same as for a Class E Felony," with the sole exception of drug felonies.[107] Existing conditions for

101. *See* SNYDER, *supra* note 7, at viii. According to a study of juvenile delinquents in Maricopa County, Arizona, 41% of first-time offenders commit second crimes; after the second offense, 59% reoffend; after the seventh, fully 79% of offenders reoffend. *See id.*

102. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1999: UNIFORM CRIME REPORTS 222 tbl.38 (2000). Property crimes, as distinguished from violent crime against persons, include motor vehicle theft, burglary, larceny, trespass, vandalism, and possession of stolen property. In 1998, one-third of all arrests for property crimes in the United States involved juveniles. *See id.* In 1994, property crimes comprised more than half of all crimes (51%) committed by juveniles in the United States. *See* MELISSA SICKMUND, DEP'T OF JUSTICE, JUVENILE DELINQUENCY PROBATION CASELOAD, 1985-1994 (1997); *see also* New York State juvenile crime statistics, *infra* note 104 and accompanying text.

103. *See* UMBREIT, *supra* note 20, at 140. "The community-at-large . . . benefits from the increased practice of nonviolent conflict resolution skills that occurs [with] . . . a local victim-offender mediation program." *Id.* Additionally, "[m]any offenders who participate in a mediation session with their victim are less likely to commit additional crimes." *Id.* Umbreit's conclusions are based on a comprehensive two-and-a-half-year study of over 1150 mediations with juvenile offenders in California, Minnesota, New Mexico, and Texas, the largest evaluation performed to date. *Id*. at 153; *see also* FREIVALDS, *supra* note 27 (asserting that restorative justice programs, including VOM, "can improve the quality of life in communities by engaging offenders to work in community improvement projects as part of [their] accountability and competency development").

104. *See* 1998 ANNUAL REPORT, *supra* note 4, at 39 tbl.11. For example, of the 2382 total youth admitted to custody in New York State in 1998, 852 (35%) had committed crimes against property such as burglary, criminal mischief, unauthorized use of a motor vehicle, and criminal possession of stolen property. *See id.* Furthermore, 2237 (94%) were in custody for the first time. *See id.*

105. *See* N.Y. FAM. CT. ACT § 353.1(2) (McKinney 1999) ("When the court orders a conditional discharge the respondent shall be released . . . without placement or probation supervision but subject, during the period of conditional discharge, to such conditions . . . as the court may determine.").

106. *See* NEW YORK SENTENCE CHARTS, PREFACE TO CHART V: JUVENILE AND YOUTHFUL OFFENDERS (McKinney 2001).

107. *Id.* (emphasis omitted). The youthful offender procedure stipulates that unless a juvenile between the ages of thirteen and nineteen has been previously convicted or sentenced for a felony, he or she may be adjudged a youthful offender, thereby obviating the need for mandatory

discharge include "mak[ing] restitution or perform[ing] services for the public good" and "such other reasonable conditions as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the filing of the petition or to prevent placement with the commissioner of social services or the division for youth."[108]

Recent data compiled by the New York State Office of Children and Family Services ("OCFS") shows that approximately thirty-five percent of children admitted to New York State juvenile detention centers in 1998 were incarcerated for low-level property offenses such as burglary, criminal mischief, unauthorized use of a motor vehicle, and criminal possession of stolen property.[109] Over ninety percent of juveniles in state facilities were first-time placements.[110] These youthful offenders are prime candidates for VOM as a less restrictive alternative to incarceration.

Further support for the establishment of VOM programs is implicit in the mandate of the OCFS.[111] The OCFS has responsibility for the oversight of residential and community treatment of court-placed youth[112] and also "takes a leadership role" in developing new legislation and merging existing statutory provisions and programs across related disciplines "for the development of policies that are in the best interest of children, youth and families."[113]

New York State law does allow for the referral of certain crimes to dispute resolution programs.[114] Community dispute resolution centers run by nonprofit organizations were originally authorized and financed by the Office of Court Administration to deal with misdemeanor offenses, but the program was expanded in 1986 to deal with "selected felonies."[115] Juvenile offenses were neither expressly included nor excluded from this dispute resolution referral process.[116] However, victims of juvenile offenders are included under the Fair Treatment

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incarceration and allowing the offender's record to be sealed. *See* N.Y. CRIM. PROC. LAW § 720.10 (McKinney 1999).

108. N.Y. FAM. CT. ACT § 353.2(2)(f), (h).

109. *See* 1998 ANNUAL REPORT, *supra* note 4, at 39 tbl.11.

110. *See id.*

111. The New York State Office of Children and Family Services ("OCFS") was created to "improve the integration of services for New York's children, youth and other vulnerable populations, to promote their development and to protect them from violence, neglect, abuse and abandonment." *Id.* at i.

112. Specifically, through the Division of Rehabilitative Services. *Id*.

113. *Id.*

114. *See* N.Y. CRIM. PROC. LAW § 215.10 (McKinney 1999).

115. *Id.*

116. *See id.*

Standards for Crime Victims Act,[117] which permits the district attorney to "consult and obtain the views of the victim . . . concerning the availability of sentencing alternatives such as community supervision and restitution."[118] Permitting juvenile offenses to be handled in dispute resolution centers would be a reasonable and modest extension of existing law.

C. Local Programs in Nassau and Suffolk Counties, Long Island, New York

The manageable nature and amount of juvenile crime in Nassau and Suffolk Counties make these communities ideal social laboratories for a restorative justice experiment. Nassau County is one of the safest communities in the nation, and as of 1998, the crime rate had reached its lowest point in decades.[119] Suffolk County boasts similar downturns.[120] The dilemma of "quality of life" and youth crime persists, however, particularly in certain communities.[121] By implementing VOM programs at the local level, Nassau and Suffolk Counties can also serve as models for the rest of the state.

Implementing VOM programs as an alternative to incarceration has become even more viable in light of the crisis faced by the counties with respect to secure facilities for juveniles.[122] Nassau and Suffolk Counties should take advantage of this window of opportunity, especially since funding and assistance, both at the state and federal levels, are presently available to support their efforts.[123] As discussed below, the groundwork

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117. N.Y. EXEC. LAW §§ 640-642 (McKinney 1996). Section 640(2) specifies that the law applies to juveniles. *See id.* § 640(2).

118. *See id.* § 642(1). Section 642 expressly provides for the victims of felonies involving violence to person or property to be "consulted by the district attorney in order to obtain the views of the victim regarding disposition of the criminal case." *Id.*

119. *See* Denis Dillon, *1998 Crime Rate*, Office of the Nassau County District Attorney, *at* http://www.nassauda.org/dawebpage/crime_rate_in_nassau.htm (last modified Mar. 13, 2001). A recent study by C.W. Post College found Nassau's crime rate to be "the lowest in the nation among municipalities of over one million people." *Id.*

120. *See* SUFFOLK COUNTY JUVENILE CRIME PREVENTION COMM'N, SAFEGUARDING SUFFOLK COUNTY FOR OUR YOUTH: A BLUEPRINT FOR THE NEXT DECADE 19 (1999) [hereinafter BLUEPRINT] (noting that "overall youth crime has been declining in recent years," particularly property crimes).

121. *See* Rene P. Fiechter, *Community Crime Prevention*, Office of the Nassau County District Attorney, *at* http://www.nassauda.org/dawebpage (last modified Mar. 13, 2001).

122. *See supra* notes 9-16 and accompanying text.

123. See *supra* notes 84-85 and accompanying text, for a discussion of grants and assistance under JJDPA.

is already in place in both Nassau and Suffolk Counties for VOM programs to be effectively and efficiently implemented.

1. Nassau County

Nassau County has undertaken a proactive, community-based prevention stance with respect to "quality of life" crimes.[124] Through a process of community outreach and education, the Nassau County District Attorney's office established a pilot program in the Town of Hempstead, which includes the four communities (Freeport, Hempstead Village, New Cassel, and Roosevelt) "which have the highest proportions of low income and single parent families in the county,"[125] with the intention of branching out to other neighborhoods in the future.[126] Several of the program's components—specifically the Weed and Seed Program, the Rising Star Program, and Community Court-may be well suited for incorporating VOM.

The Weed and Seed Program (so named for its intention to "weed out" criminal activity in the community and then "seed" with social projects) is a "crime prevention strategy based on community and law enforcement collaboration."[127] VOM fits nicely within this strategy because it acts as a preventive screen for future criminal behavior and provides an opportunity for restorative community service.

One of the Weed and Seed projects is Rising Star, which recently received a $150,000 grant from the Federal Bureau of Justice Assistance.[128] Rising Star is a coalition of various youth, community, and civic groups that provides after-school activities for young people.[129] According to the District Attorney's office, "the most important goal of [the Rising Star] [P]rogram is the development of good citizens . . . . [W]e must . . . instill in our young people a set of virtues that will allow them to realize their full potential as productive members of the

124. *See* Dillon, *supra* note 119 ("[W]e recognized a long time ago [that when you] . . . address the low-level quality of life crimes . . . you'll have an impact on the overall crime rate.") Quality of life crimes include small time drug offenses, public drunkenness, prostitution, and loitering. *See* Fiechter, *supra* note 121.

125. Fiechter, *supra* note 121.

126. *See id.*

127. *Id.*

128. *See id.*

129. *See id.* (citing studies that show that juveniles commit the most crimes between 3:00 and 7:30 PM).

community."[130] This mandate dovetails precisely with the principles underlying transformative VOM.[131]

Perhaps the most appropriate place to implement a victim-offender mediation program is within the Town of Hempstead Community Court.[132] Based on the principles of restorative justice, the Community Court was established to address quality of life crimes by using "community service and treatment" as its main tools.[133] Very little effort would be required to include VOM for first-time, low-level youthful offenders among the dispositions available to the Community Court.

2. Suffolk County

The Suffolk County Probation Department claims to provide:

- An alternative to incarceration
- Community based corrections
- Early intervention with youth at risk[134]

These are all potential benefits promised by VOM—and yet VOM is not included among the Probation Department's many laudable programs.[135] In 1997, the Suffolk County Juvenile Crime Prevention Commission was established to "develop[] a strategic plan that would significantly reduce youth crime."[136] The strategy consists of five general areas: (1) strengthening the family; (2) supporting "core social institutions in their roles to develop capable, mature, and responsible youths"; (3) preventing delinquency; (4) intervening "immediately and effectively when delinquent behavior is first manifested"; and (5) identifying and controlling "the small group of serious violent and chronic offenders."[137] All of these goals are consistent with the aims of VOM. In fact, VOM is the only disposition option that can conceivably serve all five purposes in a single intervention.

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130. Denis Dillon, *Rising Star: Working with the Community*, DISTRICT ATT'Y'S NEWSL. (Nassau County Dist. Attorney, Nassau County, N.Y.), 2000, at 2.

131. *See supra* notes 60-71 and accompanying text.

132. *See* Fiechter, *supra* note 121; *Community Court Opens in Hempstead*, DISTRICT ATT'Y'S NEWSL. (Nassau County Dist. Attorney, Nassau County, N.Y.), 2000, at 9 [hereinafter *Community Court*]. The Court has disposed over 130 cases since its establishment in June, 1999. *See id.*

133. *See Community Court*, *supra* note 132. Village courts in Nassau County are also being encouraged to use community service and treatment as dispositions for lower level crimes. *See id.*

134. SUFFOLK COUNTY DEP'T OF PROBATION (2000), *available at* http://www.co.suffolk.ny.us/probation/publications (last visited Oct. 23, 2001).

135. *See id.* Probation Department services include an Adolescent Social Skills Program, Juvenile Community Services, and Victims Assistance. *See id.*

136. BLUEPRINT, *supra* note 120, at 2.

137. *Id.* at 7.

IV. A RESPONSE TO CRITICS OF VICTIM-OFFENDER MEDIATION AND RESTORATIVE JUSTICE

Inevitably, there are critics of VOM and other restorative justice programs.[138] These criticisms fall into four broad categories: (1) due process or procedural concerns, where constitutionally protected rights of offenders are waived in order to participate in VOM; (2) net-widening, which results in more youths entering the criminal system; (3) fairness and adequacy of punishment; and (4) limitations of the mediation process itself, including power disparities between the victim, often an adult, and the youthful offender.[139]

A. Due Process Concerns

The juvenile justice system in the United States was established at the turn of the century as separate from the adult criminal system in order to serve a protective function—*parens patriae*, the state as parent.[140] But abuses of this system led, in the 1960s, to two landmark cases, *Kent v. United States*[141] and *In re Gault*,[142] which established that juvenile offenders were entitled to the same constitutional rights as adults.

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138. For criticisms of VOM and restorative justice, see generally Andrew Ashworth, *Some Doubts about Restorative Justice*, 4 CRIM. L.F. 277, 286 (1993) (drawing a sharp distinction between criminal law's "emphasis on the blameworthiness of the conduct as the reason for public prosecution" and private civil suits intended "to rectify the victim's loss"); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 751 (2000) (questioning whether VOM "can deliver on its promises"); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1249 (1994) (arguing that victim control in the criminal justice process "is inconsistent with the character and purpose of the criminal law"); *see also* Roman Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 217 (Roman Tomasic & Malcolm Feely eds., 1982) (challenging assumptions underlying neighborhood mediation programs).

139. *See generally* Delgado, *supra* note 138. Questions have also been raised about VOM's limited applicability and possible gender bias. *See id.* at 762, 768. However, even VOM's harshest critics admit that while "informal adjudication . . . is imperfect, the traditional system may be even worse. . . . [O]ur criminal justice system has emerged as perhaps the most inegalitarian and racist structure in society." *Id.* at 771. Delgado also suggests that disadvantaged youths might "be better off taking their chances within VOM than within the formal system." *Id.* at 772. Race and social inequities also arise with respect to creaming. *See infra* notes 174-76 and accompanying text.

140. *See* Orlando, *supra* note 43, at 333-34.

141. 383 U.S. 541 (1966).

142. 387 U.S. 1 (1967).

In *Kent*, the Supreme Court challenged the constitutionality of the *parens patriae* doctrine as it had evolved,[143] stating that youths "receive[] the worst of both worlds: . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[144] The Court confirmed that youths were entitled to certain "statutory rights" and immunities not enjoyed by adult offenders: a shielding from publicity;[145] confinement only until age 21, and never with adults; a preference for "retaining the child in the custody of his parents" if at all possible; and protecting against certain "consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment."[146]

In re Gault, decided the following year, reiterated and expanded upon the Court's holding in *Kent*.[147] A fifteen-year-old charged with making obscene phone calls and sentenced to a secure facility was denied "essential procedural protections" such as legal representation, an opportunity to confront his accuser or witnesses, and protection against self-incrimination.[148]

The Court again asserted that "wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles."[149] In fact, underlying the whole concept of a separate juvenile system was the principle that "a

143. *See Kent*, 383 U.S. at 554-56; *see also* Sacha M. Coupet, Comment, *What To Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1314-16 (2000) (discussing how the Supreme Court has "marked the boundaries of the constitutional due process protections available to juveniles.").

144. *Kent*, 383 U.S. at 556.

145. *See id.* But a minor's right to privacy is not absolute. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101-06 (1979) (holding that a West Virginia statute criminalizing publication of the name of a juvenile delinquent violated First and Fourteenth Amendments); Okla. Publ'g Co. v. Okla. County Dist. Court, 430 U.S. 308, 311-12 (1977) (holding that a court order prohibiting publication of a photograph of a juvenile charged with murder violated the First and Fourteenth Amendment free press guarantees). The only requirement was that photographs and names be "lawfully obtained." *See Smith*, 443 U.S. at 101; *Okla. Publ'g*, 430 U.S. at 311. In fact, the confidentiality of VOM may more successfully achieve the goal of privacy with respect to youth crime. *See generally* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE §§ 9:01-02 (2d ed. 1994) (discussing policy considerations underlying the confidentiality of mediation); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988) (describing the importance of confidentiality in mediation.)

146. *Kent*, 383 U.S. at 556-57.

147. *See Gault*, 387 U.S. at 30-31.

148. *See id.* at 9-10.

149. *Id.* at 14.

child, unlike an adult, has a right 'not to liberty but to custody,'" in the form of parents or school.[150] If the state intervenes where a child has been adjudged delinquent, it is usually due to the "parents default[ing] in effectively performing their custodial functions," and therefore, as the "custody" shifts from parents to state, "it does not deprive the child of any rights, because he has none."[151]

However, the Court also pointed out that "[t]he constitutional and theoretical basis for this peculiar system is—to say the least-debatable," and "the results [are] not . . . entirely satisfactory."[152] An unacceptable "arbitrariness" results from "unbridled discretion, however benevolently motivated," which is "a poor substitute for principle and procedure."[153] Ultimately, the court held that due process protections—"the primary and indispensable foundation of individual freedom"—must not be withheld from juveniles.[154] As long as "intelligently and not ruthlessly administered,"[155] the act of upholding due process standards would not

150. *Id.* at 17.

151. *Id.* The question of state custody of juveniles reached its apex in *Schall v. Martin*, 467 U.S. 253 (1984). Ruling on the constitutionality of a New York preventive detention statute, the Court determined that preventive custody, wherein a youthful offender could be placed in a secure facility while he or she awaited trial, was a legitimate exercise of state authority and not punishment per se. *See id.* at 256-57; *see also* SNYDER & SICKMUND, *supra* note 78, at 92 (noting that preventive custody "protect[s] both the juvenile and society from pretrial crime"); Orlando, *supra* note 43, at 338 (observing that a juvenile offender's "fundamental liberty" may sometimes "be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child"). Preventive custody contributes to the overcrowding of juvenile detention facilities, since "children are sometimes locked up for weeks on end as their cases move slowly through the process," with stays ranging from a day to three months. *Crackdown on Kids*, *supra* note 4. For example, one youth awaiting proceedings for a petty larceny charge remained in the Nassau County Juvenile Detention center for over a month. *See id.*

152. *Gault*, 387 U.S. at 17-18.

153. *Id.* at 18. Indeed, a common criticism of restorative justice is that it results in disparities of treatment as between offenders. *See* Ashworth, *supra* note 138, at 288; Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 270 (1993) [hereinafter *New Wine*]; *see also infra* notes 190-95 and accompanying text.

154. *Gault*, 387 U.S. at 20. The Court quotes Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, as saying that the three "'indispensable elements of due process'" are properly exercised jurisdiction, notice to all parties, and a fair hearing; "'[a]ll three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel.'" *Id*. at 19 n.25 (quoting Arthur T. Vanderbilt, *Foreword* to VIRTUE, BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN x (1953)); *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that at least one due process protection afforded adults, the right to trial by jury, was not guaranteed to juveniles based on the nature and purpose of juvenile court proceedings).

155. *Gault*, 387 U.S. at 21. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

supplant "the commendable principles relating to the processing and treatment of juveniles separately from adults."[156]

A key finding in *Gault* was that "the assistance of counsel is essential for purposes of waiver proceedings."[157] But a common criticism of VOM is that juvenile offenders often waive their right to counsel, among other constitutional rights, without the requisite knowledge.[158] In fact, it is widely believed that "'[m]ost children do not have access to good legal advocacy'" in either pre-trial diversion or subsequent court proceedings.[159]

Other significant holdings from *Gault* are that youth offenders must be afforded an opportunity to confront their accusers, and they must be protected against self-incrimination.[160] While VOM addresses the first concern by making the accuser/victim a participant in the process and allowing for the free and often cathartic exchange of information between victim and offender,[161] self-incrimination poses a more serious problem.

Either or both participants in any mediation, and especially transformative mediation, must feel free to terminate the process.[162] A youthful offender who initially undertakes mediation and then fails to

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156. *Id.* at 22. In its later *McKeiver* decision, the Court reiterated that the right to counsel and confrontation are due process protections grounded in the "fundamental fairness" of the fact-finding process and must be safeguarded. *McKeiver*, 403 U.S. at 543.

157. *Gault*, 387 U.S. at 36. In *Gault*, the Court quotes at great length from a 1967 report by the President's Commission on Law Enforcement and Administration of Justice. In pertinent part, the Report states:

> The presence of an independent legal representative . . . is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. . . .
>
> . . .[I]n all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made.

Id. at 39 n.65 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

158. *See* Orlando, *supra* note 43, at 336 (questioning whether youths "knowingly and intelligently" give up their due process protections).

159. Lisa Stansky, *Child Advocacy Gives Lawyers a Chance to Make the Kids Alright*, STUDENT LAW., Oct. 2000, at 12, 12 (quoting Howard Davidson, Director of the American Bar Association's Center on Children and the Law); *see also* Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1188-89 (1989); Orlando, *supra* note 43, at 336 (concluding that "the promises of *Gault* . . . have never been met" because "very few youth have legal representation, and, when they do, the lawyers are usually incompetent or unprepared to provide an adequate defense, or advice on how to proceed"). The need for counsel during the VOM process, however, is less clear. *See* UMBREIT, *supra* note 20, at 135.

160. *See Gault*, 387 U.S. at 55.

161. *See* UMBREIT, *supra* note 20, at 197.

162. *See Mediator's Role*, *supra* note 63, at 267 (emphasizing that the outcome of any mediation must remain "within the control and determination of the parties themselves").

reach an agreement may suffer the consequence of having statements that were made during the mediation used against him in any subsequent adjudication.[163] This poses two dangers: first, the fear of self-incrimination results in a reluctance on the part of the youthful offender to be fully forthcoming, where honesty and forthrightness are necessary to a satisfactory outcome; and second, a youthful offender may feel pressured to settle, and thereby avoid adjudication, once he has incriminated himself in mediation.[164]

Critics allege that informal dispositions of youthful crimes such as VOM "seem to stand on constitutionally questionable ground[s]" because they "pressure[]" juveniles to waive their rights without the requisite knowledge or legal advice.[165] However, there is nothing inherent in the VOM process that would preclude seeking the advice of counsel before undertaking it.[166] VOM also provides an opportunity to confront the accuser/victim in a non-threatening and less rigid setting, which can enable a mutual understanding that would be impossible to achieve in a family court proceeding.[167] With respect to the danger of self-incrimination, maintaining the confidentiality of statements made during a mediation session is not an insurmountable obstacle, and is consistent with the private nature of the process.[168]

B. Net-Widening Effects

Some critics point to the "wider net of social control" that would inevitably result from the broad use of VOM.[169] Rather than providing youths an early opportunity to escape or avoid the traditional juvenile

163. *See* Delgado, *supra* note 138, at 763.

164. *See id*. *But see* ROGERS & MCEWEN, *supra* note 145, § 9:03 (noting that mediation and other alternative dispute settlements "have traditionally been inadmissible to prove the validity . . . of [a] claim in litigation").

165. Delgado, *supra* note 138, at 760.

166. This, of course, presumes that attorneys are aware of the VOM option and its potential benefits and pitfalls. *See* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 41 (1982) (encouraging attorneys not only to understand how mediation works and when it can be useful, but also to serve as mediators themselves).

167. *See* BUSH & FOLGER, *supra* note 61, at 20-21; *Imaginary Conversation*, *supra* note 62, at 14.

168. *See* ROGERS & MCEWEN, *supra* note 145, §§ 9:01-02.

169. *See* Thomas G. Blomberg, *Widening the Net: An Anomaly in the Evaluation of Diversion Programs*, *in* HANDBOOK OF CRIMINAL JUSTICE EVALUATION 572, 582-84 (Malcolm W. Klein & Katherine S. Teilmann eds., 1980); *see also* Delgado, *supra* note 138, at 761-62; Orlando, *supra* note 43, at 337-38. This net-widening effect has been described as "society's treacherous net of control being cruelly dropped over a helpless child." Ira M. Schwartz & Laura Preiser, *Diversion and Juvenile Justice: Can We Ever Get it Right?*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 279, 284.

justice system, VOM may actually bring more children into the system, including some who should not be.[170] Additionally, youths who fail to fulfill their restitution agreements run the risk of being placed in a secure facility for an offense that would not have resulted in incarceration if it had been processed through traditional channels.[171]

According to one study, up to three-quarters of youths referred to diversion programs, including VOM, "would simply have been released or not even brought to the court's attention."[172] But how many of those youths, without appropriate intervention or supervision, will end up back in the system, at greater cost, with additional victims?[173]

Yet, taking the "easy" cases, a process known as "creaming," is another negative consequence of the net-widening effect.[174] "Working with low-risk children tends to result in success," which then guarantees continued funding and referrals for the agencies that provide VOM services.[175] Also, while these lesser crimes may be best suited for the VOM option, another danger of taking the "easy" cases is the potential for the marginalization of the mediation process.[176]

Any discussion of net-widening must address the special circumstances of status offenders, those juveniles found guilty of behavior that would not be criminal for an adult but pertain only to youth custody issues (such as truancy, curfew-breaking, incorrigibility, and loitering).[177] Incarceration is widely considered an excessive disposition for status offenders,[178] but a significant number of status offenders are increasingly being placed out of the home.[179] Although many of these status offenses are "victimless," they may lend themselves

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170. *See* Orlando, *supra* note 43, at 337 (noting that "the net of social control is widened" with VOM programs "to include low- or no-risk offenders," which "force[s] an already overcrowded, overburdened juvenile court to accommodate youth whose conflict traditionally would have been resolved with little or no intrusive measure[s].").

171. *See* Delgado, *supra* note 138, at 761-62; *New Wine*, *supra* note 153, at 272.

172. Orlando, *supra* note 43, at 338 (citing M.W. Lipsey et al., *Evaluation of a Juvenile Diversion Program: Using Multiple Lines of Evidence*, 5 EVALUATION REV. 283 (1981)).

173. Of course, "labeling a child as a delinquent" solely to get access to services is another potential pitfall inherent in net-widening. Orlando, *supra* note 43, at 339.

174. *See id*. (observing that youths who "genuinely present a *risk to public safety* or who have great *social needs*" get "creamed away" from diversion programs).

175. *Id.*

176. *See* UMBREIT, *supra* note 20, at 159.

177. *See* SNYDER & SICKMUND, *supra* note 78, at 166; Lee E. Teitelbaum, *Juvenile Status Offenders*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 983, 988 (Sanford H. Kadish ed., 1983).

178. *See* SNYDER & SICKMUND, *supra* note 78, at 166; Teitelbaum, *supra* note 177, at 988.

179. *See* SNYDER & SICKMUND, *supra* note 78, at 166. American juvenile courts processed more than twice as many status offense cases in 1996 than they did in 1987, and 14% of status offenders faced out-of-home placement, including secure facilities, in 1996. *See id.* at 167.

to family group conferences, in which juveniles engage in mediation with parents and other family members.[180]

Authorities have great difficulty in accurately predicting whether a juvenile will turn out to be a "low- or no-risk" offender. VOM may in fact be a suitable option for these so-called low- or no-risk youth as a relatively inexpensive way of keeping them out of the system.[181] In light of the mandate of the JJDPA, VOM should be viewed as serving a preventive, not punitive, function.[182] Youths caught in the net of VOM may actually benefit from the intervention.[183] There are, indisputably, potential risks involved with net-widening.[184] However, VOM presents a unique opportunity for dealing with low-level offenders.[185] Because it is minimally intrusive and informal,[186] not limited by strict procedural rules,[187] and remains private,[188] it is perhaps the best alternative among diversionary programs for low-risk youthful offenders.[189]

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180. *See* Matthew Kogan, Note, *The Problems and Benefits of Adopting Family Group Conferencing for PINS (CHINS) Children*, 39 FAM. CT. REV. 207, 207-09 (2001). Arguably, FGC is a net-widening diversion, but it serves as an early, less-intrusive intervention that opens the lines of communication between family members and reveals the need for services that can then be provided through the appropriate channels. *See id*. at 217; *see also* Cunha, *supra* note 41 (comparing New Zealand's FGC paradigm with programs in the United States). Mediation has also been proposed for truancy prevention. *See Truancy Prevention Through Mediation Project: An Overview*, Ohio Comm'n on Disp. Resol. & Conflict Mgmt., *at* http://www.state.oh.us/cdr/truancyoverview.htm (last updated Jan. 17, 2001).

181. *See* Arnold Binder & Gilbert Geis, Ad Populum *Argumentation in Criminology: Juvenile Diversion as Rhetoric*, 30 CRIME & DELINQ. 624, 630-31 (1984) (claiming that "widening the net" may be a useful way to apply legal consequences to youths who choose to break society's rules and bring previously unserved youths into treatment, thereby serving an effective screening function for catching potential offenders before they enter the traditional juvenile justice system).

182. *See id.;* Schwartz & Preiser, *supra* note 169, at 280 (describing the JJDPA as a "federal mandate call[ing] for the least restrictive and most rehabilitative approach regarding treatment of *all* juveniles") (emphasis added); *see also* COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, COMBATING VIOLENCE & DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN: REPORT (1996). In her forward to the report, Attorney General Janet Reno noted that, "[i]n concert with community oriented policing and strict accountability for offenders, . . . local prevention efforts are our Nation's most effective long-term weapons against crime and violence." *Id.* at iii.

183. *See* Binder & Geis, *supra* note 181, at 630-31.

184. *See* Schwartz & Preiser, *supra* note 169, at 284 ("Unwieldy nets are at best unnecessary, at worst quite dangerous.").

185. *See Mediator's Role*, *supra* note 63, at 270-71, 286 (emphasizing that VOM provides a "unique capacit[y] for promoting personal empowerment and interpersonal acknowledgment," and that "[t]hese are functions mediation can perform that other processes cannot").

186. *See* Schwartz & Preiser, *supra* note 169, at 288.

187. *See* Riskin, *supra* note 166, at 34 (observing that because mediation is "less hemmed-in by rules of procedure or substantive law," it is "more hospitable to unique solutions" that better address the needs of the participants).

188. *See* BUSH & FOLGER, *supra* note 61, at 20 ("[T]he private, nonjudgmental character of mediation can provide disputants a nonthreatening opportunity to explain and humanize themselves

C. Fairness and Adequacy of Punishment

VOM also raises concerns about the inevitability of different outcomes for offenders who commit similar crimes.[190] For example, assume that two youths each burglarize homes in the same neighborhood. One burglary victim agrees to participate in VOM, and the second does not. Here, one youth may be placed in a secure facility while the other benefits from an opportunity to negotiate a restitution agreement, become empowered, and gain a greater understanding of the human effects of his crime. To avoid this rather arbitrary disparate treatment, critics assert, "prosecution policy" should be based on "proper public accountability, and should not be a reflection of the preferences of individual victims."[191]

However, it is widely accepted in the criminal justice system that "not all disparity is wrong, nor is it possible to avoid it entirely."[192] What ought to be ensured is that "victims and offenders be treated consistently," and that disparities are not a reflection of "social, economic, or political reasons."[193] Sentencing disparities are already part and parcel of the juvenile justice system, which is all the more reason to have a spectrum of dispositions available, especially less intrusive ones. Family court judges are permitted wide discretion in sentencing youthful offenders, with a preference for the "least restrictive available alternative."[194] And although on their face two crimes may seem identical, no two outcomes, victims, or offenders are alike.[195]

To many critics, VOM strips the criminal justice system of some of its moral significance.[196] By dealing with juvenile crime as a conflict

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to one another."); ROGERS & MCEWEN, *supra* note 145, § 9:01; Prigoff, *supra* note 145, at 2; *see also* Mindy D. Rufenacht, Comment, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 114-15 (examining the history and implications of confidentiality in mediation).

189. *See* Orlando, *supra* note 43, at 341 (noting that through careful monitoring to "prevent bias and . . . ensure [that] offender and victim rights are protected," a "delicate balance . . . worthy of retention" can be achieved with VOM).

190. *See* Ashworth, *supra* note 138, at 288 ("Sentencing should provide an official response to crime that is deserved, proportionate, and fair as between offenders."); *New Wine*, *supra* note 153, at 270-71.

191. Ashworth, *supra* note 138, at 297.

192. *New Wine*, *supra* note 153, at 270; *see also* Delgado, *supra* note 138, at 759 (noting that the criminal justice system is "far from perfect" in realizing the goal of consistent results).

193. *New Wine*, *supra* note 153, at 270.

194. N.Y. FAM. CT. ACT § 352.2 (McKinney Supp. 2001).

195. *See New Wine*, *supra* note 153, at 270.

196. *See* Kai-D. Bussmann, *Morality, Symbolism, and Criminal Law: Chances and Limits of Mediation Programs*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 36, at 317, 320 ("The social

between individuals, VOM shifts the focus away from a youthful offender's "violation of *norms and values*"[197] and toward settling a "private conflict."[198] Here, the unique nature of juvenile crime may lend itself to VOM in a way that adult criminal behavior does not, because "[c]riminal acts of young offenders are not necessarily perceived as [a] . . . contravention of penal norms," since adolescents may not always comprehend fully that their behavior has "breach[ed] a norm as a social value."[199]

A further concern of critics is that VOM does not achieve the level of offender accountability that is presumed to result with more severe punishment.[200] This argument revolves around society's expectations that the criminal justice system exists to punish offenders in the form of paying a debt to society.[201] Yet, these expectations often wax and wane with the political climate.[202] Accountability "is not just purely punishment"; rather, "the goal of 'accountability' is to restore and involve as many victims as possible, and make as many offenders as possible aware of the real harm that their crimes have inflicted."[203] An essential aim of VOM "is to send a clear message to the offender that his actions have consequences, that he has wronged another human being, that he is responsible for his actions, and that he is capable of repairing

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reaction to a crime is based on two aspects: the violation of a social norm *and* the harm done to an individual.") (emphasis added).

197. *Id*. at 319.

198. *Id*.

199. *Id*. at 321; *see also* David Yellen, *Foreword: The Enduring Difference of Youth*, 47 U. KAN. L. REV. 995, 996 (1999) (noting that "intellectual and psychological differences between children and adults warrant more lenient and supportive treatment of juvenile offenders"). Yellen specifically identifies the following differences: (1) a child's "moral reasoning and cognitive abilities" are not as well-developed as an adult's; (2) children have "less empathy for others and a less complete appreciation for the consequences of their actions"; and (3) adolescents and teenagers are "inclined toward antisocial behavior," susceptible to pressure from their peers, and less able to assess risk. *Id.* at 996-97.

200. *See* Orlando, *supra* note 43, at 336-37 (questioning whether offender accountability and VOM are mutually achievable).

201. *See* Gordon Bazemore, *Three Paradigms for Juvenile* Justice, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 20, at 37, 41 (noting that "just deserts policies," characterized by mandatory sentencing guidelines and a de-emphasis on treatment and rehabilitation, were implemented "to affirm the importance of the sanctioning function" and expand the punishment paradigm of the juvenile justice system); Orlando, *supra* note 43, at 337.

202. *See* Hon. Ronald D. Spon, *Juvenile Justice: A Work "In Progress,"* 10 REGENT U. L. REV. 29, 33 (1998) (noting that "laws and court opinions . . . are only a reflection of the values which society holds at any given time").

203. *Id.* at 42.

the harm."[204] VOM requires that "[o]ffenders actively assume personal responsibility for their wrongdoing by actively making amends to restore the victim's loss."[205] A juvenile offender's accountability within VOM is therefore inextricably linked with restoring the victim.[206]

D. Limitations of the Mediation Process

Both advocates and detractors of VOM stress the importance of adequate training and standards for mediators.[207] This would seem to be all the more important in dealing with children and adolescents. Practitioners of mediation "require greater levels of skill in order to use it properly" in light of the need to incur "minimal additional trauma" when intervening in cases of juvenile misconduct.[208] In particular, community-based mediation programs, because they often employ volunteer mediators, must provide intensive training to help these mediators deal with the ethical dilemmas and interpersonal dynamics they will inevitably face.[209] Recent efforts have been undertaken by individual states and the National Conference of Commissioners on Uniform State Laws to establish certification and standards for mediators.[210]

An admittedly serious concern with VOM used with juveniles is the disparity in bargaining power between an adult victim and the youthful offender.[211] One of mediation's unique values is that both parties can feel

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204. *Id.* This view of accountability is also in stark contrast to the "treatment" approach, wherein offenders "receive the message that they 'are sick or disturbed' and that their behavior is not their fault." *Id*. at 43.

205. *Id.* at 41.

206. *See id.*; Bazemore, *supra* note 201, at 50.

207. *See* Folger & Bush, *supra* note 60, at 264 (noting that only by "develop[ing] a mindset and habits of practice" can mediators promote "transformative effects"); *Mediator's Role*, *supra* note 63, at 254-56; *see also* HUGHES & SCHNEIDER, *supra* note 23, at 5 (assessing mediator training for VOM programs). See *supra* note 64 and accompanying text, for a discussion of the mediator's orientation.

208. Schwartz & Preiser, *supra* note 169, at 288.

209. *See* Orlando, *supra* note 43, at 340.

210. *See* UNIF. MEDIATION ACT § 2 (Interim Draft Feb. 20, 2001) (last modified Feb. 28, 2001); *see also* FLORIDA STANDARDS OF PROF'L CONDUCT FOR CERTIFIED AND COURT-APPOINTED MEDIATORS pmbl. (Proposed Draft 1991); OREGON MEDIATION ASS'N, DRAFT STANDARDS OF PRACTICE pmbl. (Final Draft June 16, 2000). *But see Mediator's Role*, *supra* note 63, at 255 n.5 (noting that the "proliferation" of proposed codes of conduct for mediators in recent years "reflects the fact that no generally accepted set of standards yet exists").

211. *See* Riskin, *supra* note 166, at 33, 35 (observing that mediation is most effective where there is "relative equality of bargaining power," because "the risk of dominance by the stronger or more knowledgeable party is great"). Riskin suggests that this danger may be assuaged by the participation of an attorney. *See id.* at 35; *see also* Delgado, *supra* note 138, at 768. Delgado asserts that "[victim-offender mediation] sets up a relatively coercive encounter . . . between an inarticulate,

free to walk away from the process without reaching agreement.[212] This is especially true of transformative mediation, where great progress can be made toward empowerment and recognition even if no settlement is ever reached.[213] While the process may only proceed with the consent of both parties, the participation of the youthful offender is not always voluntary.[214] The offender has the difficult choice of either settling or suffering the unsure consequences of the traditional system.[215] If a youthful offender walks away from mediation without an agreement, he unfortunately all too often walks back into the traditional justice system.[216]

Where emphasis is placed on reaching restitution agreements, the participants may miss opportunities to come up with "alternative forms of restitution" that might be more relevant to the situation at hand.[217] Focusing exclusively on settlement may preclude the ability to address the "emotional issues surrounding crime and victimization, including even the possibility of forgiveness and reconciliation."[218]

Additional pitfalls of the mediation process have been noted by critics, including the involvement of parents. In most instances, parents have a right to be present at a child's mediation session and can be a positive and constructive influence.[219] On the other hand, they can "pose some tricky situations," especially where they are too coercive or co-opt the process from their children, taking it upon themselves to make

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uneducated, socially alienated youth with few social skills and a hurt, vengeful victim." *Id.* But this view ignores the fact that vengeful victims probably would not agree to VOM. *See supra* notes 75, 78, 80 and accompanying text. Furthermore, by stereotyping juvenile offenders as socially unskilled and uneducated, Delgado overlooks VOM's potential for empowering and educating. *See supra* notes 60-71 and accompanying text.

212. *See Mediator's Role*, *supra* note 63, at 267.

213. *See id.* at 269-70 (asserting that even when agreement cannot be reached, empowerment and recognition are "accomplishment[s] of enormous value").

214. *See* Orlando, *supra* note 43, at 338 (noting that youthful offenders often "surrender [their] rights on the basis of subtle coercion of well-meaning intake personnel," as well as parents, in order to "avoid the formal process and get 'help' sooner"). On the other hand, some commentators have suggested that, not infrequently, the youths themselves learn how to manipulate the system and say what the adults want to hear in order "to please the mediator, pacify the victim, and receive the lightest restitution agreement possible." Delgado, *supra* note 138, at 766.

215. *See* Delgado, *supra* note 138, at 760.

216. *See id.* This also has an impact on net-widening. *See supra* notes 169-73 and accompanying text.

217. UMBREIT, *supra* note 20, at 137 ("Restitution is not an unimportant question, yet it is not the only important question for victim-offender mediation.").

218. *Id.* at 157-58. See also *supra* note 64 and accompanying text, for a discussion on settlement-based mediation.

219. *See* UMBREIT, *supra* note 20, at 135.

amends.[220] Another area of concern is co-mediation, which is sometimes used to achieve gender, ethnic, or racial balance.[221] However, it may also result in confusion and competition between the mediators.[222] Finally, the VOM process risks becoming marginalized or routinized in the quest for funds, referrals, and general public acceptance, with the result that the "underlying values" of VOM are lost.[223]

V. CONCLUSION

VOM should not be mandated for all juvenile offenses. Serious crimes need to be seriously punished, even if committed by juveniles, especially if they constitute repeat offenses and involve violence. Nor can offenders and victims be compelled to participate in the VOM process. However, for low-level, first-time juvenile property offenders, VOM may be a desirable and effective alternative to incarceration. VOM may potentially relieve considerable pressure on the juvenile justice system and may halt a cycle of crime before it begins.

Responses to juvenile crime should involve an educative and rehabilitative function. VOM provides an opportunity to promote change and growth in youthful offenders, empowering them to make wiser decisions and to have compassion for others. And it gives victims a needed voice in the criminal process. At its best, VOM may transform the lives of both offenders and victims.

Adoption of VOM for juvenile non-violent offenders need not jettison procedures currently in place for all juvenile offenders. Rather, VOM merely supplements existing options for sentencing by family and community court judges. For certain recidivists and violent offenders, punitive sanctions including incarceration would not be precluded in any way in appropriate circumstances. For a great majority of first-time, non-violent youthful offenders, however, as long as the victim is willing, VOM can offer prevention, restitution, rehabilitation, and personal transformation in a single process—one that benefits the victim as well as the offender.

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220. *Id.*

221. *See id.* at 136.

222. *See id.*

223. *Id.* at 157.

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