INTRODUCTION

“An eye for an eye and the whole world is blind.” Mahatma Gandhi used these words, and religious doctrine embraces their profound message. Forgiveness often protects more than the transgressor’s eye, however; it can heal the festering ulcers and heartache of the previously angry, bitter, spiteful victim. Sometimes victims must reach deep within themselves, after years of professional counseling, to forgive harmful, often intentional, transgressions. Other times forgiveness comes rather suddenly and seemingly from outside the victim’s control. Forgiveness, and the effort it takes, depends on many factors, including the victim’s personality, the magnitude and reparability of the harm, the intentionality and motivation for the transgression, and the level of remorse perceived in the transgressor’s responses. In most cases, however, forgiveness comes much more easily after a heartfelt apology.

The emotions involved in the aftermath of transgressions are as fascinating as they are powerful. Why do victims invest so much effort in achieving retribution? Why do some victims spend a decade or more filled with anger and hatred, unable to let go? Why do others sometimes find themselves forgiving even as they try to profess they are still angry? Why do a few words of apology often have such profound effects on the victim’s healing process? And why do some apologetic gestures actually seem to add fuel to the fire of spite? This paper utilizes and further develops an evolutionary framework to shed light on retribution, apology and forgiveness and explores some implications of the framework for the role of victims in the criminal process.

Victim emotions are often either mischaracterized or ignored in public policy debates as victims become pawns in the eternal struggle between liberals and conservatives over the proper functioning of the criminal justice process. Conservatives use victim statements of anger, fear and frustration to justify their law and order policy...
proposals. Victims needs and desires are cited to justify enhanced penalties, reduced plea bargaining, relaxation of procedural protections,\(^2\) and presentation of victim impact statements at sentencing.\(^4\) The use of victims to further these proposals is hardly surprising; after all, victims make much more effective poster children for enhancing state powers than do governmental officials.\(^5\)

In contrast, liberals seem to split on the role of victims in post-offense dispute resolution. Some extol the virtues of restorative justice, where victims, offenders and members of the community replace the traditional criminal justice system with discussion, understanding, forgiveness and reintegration.\(^6\) Under a restorative justice model, victim and offender can view one another as fellow human beings, offenders come to appreciate the error of their ways, and all present reorient themselves toward future respectful behavior rather than focusing on the blame, harm and anger of the past.\(^7\) As part of the offender’s effective reintegration into society, the offender promises some form of restitution, but the community too must pledge to help alleviate the social, economic and other environmental pressures faced by the offender.\(^8\) Most importantly under restorative justice, the victim, rather than the state, plays the primary role in the resolution of crimes.\(^9\) Victim reports of satisfaction and healing following victim-offender mediation become the focus of the movement,\(^10\) while offender sociopathy and its consequent challenges for underdeterrence and recidivism are quickly swept out of the limelight.\(^11\) No doubt restorative justice proponents care deeply about victim healing, but mainstream liberals on the bandwagon seem more concerned about eliminating the harsh


\(^3\) For example, victim fear and frustration are cited to justify preventive detention statutes, more rapid case processing, and the abolition of the exclusionary rule. *Id.* at 968-77, 982-86 (citing President’s Task Force on Victims of Crime, Final Report (1982) and other sources); see also Kent Roach, *Four Models of the Criminal Process*, 89 J. Crim. L. & Criminology 671, 703 (1999) (several states have adopted victims’ bills of rights that include provisions to limit the exclusionary rule).

\(^4\) Henderson, *supra* at 967-86; Roach, *supra* at 703 (discussing use of victim impact statements as method for crime control advocates to increase punishments).


\(^6\) See infra notes \(\_\) and accompanying text.

\(^7\) Roach, *supra* note \(\_\), at 713 (concerns about restoration and prevention look to the future and make room for healing, empowerment, forgiveness, and a richer and dynamic identity for crime victims that is not limited by being a victim who demands increased punishment”).

\(^8\) This position tracks a traditional liberal focus on remedying the perceived social causes of crime, such as poverty, lack of education, and discrimination. Henderson, *supra* note \(\_\), at 943; OTHERS.

\(^9\) See Roach, *supra* note \(\_\), at 710 (“[t]he key players . . . should be the victim, the offender, and their families and supporters—not police, prosecutors, defense lawyers or judges who may appropriate their dispute. Victims play the most crucial role and this gives them some of the power and autonomy that was taken away by the crime.”).

\(^10\) CITE TO VOMA WEBSITE

\(^11\) One of the primary goals of restorative justice is rehabilitation, but, as discussed *infra* at \(\_\_), there is, as of yet, no clear evidence that programs advocated by restorative justice proponents have reduced adult recidivism rates.
penalties, prison overcrowding\textsuperscript{12} and inhumane treatment of offenders that result from the traditional criminal justice process.\textsuperscript{13}

Other liberals are wary of victim involvement in the criminal justice process. These individuals cite centuries of jurisprudential statements indicating that the point of the criminal law is to vindicate public, not private, wrongs. Victim tastes for revenge or mercy belong to tort law, and victims who wish to actively participate in the legal process should bring their own separate civil claims.\textsuperscript{14} These scholars seem to regret or deny the powerful emotions bound up in victimization. At least one scholar has gone so far as to argue that victims’ emotions cause them to need isolation and self-reflection rather than public involvement in the criminal justice process.\textsuperscript{15}

When viewed through an evolutionary lens, however, the need for crime victims to retain an option to play some active role in the criminal process becomes vividly clear. Contrary to the assertions of the critics of the recent victims’ rights movement, the removal of active victim participation in the criminal process is not a stable equilibrium, at least not in a democratic society. Victims who are unable to voice their views in the courtroom or confront their offenders privately eventually organize and take their concerns to the legislature. Victim demand can be excessive, and they can threaten to undermine important procedural safeguards, especially when victims’ voices are coopted by law enforcement. Nevertheless, many victim concerns are both legitimate and fundamental, and their quest for legislative reform is driven by something other than narrow interest group rent seeking. Rather, victim participation, through the submission of victim impact statements and through victim-offender mediation efforts, is an important component of the emotional healing process of many crime victims. Contrary to the aspirations of most restorative justice proponents, however, the criminal justice system should not attempt vastly greater use of their techniques in the criminal process. Victim forgiveness, as a substitute for incarceration, sometimes threatens the security of the rest of society, just as victim vengeance threatens the legitimacy of our criminal justice system. Although victim desires must to some extent be recognized in the criminal process, the role of those desires should remain curtailed in the context of more serious crimes.

Part I of the article discusses some victim emotions\textsuperscript{16} from an evolutionary perspective and incorporates an explanation for the value of apology and remorse. It also

\textsuperscript{12} See Mark William Bakker, \textit{Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System}, 72 N.C. L. Rev. 1479, 1482 (1994) (noting that mediation programs generate enthusiasm in part because they address the needs of an overburdened criminal justice system); \textit{id.} at 1491-94 (describing high costs of incarceration and noting that mediation programs were largely a response to the incarceration reform movement).

\textsuperscript{13} CITES Brown, Henderson, others.

\textsuperscript{14} CITES to Brown, Henderson, others.

\textsuperscript{15} Henderson, \textit{supra} note \__, at \__.

\textsuperscript{16} The article is primarily concerned with those emotions that are experienced as a result of wrongdoing by another human being. Those emotional reactions shared by survivors of natural disasters characterized as “death anxiety” and including the confronting of one’s own mortality and a generalized sense of helplessness and lack of purposefulness will not be explored in this article. For a discussion of those emotional phenomena, see Henderson, \textit{supra} note \__, at 957-64.
turns to strategic considerations of apology and remorse and discusses contexts in which victims are likely to forgive too readily. Part II discusses victim offender mediation, a growing technique in criminal justice, and uses the evolutionary framework to evaluate both its successes and limitations as a substitute for the traditional criminal justice process. Finally, Part III proposes an alternative role for victims in those contexts where victim offender mediation should not replace criminal sanction. To enable vengeful victims to express their desire for retaliation and healing victims to express their desire for forgiveness, and to encourage offenders to engage in remorseful dialogue with victims, the article advocates that control over a relatively small percent of the jail term of a convicted offender be turned over to a clearly identifiable victim.

I. VICTIM EMOTIONS FROM AN EVOLUTIONARY PERSPECTIVE

Much of contemporary legal analysis now rests on an economic model of behavior. The rational actor model probably has more explanatory and predictive powers than any competitor models of human behavior. It has severe limits in two contexts important to criminal justice however. First, traditional economic analysis cannot explain why people care about crimes in the way that they do. Much of criminal law punishes violations of social norms and interferences with personal autonomy, security, dignity and integrity. Very often, then, the criminal law concerns itself with values that do not fit comfortably within the framework of law and economics. Put differently, criminals often act for reasons other than personal financial gain, and society cares about much more than individual and aggregate financial well being. The point here is not that criminal law is necessarily uninterested in the economic framework, but rather that the economic framework often cannot be successfully utilized in criminal law without a more careful specification of individual and group preferences than economists are typically comfortable generating.

Second, a rational actor model does a very poor job of predicting and explaining criminal behaviors. Criminal sanctions function in part to deprive offenders of the benefits of their crimes, and, especially when coupled with potential tort liability, can work to deter rational actors from engaging in these harmful acts. At the point of conviction and punishment, however, the possibility of harsh penalties failed to deter the offender. How can offender behaviors be explained by a rational actor model when the criminal law, by definition, failed to deter?

To a natural scientist, this failure to understand and therefore predict criminal behaviors stems at least in part from a misunderstanding of the human brain. The brain, like the rest of our physical anatomy, is subject to evolutionary pressures over time. Natural and sexual selection work across generations to increase the frequency of those heritable traits that tend to increase reproductive success relative to other traits. These

17 See Owen D. Jones, Law and Behavioral Biology 5 (October 27, 2003) (draft manuscript on file with author).
18 Id. at 20 & n.27; see generally JOHN ALCOCK, ANIMAL BEHAVIOR (6th ed. 1998); TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, BIOLOGY, EVOLUTION AND HUMAN NATURE (2001).
evolutionary pressures are not forward looking. Rather, traits that are adaptive in the environment where the brain develops become increasingly common in each generation where that environment persists. If the environment changes, creating new selection pressures, it can take many generations before the old selected trait is replaced by the new one. Our very basic brain functions are millions of years old, and those brain functions that are uniquely human are thousands of years old. Any valid model of human behavior must therefore take into account emotions, cognitive thought processes, and behavioral tendencies that would have been adaptive, on average, in this environment of evolutionary adaptation, or “EEA.”

Central to biological theory is the proposition that reproductively successful humans maximize genetic utility rather than the economists’ individual utility:

To the extent that people and other animals often behave as if they were rational maximizers of individual utility, it is partly because their information processing pathways have been honed by natural selection, the most relentlessly economizing force in the history of life, and partly because maximizing individual utility is often epiphenomenal to maximizing genetic utility.

To the extent that individual and genetic utility diverge, however, biological theory predicts that we are more likely to see behaviors that enhance or maximize genetic utility. Moreover, we are more likely to see individuals exhibiting predispositions toward behaviors that were adaptive in the EEA than we are to see behaviors that are fitness or utility enhancing today.

Freed from the individual utility maximizing assumption of economic theory, the natural sciences have been able to offer more useful insights into the causes of criminal behavior. At the individual level, neuroscientists are beginning to understand why some offenders are not deterred by social, economic and penal sanctions. At the level of population behavior, evolutionary theory helps to explain why some criminal behaviors are harder to deter than others. In this context, evolutionary theory aids the economic framework by providing a testable theory of the relative elasticities of demand for different criminal behaviors. Assuming that we want maximal deterrence of all criminal behavior at the lowest possible cost, evolutionary theory usefully informs our judgments about where additional crime-deterring dollars should be spent.

This article uses evolutionary theory for a different purpose: to focus on the individual victim and her relationship to her community and to her offender. It takes the position that some of the tools used in both economic and evolutionary theories—namely elementary game theoretic reasoning—can be used as a starting point for understanding victim emotions and their role in both social relationships and the criminal justice process. In other words, evolutionary theory can help economists to more carefully

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20 Jones, supra at 21.
specify some of the individual and group preferences that are centrally important to the
criminal justice process.

Before proceeding with the game theoretic analysis, however, a few caveats about
the behavioral biological approach are in order. First, biologists concern themselves with
“ultimate” rather than “proximate” causes of emotions, cognitive processes, and
behavior. For biologists, the proximate causes of these phenomena explain how they
manifest themselves, whereas the ultimate causes of these phenomena explain why they
are observed. For example, the proximate causes of sexual jealousy include observing a
sex partner with an attractive potential mate as well as the neurochemical reactions in the
brain that generate heightened attention, fear, lowered self-confidence, etc. The ultimate
causes of sexual jealousy, by contrast, focus on the reasons humans experience this
jealousy. Humans experience sexual jealousy to prepare themselves to respond to threats
against their abilities to sexually monopolize their mates. Humans who experience this
jealousy (at least in moderate doses) are likely more reproductively successful than those
who do not. Nothing in behavioral biological theory requires that a sexually jealous
person be aware of the ultimate cause of his behavior. Indeed, he need not be
consciously interested in sexual reproduction as a goal. For biologists, it only matters
that the phenomenon—here sexual jealousy—in fact serves the function—here relative
reproductive success.

Second, behavioral biology predicts that humans will be predisposed toward
certain cognitive processes, emotions and behaviors. These predispositions have the
effect of biasing behavioral patterns, but they do not determine the behavior of any
particular individual. The greater the selection pressure on a given behavioral response,
the more strongly the behavioral response is predicted. For example, most humans who
have not consumed food for more than a few hours will begin to focus their energies on
obtaining food to consume. Failure to consume food for a long time leads to death, so we
can assume hunger is a fairly useful drive. Although I will argue that evolutionary theory
provides useful insights into the phenomena of apology and forgiveness, predispositions
toward apology and forgiveness are likely less universal and less likely to produce those
behaviors than is the predisposition to search for food when hungry.

Third, some of the phenomena discussed in this article are subject to considerable
individual and cultural variation. Apology and forgiveness come easily for some and are
difficult for others. Some cultures promote apologetic behaviors and encourage
forgiveness to try to strengthen the behavioral predispositions. However, the fact that
culture plays an important role in some of these phenomena does not contradict a
biological explanation. The old nature-nurture dichotomy is now widely understood to

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21 In this sense, biological theory is similar to economic theory. Economic theory assumes that individuals
engage in productive activities in order to maximize their profits. It may be the case that a baker loves to
make pies and opens a bakery to enjoy the satisfaction of making pies all day. He may care not a whit
about whether his baking generates a profit. If he does generate a profit, however, he is more likely to be
able to continue to enjoy making pies all day. Over time, those bakers who fail to generate profits are
driven out of business. The profits may not consciously motivate this particular baker, but they are a
necessary prerequisite to continuing his operations. The behavioral assumption that his actions are
motivated to generate profits is therefore descriptively useful despite his conscious decision making.
be false. Both nature and nurture play a vital role in virtually all behaviors. Some genes fail to express themselves without a facilitative environment, and many of our cultural practices are chosen to strengthen (or weaken) our genetic predispositions. Biological theory does tell us something about the marginal influence of proposed cultural practices on behavioral predispositions, however. A ban on romantic expression is much less likely to be successful than a ban on purple shoes, for example.

Are there evolutionary functions served by apology, forgiveness and victim emotions? Section A of this Part situates these phenomena in a simple game theoretic framework. Section B discusses the strategic use of apology, and Section C identifies circumstances in which victims may be apt to forgive too easily. Part III will incorporate the framework into dispute resolution in the context of the criminal justice system.

A. Apology and Forgiveness Economize on Punishment Costs

The analysis begins where most elementary game theoretic analyses begin—with the Prisoner’s Dilemma. The basic insight underlying the Prisoner’s Dilemma, which is ubiquitous in legal problems, is that selfish individuals can have difficulty precommitting themselves to cooperate. Cooperation makes people better off, but individuals are often tempted to enjoy the benefits of others’ helpful acts while cheating with one’s own efforts. Reputation, iterative plays and legal sanctions all help to bolster cooperative behavior, and often the players themselves can employ mechanisms to discourage cheating. Nevertheless, defection often remains a possibility.

Evolutionary theory can help to elucidate some common human preferences and behaviors related to cooperation and defections. Unlike the completely individualistic homo economicus, the prototypical human in evolutionary theory is seeped in social relationships. According to biologists, humans almost certainly have always lived in groups. Indeed, it is not at all clear that humans could survive without the cooperation of others to hunt, rear offspring, and protect against animal and human predators. It therefore makes sense that some of our evolved cognitive mechanisms and emotions work to elicit cooperation and discourage defections in others. After all, individuals who were successful at eliciting cooperation from others were more likely to survive, thrive, and rear offspring.

Moreover, it seems likely that certain evolved human predispositions help us to reap the benefits of cooperation. All of the primates, including humans, have affiliative tendencies. We all have the capacity to remember our previous interactions and to communicate our desires for help. Humans form friendships, families, coalitions, business partnerships, and societies. Furthermore, we seem to possess an optimism bias that often allows us to trustingly take the initial step toward forming these relationships and cooperating with one another.

\footnote{22 CITES}
\footnote{23 CITES—Ridley?; Paul H. Rubin, Darwinian Politics: The Evolutionary Origins of Freedom (2002) (stating that homonids have always been social creatures).}
\footnote{24 CITES}
Because this cooperation is exploitable, however, humans simultaneously evolved brain mechanisms to both keep track of trade and detect cheating. DESCRIBE KEVIN’S WORK. Moreover, Leda Cosmides, an evolutionary psychologist, has demonstrated that people are remarkably good at detecting cheating behavior by others.25 Other studies indicate that people are significantly better than chance at detecting defection.26 The two brain mechanisms work together to enable humans to remain vigilant about the possibility of defection. Awareness of cheating is not alone enough to discourage defections, though, so alongside these brain mechanisms we developed an emotional precommitment to punish perceived defections. Experimental subjects have consistently exhibited a willingness to incur real costs to punish those who defect, free ride, or behave unfairly.27

Evolutionary theorists are not surprised to hear that humans take a punitive stance toward cheating. John Maynard Smith, a geneticist, created a game between passive cooperators, or Doves, and aggressive defectors, or Hawks, to illustrate how cooperation, defection, and punishment coevolve.28 When a Hawk encounters a Dove, the former easily defeats the latter. When two Hawks encounter one another, they are both badly wounded. When two Doves encounter one another, however, they both receive benefits. Natural selection, Smith argued, should result in an evolutionarily stable strategy, one in which no animal using the strategy could be made better off by following a different strategy.29 When the game is played repeatedly, the Hawks initially thrive at the expense of the Doves. Eventually the population of Doves decreases, however, and the Hawk population begins to decline as Hawks mostly encounter one another. A successful strategy is one in which Doves act like Doves when they encounter other Doves but switch to Hawk behavior by retaliating when they encounter Hawks.30

27 See Elizabeth Hoffman et al., On Expectations and the Monetary Stakes in Ultimatum Games, 25 INT’L. J. GAME THEORY 289, 300 (1996) (finding subjects willing to give up profits to punish those who take too large a share of the total dollar amount to be distributed); CITE VERNON & KEVIN’S WORK (same?); see also Ernst Fehr & Simon Gachter, Cooperation and Punishment in Public Goods Experiments, 90 AMER. ECON. REV. 980 (2000) (finding subjects heavily punished free riders in public goods experiments); Cf. CITE FRANS’ NATURE STUDY WITH FEMALE CAPUCHINS THROWING THEIR FOOD AT EXPERIMENTERS WHEN THEY RECEIVE LOWER QUALITY FOOD THAN OTHER CAPUCHIN.
29 J. Maynard Smith, Optimization Theory in Evolution, 9 Annual Rev. of Ecol. & Systematics 31 (1978). The evolutionarily stable strategy is similar to the Nash equilibrium, which is achieved when each player’s individual strategy is optimal given that the other players use their own equilibrium strategies. John Nash, Non-Cooperative Games, 54 ANNALS OF MATHEMATICS 286 (1951).
Defections often are both materially and emotionally costly to their victims. The emotional harms from defections presumably are greater for intentional defections, which are often the subject of criminal law. As Stephen Garvey writes:

When an offender commits a crime, he not only imposes a material loss on his victim but also sends a message. In effect, he says: “I’m better than you. I don’t need to respect your rights. . . . Crime degrades, demeans, diminishes and dishonors the victim, in addition to whatever material damage it may cause.”

Our brains evolved during a period when humans lived in small groups without the benefit of formal government protections. One could deter intentional wrongdoing by others in part with a credible threat of retaliation, but deterrence is no doubt more effective when a potential victim can credibly threaten that her group also will retaliate against transgressions. Likely a respected member of that community could expect the others to respond supportively to attempts by others to victimize the member. This anticipated support, motivated by feelings of retribution, often served to deter harmful and intentional defections. Individuals who lacked the social support of the other members of the community were therefore more likely to be victimized. Victims thus often feel a deeply rooted sense of shame and humiliation in the fact of their victimization, no doubt in part because victimization was at one point linked to reduced social status. The status is at least partially restored when community members express their retributive instincts by requiring that the transgressor be punished. Some portion of the status is also restored when the victim himself is able to punish the defection, for community members know that retaliation also serves to deter.

The emotional urge to retaliate, which has been labelled “moralistic aggression” by biologists, is often quite powerful. Moralistic aggression by victims and retributive urges by third parties both include feelings of anger, an emotion that has the effect of providing the motivation to follow through on spiteful urges. Interestingly, anger also has the effect of causing people to think in terms of heuristics, stereotypes and scripts rather than paying close attention to details. Thus, anger has the effect of

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32 *Rubin, supra* note ____, at ___.
33 See Everett L. Worthington, Jr., *Is There a Place For Forgiveness in the Criminal Justice System?*, 27 Fordham Urb. L.J. 1721, 1727 (2000) (“The crime reduces the power and status of the victim. A victim’s sense of power can be reestablished through balancing the social books (e.g., by restitution or incarceration of the offender) and balancing the emotional books (e.g., by seeing the esteem lowering acts by the offender or through publicly humiliating the offender. In each, raising the esteem of the victim increases the victim’s relative power—either by seeking revenge or seeing the criminal punished.”).
35 Moralistic aggression is not confined to humans, as illustrated by the interaction between three chimpanzees in a colony at the Arnhem Zoo in the Netherlands. Puist, a large adult female, supported Luit, one of the dominant males, in chasing Nikkie, another male. Later, Nikkie behaved threateningly toward Puist, and she held out her hand toward Luit in an apparent request for return support. When Luit failed to assist Puist, she barked furiously while chasing and then hitting Luit. Frans de Waal, *Chimpanzee Politics: Power and Sex Among Apes* 207 (1982); *see also* Frans de Waal, *Food Sharing and Reciprocal Obligations Among Chimpanzees*, 18 J. Human Evolution 433 (1989); NATURE STUDY.
36 CITE--
37 CITE CLORE WORK.
simultaneously motivating us to punish and of seriously dampening our receptivity to the costs of punishment. According to Robert Frank, anger works to bind us to the long-term strategy of deterring defections rather than the short-term strategy of avoiding punishment costs.\(^{38}\) This interference with “rational thought” tends to further our self-interest because it helps us to retain our resources and our social status within groups, and it helps the group to prevent infiltration by Hawks.

Notice how the evolutionary theory complements and enriches the economist’s use of game theory. Economists predict that one deters intentional defections with punishment, and evolutionary theory provides a methodologically consistent bridge between the economics and psychological literatures by explaining why and how victim emotions of anger, shame and humiliation all can work to promote cooperation in a society. The evolutionary theory, coupled with knowledge from psychology, also helps to explain how victims precommit themselves to retaliate against defections.

The victim’s precommitment strategy of revenge, by itself, seems draconian, however, because not all defections entail threats to one’s life, livelihood or social status. People defect for lots of reasons, including accident, oversight, misunderstanding, need, temptation, indifference, and just plain meanness. Some defections warrant punishment, but others do not. Moreover, threats to social status can be undone if the transgressor recants his defection and/or the other members of society affirm the victim’s status by denouncing the transgressor’s acts. Threats to material resources can be undone by restitution or reparation efforts. In these circumstances, the material and psychological resources necessary to retaliate are more appropriately rechanneled into more productive activities.

Apology and forgiveness work together also to help temper the costs of moralistic aggression. According to apology experts, an effective apology requires (1) identification of the wrongful act; (2) expression of remorse and regret for having committed the act; (3) promise to forbear from committing the wrongful act in the future; and (4) offer of repair.\(^{39}\) Some of these elements can be implicit in an apology, and a victim may ultimately forgive even without an apology and/or without requiring the apologizing transgressor to actually proceed with reparations.\(^{40}\) In the face of a sincere and timely apology, however, many victims find their anger dissipates quite rapidly. Moreover, some transgressors actually feel an urge to apologize to their victims, even when they know that the apology can be used against them.

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\(^{39}\) O’Hara & Yarn, supra note ___, at ___ (summarizing definitions of several apology scholars as expressing four basic elements); see also Carrie J. Petrucci, Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System, 20 Behav. Sci. & Law 337, 340-41 (2002) (stating that essential elements of apology include “(i) an expression of remorse or regret, such as ‘I’m sorry’; (ii) an overt acceptance of responsibility for the harmful act; (iii) some type of offer of compensation, repair or restitution; and (iv) a promise to avoid such behavior in the future”) (citing other apology scholars).

\(^{40}\) In fact, one of the powerful effects of apology is that it often turns a wrongful act into a mere misfortune of life. CITEx Many victims seriously reduce their compensation demands or forgive them altogether when they receive what they perceive to be a sincere apology.
Effective apologies work in a wonderfully paradoxical way. By embracing and then rejecting the wrong, a transgressor admits that he has transgressed while simultaneously proclaiming that he is a cooperator. Apologies can be difficult, however, because they require a type of self-humiliation. To be effective, the transgressor must place himself in a morally inferior position vis-à-vis the transgressor in a symbolic gesture that has the effect of reviving the victim’s perception of his own status. The greater the harm inflicted on the victim, the more victims seem to demand apologies.\textsuperscript{41} At the same time, the shame and humiliation felt by the transgressor in the apology process likely increases with the severity of the harm inflicted. Often counteracting the shame and humiliation is a strong urge on the part of the offender to try to ameliorate any harm that he has caused the victim, and the greater the harm, the greater this offsetting urge.\textsuperscript{42} Heartfelt apologies therefore can have the effect of restoring the victim’s status, and if accepted, the transgressor’s status as well. But to restore the status of the transgressor, the transgressor must first place himself in a much lower position and hope that the victim and/or third parties show the mercy necessary to resurrect his status.\textsuperscript{43}

This revival of the victim’s status, coupled with at least an implicit offer to repair and a promise to forbear from transgressions in the future, signals to the victim, often subconsciously, that his anger is no longer serving an important function. In short, apologies can have the effect of removing the preexisting, present and future threats to the victim, making retaliation an unnecessary strategy. In these cases, victim anger often dissipates and forgiveness, typically coupled with reconciliation,\textsuperscript{44} is successful. Forgiveness is an admittedly nebulous concept, and scholars seem to have difficulty agreeing on a single definition.\textsuperscript{45} For my purposes, forgiveness is the victim’s


\textsuperscript{42} Petrucci, supra at 354 (citing empirical study and stating that “with an increased sense of responsibility and when the victim experiences serious consequences, offenders may be more motivated to apologize to the victim”).

\textsuperscript{43} CITE—TAVUCHIS?

\textsuperscript{44} Because forgiveness is a psychological event internal to the victim, it is technically possible for forgiveness to occur without reconciliation. See Robert D. Enright & Bruce A. Little, Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice, 27 Fordham Urb. L.J. 1621, 23 (2000) (distinguishing forgiving from condoning, forgetting and reconciling). Moreover, reconciliation need not always involve “a sincere and honest conversation about forgiveness.” Everett L. Worthington, Jr., Is There A Place for Forgiveness in the Justice System?, 27 Fordham Urb. L.J. 1721, 1725 (2000) Because this article focuses on the means by which an offender can facilitate the victim’s forgiveness, reconciliation and forgiveness will often be used interchangeably.

\textsuperscript{45} See, e.g., Enright & Little, supra at 1622-23 (“[p]eople, upon rationally determining that they have been unfairly treated, forgive when they willfully abandon resentment and related responses (to which they have a right), and endeavor to respond to the wrongdoer based on the moral principle of beneficence, which may include compassion, unconditional worth, generosity, and moral love”); Dennis M. Cariello, Forgiveness and the Criminal Law: Forgiveness Through Medicinal Punishment, 27 Fordham Urb. L.J. 1607, 1608 (2000) (“[f]orgiveness is the voluntary cancellation of an obligation created by conduct, whether purposeful or negligent); Everett L. Worthington, Jr., Is There A Place for Forgiveness in the Justice System?, 27 Fordham Urb. L.J. 1721 (2000) (“[f]orgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love (or even romantic love) on top of “hot” anger at the transgression or “cold” unforgiveness emotions); David M. Lerman, Forgiveness in the Criminal Justice System, 27 Fordham Urb. L.J. 1663 (2000) (adopting definition from unpublished work of Robert Enright:

\textsuperscript{45} See, e.g., Enright & Little, supra at 1622-23 (“[p]eople, upon rationally determining that they have been unfairly treated, forgive when they willfully abandon resentment and related responses (to which they have a right), and endeavor to respond to the wrongdoer based on the moral principle of beneficence, which may include compassion, unconditional worth, generosity, and moral love”); Dennis M. Cariello, Forgiveness and the Criminal Law: Forgiveness Through Medicinal Punishment, 27 Fordham Urb. L.J. 1607, 1608 (2000) (“[f]orgiveness is the voluntary cancellation of an obligation created by conduct, whether purposeful or negligent); Everett L. Worthington, Jr., Is There A Place for Forgiveness in the Justice System?, 27 Fordham Urb. L.J. 1721 (2000) (“[f]orgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love (or even romantic love) on top of “hot” anger at the transgression or “cold” unforgiveness emotions); David M. Lerman, Forgiveness in the Criminal Justice System, 27 Fordham Urb. L.J. 1663 (2000) (adopting definition from unpublished work of Robert Enright:
overcoming of those negative and hostile feelings that help to foster the urge for further retaliation.\textsuperscript{46} Individuals who develop the emotional framework necessary for the effective use of apology and forgiveness are thus placed at a competitive advantage relative to those individuals who must incur the full costs of moralistic aggression.\textsuperscript{47}

\section*{B. Strategic Apologies and the Role of Transgressor Emotions}

Apology and forgiveness thus explained introduce a potential tension in the evolutionary framework. After a transgression, both victim and transgressor may prefer reconciliation to retaliation, but ex ante the possibility of conciliation can erode the deterrent effect of the threat to retaliate. A truly strategic person knows that he can get away with defection with a simple apology.\textsuperscript{48} If victims feel compelled to forgive in the face of apology, then forgiveness has the potential to become maladaptive.

In fact, victims are often quite discriminating in their responses to apology. The nuances of apology matter a great deal to a judgment of the apology’s sincerity. Victims scrutinize everything from context to word choice and order, timing, elaborateness, eye contact, breath, body posture, facial expressions, tone of voice, and pace of speech.\textsuperscript{50} In fact, where sincerity is important, written apologies alone are typically much less effective than face-to-face communication.\textsuperscript{51} Simple apologetic gestures may suffice for very slight harms, but a more complex apology is typically

\footnotesize{\textsuperscript{46} “willingness to abandon one’s right to resentment, negative judgment, and indifferent behavior toward one who unjustly injures us”.)

\textsuperscript{47} Under this definition of forgiveness, a victim no longer desires that the transgressor be punished out of a desire for revenge. It is possible, however, that a victim would nevertheless think punishment is appropriate for rehabilitative, educational or deterrent purposes. Alternatively the victim could think that punishment is necessary in order for a transgressor to pay a debt owed to society. \textit{Cf.} Susan Bandes, \textit{When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government}, 27 Fordham Urb. L.J. 1599, 1603 (2000) (arguing that victim’s forgiveness may have no bearing on society’s demand for punishment or victim’s view of appropriateness of punishment); Cariello, \textit{supra} note ___, at 1609 (arguing that although society forgives, “medicinal punishment” may nevertheless be appropriate).


\textsuperscript{49} \textit{Cf.} Jeffrie G. Murphy, \textit{Symposium, The Role of Forgiveness in the Law}, 27 Fordham Urb. L.J. 1351, 1359 (2000) (“if I were going to set out to oppress other people, I would surely prefer to select for my victims persons whose first response is forgiveness rather than persons whose first response is revenge.”).

\textsuperscript{50} I do not mean to claim that sincerity is always important to the formal acceptance of an apology. Sometimes an insincere apology is valuable to the victim as an admission of guilt. That admission is often very useful for convincing third parties that the victim was not at fault or that the transgressor’s actions should be more carefully scrutinized. The acceptance of the perceived insincere apology is unlikely to result in subjective forgiveness, however.

\textsuperscript{51} \textit{CITE} TAVUCHIS?
demanded for more severe harms.\textsuperscript{52} And partial apologies, or apologies that do not accept blame, can actually increase the victim’s spiteful feelings.\textsuperscript{53}

In part, a sincere apology communicates that the transgressor feels guilt,\textsuperscript{54} a point that warrants some elaboration. Guilt serves an important corrective function in humans. While people can and do think about their long-term interests, it is well known that many animals, including humans, behave as though they heavily discount the value of future rewards as compared to present ones.\textsuperscript{55} Long-term relationship and reputational benefits are often larger than the short-term benefits from cheating, but a person may nevertheless discount those future benefits in favor of the present reward. In the EEA, where the preservation of goods was difficult, this preference for present consumption could be valuable at times.\textsuperscript{56} In the context of relationships, however, this preference for the present reward can be destructive. Guilt in humans can thus be viewed as an evolved emotional capacity that works to counteract the preference for present rewards where they can be harmful. Rather than counting on a rational calculation to properly value the future consequences of a present choice, feelings of guilt are evoked to help transform those future costs into presently felt ones.\textsuperscript{57} At the moment of choice, guilt, where effective, creates negative feelings that cause the decision maker to avoid choosing the present reward.

In the context of an apology, the transgressor’s guilty feelings obviously failed to prevent the transgression. There are several possible causes of this failure. The transgressor may not experience feelings of guilt, at least not very often. To the extent that guilt precommits us to be cooperators, “Hawks” are individuals who experience guilt very infrequently or with very low intensity. But Doves, defined as individuals who experience relatively high levels of guilt, are capable of transgressions too. If the harm was caused by mere inadvertence, for example, the transgressor likely did not focus enough on the possible harm for guilty feelings to be evoked. Sometimes other powerful emotions or drives such as rage or lust or hunger work to cancel out the guilt feelings that would otherwise be present. Alternatively, the transgressor might have felt guilt at the moment of deciding to transgress but the guilt feelings were insufficient to overcome the demands.

\textsuperscript{52} Carrie J. Petrucci, Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System, 20 BEHAV. SCI. & LAW 337, 352 (2002).
\textsuperscript{53} See Jennifer K. Robbennolt, Apologies and Legal Settlement: An Empirical Examination, ___ MICH. L. REV. ___ (forthcoming 2003) (subjects in study less inclined to settle when offered partial apology where offender caused severe injury and where it was clear to the victim that the offender’s actions were blameworthy).
\textsuperscript{54} I distinguish between guilt, discussed here, and shame, mentioned above and below. Guilt has internal causes in that it is experienced when one knows that he has committed, or is thinking of committing, a transgression. Shame comes from knowing that another thinks one has committed or is contemplating committing a transgression. Guilt can exist without shame, for example when one knows he has committed a transgression but believes noone else knows. Shame can exist without guilt, for example when one knows that others falsely believe that he committed a transgression.
\textsuperscript{55} CITES; ROBERT FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 79-80 (1988) (discussing this psychological phenomenon as “the matching law” and noting that similar decision making has been observed in pigeons, rats, cats, dogs, guinea pigs, and hogs).
\textsuperscript{56} CITES—OWEN’S WORK MIGHT HELP FLESH THIS OUT
\textsuperscript{57} FRANK, \textit{supra} note ____, at 82.
very large present rewards. Dove transgressors sort themselves from Hawk transgressors by showing feelings of guilt at the point of apology. Because the transgression has occurred, those feelings of guilt are accompanied by remorse. Transgressors often also feel shameful because their admitted blameworthy wrongdoing is further exposed for negative evaluation by the victim and, often, others. These emotions—guilt, remorse and shame—signal to the victim that despite the harmful act, the transgressor is a default cooperator. Facial expression, eye contact, voice, skin color, and other facets of an apologetic gesture serve as signals of the transgressors emotions.

Because undetected insincere apologies can have enormous strategic value, biologists would predict a co-evolutionary arms race between insincere transgressors’ ability to deceive victims with apologetic gestures and victims’ ability to detect transgressor insincerity. The arms race theory helps to explain why the nuances of apology are so important to victims’ decisions to forgive. The more these nuances are outside of the conscious control of the transgressor, the more likely the apology is accompanied by a credible signal of sincerity. Forgiving victims who can discern sincere from insincere apologies have an advantage over both uniformly generous and stingy forgivers. The discerning forgiver can minimize the ex post costs of moralistic aggression while simultaneously maintaining the deterrent value of potential retaliation.

This apology discussion has assumed that only the victim has an interest in the apology. Third parties have an interest in the apology too, however, because others who are aware of the transgression must decide whether they themselves want to risk future interactions with the transgressor. The general reputational value of an apology is recognized in the apology literature by scholars who identify apology as a way to repair one’s social identity and to deflect negative personality judgements. To the extent that they do not themselves need to interact with the transgressor, however, we can expect third parties to scrutinize the sincerity of the apology less carefully. Put differently, third parties can be expected to carefully scrutinize the sincerity of an apology only when they expect to bear the costs of incorrectly judging the transgressor’s remorse.

58 See Stephen P. Garvey, Punishment as Atonement, 46 U.C.L.A. L. Rev. 1801, 1814-15 (1999) (“I can feel guilty about a moral transgression I intend to commit—which may indeed stop me from doing it—but I will feel repentance or remorse (as well as guilt) only when the deed is done”); Irving Thalberg, Remorse, 72 Mind 545, 546 (1963) (“[w]e can feel guilty about intending to take a double portion of strawberries, but no one ever feels remorse for his unexecuted designs.”). When a victim scrutinizes an apology for sincerity, she is in part looking for signs of remorse. See Enright and Kittle, supra note ___, at 1630 (“Asking for or receiving forgiveness also is a moral act, not a self-serving act to reduce one’s own sentence or receive some advantage. Advantage may come, but this should not be the primary motivation. . . . Perhaps a key to genuine acts of seeking forgiveness concerns remorse. How genuinely remorseful does the offender seem to be? Does the person apologize? Does the apology seem sincere? Does the victim think it is sincere?”).

59 See Frank, supra note ___, at 120-31 (describing telltale physiological signs of a variety of emotions).


Choosing not to retaliate and believing that the transgressor will refrain from future transgressions are very different, and yet both victims and third parties can conflate the two. That is, a transgressor can sincerely feel guilt, shame and remorse for the past transgression despite the fact that his promise to forbear from future transgressions lacks credibility. Some transgressors are incapable of taking appropriate care to prevent harms. Others are consumed with emotions (such as anger) or drives (such as addiction) that will routinely overcome their preventive feelings of guilt. A transgressor can resolve to do better in the future, and can sincerely believe that he is capable of mending his ways, but self-deception\textsuperscript{63} simply prevents him from seeing that future transgressions are inevitable. At least with first transgressions, victims and third parties tend to see the apology as a precommitment device for refraining in the future. Multiple transgressions are more likely to cause the victim to separate the transgressor’s remorse for past transgressions from his promise to refrain from future transgressions. Interestingly, jurors who believe that a defendant is remorseful also tend to believe that he will not commit transgressions in the future.\textsuperscript{64} Conversely, jurors who believe that defendant is dangerous or are aware that he has a history of violence and crime are less likely to believe that the defendant is truly remorseful.\textsuperscript{65}

C. WHEN VICTIMS FORGIVE TOO EASILY

The apology game, as played in real life, involves uncertainty. As victims, we assess apologies for sincerity, but often we cannot know for sure whether another’s apology is genuine or strategic. We tend to follow our “gut instinct” about whether to forgive, but rarely do we actually forget the transgression. In the context of many ongoing relationships, then, victims can judge over time whether it was appropriate to forgive the transgressor. As indicated above, it may be that the apology was sincere, but the transgressor is unable to refrain from transgressing. Alternatively, it could be that the apology itself was strategically uttered. In any event, repeat transgressions do significantly affect the interpretation of apologies. In a study of how children respond to apology, for example, an apology by an offender with a good reputation was interpreted as an expression of regret. When the offender’s reputation was bad, however, the apology was viewed as a way to manipulate the situation.\textsuperscript{66}

Although the victim’s judgment might well be fallible, presumably the victim is typically better able to judge the sincerity of an apology than are third parties. Cognitive neuroscientists are discovering that the level of neural activity that we devote to tasks is directly proportional to the reward to be earned for successfully completing that task.\textsuperscript{67}

\textsuperscript{63} CITE SELF DECEPTION LITERATURE.
\textsuperscript{64} CITE—Pipes and Alessi article?
\textsuperscript{67} PAUL GLIMCHER, DECISIONS, UNCERTAINTY AND THE BRAIN: THE SCIENCE OF NEUROECONOMICS (2002).
In many cases, the victim alone directly suffers the consequences of misinterpreting an apology. In general, then, we might expect the victim to be better focused on the nuances of an apology than are third parties. Moreover, to the extent that the transgressor and the circumstances of the transgression are more familiar to the victim than to third parties, the victim may be better situated to interpret the appropriateness of those nuances. This assertion requires a significant caveat, however, because the subjective interpretation of an apology can involve emotional as well as cognitive factors. Unfortunately, those emotional factors can blind a victim.

The point requires elaboration. The thicker the relationship between victim and transgressor, the more accurate the interpretation of the apology and the assessment of the likelihood and cost of future transgressions. For example, a wife knows a husband’s personality and behavior much better than a stranger’s. She therefore is better able to interpret both his spoken gestures and his shrugs, slouches, touches and blushes. She knows whether his genuine remorse is likely to be expressed with few words or many, and whether his apologies are frequent or rare. Because she does not forget his transgressions, the previous ones can be called to mind in assessing whether his remorse is likely to lead to behavioral reform.

In contrast, the habits of casual friends and acquaintances may be less intimately known to a victim. Ironically, however, the victim might be better able to objectively assess those apologies. In the latter case, the victim’s perceived need for the continuation of the relationship is lower, and, therefore, the victim is less likely to mediate her judgments by some sense of a need to forgive. No doubt we can all recall at least one event in our lives when we felt strong feelings of relief when a lover or close friend offered an explanation or apology for a perceived wrong. So desperate are we to reconcile with our loved ones that we often fail, perhaps refuse, to carefully scrutinize the explanation or apology. Put more succinctly, the benefits of forgiveness rise, all else equal, as the perceived value of the future of the relationship rises.

A somewhat similar (though perhaps more blinding) phenomenon seems to occur in spousal and girlfriend abuse cases. After beating their victims, these men often proffer elaborate apologies in an attempt to resume their relationships. Some victims forgive their abusers and return to their relationships despite several very severe prior beatings. In fact, more than forty percent of women who seek aid at spouse abuse shelters return to live with their abusers. These women are often confident that the beatings will stop. Sometimes they go so far as to blame themselves or some external source of stress for these beatings. Studies of abuse victims’ decisions to return to their abusers indicate that, all else equal, victims are more likely to return when they perceive that they have no decent alternatives. Moreover, they are more likely to return when they have made relatively significant investments in their relationships. Thus,

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68 The problem is significant. An estimated 1.8 million women are beaten by their husbands annually, and an estimated 1500 women die each year as a direct consequence of spousal abuse. Caryl E. Rusbult & John M. Martz, **Remaining in an Abusive Relationship: An Investment Model Analysis of Nonvoluntary Dependence**, 21 PERSONALITY & SOC. PSYCH. BULL. 558 (1995).
69 Id. at 559.
70 INSERT STUDY CITES.
those who had married their abusers and had children with the abusers were more likely to return to the relationships.\textsuperscript{71} In these cases, the relative benefit to remaining in the relationship is perceived to be great, not because the relationship itself has a high positive value but rather because the alternative to continuing the relationship seems catastrophic. Her judgment might be based on a clear cost-benefit calculation, but often a careful calculation is foreclosed by a strong emotional sense of commitment\textsuperscript{72} to her relationship. One study of spouse abuse victims concluded that:

\textit{[q]}uite apart from feelings of satisfaction, issues related to an individual’s broader interdependence with a partner—issues of the degree to which an individual is committed to her relationship, having invested in it heavily and possessing only poor quality alternatives—are importantly predictive of the decision to remain in or exit from a relationship.\textsuperscript{73}

This sense of commitment may have its own evolutionary value,\textsuperscript{74} but may turn out to be horribly maladaptive in the context of spousal abuse. In any event, this emotional commitment to the relationship seems to have the effect of mediating victims’ judgments regarding both the sincerity of their abusers’ apologies and the credibility of their promises to stop.

At the other end of the spectrum, stranger apologies also can cause forgiveness problems. Stranger apologies are least scrutinizable of all, especially when the transgressor’s cultural background differs from that of the victim. Victims are less able to interpret stranger transgressors’ awkward body language, stoic behavior, or dramatic gestures. In other words, although the nuances of apology matter a great deal, those nuances vary in sometimes unpredictable ways across individuals. If the stranger’s apologetic gestures are misinterpreted as insincere, the victim might refuse to forgive. This doesn’t necessarily mean that victims are invariably least likely to forgive apologetic strangers, however, for at least two reasons. First, victims can misunderstand transgressor apologies to be sincere when they are not. Second, the costs to the victim of misassessing both the transgressor’s sincerity as well as the credibility of his commitment to refrain from future transgressions, are probably smallest when the victim doesn’t anticipate a future relationship with the transgressor. A victim may choose to forgive a stranger transgressor even when the sincerity of the apology is in doubt because the apology often is perceived to enhance the victim’s social status regardless of its sincerity. The victim need not worry about the future trustworthiness of a stranger, but enabling this transgressor to escape punishment today only increases the chance that others will be victimized tomorrow. In short, misplaced forgiveness can generate negative externalities.

\textsuperscript{71} Id. at 567 (study of domestic abuse victims finding that “commitment was stronger among women with greater investments in their relationships—among those who were married, had been involved for longer periods, and had children with their partners”).

\textsuperscript{72} As a psychological term, commitment refers to an individual’s intention to maintain a relationship, feel psychologically attached to it, and sustain a long-term orientation to it regardless of the satisfaction that the individual derives from the relationship. \textit{Id.} at 559.

\textsuperscript{73} Id. at 569.

\textsuperscript{74} Frank, \textit{supra} note ___, at ___.

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If the foregoing analysis is correct, the risk that an insincere apology will slip through the cracks of discernment are greatest in two circumstances: (1) apology in intimate relationships; and (2) apology by stranger transgressors.\textsuperscript{75} The former are less likely to be assessed objectively, and the latter assessments, while much less likely to be subject to strong subjective biases, nevertheless can be unreliable. To the extent that apology and forgiveness in the criminal context involve these relationships, the law might want to view victim statements of forgiveness more warily than in other contexts. Legal wariness should not be confused with discouraging these apologies, however. On the contrary, because forgiveness can entail significant psychological and physiological benefits, perhaps all victim forgiveness should be strongly encouraged. The trick, of course, is to figure out how to encourage offender apologies and victim forgiveness without sacrificing deterrence, retribution or other important goals in the criminal justice system. The next Part explores the use of apology, forgiveness and remorse in the criminal context as well as the tensions that are both created and reflected in current criminal justice policies.

II. RECONCILIATION BETWEEN VICTIMS AND OFFENDERS

A. The Victim’s Role in Criminal Litigation

We tend to view criminal litigation as a dispute between an accused defendant and the State. Prosecutors act on behalf of the public to vindicate the loss of security and trust that results in a society with frequent unpunished crimes. Victims have some input into the process by choosing to report crimes and exhibiting a desire to press charges, and their cooperation is typically necessary to a successful criminal trial. While some prosecutors pay careful attention to the victims’ wishes in their charging decisions\textsuperscript{76} and plea bargaining,\textsuperscript{77} other prosecutors are much less inclusive of victims in their decision making.\textsuperscript{78} All too often, the state takes center stage while the victim sits backstage, neglected and waiting.

A number of factors can work together to marginalize the victim in the criminal process. Prosecutors and judges must keep up with an overburdened criminal justice system, so their focus inevitably turns to “the quality of evidence, high clearance rates, efficient calendaring, speedy trials, keeping the cases moving through the courts,

\textsuperscript{75} Elsewhere Doug Yarn and I have noted that apologies by institutions are also problematic, because the public relations personnel can specialize in conveying remorse and regret while the rest of the organization continues it’s harmful conduct undeterred. O’Hara & Yarn, supra note ___ at ___. Here I focus on difficulties with individual apologetic discourse.

\textsuperscript{76} Donald J. Hall, The Role of the Victim in the Prosecution and Disposition of a Criminal Case, 28 VAND. L. REV. 931, 952-53 (1975) [hereinafter The Role of the Victim].

\textsuperscript{77} Id. at 953-56 (in Nashville, Tennessee, prosecutors and judges interviewed stated that victims play a “very significant role” in the plea bargaining process, although the weight given to the victim’s desires varies between prosecutors).

\textsuperscript{78} See Kent Roach, Four Models of the Criminal Process, 89 J. Crim. L. & Criminology 671, 701 (1999) (“[p]lea bargaining . . . is suspect because it does not include victims or meet their expectations”).
conviction rates and so on.” Another commentator described the problem for prosecutors as follows:

Prosecutors care deeply about engaging in the work of justice, but the overwhelming cases in most offices lead to a mantra of sorts, with one set of facts blending into the next. The cases become less about the real human stories behind them than about processing cases, getting through the day, placating a judge, or impressing a superior in order to achieve a coveted advancement.80

These very busy prosecutors are likely to leave the victims sitting backstage unless they are needed to serve some formal role in the process. However, the formal role and importance of the victim in the criminal justice process has shrunk over time. Witnesses rarely actually testify against offenders because criminal trials are rare.81 With the rise of determinate sentencing in the federal and some state systems, judges and juries often are unable to take the victim’s desires or suffering into account. In one survey, only thirty percent of the victims attended to—the ones whose cases actually went to trial and who spoke with the prosecutor-- felt that the prosecutor gave their opinions any weight.82

This marginalization is costly to victims:

Victimization, even that resulting from “less serious” property crimes, causes significant emotional turmoil. Moreover, many victims perceive that the existing system does not adequately meet their needs. Many victims allege that criminal justice officials neglect their plight—that their suffering is secondary to the threat to social order. Even simple requests, such as for information regarding the crime or the offender, may fall on deaf ears. Thus, victims are said to be victimized twice: first by the perpetrator of the crime and then by a system that treats them impersonally.83

The current system represents a significant change from criminal prosecutions in Colonial America, and in early Western legal systems generally.84 In both cases, victims resorted to vigilante justice much more often.85 When the formal legal system was employed, victims were responsible for apprehending and punishing criminals.86 In our own early history, victims actually paid sheriffs to make arrests, hired private attorneys to prosecute cases, and then paid jailers to incarcerate those transgressors who were unable to appropriately compensate the victim.87

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80 Lerman, supra note ___, at 1669.
81 CITE STATISTICS
82 Lerman, supra note ___, at 1670.
83 Bakker, supra note ___, at 1494-95.
84 Jennifer Gerarda Brown, INSERT CITE, p. 1254.
85 See Henderson, supra note ___, at 938-39 (discussing use of “blood feuds” and “outlawry” by victims, their families, and their communities after the collapse of the Roman Empire).
86 CITE
87 Brown, supra note ___, at 1254.
As the “state” and its resources develop, however, it tends to take over the function of prosecuting and punishing criminal transgressors, for several good reasons. First, as mentioned earlier, the victim’s choice to retaliate, or not, against the criminal has significant externalities for the other members of a social group. It may turn out that a suspected offender has not actually committed a crime. If the victim lashes out violently against the perceived offender, then the accused or his family and friends lash back against the victim, or his family and friends. Personal feuds turn to family feuds and eventually to strife akin to civil war. Even when it is clear to all that an offender has done wrong, anger causes victims to think globally rather than proportionately. The victim tends to want two eyes for an eye, and feuding possibilities arise anew.\footnote{See Worthington, supra note \__, at 1725-26 ("[I]n revenge, we typically repay more than we incurred. Vigilante justice leads to escalation of hostilities"); Bandes, supra note \__, at 1605 (stating that legal system was set up to supplant vigilante justice).}

Recall that there are problems at the other end of the retaliatory spectrum as well. Some victims wish to forgive their transgressors because they falsely believe a transgressor is remorseful or because they experience less spite and anger or more successfully control these emotions than do others. Religion tends to encourage forgiveness to enhance social cohesion, but excessive forgiveness can be a problem when a Hawk invades a population of Doves. When a victim forgives an offender who is not committed to reforming his ways, the other members of society face a greater risk of victimization, and the resulting fear of crime can erode the social bonds of the community.\footnote{David Lerman, supra note \__, at 1664 describes the effects of crime on the community: Crime can lead to a generalized fear by community members that they are going to be hurt, assaulted, or “ripped off.” As people become fearful, they become more isolated and disconnected from one another. This feeling contributes to the weakening of bonds that weave a community together. Without strong communities, there is less informal social control, which is the strongest and healthiest way to prevent crime. The ripple effect of crimes are numerous. People lose the capacity to resolve disputes on their own. They choose to rely upon the “professionals”, and place a call for emergency assistance. They become more fearful of the other and, without the opportunity to engage in a proactive healing process, they might remain bitter and fearful.} State prosecution is one mechanism that a society uses to stem Hawk infiltration.

Some victims are unable to retaliate effectively regardless of their wishes. Poor, elderly and isolated individuals often cannot punish offenders on their own and may not have the strength or resources to ensure that others will act on their behalf under a system of private retaliation. Individuals who are unable to retaliate are more vulnerable to predation. As respected members of the community, however, vulnerable individuals can be seen as deserving the extra protection of the state.\footnote{A caveat is in order here. Sometimes victims are vulnerable to predation because they themselves are engaged in illegal or immoral activities. Even with the protection of the state, these victims are unlikely to be protected because reporting the crime would require that they reveal their own problematic actions. See Donald J. Hall, The Role of the Victim in the Prosecution and Disposition of a Criminal Case, 28 VAND. L. REV. 931, 935-36 (1975) [hereinafter The Role of the Victim] (interviews of local police officers revealed that victims with “dirty hands” often fail to report crimes). Examples include blackmail and assault or}
ignorance, and cognizant of the fact that all can become vulnerable to predation at some point in their lives, community members likely decide to use collective resources to protect and vindicate the weak.

Finally, states often decide to deter through criminal punishment actions that have corrosive effects on the community even though there are no identifiable victims whose retaliation could serve as a deterrent. Many communities criminalize drug sales and possession, prostitution, obscene pornography and gambling as “victimless crimes.” Under a purely private criminal law system, these acts might well go unpunished.

The state can monopolize the punishment of criminal offenders, but where the crime targets are identifiable victims, it cannot displace the victim’s emotional reactions to either a transgressor’s criminal actions or his sense of remorse. When the state renders a victim helpless to avenge himself or to make peace with the transgressor, his anger and spite can turn to bitterness, which can have deleterious effects on the mental and physical health of the victim and on the health of his relationships.

Opponents of the recent victims’ rights movement give short shrift to these emotions and their ill social and health effects, in part because their excesses led to state prosecutions in the first place. Some think we should simply talk the victims out of their spite and anger because they are perceived as dysfunctional or somehow unethical. Others think the problem lies in victims’ lack of appreciation for their own proper roles in the greater society. One commentator asserts that “it is not the victim as subjective sufferer who forgives, but the victim as member of the public community, the victim as an robber by a hired prostitute. Moreover, even when these victims do report the crimes, it is possible that the police will refuse to arrest the offenders if they are troubled by the victim’s questionable behavior. Id. at 939.

State enforcement rarely ensures that these individuals are as protected as the less vulnerable, however. The poor, elderly and isolated unfortunately are still more likely to be victimized than are others. See Kent Roach, Four Models of the Criminal Process, 89 J. Crim. L. & Criminology 671, 696 (1999) (“the economically disadvantaged suffer crime disproportionately”); Id. at 698 (stating that women, children and minorities at increased risk of suffering crimes); RANDALL KENNEDY, RACE, CRIME AND THE LAW 76 (1997) (African Americans disproportionately victimized); GET CITES FOR ELDERLY.

Relatedly, the police are more likely to thoroughly investigate crimes committed against individuals of high status in the community. See Hall, The Role of the Victim, supra note ___, at 942 (discussing reasons why victim status can affect criminal justice decisions and noting that police officers interviewed denied making decisions based on victim status but indicated that victim status affected others’ arrest decisions). To the extent that social status is negatively correlated with vulnerability to criminal victimization, those who predate on the more vulnerable may be less likely to get caught (making vulnerable victims even more vulnerable). The point here is simply that state enforcement can help to reduce the vulnerability of some victims.

“If the kindred be no longer allowed to avenge themselves, the corresponding right of the offender to make peace with the kin is also withdrawn. A crime is now a public affair.” L.T. Hobhouse, Law and Justice, in CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION 8, 18 (Joe Hudson & Burt Galaway eds., 1975).

See Worthington, supra note ___, at 1727 (“unforgiveness can result in decreases in health, troubled mental health, and interpersonal costs due to chronic anger and bitterness); Carl E. Thoresen, et al., Forgiveness and Health: An Unanswered Question, in FORGIVENESS: THEORY, RESEARCH AND PRACTICE 254 (Michael E. McCullough, et al. eds., 2000).
“Everyman.” The same commentator expresses concern that a retributivist view of criminal punishment is justified as showing respect for the victim’s need to take away “the offender’s wrongfully gained status . . . and countering the message, implicit in the criminal act, that the victim does not count.” This rationale is seen as “unsatisfying . . . because it falsely ties the victim’s value to the offender’s punishment.”

Society demeans the victim by treating him like a pariah, the commentator claims, and the solution to the problem is to stop shunning the victim. We should just make clear to victims that we don’t think any less of them as a consequence of their victimization.

No doubt any message intended to bolster the victim’s self esteem may help at the margin. Fundamentally, however, the victim’s emotional reactions, and her feeling that her social status is threatened without punishment (or, in some cases, apology) is much too deep-rooted to simply rationalize away completely by telling the victim we love her but we are sending the offender home. The victim’s angry and fearful emotions may at times be unwarranted and in some forms even maladaptive in modern society, but to the extent that they served important evolutionary functions in the EEA, they are not so easily set aside. The evolutionary framework predicts that many victims will need the community’s retaliatory commitment in order to feel that justice has been served. Psychological, religious and social support services can all help the victim attain closure, but contrary to the suggestions of some commentators, they cannot fully substitute for a strong response by the criminal justice system as representatives of the community. Indeed, often the failure to sentence an offender to a long prison sentence is experienced by the victim and her family as a painful devaluing of the victim’s worth. Embedded in the notion of “justice” is some sense that both the victim’s and the transgressor’s status be restored to appropriate levels. Without that commitment, faith in the public process is lost. As the Rodney King trials showed all too clearly, the harmful effects of a system that fails to punish can extend far beyond the victim.

When it comes to forgiveness, victim emotions again are ignored in favor of the public characterization of the criminal law. One court expressed the principle as follows:

[the fact that the injured party, or those who would naturally be aggrieved because of the wrongs complained of in the indictment, want the prosecution dismissed, [does not] change the situation. The prosecution is not for their benefit, but for the public good. . . . [T]he party who has suffered the immediate wrong . . . is without power to direct or control the prosecution.]

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97 Id. at 1526.
98 Id.
99 Id. at 1527.
100 Id. ("we must acknowledge that the victim’s true worth or dignity is never touched by criminal actions. The more society acknowledges this, refuses to see the victim ‘as victim only’ or as sullied somehow by the crime, the better. . . . We have no business ‘valuing’ the victim in the first place").
101 Bandes, supra note ___, at 1605
103 Commonwealth v. Cundiff, 149 Ky. 37, 39-40, 147 S.W. 767, 768 (Ct. App. 1912).
As discussed above, an effective criminal justice system must at times ignore the victim’s forgiving sentiments and nevertheless punish a crime to protect the other members of society, as well as the victim herself. As discussed below, however, a victim’s desire to forgive an offender might have a proper role in the execution of the criminal sentence.

The criminal justice system therefore must acknowledge the inevitability of victims’ emotional reactions to their victimization, and, pragmatically, it must make some effort to accommodate them. In response to victims’ desires for retaliation, the state must respond swiftly, and, where possible, effectively to criminal behavior. To facilitate victims’ recovery, the state also must offer the victim an active voice in the process of punishment.

The recent movement toward admitting victim impact statements as part of the sentencing phase is one such avenue for victim empowerment. For example, the Federal Rules of Criminal Procedure now provide that “[b]efore imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence.” More than thirty States also empower the victim to appear or to submit impact statements at sentencing. Some scholars criticize the use of victim impact statements, claiming that they can exacerbate the victim’s suffering and prolong her trauma. Others criticize their use because they invite juries to disparately punish based on the status or the similarity of the victim to the jurors instead of the nature of the defendant’s wrongdoing. Because victim impact statements can focus both the victim and the juror in problematic ways, it is not clear whether and when on balance they beneficially serve the system. To the extent that victim impact statements are desirable, however, they often are permitted only during the sentencing of a few prespecified

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104 CITE.
105 Fed. R. Crim. P. 32(i)(4)(B). The original provision was enacted in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The rule also enables parents to speak or submit information when the victim is under 18 years of age or is incompetent. Id. at (B)(i). Family members and relatives can be designated to speak when the adult victim is deceased or incapacitated. Id. at (B)(ii).
108 CITE DON’S PIECE?
crimes. Their limited admissibility and effectiveness causes some victims to demand more responsiveness from the criminal justice process.

Unfortunately for victims, professional criminal law enforcement advocates can prey on victim emotions to further their own ends. As mentioned earlier, angry and frustrated victims become the poster faces for systemic efforts to erode defendants’ procedural protections. Police and prosecutors fuel the victim rights movement to further their own agendas such as eliminating the exclusionary rule and minimizing or eliminating cross-examination of victims by defense counsel. These procedural reforms would facilitate convictions, but at the inevitable cost of unreliable convictions and reduced protection against unreasonable government intrusions.

Rather than eliminating these safeguards, states tend to respond to victim demands with longer sentences for convicted offenders. Longer sentences also ease community fears and can encourage plea bargaining and cooperation with other investigations. In many contexts, longer sentences also reduce crime rates, but the marginal deterrence effect of increased incarceration is, at this point, small relative to its costs. The average prison time per violent crime tripled between 1975 and 1989, yet violent crime rates were relatively nonresponsive. Unfortunately, increased sentences also increase the number of prisoners incarcerated at any one time. The number of State and federal prisoners quadrupled between 1975 and 1994, and those numbers continue to rise. In 1994 and 1995, corrections budgets were the fastest rising component of state spending, but the federal and most State prisons were simultaneously nevertheless operating substantially above rated capacity while tens of thousands more prisoners sat in county prisons waiting for State jail spaces to open. Skyrocketing prison costs and prison overcrowding have forced political leaders to seriously contemplate sentencing reforms. In the meantime, as discussed in Section B below, victim offender mediation has become one tool for ameliorating prison problems.

Policy reform advocates are not alone in coopting victim emotions to further their causes. Victims and their emotions also can be manipulated in individual cases. To the extent that a victim desires forgiveness rather than retaliation, for example, prosecutors can have strong incentives to delay the victim’s healing process. Although it is not

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111 CITE.
112 MICHAEL TONRY, SENTENCING MATTERS 8 (1996).
113 Id. at 100-101.
114 CITE.
115 TONRY, supra at 101.
116 Id.
known how often it occurs, there is some evidence that prosecutors actually prevent victim offender mediation to enhance the anger reflected in the victim impact statement:

I heard of a prosecutor who refused to allow a victim-offender conference prior to sentencing because s/he was interested in having a “rabid” victim appear at the sentencing hearing. The prosecutor was obviously convinced that the victim would in some way “forgive” the offender, and therefore not speak as forcefully for lengthy incarceration.  

Victim impact statements are admissible to enable the victim to seek retribution for particular harms suffered. Even if she chooses not to submit a statement, the offender will be stigmatized and very likely incarcerated. In making her decision about whether to submit a statement, she therefore chooses whether and to what extent to attempt to influence the convict’s punishment. If she chooses to submit, she frames the vehemence with which the message is conveyed and thereby at least implicitly asks the sentencer to impose some amount of punishment on her behalf.

The prosecutor might wish to influence the victim’s message because he perceives the sentencer to be unduly lenient or because he hopes to bolster his tough law-and-order reputation in order to facilitate future plea bargains or to be elected (or re-elected) to public office. In these cases, however, the victim’s influence, which was intended to help her address her own emotional needs, has become the prosecutor’s tool. Far from helping to alleviate the victim’s pain and suffering, the victim impact statement drives the prosecutor to selfishly attempt to block mediation, which can have the effect of actually prolonging and enhancing the victim’s suffering. Despite some prosecutor disapproval, victim offender mediation, or “VOM,” has grown dramatically over the last few years, and victim requests for mediation have grown even more quickly. The next section briefly describes VOM and its successes.

B. Victim Offender Mediation in the Shadows of Criminal Litigation

Victim offender mediation has grown dramatically over the last two or three decades. In 1993, VOM advocates proudly announced that more than 300 centers provided VOM services in the United States. By 2001, VOM advocates counted 1300 programs in eighteen countries. Victim offender mediation programs operate today in

\footnote{117 Lerman, supra note ___, at 1670.}

\footnote{118 CITE}

\footnote{119 This article follows the pattern of others in using the label “victim offender mediation” to include programs that use this title, as well as programs that adopt other titles, such as “victim offender reconciliation program,” “victim offender dialogue,” “victim offender conferencing,” or “victim offender meetings.” These other programs all share the same goal of having victim and offender meet face-to-face to talk about the offense and its impact on their lives and to form an agreement regarding the reparation of the victim’s harm. Mark. S. Umbreit, et al., The Impact of Victim-Offender Mediation: Two Decades of Research, 65 DEC Fed. Probation 29 (2001).}

\footnote{120 CITE.}

\footnote{121 Id.}
small rural townships, large metropolitan areas, and everywhere in between.\textsuperscript{122} Often they enable the victim and offender to circumvent the criminal justice system altogether.

VOM is an important component of the restorative justice movement. Restorative justice differs dramatically from the traditional criminal justice system in many respects, but two differences are important for understanding VOM. First, restorative justice is predicated on the notion that conflict resolution surrounding criminal behavior should be cooperative rather than adversarial.\textsuperscript{123} Second, the victim plays as important a role in restorative justice as does the offender and the community.\textsuperscript{124} Restorative justice advocates seek to replace the blame-focused and impersonal criminal justice system with mechanisms that enable the victim, offender and community to jointly repair the harm done to the victim, to restore the relationship between victim and offender, and to reintegrate the offender into his community.\textsuperscript{125}

VOM differs dramatically from program to program in sources of funding,\textsuperscript{126} training of mediators,\textsuperscript{127} types of offenses mediated,\textsuperscript{128} case referral,\textsuperscript{129} and specific case management techniques.\textsuperscript{130} But VOM programs are all similar with respect to their basic focus. All VOM programs invite the victim and the offender to participate in face-to-face discussions about the crime and its effect on the parties, particularly the victim. When VOM is successful, victims and offenders achieve understanding and closure, and offenders promise victims some form of reparations. Typically, reparations take the form of monetary compensation or services performed for the victim, community service, and/or an apology.\textsuperscript{131}

\begin{itemize}
  \item\textsuperscript{122} Bakker, \textit{supra}, note ____, at 1485.
  \item\textsuperscript{124} Petrucci, \textit{supra} at 346-47.
  \item\textsuperscript{125} Petrucci, \textit{supra} at 346-47.
  \item\textsuperscript{126} Bakker, \textit{supra} note ____ at 1485 (“\textcolor{red}{w}hile most programs are governed by private, nonprofit organizations working closely with the courts, a growing number of victim-offender mediation programs are established and operated by a governmental apparatus”).
  \item\textsuperscript{127} A 1994 article stated that almost half of the programs rely on community volunteers. \textit{Id.} at 1485.
  \item\textsuperscript{128} See Brown, \textit{supra} note ____, at 1262 (some programs focus on misdemeanors, some only handle felonies, many handle both, and a few handle violent crimes).
  \item\textsuperscript{129} Programs differ in their criteria for case referral, but typically referrals to VOM are made by law enforcement or criminal court personnel at some point after the transgressor’s arrest. Brown, at 1263. However, some mediation centers do take referrals directly from the community rather than from criminal justice personnel. Bakker, \textit{supra} note ____, at 1486.
  \item\textsuperscript{130} CITE
  \item\textsuperscript{131} Umbreit, at 63-70 (describing forms of restitution that resulted from VOM’s at four program sites studied); Bakker, \textit{supra} note ____ , at 1489 n.84 (monetary restitution, community service, services performed for victim and simple apology among victim demands in VOM). According to Mark Bakker, the victim offender mediation programs are characterized by the following factors:
  \begin{itemize}
    \item A) The program involves a face-to-face meeting, in the presence of a trained mediator, between an individual who has been victimized by crime and the perpetrator of that crime.
    \item B) The program operates in the context of the juvenile and/or criminal justice systems rather than the civil court.
  \end{itemize}
\end{itemize}
Not surprisingly, the cases most commonly referred to VOM involve low level property offenses, juveniles and first offenders. VOM works well in this setting. Victims of vandalism or petty theft may feel angry and violated, but busy prosecutors and case managers prefer to focus on more serious crimes. These crime victims want the state to address their concerns, but the criminal or juvenile justice system is often not the most sensible vehicle through which to address these transgressions. As _____ queries, do we really want to spend $15,000 punishing a teenage boy for causing $300 worth of damage while giving the victim nothing? Rather than clogging the system with these cases, they are referred to VOM programs where victims actually can demand some form of compensation for their harms. Because these offenses are minor and the offenders typically young, victims feel comfortable confronting them with minimal mediator preparation. Moreover, the potential educative benefit to the offender is significant in cases involving small, first-time offenses and juvenile offenders. VOM forces young offenders to attach a human face to their misdeeds, and offenders are often willing to turn to socially and personally beneficial activities such as performing community service or attending school regularly in order to avoid the consequences of the criminal justice system.

With the increasing popularity of VOM and supply of trained mediators, VOM has increasingly expanded to cover more serious crimes, adults and repeat offenders. As one VOM expert recently wrote “there are signs of at least a subtle shift in the utilization of VOM. . . . programs are being asked to mediate crimes of increasing severity and complexity.” The potential emotional benefits to VOM are much greater for victims of more serious crimes. Rape victims and family members of murder victims search desparately for some relief from their suffering. On the other hand, the external effects of excessive forgiveness are greater the more serious the crimes committed by the offender.

VOM typically involves purely voluntary participation, although victims sometimes must participate in order to obtain reparations and offenders often cooperate

C) In addition to the likelihood of a restitution obligation, the program focuses at some level of intensity upon the need for reconciliation of the conflict (i.e. expression of feelings; greater understanding of the event and each other; closure).

Id. at 1484.

132 Brown, at 1262, n.59 (“[m]ost common are cases of vandalism, burglary or simple assault”).


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

136 Umbreit—2001 article, at 33.
initially only to circumvent criminal punishment. Those victims and offenders who choose to participate report extraordinarily high satisfaction rates. One study of mediations at four dispute resolution sites in four different U.S. states found that ninety percent of victims and ninety-one percent of offenders reported being satisfied with the mediation outcome. In part, the success of VOM turns on the fact that unlike the criminal justice process, the VOM process is humanized. Mediators meet individually with both victim and offender, often several times, before the actual mediation session. Their emotional receptivity and needs are explored, and each party, particularly victims, feel that they have some control over the resolution of the case.

Victims who are able to confront their transgressors through mediation are significantly less upset about the crime and less fearful of being revictimized as compared to victims who instead face the traditional criminal justice process. In post-mediation surveys, more than seventy-five percent of victims stated that they thought it important to receive answers from the transgressor about what happened, to tell the transgressor how the crime affected them, to negotiate restitution, and to receive an apology. Approximately ninety percent of offenders reported that the mediation was important to negotiate and pay restitution, tell the victim what happened, and apologize to the victim.

Most victims state that their desire for restitution strongly motivated their initial decision to pursue VOM. Victims who negotiate compensation seem better able to recover from their victimization. Consistent with the apology literature, however, victims seem less interested in actually collecting that restitution after the mediation. “For some victims, restitution was important only as a gesture of the offender’s admission of guilt and acceptance of responsibility for what was done. ‘I wanted them to show their willingness to pay me. But money wasn’t important.’” Thus, it seems that the offer to make restitution bolsters the credibility of the transgressor’s remorse. Once the victim is convinced that the remorse is genuine, however, he may not actually take

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137 Umbreit, supra note ___ at 30 – 2001 article—(“Expressions of satisfaction with VOM are consistently high for both victims and offenders across sites, cultures, and seriousness of offenses. Typically eight or nine out of ten participants report being satisfied with the process and with the resulting agreement.”).

138 Umbreit, at 75.

139 For petty offenses, mediators often meet with the victim and transgressor only once prior to the mediation session. Mediation in cases involving severely violent behavior can entail 8-12 months of case preparation. Umbreit, at 161.

140 One coordinator met with a shooting victim more than 60 times. Bakker, supra note ___, at 1513 n.252.

141 Umbreit, at 71.

142 Umbreit, at 72.

143 Umbreit, at 73; see also Gordon Bazemore, Restorative Justice and Earned Redemption, 41 Am. Behav. Scientist 768, 783 (1998) (“what most victims want is quite unrelated to law. It amounts more than anything else to three things: victims need to have people recognize how much trauma they have been through . . . .; they want to find out what kind of person could have done such a thing, and why to them; and it really helps to hear that the offender is sorry—or that someone is sorry on his or her behalf.”).

144 Bakker, supra note ___, at 1518.

145 See Umbreit, supra note ___, at 31—2001 article—(“Victims frequently report that while restitution was the primary motivator to participate in VOM, what they appreciated most about the program was the opportunity to talk with the offender.”).

146 Umbreit, at 96.
the transgressor’s restitution offer. In both the civil and criminal contexts, victims seem willing to trade an apology for at least some portion of the demanded compensation.  

Restorative justice advocates claim that the traditional criminal justice system creates more crime and more suffering than it deters, and, in any event, it is too expensive to sustain. These reformers are working tirelessly to instead incorporate some variant of VOM into the handling of most criminal matters. “Restorative justice makes central to the criminal act the violation of the interpersonal relationship between the victim and offender. In other words, restorative justice advocates stress that the crime represents a conflict between the parties that should be resolved.” Under a successful restorative justice model, incarceration would be a rarity reserved for those who reject reintegration into the society. As Professor Brown explains:

Perhaps VOM’s most dramatic departure from the traditional goals of the criminal justice system is its wholesale rejection of incapacitation. VOM was originally intended to be an alternative to incarceration, and several of its adherents continually call for application of VOM to very serious offenses, even violent crimes, for which incarceration would be the expected sanction. Although VOM proponents acknowledge the need to incapacitate dangerous offenders, they reject incarceration as a value for most offenders.

The fundamental premise of the restorative justice movement seems unquestionably correct: we have done society a great disservice by defining crimes as primarily “public wrongs” where the state adopts the role of the victim while the individual victim becomes at best a representative of the state and at worst an irrelevant nuisance. Instead, “restorative justice theory postulates that criminal behavior is very often first a conflict between individuals. The person who was violated is the primary victim, and the state is a secondary victim.”

To the extent that VOM displaces the criminal proceedings lurking in its background, it transmutes the criminal matter into one susceptible to private dispute settlement. Nominally, the “community” plays a role in VOM, but except in a very

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147 COHEN—ACCEPTING SMALLER SETTLEMENT AMOUNT
148 CITE
149 CITE
151 The primary purpose of VOM is reconciliation; the secondary purpose is to partially or totally replace incarceration. Mark S. Umbreit, Victim Offender Mediation: A National Survey, Fed. Probation, Dec. 1986, at 53, 54.
152 Brown, supra note ___, at 1297-98.
153 MARK S. UMBREIT, VICTIM MEETS OFFENDER 2 (1994); see also HOWARD ZEHR, CHANGING LENSES 153 (1990) (contrasting current system’s view that “crime violates the state and its laws” with restorative justice view that crime violates people and relationships).
154 Some VOM occurs post-conviction. Brown, at 1263. Like Brown, ld. at 1301-05, I have little concern about post-conviction mediation, though my reasons differ.
limited number of cases, resolution of the matter is left to victim and offender. 155 Because the state is often the source of referral of cases to VOM, state actors perform a filtering role by determining which offenses and which offenders are most appropriate for mediation. 156 In addition, as a formal matter the prosecutor must sign off on dismissal of criminal proceedings. For example, approximately twenty states have enacted compromise statutes, which authorize the dismissal of charges when the victim and offender have settled any civil dispute that grew out of the conduct that is the basis for the criminal charge. 157 Typically these statutes are only applicable for minor offenses and require both that the victim acknowledge receipt of satisfaction and that the court or prosecutor consent to the dismissal of the charges. 158 In most States, however, prosecutors have the discretion to dismiss the charges in any case, and if restorative justice advocates have their way, VOM and similar dispute resolution proceedings will continue to grow as a substitute for conviction and its consequent incarceration. Despite these hopeful proclamations, 159 prosecutors are both politically and pragmatically constrained from enabling the private settlement of more serious offenses. Section C discusses the limits of VOM as a mechanism for private criminal dispute resolution. Part III then proposes an alternative mechanism for increasing the beneficial effects of VOM.

C. The Limits of Private Criminal Dispute Resolution

VOM, as a widespread substitute for incarceration, has severe limitations. Other problems with VOM have been addressed in the literature. Jennifer Gerarda Brown points out that VOM can push victims to think about forgiveness before they are emotionally ready to resolve their negative feelings. 160 Moreover, offenders can get strong-armed into making unfair restitution promises because they fear the prison alternative. 161 VOM also has been criticized because mediation lacks many of the procedural protections present in the traditional criminal justice system. 162 However, the relative infrequency of these problems is indicated by the extraordinarily high satisfaction levels reported by both victims and offenders. 163 I focus here on the slightly different and potentially more frequent problem of victim propensity to forgive too easily.

Recall the four rationales for state criminal law enforcement identified above. States seek to (1) discourage excessive retaliatory urges; (2) discourage excessive forgiveness; (3) protect vulnerable community members; and (4) punish harmful but “victimless” crimes. Victimless crimes are unresolvable through victim offender

155 See Henderson, supra note ___, at ___.
156 CITE BROWN—AND EXPLAIN WHY SHE FINDS THIS MECHANISM PROBLEMATIC
157 Hall, The Role of the Victim, supra note ___, at 972.
158 Id.
159 CITE
161 Id. at 1281-91.
162 Id. at 1287-91. In particular, mediators strongly discourage the presence of lawyers at mediation sessions. Defendants might therefore reveal incriminating information at the mediation session. If mediation is unsuccessful, victims could reveal the incriminating statements to the prosecutor.
163 Supra note ___ and accompanying text.
mediation, and successful mediation eliminates the victim’s retaliatory urges. Moreover, because mediation often occurs with state criminal law enforcement lurking in the background, even vulnerable community members have an effective means of demanding reparations, including apology and community service. Thus, state concerns 1, 3 and 4 likely are not relevant to the private resolution of criminal matters. The state concern that excessive forgiveness creates externalities for the rest of society is still very much a problem of private dispute resolution through victim offender mediation, however. Thus, where we have reason to suspect that victims forgive too easily, victim offender mediation should not be permitted to replace the traditional criminal justice system.

Recall from the discussion in Part I that victims can be inclined to forgive offenders even when the offender is likely to continue his criminal behaviors, and that when a victim forgives, she often sheds her resolve to inflict punishment. When victims are strongly emotionally attached to their offenders, her blind sense of trust cautions a social distrust that the victim will objectively assess the situation and protect her own interests. At the other extreme, when victims encounter strangers, they have less incentive to carefully scrutinize the sincerity of the offender’s remorse or his commitment to mend his ways.

The problem of excessive forgiveness may be greater in the criminal context. The offenses are severe enough to be labeled “criminal,” presumably suggesting that the victim, society, or both need protection from the offender. The victim’s emotional trauma likely is more significant for criminal offenses than for noncriminal ones, and this increased trauma is more likely to cause some victims to search for a way to mitigate their suffering. Moreover, sociopaths make up a far larger proportion of the criminal population than of the society as a whole. Sociopaths tend to be cognizant of others’ emotional desires but are not constrained in their own behavior because they tend not to experience those emotions that commit the rest of us to moral behaviors. As a result, sociopaths are much better at deceit than most others, so they likely can feign remorseful apologies relatively effectively. This greater potential for the use and receptivity of strategic apology may be a partial explanation for the fact that VOM has not yet been shown to significantly reduce recidivism rates. VOM advocates instead must settle for the claims that (1) overall VOM is no less viable an option for recidivism reduction than is the traditional criminal justice process, and (2) juveniles who participate in VOM seem to be faring better than those who do not participate. Query then whether it is possible that some of the transgressors chosen for VOM are experiencing newfound empathy for their victims while others are merely sociopathic Hawks feigning Dove behavior.

Public safety concerns thus undoubtedly will trump any further expansion of VOM as a substitute for criminal punishment. At the same time, the benefits to victims from VOM are indisputable and often quite significant. Moreover, the more severe the

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164 CITE SOCIOPATH LITERATURE
165 Umbreit, at 109 (study of four VOM sites did not find statistically significant evidence that juvenile offenders in mediation programs committed fewer subsequent crimes than juvenile offenders not in mediation).
166 Umbreit, supra note ___, at 32 – 2001 article
offense, the greater the benefits to the victim of shedding suffering and anger and resuming a productive life capable of greater enjoyment. Presumably these benefits are just as great for victims who are duped by offenders’ insincerity, at least where the victim does not subject herself to further victimization. To the extent that the criminal justice system can satisfy any victim emotional needs—whether those associated with retribution or forgiveness—without imposing external costs, overall benefits increase. Part III now proposes a sentencing reform designed to generate such victim benefits.

III. A MODEST PROPOSAL: VICTIM CONTROL OVER SENTENCING

Before proceeding with the proposal, it may be useful to summarize the analysis developed thus far in this Article. First, victims’ post-offense emotional reactions of anger, fear and forgiveness are profound and have plausible biological roots. The victim’s desire for retaliation likely results from stronger selection pressures than does the desire for forgiveness. A desire for retaliation is likely relatively uniform across victims, but only a subset of those victims will desire forgiveness. The subset susceptible to some form of forgiveness in some contexts appears quite large, however. In any event, both these emotional reactions remain with victims despite state monopolization of retribution, and, because victims make appealing interest group representatives, their desires eventually show up in or alongside the criminal justice process. Victim impact statements and victim offender mediation are two examples of reform accommodations of victim needs. In these, as well as other forms, however, the criminal justice system’s responsiveness to victims’ desires can be coopted to serve the interests of professional reform advocates on both the left and the right.

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

When an offender is convicted and sentenced to serve time in prison, ten to twenty percent of the jail term should be handed over to the victim to impose or forgive as she chooses.

The proposal allows the victim an active role in the punishment of the offender, provides an incentive for reconciliation between victim and offender, and interferes neither with the state’s primary goals of deterrence, incapacitation, reform and rehabilitation nor with the defendant’s process protections.

Section A of this Part argues that the proposal accomplishes more than existing criminal justice mechanisms for accommodating victim desires and accounting for offender remorse. Section B briefly discusses how the proposal might affect the reconciliation efforts of victims and offenders. Finally, Section C discusses some complications and objections that might be raised in response to the proposal.
A. Third-Party Evaluation of Remorse in Current Sentencing Policy

Remorse is a form of apology strategy where the offender expresses regret, guilt and shame for his actions. For reasons, discussed in Part I, expressions of apology and remorse clearly matter a great deal to most victims. Their effect on third parties is less than clear, however, and the few studies designed to measure the effects of remorse on third parties have proved inconclusive. One such experiment was conducted with 320 individuals who were given information about a drunk driving case. The information given to the subjects about the defendant’s remorse and the severity of the accident varied. In that experiment, the subjects assigned differing amounts of punishment only as a consequence of the severity of the accident. When the driver expressed remorse, the subjects indicated that they thought he was a more responsible and sensitive person, but the fact that the driver expressed remorse did not influence the recommended sentence. These results contradict the results in an earlier study of mock jurors. In the earlier study jurors were also given information about a case involving a drunk driver, but in that experiment the recommended sanctions tended to be lower for those defendants who expressed remorse. In a third study of individuals who were provided information about a convicted rapist found that the subjects recommended slightly smaller prison sentences when the rapist expressed remorse, but the difference was not statistically significant.

Offender remorse currently plays some role in many sentencing and, where operative, parole decisions, but from the third-party studies, it is not clear that judges, juries or prosecutors would acknowledge the offender’s remorse in the same way that the victim would. To the extent that remorse is used in sentencing and parole decisions to serve the goals of the community or the government, their differing reactions to offender remorse are not problematic. To the extent that the state, jury or prosecutor stand in as official representative of the victim, however, a divergence can cause concern.

In the federal sentencing guidelines, remorse and apology can lead to a sentence reduction if they help to establish either (1) acceptance of responsibility, or (2) mitigating circumstances. All too often, however, these mechanisms for sentence reduction are used or denied to serve the ends of the prosecutor or judge rather than the victim’s. The prosecutor uses these sentence reduction techniques to encourage defendants to assist

168 Id. at 1650. Expressions of remorse can have confounding effects when it is unclear whether the defendant is guilty. Regarding crimes of negligence, for example, defendant’s expression of remorse can indicate his belief that his own actions were faulty. See Keith E. Neidermeier, Irwin A. Horowitz & Norbert L. Kerr, Exceptions to the Rule: The Effects of Remorse, Status and Gender on Decision Making, 31 J. APPLIED SOCIAL PSYCHOL. 604 (2001) (study of mock juror reactions to expressions of remorse or non-remorse of doctor defendants in criminal case involving the distribution of unscreened HIV tainted blood in emergency situation).
169 CITE.
171 CITES
prosecutors and to plead guilty quickly.\textsuperscript{172} As long as the carrot of a shorter sentence enables the prosecutor to perform his job more efficiently, he typically is inclined to request the sentence reduction without regard to whether the defendant is in fact remorseful about his criminal activities.

Federal judges are the gatekeepers of these sentence reductions to prevent collusion between prosecutors and defense attorneys. Unfortunately, they grant or deny the sentence reductions as a mechanism for maintaining some modicum of sentencing discretion under the new indeterminate sentencing regime. Judges who think that the guidelines sentences are too high grant these sentence reductions liberally, while judges who think the sentences are too low tend to be more stingy with their sentence reductions.\textsuperscript{173} There is also evidence that federal judges sometimes use acceptance of responsibility reductions to attempt to speed up criminal proceedings by forcing defense attorneys to forgo raising defense arguments.\textsuperscript{174} Once again, the sentencing reduction tools are serving interests other than the victim’s.

Elected state judges must deal with a different but no less powerful set of concerns in making their sentencing decisions. In high profile cases, elected judges must worry about whether their sentence reductions for remorse are perceived by their constituents as being soft on crime. In fact, in states with both elected judges and jury sentencing in jury trials, some judges actually admit to imposing stiff sentences in bench trials to avoid taking bench trials on the future.\textsuperscript{175} It is safer to pass the politically charged cases to the jury, and defense attorneys are more likely to request jury trials when the case is assigned to a judge with a punitive reputation.

As suggested in the last paragraph, judges are not the only sentencers in the criminal justice system. In six states today, felons convicted by juries also are sentenced by juries.\textsuperscript{176} Jurors apparently do take into account their own perceptions about a criminal’s remorse in sentencing,\textsuperscript{177} but both their perceptions and its incorporation into sentencing can be influenced by extraneous factors. For example, an empirical study of jurors in death penalty cases found that jurors with strong views in favor of the death penalty were less likely to think that a defendant was remorseful than were other

\textsuperscript{172}CITES.
\textsuperscript{173}CITE.
\textsuperscript{176}King & Noble, \textit{supra} at 3.
\textsuperscript{177}See Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, \textit{But Was He Sorry? The Role of Remorse in Capital Sentencing}, 83 CORNELL L. REV. 1599, 1600 (1997-98) (empirical study of 150 jurors who served on capital cases in South Carolina finding that jurors at least sometimes took into account the defendant’s remorse in making sentencing decisions).
Moreover, when jurors thought that the crime was extremely vicious, they were less likely to take into account the defendant’s remorse in forming their views of the appropriate sentence. And, when jurors believed that the defendant played only a minor role in the crime, they were more likely to conclude that he was remorseful. Like judges, then, jurors are prone to form judgments about a defendant’s remorse as a rationalization for acting on other sentencing concerns.

Moreover, there is some evidence that jurors become more punitive in their sentencing over time, and they might therefore become less likely to take the defendant’s genuine remorse into account the longer that they have served. If jurors inappropriately fail to respond to the defendant’s remorse, elected judges are unlikely to modify the sentence out of fear that the electorate will respond unfavorably.

In the federal and some State criminal justice systems, parole has been abolished or restricted to consideration of a very narrow range of factors. Where discretionary parole remains operative, however, the offender’s remorse can be considered as evidence of his rehabilitation and therefore his suitability for parole. Although the victim’s views about the offender’s parole are admissible in some States’ parole proceedings, victims are often not even notified when an offender becomes eligible for parole. In those cases where the victim submits her views, they are apparently given little weight in the parole decision. It may be the case that parole boards are genuinely interested in the defendant’s remorse, but, as discussed in Part II, the parole board may or may not be better situated than the victim to assess the sincerity of that remorse.

I do not mean to suggest that judges, jurors, prosecutors and parole board members are incapable of assessing the defendant’s remorse or of genuinely accounting for the defendant’s perceived remorse in making their recommendations or decisions. Nor do I mean to suggest that it is necessarily illegitimate for judges and prosecutors to use sentence reductions as a tool to help manage their caseloads to effect a more just sentence given factors that can no longer be officially considered when setting the criminal sentence. Even if consideration of defendant remorse by third parties were always conducted in a responsible fashion for legitimate reasons backed by a sound theory of retribution, a victim nevertheless should be empowered to make their own

178 See Nancy J. King & Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study 27 n.96 (Nov. 7, 2003) (draft manuscript on file with author) (quoting Virginia judge in interview: “I’d have jurors in the past that would sit for 60 days or more, and their sentences would get tougher and tougher as they had more trials. . . . They see more cases and think there’s a crime wave. Especially the last day of the term. That’s when they think, this is our last opportunity to put a stop to this nonsense.”).
179 See King & Noble, supra at 52 (“should a judge dare to reduce a jury’s sentence, his decision becomes fodder for editorial comment, or even criticism by the (also elected) prosecutor. . . . Judges facing election generally don’t welcome this sort of attention.”).
180 Id. at 1614.
181 See Nancy J. King & Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study 27 n.96 (Nov. 7, 2003) (draft manuscript on file with author) (quoting Virginia judge in interview: “I’d have jurors in the past that would sit for 60 days or more, and their sentences would get tougher and tougher as they had more trials. . . . They see more cases and think there’s a crime wave. Especially the last day of the term. That’s when they think, this is our last opportunity to put a stop to this nonsense.”).
182 See Hall, The Role of the Victim, supra note ___, at 963 (stating that Tennessee Board of Pardons and Paroles will take into account victims’ views but give them relatively little weight).
separate determination of the genuineness of the defendant’s remorse and the effect that his remorse should have on his criminal sentence. Section B explains why.

**B. Victim Sentence Control and Reconciliation Efforts**

As explained earlier, victims who are given the option to exercise some influence over the outcome of the criminal justice process report greater satisfaction with that process and are better able to replace their anger, fear, and bitterness with greater optimism for the future. Unfortunately, victims are given an official role only with regard to testifying and, in some crimes, submitting victim impact statements. Although the victim as witness role is active, it is of limited emotional utility to the victim because her testimony typically is reduced to a script whose emotional content has been essentially expunged. Victims can express their emotions by submitting victim impact statements, but sentencers can, and often must, disregard these statements in setting the sentence. To the extent that the statements are taken seriously by the sentencers, relatively highly educated, wealthy, articulate and expressive victims are likely to influence the sentence to a much greater extent than are other victims.\(^{185}\) The resulting sentences create disparities having little to do with either the culpability of the defendant’s actions or the emotional impact on or needs of the victim.

Victim preferences also can be taken into account informally in the context of a number of decisions made throughout the criminal justice process. Police and prosecutors can accept the victim’s input in the process of making decisions about arrest, charge, bail, plea bargaining, trial and the proposed sentence. Unfortunately, as discussed in Part II, prosecutors differ markedly in their general responsiveness to victims, and a majority of victims polled report dissatisfaction with the prosecutor’s attitude toward them. There is also evidence indicating that police and prosecutors who do endeavor to take victim preferences into account end up disparately accommodating victims depending on their status, wealth, race, sex and age.\(^{186}\)

Moreover, to the extent that police and prosecutors endeavor to respond to reasonable victim preferences in making their decisions, the victim’s input into the process is not only informal but also at least two or three steps removed from the actual outcome of the case. Victims must work with police officers and prosecutors and hope that they will act on behalf of the victim. The sentencing decision often is rendered months later and influenced by dozens of factors having nothing to do with the victim or her preferences. Whether or not the sentence imposed corresponds with the victim’s sense of justice, it becomes clear to the victim that the process and its ultimate sentence are serving the state’s ends rather than the victim’s.

As acknowledged earlier, the state’s interests are no doubt legitimate and important. To the extent that they are served to the unnecessary exclusion of the victim and her interests, however, the criminal justice system sits in disequilibrium. The

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\(^{185}\) CITE Hall’s piece on victim impact statements.

\(^{186}\) *Id.* at 984.
victim’s preferences ultimately will be expressed in the criminal justice process, and the question becomes how best to incorporate the victim’s voice without interfering with the other important goals of the process. The state endeavors to serve the ends of deterrence, incapacitation, retribution, and rehabilitation while economizing on the costs of criminal punishment. At the same time, the defendant’s procedural protections need preserving, and irrelevant disparities in the system’s responsiveness to victims must be minimized if not completely eliminated. If carefully crafted, the proposal above can accommodate these goals while simultaneously affording the victim an active and direct role in the process of criminal punishment.

Giving the victim control over a portion of the sentence may be a novel proposal, but it is not a radical one. In fact, prosecutors often pay careful attention to the desires of a victim’s family members in death penalty cases. Many prosecutors place the decision about whether to seek the death penalty in the hands of the family. DESCRIBE REASONING. If a decision as important as life or death can be given to the family, why not also the decision between 8 and 10 or between 18 and 20 years?

Under this proposal, a retaliatory victim enjoys the satisfaction of knowing that the last few weeks, months, or even years of a convict’s jail term will be served only because the victim has opted to make him serve the sentence. This sense of empowerment no doubt helps to alleviate the victim’s feelings of anger, fear and helplessness. Moreover, by turning the controls over to the victim, all victims are equally empowered with regard to this particular decision regardless of race, sex, age, wealth, social status, or public speaking skills. Coupled with the current trend of increasing the sentences of those offenders who prey on the vulnerable, placing an equally large symbolic club in the hands of the vulnerable victim might help to protect future vulnerable individuals from criminal victimization.

The largest potential value of this proposal lies not in enabling retaliatory victims to impose suffering on their offenders, however. Rather, my goal in proposing to turn over control of a portion of the criminal sentence to the victim is to encourage offenders to reconcile with their victims. VOM centers are successful in obtaining offenders’ initial cooperation because the offender hopes to avoid a criminal conviction and prison. Under my proposal, the carrot of VOM is much smaller because the state’s goals do not enable dismissal of the criminal proceedings. Nevertheless, offenders who seek early release from prison have some incentive to meet with their victims. Even if the carrot is small, those offenders who are otherwise inclined to apologize to their victims now have a purpose for overcoming their feelings of shame and stepping forward. In other words, to the extent that the offender truly feels remorse but his urge to apologize is counteracted by shame, a potential sentence reduction may be sufficient to break this equipoise in favor of the apology.

For all of its claimed potential faults, VOM seems to profoundly assist the victim’s healing process. Victim empowerment is part of mediation success, as indicated

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187 CITE
by victim’s survey responses. By playing an active role in determining the transgressor’s punishment, many victims report that the release of their anger, fear and frustration is made easier. Moreover, the focus in mediation is more positive than is the case when victims present impact statements. Victims often walk into mediation hoping to force the offender to accept a punishment. They very often also present demands for reparations. At the end of the VOM process, however, what victims really value is the apology, expression of remorse, and understanding that only the VOM process could have provided to them. Unlike the submission of victim impact statements, the VOM process can work to transform a desire for retaliation into forgiveness even when the victim walks into VOM disinclined to forgive.

Notice too that VOM has the potential to produce much more positive effects than does the shaming technique of ordering the offender to apologize to his victim. When a judge orders an offender to proffer an apology, he sends a symbolic message to the rest of society that offenders should acknowledge their wrongdoing and attempt to compensate their victims at least with an apology. The social effects of forced apologies might be positive, but the effects on the parties can be counterproductive. The victim might enjoy the satisfaction of knowing that the offender is placed in a shameful position on behalf of and in front of the victim. The fact that the judge is willing to make the offender proffer an apology is symbolically valuable to the victim because it conveys to the victim a statement by society that the victim is deserving of greater respect than the offender or the process has so far afforded her. Presumably, however, much of this sense of vindication and empowerment can be achieved by alternatively granting the victim some control over the execution of the defendant’s sentence. More importantly, forced apologies do little to promote either victim forgiveness or offender commitment to refrain from future offenses because these benefits can only be obtained when the offender’s remorse comes from within. In short, the proposal, by promoting genuine expressions of remorse, commitments to forbear in the future, reparation offers, and victim forgiveness, is preferable to forced apologies.

Some victims who are given control over a portion of the sentence will choose to impose it, while others will choose to forgive it. Any particular victim’s decision will depend in part on behavior and attitude of offender, but it likely will also depend on the personality and disposition of the victim. A meta-study of VOM found that across programs, forty to sixty percent of those offered an opportunity to participate in VOM refused. This number is not surprising, given that victims no doubt experience conflicting emotions regarding the resolution of their anger. Moreover, timing is critical to victim forgiveness, and VOM participation may be offered too early for those who have been victimized by more serious crimes. The most heinous crimes may be appropriately deemed unforgiveable. We might therefore expect that the number of

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188 Umbreit quotes victims as stating the following: (1) “. . . I felt I was able to make decisions rather than the system making them for me;” (2) “In mediation . . . you could deal with the offender, instead of the cops taking him away;” and (3) “I am the one who decided the restitution.” Umbreit, at 94.

189 CITE KAHAN

190 Of course, a forced apology might be wholly appropriate in lieu of incarceration where VOM efforts proved unsuccessful or were somehow unavailable.

191 Umbreit, supra note ___, at 30.—2001 article
victim refusals to mediate would rise with the seriousness of the offense. Moreover, we might expect VOM participation rates to vary across population subgroups, because religion and other cultural factors influence the victim’s position on the desirability of forgiveness.

Even though many victims will choose not to participate in VOM or other reconciliation efforts, promoting the option can significantly help those victims who do choose to participate. Those victims of violent crimes who seek mediation with their offenders “report feelings of relief, a greater sense of closure, and gratitude for not being forgotten and unheard.” 192 The benefits are hard to quantify, but the value of giving a victim back her sense of security and belonging, her peace of mind, her sense of humor and her trust in others should be considered great. Victims seem to agree, because despite the burgeoning number of VOM centers, in several States today, the lists of victims seeking to meet with violent offenders far exceed the resources available to accommodate the victims’ desires.” 193 Given the significance of these benefits, States should consider devoting greater resources to VOM centers.

Because VOM can work miracles for suffering victims desparately hoping to heal their emotional wounds, the State should permit virtually all victims and offenders to undergo VOM. It may well be that victims are duped into believing the sincerity of an offender’s feigned remorse, but so long as the victim believes that the remorse is genuine, she can enjoy significant psychological benefits. The State, in its official capacity, can guard against excessive forgiveness by empowering the victim with only a limited portion of the sentence. As long as the portion in the victim’s control is small enough so that the goals of retribution, deterrence and incapacitation can be served even when the victim chooses to forgive, duped victims typically will not pose a problem that the State need address. The negative externalities that can arise with excessive victim forgiveness can be successfully stemmed with the proposal.

Domestic abuse cases are more difficult, however. Excessive victim forgiveness in this context can generate harmful external effects, but the state is more immediately concerned that the victim will fail to adequately protect herself against future harm. For this reason, VOM should not replace conviction and punishment in domestic violence cases. Some VOM centers are understandably quite reluctant to mediate domestic violence cases. North Carolina’s mediation programs, for example, have adopted a policy to categorically exclude most domestic violence cases from VOM. 194 It may be that abused women who participate in VOM see the humanity and charm of their partners and become more likely to reenter their cycle of abuse than women who do not participate in VOM. Moreover, many domestic violence victims have seen the abuser’s display of remorse at least once before, and that display caused forgiveness and ultimately further abuse. Given these concerns, it is unclear whether VOM in the domestic violence context produces more good than harm on balance. At the same time, sixty percent of domestic violence victims choose not to return to their relationships.

192 CITE—umbreit?
193 Umbreit, 2001 article—at 33.
194 Bakker, supra note ___, at 1488 n.74.
Stronger victims might benefit significantly from VOM, and it is possible that they can be identified. Instead of adopting a categorical policy against mediation, trained VOM mediators might form case-by-case judgments regarding the likelihood that mediation would contribute to the victim’s emotional healing without resulting in her return to her abusive relationship. VOM centers might also reasonably require that domestic abuse victims first receive standard interventions such as continuing education, job training, short-term financial assistance, legal advocacy and a means of transportation prior to participating in VOM with her former abuser. Alternatively, a center might understandably choose to refrain from providing domestic violence mediation altogether, given the extraordinarily high rate at which battered women return to their batterers. Studies of prior attempts to mediate domestic violence cases should be carefully scrutinized for guidance. Even if domestic violence victims are excluded from VOM, however, the state might nevertheless empower them to forgive or impose a portion of the abuser’s sentence.

C. Complications and Objections Considered

This is where I really need your help. I have identified a few problems with my proposal, but I am certain that you can help me identify several more.

Objection 1: the proposal forces victims to participate in sentence execution. Many victims prefer to walk away from the crime after sentencing, and the proposal threatens to reopen wounds if it forces victims to participate.

To deal with this problem, states should adopt a default rule whereby the offender serves the entirety of his sentence unless the victim affirmatively forgives her portion of the sentence. Victims who prefer to avoid further participation or contact with the offender can simply opt not to participate. If the state is concerned that crime victims will feel traumatized when held responsible for the incremental incarceration decision, could experiment with lower-level non-violent offenses and gradually add crimes eligible for victim participation.

Objection 2: the proposal won’t be effective because VOM either won’t occur at all or will occur after conviction and sentencing—too late to make a real difference.

Victim offender mediation is unlikely to occur until after conviction and sentencing under this proposal. From the victim’s perspective, this delay actually might be beneficial. Quick apologies are most effective after small slights, but with severe offenses, victims seem more ready to forgive several months or even years after the

195 According to one study, women who leave abusive relationships tend to be more highly educated, are employed, own a car, and are single with no children. Rusbult & Martz, supra note ___.

196 Rusbult & Martz, supra note ___, at 569 (listing these interventions as an integral part of the domestic violence shelter movement).
offense. Studies of post-conviction mediation indicates that apologies are still well accepted long after adjudication.  

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

**Objection 3: Many states still have parole boards. Will the victim’s preferences trump the parole board’s determination about whether the defendant should be released?**

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

**Objection 4: You claim that this proposal is value-neutral, but in reality it appears to be shaving time off of current prison sentences. How can you expect law-and-order constituencies to swallow the reduced sentences?**

First, states should incorporate this proposal gradually. The state could start with theft or fraud, perhaps, and carefully study the effect of this change on crime rates. We know that the current high sentences are adding very little to marginal deterrence and incapacitation, so it might well be possible to hand a portion of the sentence to the victim without significantly affecting the state’s goals. Moreover, from an ex ante deterrence perspective, an offender who cannot forecast whether his victim is vindictive or forgiving or will even choose to participate in sentence execution is unlikely to alter his criminal behavior as a result of this reform. To the extent that the reform generates concerns about sentence reduction or studies show that the reform increases crime rates, the reform could be coupled with an increase in the default prison term to offset concerns regarding early release of offenders.

**Objection 5: Under the proposal two different offenders who have engaged in the same conduct and the same displays of remorse will be treated differently. Can this disparity be justified?**

It is true that after this proposal is implemented, different criminals may end up being treated somewhat differently for the same criminal conduct and the same displays.

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197 Petrucci, *supra* note __, at 344.
198 CITES.
of remorse. This disparity is problematic only from a perspective of crime that completely disempowers the victim. Even where the victim’s role in a criminal prosecution are indirect, offenders who commit intentional transgressions run the risk that their victims will turn out to have a strongly retaliative disposition. Reporting crimes, assisting investigations, testifying, and submitting impact statements are all costly to victims. More retaliative victims are more willing to expend greater effort to achieve conviction and punishment than are less retaliative victims. The victim’s indirect role treats victims disparately based on what should be impermissible factors. The victim’s direct role treats offenders disparately, but this disparity reflects a legitimate concern of the justice system—that victim emotional needs be accommodated. While the state has some responsibility to curb the excesses of individual efforts to retaliate, it is not clear it has a responsibility to render the victim completely impotent to retaliate. Here, the state would simply prescribe the reasonable range of punishment for this individual offender and allow the victim to determine whether the time that the offender actually serves falls at the lower or the higher end of that range. The victim’s retaliative option is carefully constrained and designed to encourage victim forgiveness, where feasible. If prosecutors can allow the victim’s family to choose between life and death in death penalty cases, surely this proposal can withstand scrutiny.

Objection 6: If remorse is difficult for nonsociopaths to feign, then innocent convicts will be relatively unable to convince victims that they are remorseful. Under the proposal, then, innocent convicts will end up serving longer sentences than guilty ones. Isn’t that unacceptable?

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

It is not clear that this problem, however real and unfortunate, should be addressed with sentencing policy, however. The real source of the injustice is the conviction of the innocent defendant. The problem of innocent conviction threatens to grow as legislatures respond to victim demands by eroding the defendant’s procedural protections. By shifting the focus of victim accommodation to sentence control and away from procedural reforms, innocent convicts may serve longer sentences, but fewer

199 Cf. Donald J. Hall, Victims’ Voices in Criminal Court: The Need for Restraint, 28 Amer. Crim L. Rev. 233, 258-59 (1991) (criticizing laws that permit submission of sentence recommendations by crime victims because they can result in similarly situated defendants receiving disparate sentences).

200 Cf. Jayne W. Barnard, Allocation for Victims of Economic Crimes, 77 Notre Dame L. Rev. 39, 78 (2001) (“it is not at all illegitimate to provide a forum for victims to seek retributitional punishment for their offenders, so long as the system is designed to moderate their impulse”).
innocent defendants should be convicted in the first place. On balance, the injustice to innocent defendants should be minimized.

**Objection 7:** How can the proposal account for the fact that in some cases victims are not clearly identified while in others there are multiple victims or a single direct victim who has died or is incapacitated?

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

Often an offender who has victimized several people will be convicted of several counts of a crime, say mail fraud, where each instance of victimization constitutes a separate count in the conviction. If the offender is sentenced to a particular jail term for each count, then presumably each victim can determine whether to forgive a portion of the sentence for that particular count. Moreover, each victim could separately decide whether she is interested in participating in VOM efforts.

When a victim is incapacitated or dies before making a determination about the execution of her portion of the sentence, the state must make a determination about who, if anyone, becomes empowered to impose or forgive a portion of the sentence on the victim’s behalf. Close family members must cope with their own pain and suffering, and their wounds are deeper when the victim was killed to incapacitated as a result of the offense. These family members stand to benefit from VOM, as well as from the sense of empowerment that comes with having control over a portion of the offender’s punishment. It therefore makes sense to pass sentence control rights to family members when the victim is unable to exercise them herself.

For similar reasons, the family members of a deceased or incapacitated victim are permitted to submit victim impact statements at sentencing. Rules regarding representation rights in this context reflect a concern for judicial economy and potential jury prejudice, but they typically also enable the judge to allow the submission or presentation of victim impact statements by more than one family member. Assignment of sentence control rights, by contrast, would require execution by a single family member. For minor victims, sentence control rights should be given to the victim’s parents or legal guardian, where possible. Otherwise, control should be given to a grandparent who expresses a desire to make the decision regarding sentence execution. If multiple grandparents wish to control the execution of the sentence, the judge should appoint a single representative but encourage the grandparents to attempt to achieve

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201 VERIFY THAT THIS IS RIGHT—AND PROVIDE CITE.
consensus prior to exercising sentence control rights. In the case of an adult victim, the
decision should be granted first to the victim’s spouse, second to the children (with one as
the victim’s official representative), and third to the parents of the victim. States could
debate whether it makes sense to extend the assignment of the right to adult siblings of
the victim if none of these relatives are available and willing to exercise it. Sentence
execution rights probably should not extend beyond the family members mentioned,
however, because more distantly related relatives are less likely to experience as strong a
benefit from possessing the right to control sentence execution. Because the right carries
the potential to smack of vigilantism, it should be granted only to the limited number of
people who are likely to glean substantial emotional benefits from its exercise.

CONCLUSION

-- proposal—rationale—strengths and weaknesses—advocate limited experimentation to
assess utility.