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# Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System

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# COMMENTS

## Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*

> *[A] single injustice, a single crime, a single illegality . . . is sufficient to shatter the whole social pact, the whole social contract, [and] a single legal crime, a single dishonorable act will bring about the loss of one's honor, the dishonor of a whole people.*[1]

> *Dust as we are, the immortal spirit grows / Like harmony in music; there is a dark / Inscrutable workmanship that reconciles / Discordant elements, makes them cling together / In one society.*[2]

When a drunken teenager vandalized Mario's truck and caused $800 in damages, Mario was understandably angry. The incident cost him substantial amounts of time and money. When confronted with the possibility of meeting the offender, Mario's first instinct was negative—he might, after all, want to hurt the youth. However, Mario's anger subsided when he met the seventeen-year-old, who demonstrated some sense of repentance over the act. With the help of a mediator, the two were able to negotiate a deal whereby the teen would make restitution by working for Mario. Furthermore, the young offender agreed to remain in school and demonstrate his scholastic improvement by sending Mario a copy of his report card.[3]

Suzanne's son was killed in a random, senseless shooting in downtown Providence, Rhode Island. She not only lost her son, but suffered other adverse effects: her emotional trauma jeopardized other family ties, her job status, her friendships, and her health. Because the defendant pled no contest, Suzanne received few details concerning the crime. The system failed to recognize or respond to her needs. Yet, after a year of preparation for mediation, she met with the man who murdered her son. By expressing her thoughts and feelings, she was able to release some of the pain of her son's death. Although she couldn't forgive the man, the two left the mediated setting with a handshake.[4]

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1. CHARLES PÉGUY, MEN AND SAINTS 111 (Anne Green & Julian Green trans., Pantheon Books Inc. 1944) (1910).

2. WILLIAM WORDSWORTH, THE PRELUDE 1799, 1805, 1850 at 47 (Jonathan Wordsworth et al. eds., W.W. Norton & Co. 1979) (1850).

3. Gina Seay, *Program Lets Victims Meet Offenders*, HOUS. CHRON., Oct. 30, 1991, at B1.

4. Joseph P. Kahn, *Making Peace with a Murderer: Sue Molhan's Long Struggle to Confront the Stranger Who Gunned Down Her Son*, BOSTON GLOBE, Jan. 20, 1994, at 45.

These vignettes describe the process of mediation,[5] one of the more successful innovations introduced in various communities to resolve some of the problems caused by crime. Over the last fifteen years, the extension of a mediated process into criminal conflicts has grown tremendously.[6] Operating within or alongside the criminal justice system, advocates have created programs and trained mediators to facilitate face-to-face meetings between victims and offenders of crime—the purpose of which is to help the parties come to an agreement in an attempt to make the situation as "right" as possible.[7]

Although mediation has only recently gained national attention as a resource for handling crime,[8] mediation itself is not an entirely new phenomenon. Mediation programs within the criminal justice system constitute a growing component of a broader Alternative Dispute Resolution (ADR)[9] movement.[10] The increased use of ADR programs in recent years to alleviate some of the perceived problems of civil litigation has received considerable attention.[11] Because practitioners have found that mediation can be a less combative, less costly, more flexible, and more expeditious process than litigation,[12] mediation has emerged as a primary means to avoid litiga-

5. Mediation is a "[p]rivate informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties." BLACK'S LAW DICTIONARY 981 (6th ed. 1990).

6. *See, e.g.*, PACT INSTITUTE OF JUSTICE, VICTIM-OFFENDER RECONCILIATION & MEDIATION PROGRAM DIRECTORY 1993 [hereinafter PROGRAM DIRECTORY] (Harriet Fagan & John Gehm eds., 1993) (noting in introductory chart that victim-offender mediation programs expanded from 32 in 1985, to 65 in 1989, and to 122 in 1993).

7. This process is described *infra* notes 72-86 and accompanying text.

8. *See, e.g.*, Wendy Benedetto, *Victims, Offenders Meet Face to Face*, USA TODAY, Sept. 9, 1991, at 11A; Ellen Joan Pollock, *Victim-Perpetrator Reconciliations Grow in Popularity*, WALL ST. J., Oct. 28, 1993, at B7.

9. Alternative Dispute Resolution programs generally include arbitration, mediation, negotiation, or some hybrid of these techniques. A broad discussion of ADR can be found in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (2d ed. 1992).

10. While the different ADR programs do not necessarily share the same goals and philosophy, some still refer to them collectively as a "movement." *See, e.g.*, Daniel McGillis, *The American Dispute Resolution Movement*, *in* ABA SPECIAL COMM. ON DISPUTE RESOLUTION, DISPUTE RESOLUTION PAPER SERIES NO.2, MEDIATION IN THE JUSTICE SYSTEM 18, 23 (Maria R. Volpe et al. eds., 1983); *see also* Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85, 85-86 (suggesting that victim-offender mediation is part of the larger ADR movement in the United States).

11. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Edwin H. Greenebaum, *Lawyers' Agenda for Understanding Alternative Dispute Resolution*, 68 IND. L.J. 771 (1993); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987); Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986).

12. *E.g.*, Roy J. Baroff, *Why Mediation?*, TRIAL BRIEFS, Fall 1993, at 4.

tion.[13] The success of mediation in diverse, non-criminal contexts[14] legitmated the notion that mediation should be explored as an alternative means of resolving some of the problems encountered in handling the criminal conflict.[15]

With the current awareness of crime in the nation and in North Carolina reaching prodigious levels,[16] the time may be ripe for change in the way the criminal justice system deals with crime. Most reformers agree that the system is beyond a "quick fix" cure; they say a major overhaul is

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13. *See, e.g.*, Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5-S12 (1989); Ellen Joan Pollack, *Arbitrator Finds Role Dwindling as Rivals Grow*, WALL ST. J., Apr. 28, 1993, at B1 ("Binding arbitration is being supplanted by more flexible nonbinding mediation as business' favorite alternative to litigation.").

14. *See, e.g.*, Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 281-91 (1982); Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327, — (1992); Barbara Ashley Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1236-41 (1983); Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 25-44 (1993); Anita R. White, *Mediation in Child Custody Disputes and a Look at Louisiana*, 50 LA. L. REV. 1111, 1115-16, 1127-30 (1990).

15. The benefits of mediation are described *infra* notes 152-87 and accompanying text.

16. Issues involving crime appear to have played an important role throughout American political and social history. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 449 (1993). Even with this historical preoccupation, a dramatic increase in the level of awareness of crime in American society has occurred in recent years. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1991, at 185 (1992) [hereinafter SOURCEBOOK-1991] (suggesting that Americans generally perceive that more crime occurs presently than in the past); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1992, at 163 (1993) [hereinafter SOURCEBOOK-1992] (suggesting that 29% of Americans claim that crime is a real problem in their neighborhood). *But see id.* at 162 (noting that few Americans ranked crime as the most important problem facing the country between 1981 and 1993). President Clinton declared that addressing issues of crime would be his first priority for 1994. *E.g.*, *Crime Bill is Clinton's First Priority of 1994: President Singles Out Brady Bill Approval*, CHARLOTTE OBSERVER, Nov. 28, 1993, at A4. Headlines often scream that citizens want to "get tougher" on crime. *E.g.*, Rob Christensen, *Get Tough on Crime, People Tell Hunt*, NEWS & OBSERVER (Raleigh), Jan. 20, 1994, at A3; Sam Vincent Meddis & Robert Davis, *Poll: Get Tougher on Crime / 80% Willing to Pay for More Police*, USA TODAY, Oct. 28, 1993, at A1. Even though statistics do not necessarily show such a dramatic increase in crime in either the country as a whole or North Carolina, crime seems to have generated a great interest among political leaders to deal with an issue that resonates with voters. *See* Gary Blonston, *Despite Fears, Statistics Show No U.S. Crime Wave*, CHARLOTTE OBSERVER, Oct. 24, 1993, at A1 ("Serious crime across the country, the figures show, has occurred much less frequently since the record-setting years of the early 1980s."); Michael Rezendes, *A Dream Dashed on the Street: Crime Rates Fall, but Fears Rise*, BOSTON GLOBE, Dec. 22, 1993, at 1 (rationalizing that, despite the twenty-year low in overall crime, "'most people don't respond to dry statistical information the way they do to anecdotal information'" (quoting psychologist Arthur Lurigio of Loyola University)); Carolyn Skorneck, *Serious Crimes Fall in First 6 Months of '93, FBI Says*, CHARLOTTE OBSERVER, Dec. 6, 1993, at A4 (reporting that both violent crime and property crime has dropped since the same period in 1992); *see also infra* notes 110-11 and accompanying text (outlining national figures on crime rates).

needed.[17] Consequently some have advocated the introduction of a mediated process into the criminal justice system, believing that it might produce more beneficial results.[18] Mediation programs generate enthusiasm not only because they address the needs of an overburdened court system,[19] but also because they offer a starting point for ushering in a new paradigm of criminal justice.[20] Proponents claim that by "empowering victims in their search for closure through direct involvement in the justice process, impressing on offenders the real human impact of their behavior[,] and compensating victims for their losses through restitution by the offender," instead of focusing on harsh punishment of the offender, mediation in the criminal justice system offers a fresh approach to the problem of crime in the United States.[21]

This Comment surveys the growth, goals, and procedure of two distinct but related kinds of mediation programs at work in the criminal justice system in the United States.[22] Part II contends that three practical impulses gave rise to the development of mediation: a conviction that the current manner of dealing with crime has been ineffective and expensive, a growing realization that the needs of crime victims have been neglected, and a belief that systems of reparation as sanctions for crime should be more widespread.[23] Part III discusses the advantages that mediation brings to the criminal justice system and the inherent drawbacks that appear to limit mediation as a legitimate means to handle crime.[24] Part IV describes some of the mediation initiatives and innovations presently occurring within different criminal justice jurisdictions in this country.[25] Part V places these programs in a larger context by discussing the philosophy of restorative justice as an alternative paradigm to deal with crime.[26] Finally, this Comment con-

17. This cry for change has been heard at many different levels: within the grassroots community, *see, e.g.*, Josh Meyer, *Citywide Town Meeting Blasts Justice System*, L.A. TIMES, Apr. 5, 1993, at A1; at a political level, *see, e.g.*, Milo Geyelin, *Law: Quayle Faces Powerful Foes on Law Reform*, WALL ST. J., Dec. 12, 1991, at B1; within the criminal justice system, *see, e.g.*, David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 657 (1993); and among academicians, *see, e.g.*, William A. Stanmeyer, *Making Criminal Justice Work*, *in* CRIMINAL JUSTICE REFORM: A BLUEPRINT 235, 235-57 (Patrick B. McGuigan & Randall R. Rader eds., 1983).

18. The similarities and differences in victim-offender mediation and traditional mediation are outlined in Umbreit, *supra* note 10, at 101-04.

19. *See* STEVENS H. CLARKE ET AL., N.C. INST. OF GOV'T, MEDIATION OF INTERPERSONAL DISPUTES: AN EVALUATION OF NORTH CAROLINA'S PROGRAMS 61 (1993).

20. *See infra* notes 262-311 and accompanying text.

21. MARK S. UMBREIT & ROBERT B. COATES, VICTIM OFFENDER MEDIATION: AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE U.S. 1 (1992).

22. *See infra* notes 28-97 and accompanying text.

23. *See infra* notes 98-151 and accompanying text.

24. *See infra* notes 152-215 and accompanying text.

25. *See infra* notes 216-61 and accompanying text.

26. *See infra* notes 262-311 and accompanying text.

cludes by suggesting paths of change for the state of North Carolina in dealing with the criminal act.[27]

## I. INFORMAL JUSTICE: THE GROWTH AND PROCESSES OF MEDIATION PROGRAMS

Two strains of mediation programs deal with criminal conflicts. The first is based upon the Victim Offender Reconciliation Program (VORP)[28] movement, which was initiated in a small city in Ontario, Canada, in the early 1970s.[29] Responding to damage done by two intoxicated teenagers, a probation officer and a church volunteer embarked upon an innovative experiment. They accompanied the offenders as they approached twenty-one victims of vandalism to assess damages and make restitution.[30] These informal and unplanned meetings evolved into an organized victim-offender reconciliation program funded by church donations and government grants and supported by various community groups.[31] Trained volunteer mediators facilitated meetings between victims and offenders, and began to form a vision that the "process of bringing victims and offenders together to reach a mutual agreement regarding restitution [would] become the norm."[32] Following several other Canadian initiatives, a group of concerned citizens replicated the program in Elkhart, Indiana, in 1978.[33] With training and program materials developed by the Mennonite Central Committee,[34] the concept grew from an experimental project to one that has

27. *See infra* notes 311-56 and accompanying text.

28. "VORP," "victim-offender mediation," and "victim-offender programs" will be used interchangeably throughout this Comment. Though more than half of the programs in the victim-offender mediation program directory are entitled "Victim Offender Reconciliation Programs," PROGRAM DIRECTORY, *supra* note 6, at introductory letter, "VORP" does not denote a franchising relationship and does not necessarily indicate identical programmatic procedure.

29. Dean E. Peachey, *The Kitchener Experiment*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 14 (Martin Wright & Burt Galaway eds., 1989).

30. *Id.* at 15-16.

31. Tony Dittenhoffer & Richard V. Ericson, *The Victim/Offender Reconciliation Program: A Message to Correctional Reformers*, 33 U. TORONTO L.J. 315, 316 (1983).

32. Peachey, *supra* note 29, at 19.

33. Robert B. Coates, *Victim-Offender Reconciliation Programs in North America: An Assessment*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 125, 127 (Burt Galaway & Joe Hudson eds., 1990). VORP was developed by an organization called Prisoners and Community Together, which advocated the greater use of alternatives to prison. MARK UMBREIT, CRIME AND RECONCILIATION: CREATIVE OPTIONS FOR VICTIMS AND OFFENDERS 87-97 (1985) [HEREINAFTER UMBREIT, CRIME AND RECONCILIATION].

34. Coates, *supra* note 33, at 127. The Mennonite community, long interested in peace and justice issues, has been instrumental in advancing the ideas of reconciling victims and offenders. *See* Peachey, *supra* note 29, at 14-15.

been adopted in more than 120 communities in the United States[35] and exported to a host of other countries.[36]

The driving force behind the formation of VORP programs is the desire to meet the needs of both victims and offenders of crime. These programs are distinguished by a number of factors:

> 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.
> B) The program operates in the context of the juvenile and/or criminal justice systems rather than the civil court.
> 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).[37]

Victim-offender mediation programs provide a process in which offenders and victims may discuss the incident that has occurred, strive for greater understanding of the crime, negotiate restitution, and express their future intentions.[38] In essence, the goal is to provide a resolution of the criminal conflict that both victim and offender perceive as fair.[39]

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35. *See* PROGRAM DIRECTORY, *supra* note 6, at introductory letter.

36. *See, e.g.*, Stergios Alexiadis, *Victim Offender Reconciliation Schemes in the Greek Justice System*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 309 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (Greece); Pino Centomani & Bruna Dighera, *The New Juvenile Penal Procedure Code and the Reparation-Reconciliation Process in Italy: A Chance for a Possible Change*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 355 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (Italy); Tony F. Marshall, *Restorative Justice on Trial in Britain*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 15, 17 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (England); *see also*, UMBREIT & COATES, *supra* note 21, at 1 (highlighting the international development of victim-offender mediation).

37. Mark S. Umbreit, *Victim Offender Mediation: A National Survey*, FED. PROBATION, Dec. 1986, at 53, 54. Umbreit also lists the key points of the classic VORP model:

> 1. Primary purpose is RECONCILIATION.
> 2. Secondary purpose is partial or total SUBSTITUTE FOR JAIL OR PRISON INCARCERATION.
> 3. VORP is not primarily a rehabilitation program for offenders. Rehabilitation is a byproduct of the reconciliation process.
> 4. VORP is deeply rooted in JUDEO-CHRISTIAN VALUES.
> 5. VORP operates best through a COMMUNITY-BASED ORGANIZATION (working closely with probation staff).
> 6. VORP involves a creative use of VOLUNTEERS as mediators. 7. VORP has a relatively low-cost budget.

UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 103.

38. While most victim-offender programs share this format, individual programs may have different priorities, methods, or procedures.

39. Umbreit, *supra* note 10, at 87.

The reach of victim-offender programs has been extensive. VORPs have been established in large metropolitan areas as well as small rural townships.[40] While 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.[41] Almost half of the programs rely on community volunteers.[42] Most programs serve juvenile offenders; others focus on adult offenders.[43] The most common referrals involve property crimes such as vandalism and burglary,[44] yet some programs have applied VORP techniques to more violent offenses, such as negligent homicide, armed robbery, and rape.[45] Moreover, mediation may occur at several different points in the criminal justice process, including pretrial diversion or post-trial sentencing.[46]

The second strain of mediation within the criminal justice system is associated with the development of the community dispute resolution model and the formation of dispute settlement centers and neighborhood justice centers.[47] These models claim a heritage from what appears to have been the first attempt at a formal mediation program within the criminal justice system, in Columbus, Ohio, in 1969.[48] In Columbus, the prosecutor established a forum for the mediation of minor disputes that were clogging up the court system and were otherwise ineffectively handled.[49] The success of this experiment stimulated other cities to develop community mediation programs, often directly connected to the formal justice system.[50] Eyeing the positive results to be gained from these experiments, the United States

40. For example, programs exist in such diverse places as Oakland, California, PROGRAM DIRECTORY, *supra* note 6, at 3, and Carrboro, North Carolina, *id.* at 25. According to one analysis, only minor differences distinguish programs in large and small counties. STELLA P. HUGHES & ANNE L. SCHNEIDER, U.S. DEP'T OF JUSTICE, VICTIM-OFFENDER MEDIATION IN THE JUVENILE JUSTICE SYSTEM 11-12 (1990).

41. Umbreit, *supra* note 10, at 86; *see also* HUGHES & SCHNEIDER, *supra* note 40, at 4 (indicating that approximately 43% of victim-offender mediation programs in the juvenile justice system are private/nonprofit organizations, 21% are governed by probation departments, 17% are housed within a county or state agency, and 7.4% are administered by the courts); *see also infra* notes 228-37 and accompanying text (describing the Oklahoma state-run program).

42. HUGHES & SCHNEIDER, *supra* note 40, at 5.

43. *See* Coates, *supra* note 33, at 129.

44. *See id.*

45. Umbreit, *supra* note 37, at 53; *see also infra* notes 250-54 and accompanying text.

46. *See* Umbreit, *supra* note 37, at 54. According to a study done by Umbreit in 1985, 49% of the referrals occurred during the pretrial stage, 66% between conviction/adjudication and sentencing/disposition, and 76% after sentencing/disposition. *Id.* Many programs have more than one intervention point. *Id.*

47. For a short history of community dispute-resolution programs, see DANIEL MCGILLIS, U.S. DEP'T OF JUSTICE, COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY 3-18 (1986) [hereinafter MCGILLIS, DISPUTE RESOLUTION PROGRAMS].

48. *See, e.g., id.* at 5.

49. *Id.*

50. *See id.*

Department of Justice created model Neighborhood Justice Centers in Atlanta, Kansas City, and Los Angeles in 1977.[51] Similar to the VORP programs, such community dispute resolution programs[52] have grown in popularity across the country.[53]

Community dispute settlement centers formed independently of the VORP movement and contain slightly different emphases. The establishment of mediation centers stems from the dissatisfaction with the formal criminal justice process. Adherents of mediation suggest that minor disputes[54] should be removed from the overburdened court system and submitted to a more suitable forum for resolution.[55] These proponents highlight the benefits of mediation by contrasting the mediation process with the formal system. They perceive that minor disputes, especially between individuals with ongoing relationships,[56] are best resolved outside the adversarial system.[57] Similarly, advocates accentuate the informality of mediation.[58] By referring to mediation as "antilegal,"[59]

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51. *See* Janice A. Roehl & Royer F. Cook, *The Neighborhood Justice Centers Field Test, in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 91, 91 (Roman Tomasic & Malcolm M. Feeley eds., 1982). Broad insight into the formation and effect of these initial neighborhood justice centers can be found in Edith B. Primm, *The Neighborhood Justice Center Movement*, 81 KY. L.J. 1067 (1993).

52. For purposes of this Comment, "mediation centers," "dispute settlement centers," and "neighborhood justice centers" are synonymous and will be used interchangeably. Such lumping of the programs may be somewhat misleading because it may leave the impression that the programs clone each other. In truth, the neighborhood justice centers and their progeny, while sharing similar goals and components, tend to be autonomous and tailored to the community in which they exist. *See* Roehl & Cook, *supra* note 51, at 95.

53. *See* MCGILLIS, DISPUTE RESOLUTION PROGRAMS, *supra* note 47, at 7-10; MEDIATION NETWORK OF NORTH CAROLINA & THE DISPUTE SETTLEMENT CTR. OF ORANGE COUNTY, TRAINING MANUAL FOR MEDIATORS 3-4 (1993) [hereinafter TRAINING MANUAL].

54. "Minor disputes" is a rather ambiguous phrase, but it generally refers to charges such as simple assault, misdemeanor larceny, criminal trespass, or placing harassing phone calls. *See, e.g.*, CLARKE ET AL., *supra* note 19, at 23 & n.69.

55. Roman Tomasic & Malcolm M. Feeley, *Introduction, in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA ix, ix (Roman Tomasic & Malcolm M. Feeley eds., 1982). Concern for the effectiveness of the court system is a driving force behind many of the mediation programs formed in North Carolina. *See* CLARKE ET AL., *supra* note 19, at 8-9, 11-12.

56. Such disputes may include family disputes, landlord-tenant problems, or civil rights issues between prisoners and guards. *See* Lawrence H. Cooke, *Mediation: A Boon or a Bust?, in* ABA SPECIAL COMM. ON DISPUTE RESOLUTION, DISPUTE RESOLUTION PAPER SERIES NO. 2, MEDIATION IN THE JUSTICE SYSTEM 3, 6-7 (Maria R. Volpe et al. eds., 1983) (noting that in these cases "disputants are in situations where the instant problem may not only be a recurring event, but also may be symptomatic of some deeper, and perhaps subconscious, problem").

57. Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments, in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 60, 61 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

58. CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 12, 169-70 (1985).

59. William L.F. Felstiner & Lynne A. Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 LAW & HUM. BEHAV. 223, 223 (1978). The authors

"delegaliz[ed],"[60] or "decentralized,"[61] proponents implicitly suggest that mediation is a much more user-friendly and democratic process than traditional legal channels.

Community mediation programs are not wholly reactive to the formal system, however. A second motivation for their establishment is that they empower communities to resolve conflicts without submitting to the powers of the state.[62] To this end, mediation centers invite the voluntary participation of the disputants and attempt to resolve the underlying causes of the dispute.[63] Advocates contend that mediation is a holistic process; by focusing on the reparation of relationships rather than concentrating on individual rights, mediation contains community building aspects.[64] In other words, adherents claim that mediation programs serve a proactive role by increasing community involvement in the justice process.[65]

Mediation centers also operate under diverse contexts. Some programs are sponsored exclusively by courts or prosecutors.[66] Others are more community-based, receiving referrals directly from the community rather than the justice system.[67] Most programs are a hybrid of the two,[68] remaining independent from the formal justice system but maintaining close ties with, and taking referrals from, justice system agencies.[69] Different centers may also use alternatives to mediation by employing conciliation or arbitration techniques to settle disputes.[70] These centers also often offer programs to the community beyond those relating to the criminal justice

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explain this assertion by contending that mediation in the criminal justice system has its roots not in historical American jurisprudence, but "in African moots, in socialist comrades courts, in psychotherapy, and in labor mediation." *Id.* at 224.

60. HARRINGTON, *supra* note 58, at 1.

61. Richard Danzig, *Towards the Creation of a Complementary, Decentralized System of Criminal Justice*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 1, 1 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

62. CLARKE ET AL., *supra* note 19, at 12.

63. *Id.* at 10-11.

64. HARRINGTON, *supra* note 58, at 96-99.

65. *Id.* at 31. It should be noted that this goal is not well-served when mediation programs are inextricably linked with traditional legal systems. *See* SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 179-82 (1990) (concluding that when citizens assert their legal rights and utilize the courts, including court aided-mediation programs, they paradoxically submit to the power of the law, decreasing individual autonomy).

66. MCGILLIS, DISPUTE RESOLUTION PROGRAMS, *supra* note 47, at 20-24.

67. *Id.* at 24-28. Although community-based mediation centers make up an important part of the movement, they usually refrain from taking cases from the criminal justice system in a formal matter and will not be a focus of this Comment.

68. *Id.* at 28-29.

69. *Id.* The Dispute Settlement Centers in North Carolina fall under this hybrid category. *Id.* at 28.

70. *Id.* at 31. Conciliation is "any effort by a neutral third party to assist in the resolution of a dispute short of bringing the parties together face-to-face for a discussion of the matter." *Id.*

system, including mediation training programs, divorce mediation, public dispute mediation, meeting facilitation, and truancy mediation.[71]

Despite the differences between victim-offender programs and those housed in community mediation centers, the mediation process is essentially the same. The process usually begins with a referral from an official in the criminal justice system.[72] A variety of sources may refer cases to mediation: judges, district attorneys, court counselors, police personnel, or probation officers.[73] Referral criteria are generally few in number.[74] So long as an identifiable victim exists, restitution issues are present,[75] or ongoing interpersonal relationships need to be repaired,[76] programs are willing to accept cases. Next, a trained mediator invites the parties to meet.[77] A basic tenet of both VORP and other mediation programs is that both victim and offender willingly come to the negotiating table.[78] To fur-

71. *See, e.g.*, N.C. MEDIATOR (Mediation Network of N.C., Carrboro, N.C.), Summer/Fall 1993, at 2.

72. As one judge commented concerning referrals, "few criminals will volunteer [on their own] to sit down with their victims to reach some agreement about appropriate punishment." Cooke, *supra* note 56, at 11.

73. For example, among programs in the juvenile justice system, referrals are most likely to come from court, probation, or intake officials. HUGHES & SCHNEIDER, *supra* note 40, at 4. Some suggest that because traditional criminal justice personnel focus on offenders, alternatives for referral solicitations—such as victim support groups—should be sought. *See* Marshall, *supra* note 36, at 21.

74. The mediation programs in North Carolina accept many criminal cases but have adopted a policy against mediating cases involving domestic violence, unless narrow conditions are met. CLARKE ET AL., *supra* note 19, at 16. The reason for this exclusion is that in the typical domestic violence case, the mediator is unable to adjust the power imbalance of the parties. *Id.*

75. *See* UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 104 (noting, however, that some programs emphasize referrals from more serious crimes to serve the purpose of a total or partial substitute for incarceration).

76. *See* CLARKE ET AL., *supra* note 19, at 16.

77. Programs vary in their use of volunteer mediators and the extent of their training. HUGHES & SCHNEIDER, *supra* note 40, at 5.

78. CLARKE ET AL., *supra* note 19, at 10 ("One key idea [of the mediation programs] is the *voluntary participation of the disputants.*"); UMBREIT & COATES, *supra* note 21, at 10 ("The question of whether or not victims and offenders actually participate voluntarily in mediation is crucial to the integrity of the victim-offender mediation process."). Questions of offender freedom are troublesome. In order for offenders to take ownership in the process, voluntariness is crucial. *Id.* at 10. Most programs do allow an "opting-out" process whereby the offender has an opportunity to decline to meet with the victim. Yet, such action may be negatively perceived by probation or other correctional officials, thereby making the offender feel as if he has no choice. *See* Dittenhoffer & Ericson, *supra* note 31, at 331; McGillis, *supra* note 10, at 25-26; Umbreit, *supra* note 10, at 89-90. By the same token, victims may be coerced into meeting if they are given little recourse to regain their losses outside of a VORP or other mediation program. Even so, most mediation programs take pains to be sure that the victim is not re-victimized by feeling obliged to meet with the offender. Umbreit, *supra* note 10, at 89. *But see* Dittenhoffer & Ericson, *supra* note 31, at 331-32 (noting that some victims commit to mediation after being sent letters discussing the referral but neglecting to mention that the victim may choose not to participate). Studies indicate that most offenders (81%) and victims (91%) perceive their participation as voluntary. UMBREIT & COATES, *supra* note 21, at 10.

ther this end, the mediator may meet individually with both victim and offender to explain the process and gain their consent.[79] During this time, the mediator listens to the parties, assesses the victim's losses and the offender's ability to pay, and encourages participation by both parties.[80]

Once the parties come together, the mediator facilitates the meeting. VORP meetings often focus on three elements: (1) recognizing the violation by expressing the facts and feelings surrounding the incident, (2) restoring equity by negotiating a restitution agreement, and (3) addressing future intentions.[81] Mediation centers, on the other hand, generally follow a five-stage process: (1) describing the situation, (2) reframing and prioritizing the concerns of the parties, (3) generating alternatives, (4) evaluating and selecting alternatives, and (5) formulating an agreement.[82] If the parties come to an agreement, they put it in writing,[83] and each party retains a copy.[84] Some programs send a copy of this agreement to the referral source.[85] The failure to come to an agreement at such a meeting is rare; one

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79. Umbreit, *supra* note 10, at 88. Umbreit underscores the importance of the preparatory stages of mediation: "The quality of the work done during this phase will have a great deal of impact upon the actual mediation session. . . . Problems that later may occur in the mediation session often result from not having thoroughly completed this extremely important phase in the victim-offender mediation process." *Id.* One VORP resource notes that failure to meet separately with the victim and offender may "result in disaster as participants may be misinformed about the nature of the meeting, may have a personal agenda that [the volunteer may] know nothing about and generally will approach the meeting with more hostility." OFFICE OF CRIMINAL JUSTICE, MENNONITE CENT. COMM. & MCC U.S., VORP VOLUNTEER HANDBOOK 9 (1990) [hereinafter VORP HANDBOOK]. Furthermore, a meeting with the victim may dissipate some of the initial anger that the victim feels, thereby paving the way for a more constructive meeting with the offender. Umbreit, *supra* note 10, at 91. Not every victim-offender mediation program follows this procedure. In Austin, Texas, for example, employees of the probation office make the initial contacts with the victim and offender. Then, without prior contact with the victim or offender, a local volunteer mediator conducts the mediation session. UMBREIT & COATES, *supra* note 21, at 11. Similarly, mediation centers often employ intake personnel to set up the meetings with the disputants; mediators facilitate the cases without having met the parties beforehand. *See, e.g.*, DISPUTE SETTLEMENT CTR. IN ORANGE COUNTY, ORGANIZER'S MANUAL AND PROGRAM GUIDE 3 (1982)

80. VORP HANDBOOK, supra note 79, at 9-13.

81. Each of these elements is described in *id.* at 14-17; *see also* Umbreit, *supra* note 10, at 90-92 (explaining the mediation process).

82. *See, e.g.*, TRAINING MANUAL, *supra* note 53, at 32-45.

83. Programs implore their mediators to facilitate agreements that are specific, balanced, future-focused, and positive. *See* TRAINING MANUAL, *supra* note 53, at 41.

84. Most often, a monetary restitution contract is drawn, although a substantial number of community service agreements are also made. At times, the offender may work for the victim directly. *See* HUGHES & SCHNEIDER, *supra* note 40, at 6; *see also supra* note 3 and accompanying text. Some victims merely desire an apology by the offender as restitution. UMBREIT & COATES, *supra* note 21, at 11.

85. VORP HANDBOOK, *supra* note 79, at 16. Many referring agencies reserve the right to invalidate the agreement, thereby serving as a back-up to an unfair contract. *Id.* Some mediation programs, in maintaining their independence from the criminal justice system and also protecting the confidentiality of the parties, do not report the specifics of the agreement to referring sources.

study reported that ninety-five percent of the meetings end with a successfully negotiated restitution agreement.[86]

Some mediation programs monitor the agreements that are made[87] or schedule second sessions.[88] For agreements in which payments will be made over a period of time, follow-up meetings may be the best means to review the agreement, hold the offender accountable to the agreement, discuss any changes that may be necessary, or celebrate the fulfillment of the contract.[89] At times, circumstances may dictate that the parties renegotiate the agreement.[90] Even when no formal follow-up meetings are scheduled, either party may request another meeting.[91] Some programs engage in rather extensive agreement monitoring by reminding the offender of payments due, collecting the payments, and forwarding them to victims. Such monitoring better ensures that the agreement will be completely fulfilled.[92]

Mediation programs are only as good as the mediators they employ. The style of the mediator certainly plays a role in the mediation process. Mediators are asked to master diverse roles: victims often expect the mediator to exhibit leadership; offenders rank the ability to make them feel comfortable as the mediator's most important task.[93] Programs often emphasize "empowering" mediation styles over those that are more "controlling."[94] However, if one party completely dominates the other, or if a party has trouble verbalizing her thoughts, the mediator may have to be more directly involved.[95] Yet such involvement is only warranted when it is clear that the

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86. UMBREIT & COATES, supra note 21, at 11-12.

87. Up to 90% of juvenile mediation programs monitor the contracts that are made. HUGHES & SCHNEIDER, *supra* note 40, at 6.

88. *See, e.g.*, TRAINING MANUAL, *supra* note 53, at 46.

89. *See* Umbreit, *supra* note 10, at 92. Usually these follow-up meetings are less formal and structured than the previous meeting. *Id.*

90. VORP HANDBOOK, *supra* note 79, at 18.

91. *See* TRAINING MANUAL, *supra* note 53, at 46.

92. *See infra* notes 161-62, 172-73 and accompanying text.

93. *See* UMBREIT & COATES, *supra* note 21, at 11.

94. Umbreit, *supra* note 10, at 95. An empowering style of mediation is one in which the mediator remains in control of the meeting but encourages direct communication between victim and offender. The mediator wants to facilitate a mechanism by which the parties take control of the reconciliation process. *Id.* at 92-94. The controlling style of mediation is one in which the mediator dominates the meeting and remains active throughout the meeting. The mediator focuses on the major issues and initiates much of the communication between the parties. *Id.* at 94. For obvious reasons, the empowering style tends to meet the emotional needs of the offenders and victims. *Id.* at 95. For more on mediator styles, see VORP HANDBOOK, *supra* note 79, at 20-21.

95. *See* Umbreit, *supra* note 10, at 95. One of the roles of the mediator is to

> [h]elp to equalize *situational power.* Such meetings may involve participants who have radically different positions of power. . . . [The mediator] can help to equalize the situation by: giving both sides equal time, . . . making points which may have been missed, . . . being careful to address both sides equally, and . . . . choosing a seating arrangement and/or a place of meeting that does not emphasize differences in power.

more therapeutic empowering style is not helpful.[96] Due in no small part to the atmosphere that the mediator creates, very few victim-offender meetings have involved violent or extraordinarily hostile behavior.[97]

## II. The Past: Practical Problems Provide an Impetus for Mediation

Mediation programs were not created in a vacuum. A number of factors—in addition to the general rise in ADR techniques[98]— account for the rise of criminal justice mediation programs in the United States. Two criminal justice reform movements appear to have set in motion the ideas for change: the incarceration reform movement and the victims' rights movement.[99] Reaction to these problems produced the reparation movement, in which judicial sentences centered on the payment of restitution from offender to victim.[100] Against this backdrop, mediation programs became an amenable choice to handle crime.

### A. *The Need for Reform in Dealing with Crime*

Many Americans have been dissatisfied with the state of affairs of the criminal justice system.[101] Reform is a common refrain in the discussion of how the criminal justice system deals with crime and criminal offenders.[102]

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VORP Handbook, *supra* note 79, at 18-19. The handbook also encourages mediators to "[s]eek to equalize—and certainly try to avoid amplifying—any inequalities of power." *Id.* at 26.

96. *See* Umbreit, *supra* note 10, at 96.

97. *See, e.g.*, Brook Larmer, *After Crime, Reconciliation*, Christian Sci. Monitor, June 24, 1986, at 1. Of course, the fact that the programs are voluntary in nature may weed out cases in which the parties would be bent on revenge or retaliation. Furthermore, the empowerment process itself may defuse much of the hostility—the parties might then feel as if they have some control in the proceedings. In any case, to combat even the slightest chance of danger, mediators should have the parties consent to an "unconditional commitment to be constructive," at the introduction of the meeting. VORP Handbook, *supra* note 79, at 10 (citation omitted).

98. *See supra* notes 9-13 and accompanying text.

99. *See infra* notes 101-30 and accompanying text.

100. *See infra* notes 131-51 and accompanying text.

101. *See* Sourcebook-1991, *supra* note 16, at 178 (rating public satisfaction with the criminal justice system).

102. *See, e.g.*, Calvert R. Dodge, A World Without Prisons: Alternatives to Incarceration Throughout the World 252-54 (1979) (concluding that society ought to depend less on prisons for changing behavior); Umbreit, Crime and Reconciliation, *supra* note 33, at 57-66 (advocating the development of more sentencing options for judges and prosecutors, who often do not have a choice between prison, which is often too expensive, and probation, which is often too lenient); Alan T. Harland & Philip W. Harris, *Developing and Implementing Alternatives to Incarceration: A Problem of Planned Change in Criminal Justice* 1984 U. Ill. L. Rev. 319, 327-43 (exploring the feasibility of alternatives to prison); Elmar Weitekamp, *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, *in* Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation—International Research Perspectives 81, 84-86 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (citing statistical evidence to demonstrate the crisis in corrections in the United States).

Specifically, critics have demonstrated the failure of the corrections system in the United States by exposing the overburdening of courts, the rising incarceration rate, the high recidivism rate, and the high cost of housing inmates.[103]

According to critics, the increased use of courts to deal with crime has resulted in congestion and undue delay.[104] This increased court caseload corresponded with an explosion in the incarceration rate over the past twenty years: in 1991, federal and state prisons held over 820,000 inmates, reflecting a 149% increase since 1980.[105] This shift does not merely reflect an increase in the general population: 310 sentenced prisoners were housed for every 100,000 residents in 1991, a 123% increase over the number in 1980.[106] The United States may well incarcerate more of its citizens than any other industrialized country in the world.[107] Over two percent of the entire adult residential population in the United States was under some type of correctional care (probation, jail, prison, or parole) in 1990.[108]

Surprisingly, these increased incarceration rates may not reflect a parallel growth of crime.[109] Indeed, victimization trends suggest that the rate of all crimes (including violent crime) has remained steady since 1973.[110]

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103. *See infra* notes 104-18 and accompanying text.

104. *See, e.g.*, Roman Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement, in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 239-40 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

105. TRACY L. SNELL & DANIELLE C. MORTON, U.S. DEP'T OF JUSTICE, PRISONERS IN 1991 1 (1992). Interestingly, the rate of incarceration slowed in the United States in 1991, showing a 6.5% increase in 1991, the smallest percentage increase since 1984. *Id.*

106. *Id.* at 2.

107. *See* Leven, *supra* note 17, at 643 (stating that the United States imprisons 455 persons per 100,000 population).

108. LOUIS W. JANKOWSKI, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1990 5 (1992). North Carolina had over 114,000 individuals under correctional care, in custody, or under correctional control—2.28% of its adult population. *Id.*

109. While the levels of crime have increased as the population grows, the per capita index of crime has remained stable in the nation as a whole and in North Carolina. *See* Stevens H. Clarke, *Crime: It's a Serious Problem, But Is It Really Increasing?*, POPULAR GOV'T, Summer 1992, at 34-39. Clarke noted that robbery, aggravated assault, burglary, larceny, and motor vehicle theft in North Carolina were below the national average, and the homicide rate, while showing a decreasing rate, hovered above the national average. *Id.* at 36-38. Some have debated the assertion that crime has decreased. *See, e.g.*, GOVERNOR'S ADVISORY BD. ON PRISONS AND PUNISHMENT, A REPORT TO THE GOVERNOR: NORTH CAROLINA'S PRISON CRISIS 3 (1990) [hereinafter PRISON CRISIS] (reporting that there has been a 39% increase in reported crime in North Carolina from 1984 to 1989).

110. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1990, at 3 (1992). Furthermore, the percentage of households experiencing a crime has fallen from about 32% to just under 24% between 1975 and 1991. LISA D. BASTIAN, U.S. DEP'T OF JUSTICE, CRIME AND THE NATION'S HOUSEHOLDS, 1991, at 1 (1992). This shift may be surprising, as reports seem to indicate a widespread fear that crime is out of control. *See supra* note 16 and accompanying text. This disparity between perception and reality is often blamed on the media. *See* UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 39-43 (noting the perva-

The increased use of the correctional system seems instead to have been the result of a major shift in criminal justice policy.[111]

Unfortunately, increased incarceration rates have not corresponded with lower criminal recidivism rates. Evidence tends to show that of 108,000 prisoners released in 1983, more than 41% returned to prison or jail within three years.[112] While prison does incapacitate offenders,[113] the threat of incarceration seems to have done little to deter or rehabilitate offenders from committing future crimes.

Additionally, many have noted that the reliance upon incarceration to deal with crime has proven to be exceedingly expensive. First, increased incarceration has produced major housing problems. In 1990, state prisons were operating at a level twenty-two percent above their designed capacity.[114] Many state prisons are operating under a court order or pending litigation due to crowding.[115] Total spending on state and federal prisons reaches almost 11.5 billion dollars annually, about forty-five dollars per United States resident.[116] Second, operating these prisons is an equally

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sive media coverage of crime but arguing that while "the total volume [of crime] is too high, there is little evidence that it is at an epidemic level"); *see also* Rezendes, *supra* note 16, at 1 ("[M]any specialists believe this [crime] phenomenon is reinforced by news media, particularly television, which typically takes greater interest in unusual crime stories.").

111. *See, e.g.*, JOHN J. DIIULIO, JR., U.S. DEP'T OF JUSTICE, RETHINKING THE CRIMINAL JUSTICE SYSTEM: TOWARD A NEW PARADIGM 7 (1992) (suggesting that, between 1980 and 1992, the federal government fought a war against crime by increasing the conviction and incarceration of criminals); Michael J. Mandel et al., *The Economics of Crime*, BUS. WK., Dec. 13, 1993, at 73, 75-78 (noting that a higher emphasis has been placed on prison rather than other components of law enforcement); Howard Zehr, *Justice: Stumbling Toward a Restorative Ideal*, *in* JUSTICE: THE RESTORATIVE VISION 1, 2-3 (1989) (occasional paper of the Mennonite Central Committee U.S. Office of Criminal Justice & Canada Victim Offender Ministries Program) (proclaiming that rehabilitative values of sentencing were recently replaced by an emphasis on punishment, thereby increasing incarceration rates).

112. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 1 (1989). Not surprisingly, the "more extensive a prisoner's prior arrest record, the higher the rate of recidivism—over 74% of those with 11 or more prior arrests were re-arrested, compared to 38% of the first-time offenders." *Id.* at 2. Often, these rearrests were for the same type of crime for which the prisoner was first imprisoned. *Id.* The amount of time spent in prison before the release was not deemed a significant factor with regard to recidivism. *Id.* at 9. Also, "[n]early one in three released violent offenders and one in five released property offenders were arrested within three years for a violent crime following their release from prison." *Id.* at 2.

113. This assertion is debatable as well; for example, only 4.1% of all prisoners released from prison in 1983 had been there longer than five years. *Id.* at 9. The great majority of prisoners who were released had been in prison 24 months or less. *Id.* In North Carolina, time served in prison as a percentage of sentence declined 40% between 1984 and 1989. PRISON CRISIS, *supra* note 109, at 5.

114. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, PRISONS AND PRISONERS IN THE UNITED STATES 5 (1992).

115. *See* Leven, *supra* note 17, at 641 ("[F]orty states are under court order to remedy unconstitutional prison conditions.") (citation omitted).

116. GREENFELD, *supra* note 114, at 12. The amount spent on state prisons per U.S. resident has doubled since 1984. *Id.* In 1990, expenditures for state and local justice systems—including

costly business. In total, spending for corrections in state and local justice systems exceeds twenty-three billion dollars each year.[117] Not surprisingly, the high rates of re-incarceration and high costs of administering the corrective system have led some to question whether alternatives to incarceration could be more efficient and effective means of dealing with crime.[118]

### B. *The Rise of Victim Advocacy*

The reemergence of the crime victim as a significant player in the criminal justice system has also had an effect on the growth of mediation in the criminal justice system. Victims not only experience the immediate cost of crime,[119] but they must also pay taxes to house sentenced offenders.[120] Victimization, even that resulting from "less serious" property crimes, causes significant emotional turmoil.[121] Moreover, many victims perceive that the existing system does not adequately meet their needs.[122] Many victims allege that criminal justice officials neglect their plight—that

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such things as police protection, courts, and corrections—cost each U.S. resident over $260. SOURCEBOOK-1992, *supra* note 16, at 5. Yet many Americans perceive that the country is spending too little to halt the spread of crime. *Id.* at 187.

117. *See* SOURCEBOOK-1992, *supra* note 16, at 4. For North Carolina figures on prison operation, see *infra* notes 323-25 and accompanying text.

118. The appeal for alternatives to prison has been particularly embraced in the juvenile justice system. *See, e.g.*, Robert E. Byrne & John J. Lapinski, *Programs Ease Burden on Juvenile Courts, Help Kids*, CHI. DAILY L. BULL., Sept. 21, 1992, at 5 ("Most of the ADR programs in the juvenile area have taken the form of voluntary diversion programs designed to keep young people out of the court system . . . ."). Because implementing alternatives to incarceration may be a difficult sell, Mark Umbreit lists "strategies" for success, including defining a specific group of offenders who would be appropriate for such programs, developing a palatable rationale for the project, determining the placement and structure of such a program, and communicating these ideas to the public in an effective and persuasive manner. UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 63-66.

119. Over 72% of all victims of personal crimes reported some kind of economic loss. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1991 68 (1992).

120. *See* Weitekamp, *supra* note 102, at 88. Housing one prisoner for one year costs approximately $27,000. Mandel et al., *supra* note 111, at 75.

121. *See* DANIEL W. VAN NESS, CRIME AND ITS VICTIMS 28-37 (1986); *see also* Zehr, *supra* note 111, at 4 ("Victimization is a truly devastating experience that affects many areas of a person's life. It often involves extreme feelings of fear, of powerlessness, of guilt, of self-blame.") (citations omitted). Zehr contends that even what some consider minor crime can be "traumatic because it threatens people's sense of themselves as autonomous individuals in a predictable world." *Id.* at 5.

122. *See* ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 125-74 (1984). One victim reported, "I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment of the judicial system is many times more painful. I would not in good faith urge anyone to participate in this hellish process." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 4 (1982) [hereinafter TASK FORCE]. An account of the degradation, inconveniences, and insults that victims often face following a criminal encounter can be found at *id.* at 3-13.

their suffering is secondary to the threat to social order.[123] Even simple requests, such as for information regarding the crime or the offender, may fall on deaf ears.[124] Thus, victims are said to be victimized twice: first by the perpetrator of the crime and then by a system that treats them impersonally.[125]

Consequently, in the last twenty years, there has been a rise in victim awareness.[126] Victim advocacy groups have formed to guide, enlighten,

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123. *See* KARMEN, *supra* note 122, at 147. Many victims suffer from lack of information, lack of guidance, and lack of advocacy. For example, one survey found that 30% of victims did not recover property that was used in evidence, 60% were not informed of possible state compensation programs, 78% lost pay to come to court, and 42% were not informed of the outcome of the case. *Id.* at 148 (citations omitted); *see also* Gilbert Geis, *Victims of Crimes of Violence and the Criminal Justice System*, *in* PERSPECTIVES ON CRIME VICTIMS 62, 62-70 (Burt Galaway & Joe Hudson eds., 1981) (concluding that steps must be taken to recognize the inconveniences that victims face); Mary S. Knudten & Richard D. Knudten, *What Happens to Crime Victims and Witnesses in the Justice System?*, *in* PERSPECTIVES ON CRIME VICTIMS 52, 52-61 (Burt Galaway & Joe Hudson eds., 1990) (finding that the inconveniences imposed upon victims as a result of involvement in the criminal justice system are substantial).

124. *See, e.g.*, Diane Peters, *'Why Weren't We Told' of Molester's Release? — Crime Victim's Mother Asked Just One Thing, and System Didn't Do It*, SEATTLE TIMES, Dec. 17, 1993, at A1.

125. *See* KARMEN, *supra* note 122, at 3 ("At best, victims are the forgotten persons within the crime problem; at worst, they are harmed twice, the second time by a criminal justice system more intent on satisfying the needs of its constituent agencies and officials than of the directly injured parties."); Umbreit, *supra* note 10, at 86 ("Victims often feel powerless and vulnerable. Some even feel twice victimized . . . . It is not unusual for anger, frustration, and conflict to be increased as the victim and offender move through the justice process."). Klaus Sessar goes further by suggesting that because criminal justice officials use victims as witnesses to convict offenders, a tertiary victimization exists. Klaus Sessar, *Tertiary Victimization: A Case of the Politically Abused Crime Victims*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 37, 38 (Burt Galaway & Joe Hudson eds., 1990). Some argue that even in restitution programs, which are arguably beneficial for the victim, victims are manipulated to serve the interests of offenders. Gwynn Davis, *Reparation in the UK: Dominant Themes and Neglected Themes*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 445, 457-58 (Heinz Messmer & Hans-Uwe Otto eds., 1992). Much of the problem is due to the inherent tension between the different interests of victims and the officials in the criminal justice system:

> In the aftermath of their victimization, victims rate income and property loss highest. Time loss and physical-emotional suffering are among the most serious problems for the greatest number of people. Yet, these are not the priorities of the criminal justice system when it comes to pursuing the case. These are, rather, the quality of evidence, high clearance rates, efficient calendaring, speedy trials, keeping the cases moving through the courts, conviction rates, and so on. This conflict of goals, priorities, and expectations results in a lack of incentive to cooperate with the criminal justice system and in strained relations between the victim/witnesses and the system.

Emilio C. Viano, *Victims, Offenders, and the Criminal Justice System: Is Restitution an Answer?*, *in* OFFENDER RESTITUTION IN THEORY AND ACTION 91, 96 (Burt Galaway & Joe Hudson eds., 1978).

126. Andrew Karmen attributes the popular rise in victim awareness to the mass media, victim service profiteers (such as the home security industry), and various social movements. KARMEN, *supra* note 122, at 3-23. An academic study of victims, called victimology, has developed since

counsel, and provide services for victims of crime.[127] Legislatures have passed laws to ensure that victims' rights are considered throughout the judicial system.[128] In 1982, a presidential task force recommended far-reaching changes in legislation and the administration of criminal justice, and suggested improvements that community organizations could make in serving victims of crime.[129] The federal government has encouraged local criminal justice agencies to set up programs that offer services to victims of crime.[130] Thus, programs that emphasized improved services to victims—such as mediation programs—have garnered a special interest from criminal justice officials.

### C. *The Restitution Movement*

In response to the shortcomings of incarceration and the heightened interest in victims, restitution and compensation schemes began to emerge as an option for judicial sentencing.[131] Instead of merely sentencing of-

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the 1970s. *See id.* at 23-32; Stephen Schafer, *The Beginning of Victimology*, *in* PERSPECTIVES ON CRIME VICTIMS 15, 15-26 (Burt Galaway & Joe Hudson eds., 1981).

127. For example, the North Carolina Victim Assistance Network encourages victim participation in the criminal justice system, guides victims through the courtroom process, lobbies for legislative provisions that advance victims' interests, and educates appropriate agencies in the handling of victims. *See, e.g.*, NORTH CAROLINA VICTIM ASSISTANCE NETWORK, SURVIVING VIOLENT CRIME: A HANDBOOK FOR VICTIMS, THEIR FAMILIES AND OTHERS WHO CARE 16-29 n.(d).

128. *See, e.g.*, N.C. GEN. STAT. § 15A-825 (Supp. 1993) (enumerating the responsibilities of law-enforcement agencies to victims of crime); U.S. DEP'T OF JUSTICE, VICTIMS OF CRIME ACT OF 1984 AS AMENDED: A REPORT TO CONGRESS BY THE ATTORNEY GENERAL 2-4 (1990). The advocacy for victim participation in the prosecution of criminals has been widely propagated. *See* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518 (1982) (suggesting that "the victim should be given the right to be heard ('allocution') and perhaps even be made a party at specified stages of the criminal process"); U.S. DEP'T OF JUSTICE, VICTIMS OF CRIME: PROPOSED MODEL LEGISLATION, at II-1 to II-10 (1986). The Presidential Task Force concluded that the Sixth Amendment of the Constitution should be modified to ensure that "the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." TASK FORCE, *supra* note 122, at 114. More victim participation in the criminal justice process has gained wide public approval. *See* SOURCEBOOK-1992, *supra* note 16, at 206. As a result, some state constitutions already include basic rights for victims such as the rights to participation and restitution. *E.g.*, CAL. CONST. art. I, § 28. However, these rights can be constrained by the widespread use of plea bargaining. EDWIN VILLMOARE & VIRGINIA V. NETO, U.S. DEP'T OF JUSTICE, VICTIM APPEARANCES AT SENTENCING UNDER CALIFORNIA'S VICTIMS' BILL OF RIGHTS 5 (1987) (suggesting that victim participation should come at an earlier stage of the process).

129. TASK FORCE, *supra* note 122, at 16-111.

130. *See, e.g.*, BLAIR B. BOURQUE & ROBERTA C. CRONIN, U.S. DEP'T OF JUSTICE, HELPING VICTIMS AND WITNESSES IN THE JUVENILE JUSTICE SYSTEM: A PROGRAM HANDBOOK (1991) (providing comprehensive materials for developing a victim/witness assistance program).

131. DANIEL MCGILLIS, U.S. DEP'T OF JUSTICE, CRIME VICTIM RESTITUTION: AN ANALYSIS OF APPROACHES 1 (1986) ("Few concepts in the justice system command the widespread support accorded restitution."). Restitution usually refers to some sort of payment made by the perpetrator of the crime to the victim. Compensation generally refers to a system operated by the state to reimburse victims of crime. *See, e.g.*, N.C. GEN. STAT. § 15B (1990 & Supp. 1993). This Com-

fenders to prison, judges began to consider restitution orders whereby offenders would pay for damages directly, through monetary payments to the victim, or symbolically, through community service.[132] Proponents of the trend claim that restitution benefitted both victim and offender, enabling reparation programs to grow in number and credibility.[133]

Restitution payments have obvious advantages for victims of crime. While many victims report economic loss as a serious consequence of the crime that was committed,[134] only recently have courts recognized that victims should be adequately reimbursed for the losses they sustained.[135] Without restitution in modern courts, victims are often left without a viable forum to recover losses; pursuing claims in civil or small claims court has proven to be not only time consuming and expensive, but also fruitless, as judgments are often difficult to recover.[136] With the total cost of crime at staggering heights—some suggest that the fiscal burden of crime in this

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ment will not address compensation directly, but more information about compensation programs can be found in ROGER E. MEINERS, VICTIM COMPENSATION: ECONOMIC, LEGAL, AND POLITICAL ASPECTS (1978); DALE G. PARENT ET AL., U.S. DEP'T OF JUSTICE, COMPENSATING CRIME VICTIMS: A SUMMARY OF POLICIES AND PRACTICES (1992); and Cass R. Sunstein, *The Limits of Compensatory Justice*, *in* COMPENSATORY JUSTICE 281 (John W. Chapman ed., 1991).

132. Burt Galaway, *Restitution as an Integrative Punishment*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 331, 331-33 (Randy E. Barnett & John Hagel III eds., 1977).

133. For a brief history of restitution, see Joe Hudson & Burt Galaway, *Introduction*, *in* OFFENDER RESTITUTION IN THEORY AND ACTION 1, 2-6 (Burt Galaway & Joe Hudson eds., 1977); Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 71-80 (1970). Restitution programs have been especially prevalent within juvenile justice operations. ANNE L. SCHNEIDER & JEAN S. WARNER, U.S. DEP'T OF JUSTICE, NATIONAL TRENDS IN JUVENILE RESTITUTION PROGRAMMING *passim* (1989). Forty-eight states now have legislation that mandates some sort of restitution. Carol Shapiro, *Is Restitution Legislation the Chameleon of the Victims' Movement?*, *in* CRIMINAL JUSTICE, RESTITUTION, & RECONCILIATION 73, 74 (Burt Galaway & Joe Hudson eds., 1990) (suggesting, however, that restitution practice lags behind legislation and academic discussion).

134. *See* Viano, *supra* note 125, at 97. Mark Umbreit found that, of the burglary victims that he surveyed, 88% of the victims suffered a loss of property, and 94% indicated that restitution was important. Mark S. Umbreit, *The Meaning of Fairness to Burglary Victims*, *in* CRIMINAL JUSTICE, RESTITUTION AND RECONCILIATION 47, 49, 52 (Burt Galaway & Joe Hudson eds., 1990); *see also* SOURCEBOOK-1992, *supra* note 16, at 272 (highlighting the economic loss associated with crime).

135. *See, e.g.*, KARMEN, *supra* note 122, at 180. However, victim reparation is not a new concept. Restitution from offender to victim was commonly sanctioned in ancient history. *See, e.g.*, *Exodus* 22:1-6; Daniel W. Van Ness, *Restorative Justice*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 7, 7-8 (Burt Galaway & Joe Hudson eds., 1990); Weitekamp, *supra* note 102, at 81.

136. *See* Sveinn A. Thorvaldson, *Toward the Definition of the Reparative Aim*, *in* VICTIMS, OFFENDERS, AND ALTERNATIVE SANCTIONS 15, 18-19 (Joe Hudson & Burt Galaway eds., 1980). *But cf.*, VICTORIA O. BRIEN, U.S. DEP'T OF JUSTICE, CIVIL LEGAL REMEDIES FOR CRIME VICTIMS 7-8 (1992) (dispelling the myth that judgments against offenders may be uncollectible). For a comparison of civil restitution and criminal restitution, see Sveinn A. Thorvaldson, *Restitution and Victim Participation in Sentencing: A Comparison of Two Models*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 23, 23-35 (Burt Galaway & Joe Hudson eds., 1990).

country exceeds 420 billion dollars annually[137]—restitution sanctions are an effective means for victims to recoup their losses.

Reparation also confers emotional benefits upon the victim. First, restitution from the offender enables the victim to experience a more concrete sense of vindication; that is, the victim can be sure that the offender acknowledges and accounts for the offense.[138] Second, reparation programs give victims a sense of distributive equity. Instead of "lowering" the offender with retributive punishment, restitution restores victims to a condition similar to the one that they were in before the crime occurred.[139] In the absence of such programs, some suggest that victims suffering financial or emotional loss may not feel satisfied that justice was served merely because the offender of the crime was placed in prison.[140] Advocates augment this view with evidence that victims appear to exhibit greater tolerance than the general public for reparative sentences over incarcerative sentences.[141]

Proponents further argue that restitution sanctions reduce prison overcrowding, are less expensive to administer than incarceration, and shield offenders from the corrupting forces of the prison world.[142] They point out that restitution sanctions are clearly related to the offense.[143] Further, they cite evidence that restitution programs appear to reduce recidivism at a higher rate than incarceration.[144] Moreover, some advocates suggest that

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137. Mandel et al., *supra* note 111, at 79 (analyzing the total economic costs of crime); *cf.* Sara Collins, *Cost of Crime: $674 Billion*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 40-41 (estimating the cost of crime to be $674 billion); *Crime Injuries Expensive*, CHARLOTTE OBSERVER, Jan. 8, 1994, at A8 (totaling the amounts of medical, psychological, and productivity losses to a sum of $202 billion).

138. *See* HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 192 (1990).

139. *Id.* at 193.

140. UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 49. Umbreit queries whether "it makes sense to punish a $300 thief with $15,000 of prison punishment, while the victim receives no repayment." *Id.* at 55.

141. *See* ZEHR, *supra* note 138, at 193 (citation omitted); Imho Bae, *A Survey on Public Acceptance of Restitution as an Alternative to Incarceration for Property Offenders in Hennepin County, Minnesota, U.S.A.*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 291, 301-03 (Heinz Messmer & Hans-Uwe Otto eds., 1992). Generally, the public supports restitution sentences in property crimes as an alternative sanction to prison more than criminal justice officials may be willing to concede. *Id.* at 303.

142. KARMEN, *supra* note 122, at 177.

143. Burt Galaway & Joe Hudson, *Sin, Sickness, Restitution—Toward a Reconciliative Correctional Model*, *in* CONSIDERING THE VICTIM—READINGS IN RESTITUTION AND VICTIM COMPENSATION 59, 66 (Joe Hudson & Burt Galaway eds., 1975).

144. JEFFREY A. BUTTS & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, RESTITUTION AND JUVENILE RECIDIVISM 4 (1992) ("Juveniles agreeing to pay restitution . . . return to court significantly less often than juveniles who do not pay restitution."); Heinz Messmer & Hans-Uwe Otto, *Restorative Justice: Steps on the Way Toward a Good Idea*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM OFFENDER MEDIATION—INTERNATIONAL RESEARCH PER-

restitution is therapeutic for offenders: their self-esteem is increased by actively participating in the sanction instead of passively receiving their punishment.[145] Moreover, the fact that restitution sanctions enable the offender to maintain important community and employment ties appeals to advocates.[146] Those who work in restitution programs believe that restitution—as opposed to incarceration—is more equitable for both victims and offenders, holds offenders more accountable for their action, allows for greater offender rehabilitation, and has greater effects on the reduction of recidivism.[147] While restitution programs have not been a major panacea for handling crime,[148] these positive effects of restitution have led some to ad-

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SPECTIVES 1, 1 (Heinz Messmer & Hans-Uwe Otto eds., 1992) ("[G]rowing evidence [exists] that dropping formal punishments in no way increases the risk of recidivism, at least in the field of petty crime."); Charles R. Tittle, *Restitution and Deterrence: An Evaluation of Compatibility, in* OFFENDER RESTITUTION IN THEORY AND ACTION 33, 55 (Burt Galaway & Joe Hudson eds., 1977) (concluding that "there is no inherent conflict between deterrence and restitution"). *But cf.* STEVENS H. CLARKE & ANITA L. HARRISON, RECIDIVISM OF CRIMINAL OFFENDERS ASSIGNED TO COMMUNITY CORRECTIONAL PROGRAMS OR RELEASED FROM PRISON IN NORTH CAROLINA IN 1989 29 (1992) (noting that in North Carolina, probationers required to pay restitution may have an increased likelihood of re-arrest, perhaps because the added financial burden adds to the temptation to steal); Weitekamp, *supra* note 102, at 93-95 (noting that a study of restitution centers in Minnesota, Georgia, and Texas found recidivism to be higher with those who receive restitution sentences).

145. Galaway & Hudson, *supra* note 143, at 67; Thorvaldson, *Toward the Definition of the Reparative Aim*, *supra* note 136, at 19-20.

146. MCGILLIS, *supra* note 131, at 13.

147. *See* HUGHES & SCHNEIDER, *supra* note 40, at 8-9.

148. Restitution programs face practical problems. First, conflicts of interest inherently exist between the criminal justice system and the victim. For example, strict sentencing guidelines may induce prosecutors to reduce charges in plea bargaining. Because many states enable victims to recover only those damages that the offender is convicted of causing, this plea bargaining may prevent some victims from obtaining full financial recovery. *See* David A. Starkweather, Note, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 862-64 (1992); *see also* William F. McDonald, *Expanding the Victim's Role in the Disposition Decision: Reform in Search of a Rationale, in* OFFENDER RESTITUTION IN THEORY AND ACTION 101, 102 (Burt Galaway & Joe Hudson eds., 1977) (identifying the tension between victim participation and plea bargaining). Not suprisingly, such conflicts of interest pit prosecutors and victims against each other. The Supreme Court nevertheless upheld the prosecutors' use of discretion to bargain with the accused offender, holding that the Victim and Witness Protection Act of 1982 authorizes restitution only for the specific conduct that was the basis of conviction. Hughey v. United States, 495 U.S. 411, 415-22 (1990). Second, the use of restitution has not been implemented in a widespread manner. Many times restitution is used primarily to divert offenders away from prison, implicating more individuals within the system but failing to provide a workable alternative sanction. Joe Hudson, *A Review of Research Dealing with Views on Financial Restitution, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 239, 275 (Heinz Messmer & Hans-Uwe Otto eds., 1992). For more on the discussion of the "net-widening" effect of diversionary programs, see *infra* notes 188-92 and accompanying text. Finally, administrative problems exist in setting up programs and collecting the restitution. MCGILLIS, *supra* note 131, at 2-3.

vocate that restitution replace incarceration as a major sanction for crime.[149] Therefore, the step from restitution programs to mediation programs was not a large one to take. Practitioners found that the most effective way to administer restitution was through face-to-face contact between the parties.[150] This contact would not only reduce reliance on courts and prisons, advocates of mediated solutions argue, but it would also meet the needs of victims and offenders in tangible ways.[151]

## III. MEDIATION AND CRIMINAL JUSTICE: BENEFITS AND SHORTCOMINGS

Recognizing the problems of incarceration, the needs of victims, and the merits of restitution, many proponents claim that mediation programs are an effective way to deal with crime. While practitioners have debated the appropriate measure of "effectiveness,"[152] adherents nonetheless suggest that an examination of the mediation process shows that mediation programs have real advantages in dealing with crime.[153] In essence, proponents claim that mediation programs have the rare ability to consider the interests of, and improve services to, victims, offenders, local communities and criminal justice institutions.[154]

Advocates point out that the mediation process itself deals with the criminal act in a constructive manner. With mediation, the victim (or complainant) has an opportunity to confront the offender, receive answers, vent emotion, regain losses, and recover a sense of security.[155] For some vic-

149. CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION: A RESTITUTIONARY APPROACH TO CRIME AND THE CRIMINAL 23, 84-85 (1984); Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice, in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349, 364-67 (Randy E. Barnett & John Hagel III eds., 1977).

150. At times, court-mandated restitution has been difficult to collect. *See, e.g.*, Kate Shatzkin, *Expect Long Wait to Recoup Losses*, SEATTLE TIMES, Apr. 12, 1992, at A10 (noting that juvenile court judges in Seattle ordered over $530,000 in restitution but collected less than $170,000). Completion of restitution agreements that are mediated have a much better track record. *See infra* notes 161-62 and accompanying text.

151. *See infra* notes 159-76 and accompanying text.

152. *See, e.g.*, DIIULIO, *supra* note 111, at 10-12 (measuring performance by such categories as doing justice, promoting secure communities, restoring victims, and promoting noncriminal options, instead of merely analyzing the level of crime or recidivism); Coates, *supra* note 33, at 133 ("The future of VORP rests upon resisting the effort to focus on one goal exclusively and upon maintaining a balance among what are often perceived as competing goals."); Lode Walgrave, *Mediation and Community Service as Models of a Restorative Approach: Why Would It Be Better? Explicating the Objectives as Criteria for Evaluation, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 343, 350 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (commenting that recidivism may be a simplistic measure of results).

153. *See* UMBREIT & COATES, *supra* note 21, at 1.

154. Coates, *supra* note 33, at 133.

155. VORP HANDBOOK, *supra* note 79, at 14-17. Victims often suggest that an opportunity to get questions answered and confront offenders—something rarely offered by formal adjudication—helps them regain wholeness. *See, e.g.*, Gary Smith, *'Meeting Tommy Brown Helped Me*

tims, the chance to forgive the offender may not only be appropriate, but may also aid in the victim's efforts to regain wholeness.[156] Further, mediation proponents claim that the offender may assume the responsibility of his own action by making payments, expressing remorse, and assuring the victim that the offense will not recur.[157] The process empowers both parties to deal with each other on a personal level, thereby breaking down stereotypes and reducing fear.[158]

The positive way in which crime victims react to the process underscores the advantages of mediation in criminal contexts.[159] Certainly, the victim appreciates restitution, whether it is financial, in-kind, or emotional.[160] With mediation, victims are more likely to receive monetary restitution than those who merely rely on court mandates.[161] For example, in one program, ninety percent of the reported restitution is successfully completed within a year.[162] Nevertheless, victims deem most important the opportunity to obtain answers and information, negotiate restitution, and directly express to the offender the effects of the crime.[163] Adherents note

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*End This Ordeal'*, USA TODAY, Sept. 9, 1991, at 11A (explaining why the author, a victim of a violent assault, believed meeting with the offender was valuable).

156. *See* John R. Gehm, *The Function of Forgiveness in the Criminal Justice System*, *in* RESTORATIVE JUSTICE ON TRIAL: THE PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 541 (Heinz Messmer & Hans-Uwe Otto eds., 1992). While forgiveness has historically been associated with religious experiences, modern psychotherapists are beginning to utilize its power. *Id.* at 541-42. Gehm contends that forgiveness is not condoning the offender's action, but releasing from the victim the power of the offense. *Id.* at 542. In other words, forgiveness allows a healthy resolution of anger, permitting victims to go on with their lives. *Id.* at 545. Thus, because "forgiveness lies at the very heart and center of processes for overcoming the deleterious effects of crime and other social inequity[,] [t]here is increasing evidence to suggest that victim-offender reconciliation programs may have the potential for far broader applications than was previously thought possible or desirable." *Id.* at 547; *see also* Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, *in* RESTORATIVE JUSTICE ON TRIAL: THE PITFALLS AND POTENTIAL OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 551, 555-56 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (asserting that forgiveness is an increasingly important dimension within the criminal justice system).

157. Peachey, *supra*, note 156, at 555-56.

158. Umbreit, *supra* note 10, at 91-92.

159. Clarke's study found that "[c]omplainants who participated in mediation sessions were quite satisfied with the experience and rated mediation highly in a number of [areas]." CLARKE ET AL., *supra* note 19, at 57.

160. The benefits of restitution for the victim are described *infra* notes 134-37 and accompanying text.

161. UMBREIT & COATES, *supra* note 21, at 19.

162. Coates, *supra* note 33, at 129.

163. UMBREIT & COATES, *supra* note 21, at 17. Even receiving an apology was ranked more important than receiving restitution. *Id.* The importance of non-material satisfaction is echoed in Marshall, *supra* note 36, at 20. Anthropologists who studied litigants in small claims court confirm that "the opportunity to tell [one's] whole story is sometimes more important than the result." JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 130 (1990).

that this kind of communication, which fosters understanding and reduces the need to punish, is unavailable through the formal justice process.[164]

Moreover, supporters contend that mediation offers several other emotional benefits that supplement the actual agreement. First, following a mediated setting, victims are less upset about the crime and less fearful that they will be re-victimized by the offender.[165] Second, victims experience an overall personal satisfaction with the outcome of mediation.[166] Third, victims who participated in a mediation session are more likely to perceive that their cases are handled fairly.[167] As a result, ninety-five percent of victims who have participated in a mediated session with the perpetrator of their crime opined that a mediated session should be considered as an alternative to incarceration.[168]

Mediation supporters also claim that offenders have reacted positively to mediated agreements with victims. One study determined that eighty-five percent of offenders were satisfied with the processing of the case following mediation, and ninety-one percent of offenders were satisfied with the mediation outcome.[169] Eighty-nine percent of offenders perceived the process as fair.[170] Proponents of mediation also herald other effects. First, adherents suggest that mediation may have an important impact on the attitudes of offenders.[171] Second, because mediation seems to increase the

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164. *See* Heinz Messmer, *Communication in Decision-Making About Diversion and Victim-Offender Mediation, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 461, 473-74 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

165. *See* UMBREIT & COATES, *supra* note 21, at 12.

166. This effect seems to be almost universal. *See id.* at 13 (showing that 90% of victims were satisfied with the mediation outcome); CLARKE ET AL., *supra* note 19, at 62 ("[T]he procedure of mediation, as well as its outcome, contributed to [party] satisfaction."); Cooke, *supra* note 56, at 13 (contending that victims who participated in mediation—as opposed to those who remained in court—were much more satisfied and were more inclined to believe the overall process was fair).

167. UMBREIT & COATES, *supra* note 21, at 15-16 (noting that 83% of victims who participate in mediation perceive the justice process as fair—a substantially greater percentage than those who did not participate in the mediation process).

168. Coates, *supra* note 33, at 130.

169. UMBREIT & COATES, *supra* note 21, at 13-14. These statistics were not conclusively significant—many offenders appeared satisfied with case processing and outcome without the aid of mediation. *Id.*

170. *Id.* at 15.

171. *Id.* at 18. As one offender expressed following a mediated setting, "I was able to understand a lot about what I did . . . . I realized that the victim really got hurt and that made me feel really bad." *Id.* (omission in original); *see also* Robert B. Coates & John Gehm, *An Empirical Assessment, in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 251, 255 (Martin Wright & Burt Galaway eds., 1989) (finding a shift in attitude toward the crime or the victim in approximately one third of offenders).

chance that offenders will fulfill their restitution obligation,[172] adherents conclude that mediation may hold offenders more accountable than court-ordered restitution.[173] Finally, proponents suggest that some evidence demonstrates that mediation lowers recidivism rates.[174] Those who work in mediation programs certainly claim to see a higher rate of effectiveness in the categories of offender accountability, offender rehabilitation, and recidivism reduction than those who work in other components of the criminal justice system.[175] While the evidence of lowered recidivism rates is as of yet unconvincing, commentators suggest that recidivism is at least no greater among those who participate in a mediated agreement than those who were not given or failed to take advantage of such an opportunity.[176]

Mediation supporters also indicate the value that such programs have within the community. On one level, the delivery of justice is allegedly improved, thus improving the community's sense that justice can be attained[177]—a notion essential for "community" to occur.[178] On another level, the use of local mediation programs and community volunteer mediators permits the power of resolving conflicts to be returned to the neighborhood level.[179] Thus, the community at large is given the ability to deal with neighborhood disputes instead of relying upon the intrusion of the state.[180]

Adherents also emphasize the positive effects that mediation has on the formal justice system. First, they produce evidence that mediation pro-

172. UMBREIT & COATES, *supra* note 21, at 19. In Clarke's study of North Carolina mediation programs, compliance with the agreements was quite high. CLARKE ET AL., *supra* note 19, at 59. *See also* McGillis, *supra* note 10, at 24 (reporting that in one program, because defendants felt a "moral" and "legal" obligation to pay restitution following mediation, they were more likely to fulfill the agreement than those who had restitution mandated by court).

173. UMBREIT & COATES, *supra* note 21, at 19.

174. HUGHES & SCHNEIDER, *supra* note 40, at 10. *But cf.* UMBREIT & COATES, *supra* note 21, at 20 (finding no statistically significant difference in recidivism rates between juvenile offenders who participated in mediation and those who did not); Tomasic, *supra* note 104, at 241-42 (arguing that data suggests that mediation makes little significant difference in recidivism).

175. HUGHES & SCHNEIDER, supra note 40, at 10 (measuring the responses of employees in agencies that have mediation programs against employees of those that do not).

176. Umbreit and Coates concede that "it is rather naive to think that a time-limited intervention such as mediation by itself . . . would be likely to have a dramatic effect on altering criminal and delinquent behavior in which many other factors" contributed to the delinquency in the first place. UMBREIT & COATES, *supra* note 21, at 20.

177. *See* Cooke, *supra* note 56, at 15 ("The perception of justice is improved when there is available a relatively inexpensive, expeditious, and accessible forum providing fair resolutions of citizens' disputes.").

178. *See* MALCOLM DAVIES, PUNISHING CRIMINALS: DEVELOPING COMMUNITY-BASED INTERMEDIATE SANCTIONS 15-25 (1993) (discussing the importance of building and maintaining public confidence in criminal justice policy). Some commentators have diminished the importance of "community" in modern American life. *See* MERRY, *supra* note 65, at 172-76.

179. *See* Cooke, *supra* note 56, at 15.

180. *See supra* notes 62-65 and accompanying text.

grams are relatively inexpensive and save taxpayer money by easing the system's heavy workload.[181] Although such assertions have been disputed,[182] advocates contend that reducing the intrusion of the state into the conflict is less expensive than operating the formal justice system.[183] For example, the proper utilization of mediation to handle criminal conflict reduces trials and convictions,[184] resulting in decreased court operational costs. One Indiana study suggested that VORP participation reduced time for offenders in state institutions and may have saved the state substantial amounts of money.[185] Second, adherents note that the formal system receives indirect benefits from mediation programs. Some judges indicate that because mediation removes cases inappropriate for adjudication from the courts, more time and care can be devoted to those cases that remain in court.[186] Additionally, disputants generally seem to be more satisfied with the way the criminal justice system works after they participate in a mediated process.[187] In other words, on a public relations level, mediation appears to heighten the perception that the formal system delivers justice in real, albeit often intangible, ways.

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181. Annual budgets of individual programs may vary. One study showed that the cost per mediated case ranged from $292 to $986 in different programs. UMBREIT & COATES, *supra* note 21, at 21. A study in New York revealed that the average cost of processing a case in the formal system that was ultimately dismissed was $945. *See* Tom Christian et al., *The New York Experience: The Community Dispute Resolution Centers Program*, *in* ABA SPECIAL COMM. ON DISPUTE RESOLUTION, DISPUTE RESOLUTION PAPER SERIES NO. 2, MEDIATION IN THE JUSTICE SYSTEM 28, 31 (Maria R. Volpe et al. eds., 1983).

182. *See* Tomasic, *supra* note 104, at 238-39 (noting that some data suggests that mediation costs more than court processing).

183. *See, e.g.*, Ira M. Schwartz & Laura Preiser, *Diversion and Juvenile Justice: Can We Ever Get It Right?*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 279, 286-88 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (noting the cost-effectiveness of mediation within the juvenile justice system); *see also* Christian et al., *supra* note 181, at 29-33 (describing the costs of administering justice in minor disputes without mediation in New York as "staggering").

184. *See* CLARKE ET AL., *supra* note 19, at 41. Clarke noted in his study that North Carolina mediation centers "can have a substantial effect on court dispositions of mediation-eligible cases, especially on trials, if [they] receive[ ] enough cases." *Id.* at 45. In fact, although it slowed down the process, one program may have reduced trials by as much as two-thirds. *Id.*

185. Coates & Gehm, *supra* note 171, at 258-60.

186. Cooke, *supra* note 56, at 15. One commentator suggested that

> if we can somehow together find a way to go into that huge pool of . . . arrests made each year and get the police, the district attorneys and the courts to recognize that there is going to be no satisfactory resolution of many of those cases, and that they should be referred at the first instance before they get to the courthouse door to dispute resolution agencies, then we will begin to reduce the number of cases coming in to the criminal court and we will be able to deal with them more effectively.

Christian et al., *supra* note 181, at 34.

187. UMBREIT & COATES, *supra* note 21, at 13. In their study, Umbreit and Coates determined that 79% of victims who participated in mediation were satisfied with the case processing by the system, while only 57% of victims who chose not to participate or were not referred were satisfied. *Id.* at 13.

Mediation is not universally praised, however.[188] Among the concerns is that unless reliance upon prisons is reduced, mediation programs may simply "widen the criminal net" by allowing the criminal justice process to extend and multiply the number of people under its control.[189] That is, mediation programs do not provide an alternative to incarceration if the targeted offenders would not have been incarcerated had the case entered the formalized process of the criminal justice system.[190] Used in this fashion, mediation programs become a supplement or an addition rather than an alternative to the incarcerative system.[191] Even staunch supporters of mediation programs concede that mediation programs will not reach the potential its originators intended until it becomes a viable alternative to incarceration.[192]

Critics also suggest that mediation programs will not be a palatable alternative to incarceration to the American public. First, some are concerned that mediation may not be an effective tool for Western societies.[193] Some anthropologists have suggested that modern industrialized societies may not provide the social context necessary to provide a legitimation of mediation on a large scale.[194] Second, the American premium placed on

188. For an overview of the "false" assumptions made by judicial reformers advocating mediation, see Tomasic, *supra* note 104, at 222-42.

189. HOWARD ZEHR, MENNONITE CENTRAL COMM. & MCC U.S., MEDIATING THE VICTIM-OFFENDER CONFLICT 5 (1990). Dittenhoffer & Ericson state that "[i]n the context of pre-trial diversion, [we have been] warned of the 'widening net' whereby diversion would ultimately result in more pervasive but less severe control over a substantially larger number of citizens. While there is little evidence of the less severity, greater pervasiveness would seem accurate." Dittenhoffer & Ericson, *supra* note 31, at 318 (footnote omitted).

190. *See* Weitekamp, *supra* note 102, at 94 (noting that restitution programs seriously limit eligible offenders, usually admitting primarily property and first-time offenders, thus failing to provide an alternative to incarceration). Weitekamp explains that restitution programs might actually lead to more incarceration because offenders that would not have been incarcerated might be sentenced for failing to meet their restitution obligation—a failure somewhat likely because few offenders are fully employed. *Id.* Such incarceration as a result of failure to pay restitution would be akin to imprisonment for debt. Dittenhoffer & Ericson, *supra* note 31, at 324. However, supporters note that VORP processes negate some of these possibilities, because restitution is negotiated as opposed to mandated, thus giving the offender some sense of ownership in the agreement. *Id.* at 235. Further, they claim that a mediator can facilitate an agreement that is somewhat realistic. *Id.* Some studies have found that VORP has great potential as an alternative sanction; judges may reduce time served for those offenders who go through VORP. *See* Coates & Gehm, *supra* note 171, at 262.

191. *See* Martti Grönfors, *Mediation—A Romantic Ideal or a Workable Alternative*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 419, 421 (Heinz Messmer and Hans-Uwe Otto eds., 1992) (arguing that true change in attitude about conflicts in society can only occur if mediation is practiced without official interference).

192. *See* Coates, *supra* note 33, at 131-32.

193. *See* Tomasic, *supra* note 104, at 245.

194. *Id.* Anthropologists have questioned whether either courts or mediation centers are the primary problem-solving device in our culture. *See, e.g.*, John M. Conley & William M. O'Barr,

individual rights might be substantially diminished with a system based on mediation.[195] Jerold Auerbach has observed:

> It is chimerical to believe that mediation or arbitration can now accomplish what law seems powerless to achieve. The American deification of individual rights requires an accessible legal system for their protection. Understandably, diminished faith in its capacities will encourage the yearning for alternatives. But the rhetoric of "community" and "justice" should not be permitted to conceal the deterioration of community life and the unraveling of substantive notions of justice that has accompanied its demise. There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.[196]

Third, mediation programs may not accomodate a public desire for retribution and punishment.[197] Prisons instill public confidence; mediation may not.[198]

One drawback to a more widespread introduction of mediation programs within the criminal justice system, say skeptics, may be the public perception that VORP is "soft" on crime.[199] Many people believe that courts presently are not dealing with criminal activity in a harsh enough

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*Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41, 60 (1993).

195. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 146 (1983).

196. *Id.* at 145. Auerbach also mentions that:

> Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose [inherent in mediation programs]. For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American. Until then, the pursuit of justice without law does incalculable harm to the prospect of equal justice.

*Id.* at 146.

197. Mediation, like other prison alternatives, may suffer from public perceptions that such options may not be appropriate punishment. *See* DAVIES, *supra* note 178, at 16-17.

198. *Id.* at 19; *see also id.* at 21 ("Despite its ineffectiveness, . . . the ideology of the prison persists, perhaps because it is one form of punishment that instills public confidence."). *But cf. id.* at 22-25 (claiming that public opinion should not be the exclusive determinant of sentencing policy).

199. *See, e.g.*, Christian et al., *supra* note 181, at 33; Maria R. Volpe & Charles Lindner, *Mediation and Probation: The Presentence Investigation*, 9 MEDIATION Q. 47, 53 (1991). Interestingly, victims and offenders who participate in VORP sessions perceive the process as adequate punishment. *See* Coates & Gehm, *supra* note 171, at 255-56 (finding that 75% of victims and 100% of offenders considered VORP to be adequate or excessive punishment).

manner.[200] Thus, doubters claim that mediation may not elicit the public support necessary for such a transformation.[201]

Some commentators also voice concern that the mediation process is too radical a departure from established legal procedures.[202] As Professor Brown succinctly critiqued:

> [O]ffenders may often need the protection of public process to insure that their rights are not unfairly compromised. Public processes can protect offenders through various safeguards: the right to counsel, judicial review to insure offenders are informed and act voluntarily, rules of evidence that exclude irrelevant information from proceedings to determine guilt and punishment, and uniform sentencing schemes to make sure that punishment is reasonably related to the crime committed rather than being based upon the individual who committed it. Because victim-offender mediation stresses substantive outcomes rather than procedural regularity, it cannot protect offenders from unfairly subjective assessments of their culpability or from well intentioned but unrestrained exercise of discretion by program administrators.[203]

Offenders may not be the only casualty of the informal mediation process. Brown suggests that the subversion of the traditional trial process may injure societal expectations and collective substantive norms.[204] Brown echoes concerns that mediation and other settlement techniques may lack the legitimacy of adjudicated cases.[205] Moreover, some commentators posit that handling criminal cases outside the courtroom may undermine the role and authority of the judiciary.[206]

Moreover, mediation programs are hampered by numerous practical concerns. First, because few programs have taken large groups of cases, no real benchmark for success at a macro-level exists. One reason for the low caseload is that the criminal justice system appears hesitant to refer large numbers of cases for mediation.[207] A direct consequence is that programs must either curry support and credibility within the criminal justice sys-

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200. *See, e.g.*, SOURCEBOOK-1992, *supra* note 16, at 203 (suggesting that 79% believe that criminals are "let off" too easily by the system); *id.* (noting that 83% of Americans contend that the system is not dealing harshly enough with criminals); Paul Sperry, *Has Lady Justice Been Peeking? Sympathy for Criminals Replaces Blind Justice*, INVESTOR'S BUS. DAILY, Feb. 3, 1994, at 1.

201. Dittenhoffer & Ericson, *supra* note 31, at 322-23.

202. *See* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique* 43 EMORY L.J. (forthcoming Fall 1994).

203. *Id.*

204. *Id.* at 51-52, 60-61.

205. *Id.* at 68; *see, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

206. For example, in Canadian courts the judge may be unable to delegate a restitution sentence. Dittenhoffer & Ericson, *supra* note 31, at 326.

207. *See* Volpe & Lindner, *supra* note 199 at 53. The authors surmise that

tem[208] or lose their perceived sense of independence.[209] Second, little evidence exists that mediation can effectively process a broad range of disputes.[210] Cases that are referred are usually of a burdensome or trivial nature.[211] Moreover, the programs themselves are inherently self-limiting in that they are dependent on the willingness of victims and offenders to

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> [s]everal factors may contribute to this phenomenon. Mediation is neither broadly known nor understood within the criminal justice system, so court staff often fail to identify appropriate cases. A similar lack of knowledge often prevents the parties appearing before the court from requesting services for themselves. Furthermore, . . . some view programs offering conciliation and restitution "as mere lenience allowed by soft-hearted judges." Moreover, the criminal justice community may resist mediation because it distrusts all programs outside of the system. This is also true of volunteer efforts, which may be seen by members of the justice system as a threat to professional exclusivity.

*Id.* (citation omitted) (quoting J.P. Conrad, *News of the Future: Research and Development in Corrections*, FED. PROBATION, 72, 75 (1988)).

208. At times, the tenets of mediation programs, antithetical to the retributive model, may prove to be a difficulty when forming relationships with formal institutions of criminal justice. *See* Marshall, *supra* note 36, at 15, 21-23 (examining the operation of reconciliation schemes in a hostile environment). Yet supporters allege that programs are gaining the support of court officials. UMBREIT & COATES, *supra* note 21, at 18. In juvenile mediation programs, for example, the support of juvenile court judges and service providers is reportedly high. HUGHES & SCHNEIDER, *supra* note 40, at 6-7.

209. Dittenhoffer & Ericson, *supra* note 31, at 330-31. Because of the different priorities of a mediation program and the current retributive system, some suggest that an independence of the two schemes is important to prevent client confusion and the dilution of ideals. Marshall, *supra* note 36, at 21-23. Similarly, the independence of the mediation centers from local and state government in North Carolina is considered "highly prized," and a "critical ingredient[ ] of the centers' success." CLARKE ET AL., *supra* note 19, at 13 (citation omitted). Yet this independence prevents many programs from receiving the number of cases required to deal with crime in a substantive manner.

210. *See* Tomasic, *supra* note 104, at 234-37. This concern becomes especially acute if the mediation process becomes a means for those with power to co-opt those with less power. McGillis, *supra* note 10, at 24-25. Moreover, existing programs are sharply limited in scope. The majority of victim-offender mediation programs primarily deals with juveniles who are first-time property offenders. *See* Weitekamp, *supra* note 102, at 83-84. Weitekamp also notes that VORPs disproportionately lack minority offenders. *Id.* at 84. There is often systematic pressure to find the "proper" VORP cases. As one judge suggested,

> You've got to choose your people; [VORP] doesn't apply to every person. First of all, basically your dyed-in-the-wool, long-term, long-record criminal isn't an ideal situation unless you're absolutely satisfied that he's done an about-face and is rehabilitated. Really it's for your first offenders, primarily your young offenders . . . . It has to be a person you assessed and feel they'll benefit from it.

Dittenhoffer & Ericson, *supra* note 31, at 337. In addition, 80% of mediation programs in the juvenile justice system place restrictions on the type of offenders or cases that they will process. HUGHES & SCHNEIDER, *supra* note 40, at 4.

211. *See* David P. Mesaros, *The Oklahoma Department of Corrections: Assisting Crime Victims through Post-Conviction Mediation*, 1 J. ON DISP. RESOL. 331, 331 (1986). Mesaros suggests that because of this attitude within the formal system, "the use of mediation as a potentially effective mechanism for dispute resolution remains largely untapped." *Id.* Often, disputes may be referred to mediation because they are labeled as problems, not legally worthy "cases." MERRY, *supra* note 65, at 101-04, 108-09.

participate in a constructive manner.[212] Third, some corollary concerns exist. Mediation does not necessarily expedite the criminal justice process, thereby raising questions as to mediation's efficiency.[213] Perhaps even more important, programs often suffer from uncertain funding,[214] further hampering chances for legitimation and credibility.[215]

## IV. THE PRESENT STATE OF MEDIATION: CONTINUED EXPERIMENTATION AND POTENTIAL FOR GROWTH

The reach of mediation within the criminal justice system has been limited and its publicity thus far seems to have been the effect of its novelty rather than its unwavering acceptance. Yet state initiatives in criminal mediation and other experiments indicate that the option of mediation may become more commonplace.[216] While the increase of victim-offender mediation has been a nation-wide phenomenon, several states have particularly nurtured the growth of reconciliatory programs.[217] Some states have merely made funds available for victim-offender reconciliation programs as a part of a broad mandate to develop better correction system services.[218] Others have laid out more elaborate schemes. In Indiana, for example, VORP is institutionalized as a responsibility of the prosecuting attorney or victim assistance program.[219] The Minnesota legislature has awarded grants to expand, initiate, and evaluate victim-offender mediation pro-

212. UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 105-06. Having truly "voluntary" standards may result in lower caseloads. *See* McGillis, *supra* note 10, at 25.

213. *See* Tomasic, *supra* note 104, at 237-38; *see also* CLARKE ET AL., *supra* note 19, at 45-46 (suggesting that North Carolina mediation centers increased the amount of time required to reach a final disposition by the court).

214. *See* McGillis, *supra* note 10, at 26. McGillis clarified the conflict between independence and funding:

> In these times of fiscal retrenchment, many programs face a great challenge in switching from federal and foundation seed to local funding support. Many mediation projects have proved successful in securing state and local budgetary support, but many others are struggling for survival . . . .
>
> Once institutionalized, however, projects face the hazard of taking on the problems that are characteristic of many mature bureaucracies—lack of responsiveness to the needs of clients, overburdened staff, and related problems.

*Id.*

215. *See* RON CLAASSEN ET AL., MENNONITE CENTRAL COMM. U.S., VORP ORGANIZING: A FOUNDATION IN THE CHURCH 7 (1989) ("If the VORP movement does not survive, it will not be because it does not work or because there is no need, but because of lack of funding."); *see also id.* at 11 (describing the funding difficulties of systems-based VORPs and church-based VORPs).

216. *See infra* notes 217-61 and accompanying text.

217. *See infra* notes 218-22 and accompanying text.

218. *See, e.g.*, ALA. CODE § 15-18-180(a)(1) (Supp. 1993); ARIZ. REV. STAT. ANN. § 12-299.01(d)(1) (1992); OHIO REV. CODE ANN. § 307.62(B) (Anderson Supp. 1993).

219. IND. CODE ANN. § 33-14-10-5 (Burns 1992). The statute reads in pertinent part:

> (a) The Prosecuting attorney or the victim assistance program shall do the following . . . .

grams.[220] Tennessee enacted the Victim-Offender Mediation Center Act of 1993, extensive legislation that appropriated funds to stimulate and encourage the creation of mediation centers that focus on the victim-offender conflict.[221] Following the formation of a Joint Taskforce on Access to Justice, the California legislature discussed bills that specifically included the use of ADR in criminal cases and provided for the utilization of victim-offender mediation programs.[222] However, encountering opposition by the California District Attorneys Association, the bill failed to pass.[223]

States have also established mediation centers. State and local governments have enabled dispute-resolution centers to proliferate despite the lack of federal funds.[224] Paving the way was the establishment of Community Dispute Settlement Centers across the state of New York in 1981.[225] Buoyed by an appropriation of more than one million dollars by the state legislature, New York became the first state to fund a network of dispute-resolution centers.[226] Other states have since been actively involved in fostering the growth of mediation centers to handle criminal disputes.[227]

Other mediation initiatives have begun to expand the reach of mediation in the criminal justice system. A revolutionary program for mediation

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(7) In a county having a Victim-Offender Reconciliation Program (VORP), provide an opportunity for a victim, if the accused person or the offender agrees, to

(A) Meet with the accused person or the offender in a safe, controlled environment; and

(B) Give to the accused person or the offender, either orally or in writing, a summary of the financial, emotional, and physical effects of the offense on the victim and the victim's family; and

(C) Negotiate a restitution agreement to be submitted to the sentencing court for damages incurred by the victim as a result of the offense.

*Id.*

220. MINN. STAT. § 611A.77 (Supp. 1994).

221. Victim-Offender Mediation Center Act of 1993, 1993 Tenn. Pub. Acts 420. The Tennessee General Assembly declared that:

(1) The resolution of felony, misdemeanor and juvenile delinquent disputes can be costly and complex in a judicial setting where the parties involved are necessarily in an adversary posture and subject to formalized procedures; and

(2) victim-offender mediation centers can meet the needs of Tennessee's citizens by providing forums in which persons may voluntarily participate in the resolution of disputes in an informal and less adversarial atmosphere.

*Id.*

222. Cal. Assembly Bill 3011 (1992) (submitted by Rep. Isenberg).

223. *See* Bill Ainsworth & Monica Bay, *ADR Bill Under Fire from DAs, Trial Lawyers*, THE RECORDER, May 5, 1992, at 2.

224. MCGILLIS, DISPUTE RESOLUTION PROGRAMS, *supra* note 47, at 10-12. Some estimates count over 400 mediation centers in 44 states. TRAINING MANUAL, *supra* note 53, at 4.

225. *See* Christian et al., *supra* note 181, at 28.

226. *Id.* See *id.* at 36-46 for the history of the passage of the bill.

227. For example, note the growth of North Carolina's dispute-settlement centers, described *infra* notes 337-46 and accompanying text.

between victims and offenders developed in Oklahoma in the 1980s.[228] Instead of employing nonprofit agencies to sponsor mediation, the state corrections department began to offer a mediation service to victims and offenders with a broad mandate to recommend appropriate sentences.[229] With the avowed goals of alleviating secondary injuries to victims and reducing offender recidivism,[230] the Oklahoma program uniquely links community interests, state agencies, and judicial courts.[231] The program processes both violent and non-violent crimes,[232] and within certain parameters the parties address restitution, counseling, treatment, incarceration, and community service.[233] The mediation is voluntary for both parties, and the process itself tends to be rigidly structured and administered by a variety of trained mediators.[234] In the initial stages of the program, the results have appeared to be positive.[235] Moreover, the state incurred substantial savings in terms of reduced confinement of offenders.[236] With Oklahoma leading the way, more public and state agencies are sponsoring mediation services to handle the victim-offender conflict.[237]

Some have proposed that probation departments sponsor mediation programs.[238] Probation departments play a unique role as a substitute for incarceration in the United States.[239] Thus, proponents suggest that the probation structure is well-suited to provide a framework for mediating between victims and offenders.[240] For example, in the area of pre-sentence

228. *See* Mesaros, *supra* note 211, at 332.

229. *Id.*

230. *Id.* at 333.

231. *Id.* at 335.

232. *Id.* at 334. The types of crime ranged from burglary and drunk-driving to manslaughter. *Id.* at 337.

233. *Id.* at 334. Some guidelines are given for the upper and lower limits for sentencing. According to Mesaros, such limitations are needed "to ensure consistency among the cases handled in the program. In addition, the agreements still reflect overall community standards regardless of the parties' personal orientation, and the sentencing parameters assure that agreements are not solely the result of the passion or prejudice of any particular victim." *Id.* at 336.

234. *Id.* at 336.

235. In the first eighteen months, 72% of victims invited to participate wished to do so, 50% of offenders responded to the invitation, 97% of those who met formed some sort of satisfactory agreement, and negotiation resulted in $650,000 of restitution. *Id.* at 337. Last year, the program reportedly took 450 cases. PROGRAM DIRECTORY, *supra* note 6, at 28.

236. Mesaros, *supra* note 211, at 338-39.

237. *See* PROGRAM DIRECTORY, *supra* note 6 (highlighting in introductory chart and letter that "the fastest growing segment of new [VORP] program development appears to be occurring in the public sector").

238. Carol Shapiro, *Adult Probation in America: Its Role in Restorative Justice, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 397 *passim* (Heinz Messmer & Hans-Uwe Otto eds., 1992); Volpe & Lindner, *supra* note 199, at 48.

239. Shapiro, *supra* note 238, at 398.

240. *Id.* at 403-06. For example:

investigation—following conviction but before sentencing—probation departments could advance the possibility of mediation between the parties.[241] While not focusing on reconciliation per se, the parties could form restitution agreements and resolve other conflicts related to the crime.[242] Like the Oklahoma corrections program, the inherent difficulties in making referrals to sources outside the system would be eliminated.[243]

Some programs have purposely avoided the reach of greater governmental involvement and established church-based mediation programs.[244] These advocates claim that the birth and growth of VORP can be credited in large part to the role of the church as an institution and to the work of individual church members.[245] They contend that Biblical ideals make up the vision and values of VORP.[246] Moreover, these values of reconciliation and restoration, according to proponents, would deteriorate under the pressures of the criminal justice system.[247] Yet their arguments are not exclusively anti-systemic; they also convey the particular strengths of church involvement in victim-offender mediation: "[l]ong-term staying power;" historic commitment to reconciliation and justice; and "[t]remendous organizational, financial, and [human] resources."[248] One such program in Fresno, California, has enjoyed fantastic success as a church-based VORP. In 1993, the Fresno VORP accepted almost 500 case referrals from the local juvenile justice system, trained 120 community volunteers to facilitate me-

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> Probation must develop a cohesive mission that reflects harmonious victim, offender, and community interests. Specifically, this includes policy development in the areas of pre-sentence investigation reporting, sentencing recommendations and enforcement, and support for supervision conditions that reflect balance, not retribution, deterrence, or fear. An analysis and reallocation of resources is implicit, as is a need for a consistent value orientation.

*Id.* at 404.

241. Volpe & Lindner, *supra* note 199, at 49; *see also* Starkweather, *supra* note 148, at 875-78 (proposing changes to the plea-bargain process).

242. Volpe & Lindner, *supra* note 199, at 51. The authors contend that "[c]urrently, sentencing is pronounced on criminal cases with little effort to resolve the conflict underlying the crime, often resulting in the defendant's repeated appearances before the court." *Id.* at 58.

243. *Id.* at 53-54 (noting that institutionalizing mediation within the probation system would result in increasing the number of mediated cases and decrease delay); *see also supra* note 207 and accompanying text (reviewing the difficulties in establishing a referral relationship between the formal system and mediation programs).

244. *See* CLAASSEN ET AL., *supra* note 215, at 5. A comparison of a church-based model with a system-based model can be found at *id.* at 10-12.

245. *See, e.g., supra* note 34 and accompanying text.

246. *See* CLAASSEN ET AL., *supra* note 215, at 5-6.

247. *Id.* at 6-7. The authors contend that prisons and probation, intended to be rehabilitative in nature, have become instruments of control and punishment. *Id.* at 6. Fearing that the same would result in a system-based VORP, they propose that housing VORP in a church-based environment may enable them to withstand the pressure to be sidetracked from its original goals. *Id.* at 7.

248. *Id.* at 8.

diations, began an adult VORP to augment their services, increased their sponsorship by local churches from eighteen to thirty-five, and raised over $50,000—enough to cover all expenses.[249]

The use of mediation between victims and offenders of violent crime is also becoming more commonplace. The sheriff's department in Genesee County, New York, administers an innovative program that deals almost exclusively with felony crimes.[250] The program services the needs of victims and offenders immediately after such an offense occurs.[251] Department personnel support the victims, include them in the justice process, and offer them the opportunity to meet with the offender in a mediated setting.[252] Despite the severity of the crime, studies indicate that many of the issues involved in these violent crimes are similar to those in non-violent settings.[253] While mediation in more violent crimes is not extensive and the process takes much longer to develop, it appears to be a helpful experience for victims and offenders who willingly participate.[254]

Finally, some corrections officials have experimented with vicarious mediation.[255] Groups of victims are brought into corrections facilities to engage in dialogue with offenders about crime and its impact on both victims and offenders.[256] Although the parties are not "related,"[257] the positive

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249. *1993 Summary*, VORP NEWS (Victim Offender Reconciliation Program of the Central Valley, Clovis, Cal.), Feb. 1994.

250. ZEHR, *supra* note 138, at 207. Specifically, the program was designed to deal with manslaughter, assault, and homicide. *Id.*

251. *Id.* at 207-08.

252. *Id.* at 208. In fact, one coordinator met with a victim more than 60 times following a shooting. *See* Larmer, *supra* note 97, at 1.

253. Mark S. Umbreit, *Violent Offenders and Their Victims*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 99, 108 (Martin Wright & Burt Galaway eds., 1989). For example, Umbreit found that in the mediation of violent crimes,

> [m]any lingering questions that the victims had were answered by the offender. The offender gained far more understanding of the full human impact of his behavior. Both the direct victims . . . and the secondary victims represented by the community representatives, were able to understand more clearly why this terrible crime had occurred, and what type of individual had committed it.

*Id.*

254. *Id.* at 109.

255. Gilles Launay & Peter Murray, *Victim/Offender Groups*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 113, 124 (Martin Wright & Burt Galaway eds., 1989). For a description of the merits of this kind of program implemented in California, see Januarius E. Rodrigues, Victim Advocacy in Corrections (May 17, 1991) (unpublished manuscript, on file with the *North Carolina Law Review*) (presented at the Seventh International Institute of Victimology, Oñata, Spain).

256. *Id.* at 5.

257. That is, they are not related by the same offense. Launay & Murray, *supra* note 255, at 129.

effects on its participants impress program operators.[258] Observers contend that the program has several benefits: it is fairly easy to administer,[259] and because sentencing is unaffected, taking part is truly voluntary.[260] While this kind of program may not have the same effect as a meeting between an offender and his "own" victim, such a program may prove a useful alternative for participants who are unable to meet with their "original" counterparts because the other was unwilling or unavailable.[261]

## V. THE FUTURE OF MEDIATION: A SYSTEM OF RESTORATIVE JUSTICE

While some observers laud the specific applications of mediation in the criminal justice realm, mediation generates a greater interest because of its potential to usher in changes at a systemic level. Combating traditional assumptions about crime, offenders, and victims, theorists undertook to develop a criminal justice alternative that formed a more "far-reaching answer to the erosion of meaning and effectiveness in formal criminal law that is closer to individual needs and the social sense of justice."[262] Restorative justice, as it was labeled, hailed a philosophical change in viewing crime and punishment.[263] It built upon the framework of mediation to bring about a "paradigm shift" in the criminal justice system.[264] Restorative justice advocates consider the retributive incarcerative practice as merely adding more harm to the world; their response would balance the criminal harm already done with support for the victim and a requirement that the offender make reparations.[265] While restorative justice has not gained universal endorsement, the idea has attracted a wide variety of adherents.[266]

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258. *E.g.*, Rodrigues, *supra* note 255, at 6 ("The victim is offered the empowering option of allocution and the offender is afforded an opportunity for social and moral reconciliation through the sincere acceptance of his responsibilities and obligations.").

259. Launay & Murray, *supra* note 255, at 121.

260. *Id.* at 129.

261. *Id.* at 121.

262. Messmer & Otto, *supra* note 144, at 5.

263. Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 276 (1993) (arguing, however, that restorative justice merely reapplies ancient forms of justice).

264. ZEHR, *supra* note 138, at 83-94 (1990). Zehr's thesis is that "[t]he source of many of our failures [in crime and justice] . . . lies in the lens through which we view crime and justice, and that lens is a particular construction of reality, a paradigm. It is not the only possible paradigm." *Id.* at 94.

265. *See* Martin Wright, *Victim-Offender Mediation as a Step Towards a Restorative System of Justice*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 525, 525-26 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

266. *See, e.g.*, Messmer & Otto, *supra* note 144, at 4-5 ("[R]estorative justice has grown into a serious factor in the criminological debate in many Western countries. In the discussion of more correct, better, and more efficient interventions in deviant behavior, restoration can no longer be dismissed.").

The roots of restorative justice are grounded in the restitution movement. As restitution programs became more popular, a debate ensued about the role and purpose of reparation within the criminal justice system. One school of thought contended that restitution represented the most justifiable form of punishment and was more effective than deterrence, retribution, and rehabilitation as the central goal of the criminal justice system.[267] This school conceded that restitution was valuable, but should remain punitive in nature.[268] Soon, a second school of thought emerged. This group claimed that restitution programs lose much of their value if they exist as a tool for punishment.[269] Instead, they contend that reparative sanctions represent an alternative means to administer justice.[270] These ideas produced the first stirrings of restorative justice.[271]

Restorative justice theory relies on the premise that "[c]rime is a violation of people and relationships. It creates obligations to make things right. Restorative justice involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance."[272] The first step in the process is to recognize that crime involves injury to both victims and the community.[273] The primary emphasis, however, is the wrong done to the person, as opposed to that done to the

267. ABEL & MARSH, *supra* note 149, at 57-128.

268. Richard Dagger, *Restitution, Punishment, and Debts to Society*, *in* VICTIMS, OFFENDERS, AND ALTERNATIVE SANCTIONS 3, 7-12 (Joe Hudson & Burt Galaway eds., 1980). Dagger concurs that restitution sanctions are good for victims. However, he claims that offenders also owe a debt to society, the biggest victim of crime, for avoidance, insurance, and attitudinal costs. *Id.* at 4-7; *see also* Galaway & Hudson, *supra* note 143, at 65 (noting that classical crime theorists, such as Jeremy Bentham, favored restitution because of its punitive and deterrent effects).

269. *See, e.g.*, Wright, *supra* note 265, at 531-32.

270. *See* Barnett, *supra* note 149, at 364-67.

271. Galaway and Hudson assert that the restitution movement has evolved into a growing appreciation for the restorative justice movement. Burt Galaway & Joe Hudson, *Introduction*, *in* CRIMINAL JUSTICE, RESTITUTION AND RECONCILIATION 1, 1 (Burt Galaway and Joe Hudson eds., 1990). Messmer and Otto trace the growth of the restorative justice ideal to the emergence of informal justice operations (such as community dispute-settlement centers), the dissatisfaction with the state of formal punishment proceedings, and the rise of victim advocacy groups. Messmer & Otto, *supra* note 144, at 1-2. For the origin of the term "restorative justice," *see* Van Ness, *supra* note 263, at 258 n.28.

272. ZEHR, *supra* note 138, at 181. Zehr contrasts restorative justice with the current system of retributive justice, which he claims treats "[c]rime [as] a violation [against] the state, defined by lawbreaking and guilt. [Retributive j]ustice determines blame and administers pain in a contest between the offender and the state directed by systematic rules." *Id.* at 181; *see generally id.* at 184-85, 202-03, 211-14 (contrasting restorative justice and retributive justice). Restorative justice advocates generally agree that a system of restorative justice should replace the retributive form of punishment. *See, e.g.*, Messmer & Otto, *supra* note 144, at 3.

273. Daniel W. Van Ness, *Pursuing a Restorative Vision of Justice*, *in* JUSTICE: THE RESTORATIVE VISION 17, 19 (1989) (occasional paper of the Mennonite Central Committee U.S. Office of Criminal Justice & Canada Victim Offender Ministries Program).

state.[274] Restorative justice makes central to the criminal act the violation of the interpersonal relationship between the victim and offender.[275] In other words, restorative justice advocates stress that the crime represents a conflict between the parties that should be resolved.[276]

The next step is to identify the relevant needs and obligations, so that the relationship between victims, offenders, and the community can be made as "right" as possible.[277] According to theorists, the victim has special needs that must be met in order to be restored:

> Victims often seek vindication. This vindication includes denunciation of the wrong, lament, truth-telling, deprivitization, and deminimization. They seek equity, including reparation, reconciliation, and forgiveness. They sense a need for empowerment, including participation and safety. Another need is reassurance, including support, 'suffering with,' safety, clarification of responsibility, and prevention. And they have a need for meaning, including information, fairness, answers, and a sense of proportion.[278]

While they concede retributive justice does allow for some forms of vindication and equity, restorative justice theorists prefer the reparative model because of its material and psychological advantages.[279]

The needs tautology does not end with the victim; restorative justice adherents also address community concerns and the needs of offenders. Because crime has public components and undermines community wholeness, proponents acknowledge that the community must denounce the violation as wrong; and satisfy itself that a repeat offense will not occur.[280] Restorative justice advocates suggest that a properly balanced model would promote community security by providing an effective deterrence to crime.[281]

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274. *See* ZEHR, *supra* note 138, at 182-84; Messmer & Otto, *supra* note 144, at 2; Umbreit, *supra* note 10, at 86.

275. Zehr contends that even if the two parties were not previously acquainted with each other, the criminal act creates a relationship. Moreover, "that relationship is usually hostile. Left unresolved, that hostile relationship in turn affects the well-being of victim and offender." ZEHR, *supra* note 138, at 182.

276. *Id.* at 182-83. The use of the term "conflict" could be misleading in that it could be manipulated to place the blame on victims. *Id.* at 183.

277. *Id.* at 186.

278. *Id.* at 194; *see also* DIIULIO, *supra* note 111, at 11 ("Victims of crime have a special claim upon the criminal justice system's human and financial resources. Whatever else it may achieve, no system that dishonors that claim can be considered legitimate.").

279. *See* ZEHR, *supra* note 138, at 192-93; Messmer & Otto, *supra* note 144, at 2; *see also supra* notes 138-41, 145-47 and accompanying text.

280. *See* ZEHR, *supra* note 138, at 194-96.

281. Martin Wright addresses the dilemma of deterrence:

> There would continue to be strong disincentives. Firstly, as now, there would be the prospect of being caught and convicted. Secondly, reparation would have to be made, and for the more serious offences it would be substantial. Thirdly, to give priority to

They also emphasize that offenders may have different needs: the need to be held accountable for their actions,[282] emotional needs of dealing with guilt, anger, or low self-esteem, or more basic needs such as developing employment skills, learning how to resolve conflict appropriately, or making use of educational opportunities.[283] In other words, they advocate a program that permits offenders to avoid the "secondary deviations"[284] produced by incarceration.[285]

Those who adhere to the restorative justice ideal claim that crime not only produces needs, but also creates obligations.[286] They explain that restorative justice encourages offenders to take responsibility for their action instead of allowing imprisonment or punishment to relieve the offender of responsibility.[287] They concede that offenders are rarely able to make the situation completely right. Nonetheless, they stress that even if the action is incomplete or symbolic, the perpetrator should attempt to make things as right as possible with the victim.[288] The offender has created a debt that must be repaid.[289] Moreover, this obligation exists whether or not the offenders wish to repair the injuries they caused.[290] In sum, restorative justice

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> restorative justice does not mean to abandon restraints. Those who could be prevented in no other way would be kept apart from the circumstances of their offending, for example by being banned from driving a motor vehicle, or working with children, or running a company, according to the nature of their offence. For the small minority of serious offenders where there was a high risk that they would repeat their offences, there would remain the possibility of detention, which would provide a strong disincentive in addition to its primary purpose, public protection.

Wright, *supra* note 265, at 530.

282. ZEHR, *supra* note 138, at 188, 200-03. Proponents point out that this accountability may bring about healing for offender. *Id.* at 188. Often, a part of this accountability involves the stripping away of rationalizations and stereotypes that the offender has concerning the victim or the violation. Zehr suggests that these "misattributions" by the offender must be confronted. *Id.* at 200.

283. *Id.*

284. For a synopsis of the secondary effects of incarceration on offenders, see VAN NESS, *supra* note 121, at 47-59; *see also* Leven, *supra* note 17, at 641-42:

> Prisoners must endure a wasteful, if not destructive, period of their lives in an environment that makes it difficult to maintain dignity and self-esteem . . . . [Prisons] "reinforce the violence and exploitation that many offenders were sentenced to prison for in the first place" [and] . . . "offenders are more dangerous when they are released than when they entered prison."

(citation omitted).

285. *See* Messmer & Otto, *supra* note 144, at 2.

286. ZEHR, *supra* note 138, at 196-99.

287. *See* Jonna Smit, *The Role of Probation in Restitution Procedures*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 387, 388 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

288. *See* ZEHR, *supra* note 138, at 197.

289. *See* Van Ness, *supra* note 273, at 22.

290. Howard Zehr suggests that

demands accountability on the part of offenders to take steps to make reparation for the harm they have done.[291]

Obligations do not end with the offender, however. Advocates emphasize that the community also must assume the responsibility to deliver restoration and healing. They argue that the local community cannot expect law enforcement officials to solve crime problems without cooperation and support.[292] If the local citizenry expects offenders to fulfill their obligations, the community must support the reconciliatory efforts between offender and victim.[293] Toward this end, some supporters of restorative justice envision an evenly balanced two-track system in which the government operates a criminal justice system and the community seeks to bring about rehabilitation, healing, and reconciliation.[294]

Finally, adherents claim that the restorative justice model empowers victims, offenders, and communities.[295] Adherents postulate that the process of accepting and fulfilling negotiated compensation agreements empowers participants.[296] Proponents cite, for instance, that participation by victims in such an agreement aids in the development of their recovery.[297] Similarly, the process requires the inclusion of offenders to encourage them to assume responsibility and to initiate and fulfill agreements.[298] Finally,

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> [m]any offenders are reluctant to make themselves vulnerable by trying to understand the consequences of their action. After all, they have built up edifices of stereotypes and rationalizations to protect themselves against exactly this kind of information. Many are reluctant to take on the responsibility to make right. In many ways taking one's punishment is easier. While it may hurt for a time, it involves no responsibility and no threat to rationalizations and stereotypes. Offenders often need strong encouragement or even coercion to accept their obligations.

ZEHR, *supra* note 138, at 197.

291. It might be instructive to clarify the notion of voluntariness. Certainly, mediation requires the disputants involved to come to the table voluntarily. *See infra* notes 78-79 and accompanying text. Yet, restorative justice mandates that offenders be accountable for their actions. Restorative justice proponents resolve the paradox by contending that offenders should be presented with the opportunity for mediation; if they choose not to engage in such activity, they should still be required to make reparation. Wright, *supra* note 265, at 528.

292. DILULIO, *supra* note 111, at 9 ("Citizens, not judges, prosecutors, law enforcement officers, or corrections officials, are primarily responsible for the quality of life in their communities, including the prevalence and severity of crime within them."). As an example, DiIulio suggests that the community has the obligation to bring healing and wholeness to victims of crime. *Id.* at 11.

293. *See* Marshall, *supra* note 36, at 25.

294. Van Ness, *supra* note 273, at 23.

295. *See* ZEHR *supra* note 138, at 203-08.

296. Messmer & Otto, *supra* note 144, at 2.

297. *See* ZEHR, *supra* note 138, at 202.

298. *See Id.* at 205-06.

the use of local personnel and programs permits the community to aid in the solution rather than stand helplessly on the sidelines.[299]

While the traditional tenets of restorative justice may appear radically different from the model in place today, proponents argue that restorative justice ideals incorporate historical concepts of justice and conflict.[300] They claim that only recently has the retributive model of justice predominated in the criminal policy arena to the extent that it does today.[301] Negotiating restitution settlements, emphasizing relationships, and offering a wider range of solutions, they argue, are the hallmarks of traditional, albeit less formal, processes of justice.[302] Restorative justice is not limited to ancient times, however. Adherents claim that concepts of restorative justice practiced in other countries in modern times may be transferable into Western forms.[303] Thus, they claim that their vision, while perhaps somewhat utopian in nature, is attainable in practice.[304]

Proponents portray mediation programs as tangible examples of restorative justice in action.[305] They claim that mediation addresses the needs of

299. Local citizens should be "co-producers of justice" by exercising their right and fulfilling their responsibility to participate in the system. DiIULIO, *supra* note 111, at 8. Proponents of restorative justice note that community involvement may include other benefits—not only discouraging criminal activity, but also helping the public to understand the underlying causes and consequences of criminal behavior. Marshall, *supra* note 36, at 25; Messmer & Otto, *supra* note 144, at 3.

300. See generally, ZEHR, *supra* note 138, at 97-125 (arguing that the ancient practice of community justice has much more in common with restorative justice than the more "enlightened" retributive model).

301. Zehr offers a number of reasons for this "legal revolution," the most plausible being that emerging nation-states had to monopolize justice and punishment instrumentalities in order to consolidate power and exercise control. ZEHR, *supra* note 138, at 124-25.

302. *Id.* at 107. While personal vengeance was at times utilized, and courts were occasionally available, Zehr concludes that the norm for traditional justice "placed a high premium on negotiated, extrajudicial settlements, usually involving compensation." *Id.* at 101.

303. For example, some commentators have cited the Japanese model of criminal justice as a restorative justice ideal. *See, e.g.*, John O. Haley & Ann Marie Neugebauer, *Victim-Offender Mediation: Japanese and American Comparisons, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 105, 114-20 (Heinz Messmer & Hans-Uwe Otto eds., 1992). The authors suggest that despite the different legal models, the Japanese model, based on confession, repentance, and absolution, may be adaptable in some forms in the United States. *Id.* at 121-25. *But see* Kai-D. Bussman, *Morality, Symbolism, and Criminal Law: Chances and Limits of Mediation Programs, in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 317, 321 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (concluding that the restorative paradigm in a mediated setting may be limited in Western culture because it lacks the symbolism of social norms or values that the retributive system measures).

304. For example, David C. Leven, the Executive Director of the Prisoners' Legal Services of New York, insists that a reformulation of legislation and radical sentencing reform can help achieve a restorative vision of justice. *See* Leven, *supra* note 17, at 653-57. *But see generally* Andrew Ashworth, *Some Doubts About Restorative Justice*, 4 CRIM. L.F. 277, 282-96 (1993) (casting doubt on some of the features of the restorative justice model).

305. *See, e.g.*, Marshall, *supra* note 36, at 26.

offenders, victims, and communities,[306] provides an opportunity for restitution, proposes an alternative to incarceration, encourages reconciliation between victims and offenders, permits offenders to be responsible for their action, and confers emotional satisfaction upon victims.[307] The mediation process empowers the parties to develop solutions and draw up agreements.[308] Furthermore, mediation programs often solicit the use of neighborhood volunteers and local centers. The individual community thus claims a stake in the process.[309] Adherents emphasize that mediation offers an opportunity to heal broken relationships with a precise tool that minimizes state intrusion.[310] As Mark Umbreit summarized, mediation programs are "model[s] of citizen involvement through alternative community-based programs which can strengthen the principles of justice and reconciliation."[311]

## VI. CONCLUSION—A VISION FOR NORTH CAROLINA

Providing theoretical alternatives to deal with crime must be more than mere academic exercises or utopian dreams. Criminal justice theories can suffer due to lack of perceived need (the system works well the way it is) or lack of acceptance of the proffered alternative (this would never work here). The conclusion to this Comment suggests that the state of North Carolina recognizes that a "crime problem" exists and that the criminal justice system is ripe for change.[312] Moreover, this section suggests that mediation is well-respected and accepted in North Carolina in both civil and criminal contexts and may help to provide a viable alternative to the way in which this state deals with crime.

Crime has become a defining issue in North Carolina politics.[313] Early in 1994, Governor Hunt called together the General Assembly for a special legislative session on crime.[314] The issue commands a state-wide focus;

306. UMBREIT, CRIME AND RECONCILIATION, *supra* note 33, at 101-03.

307. *See id.*; Dittenhoffer & Ericson, *supra* note 31, at 318;

308. *See* Coates, *supra* note 33, at 132.

309. This assertion is especially true for programs sponsored by private, non-profit agencies. *Id.* at 130.

310. *See* Schwartz & Preiser, *supra* note 183, at 288.

311. UMBREIT, CRIME AND RECONCILIATION, supra note 33, at 118.

312. *See supra* notes 101-18 and accompanying text.

313. *See, e.g.*, Joe Dew & Mary Miller, *Citizens Make Presence Felt at Crime Session*, NEWS & OBSERVER (Raleigh), Apr. 4, 1994, at A3.

314. Dennis Patterson, *Crime Session for Feb. 8*, CHARLOTTE OBSERVER, Jan. 8, 1994, at 4C; *cf.*, Stevens H. Clarke, *Crime and Delinquency in North Carolina*, POPULAR GOV'T, Fall 1974, at 6 (suggesting that even in 1974, crime was near the top of North Carolina citizens' concerns).

debates on how to resolve the crime crises have raged both within and outside of the legislative chambers.[315]

Connected to these discussions of crime is the crisis surrounding North Carolina's prison system. Incarceration in North Carolina may have grown out of control.[316] Court-docket filings have increased fifty-nine percent between 1983 and 1992.[317] Not surprisingly, the state jail population also grew sixty percent between 1975 and 1992.[318] Sixty-three North Carolina correctional departments were under court order in 1991 to limit prison population size.[319] A prison cap was established to settle these lawsuits.[320] As a result, the state aggressively built more facilities to house prisoners.[321] Still, the prisons were not enough to contain the convicted.[322]

The state-run corrections system has been an expensive undertaking.[323] Between 1985 and 1991, 421 million dollars were appropriated to construct prisons in North Carolina,[324] most of which had been spent by 1993.[325] Because little evidence shows that prisons are effective—imprisonment may actually increase one's chances of re-arrest—some have queried whether the costs of incarceration justify the benefits received.[326]

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315. *See, e.g.*, Rob Christensen & Joseph Neff, *Governor Finds Allies in GOP*, NEWS AND OBSERVER (Raleigh), Jan. 16, 1994, at A1, A6.

316. North Carolina incarceration rates are below the rate for the nation as a whole (270 sentenced prisoners for every 100,000 residents), SNELL & MORTON, supra note 105, at 2, but North Carolina's total prison population grew in every year but one between 1986 and 1991, *id.* at 3. Still, with a 22 % increase in prison population between 1980 and 1988, North Carolina showed the second lowest increase in prison population in the United States for that period. PRISON CRISIS, *supra* note 109, at 9. *But see* SNELL & MORTON, *supra* note 105, at 2 (showing that 22 states have a higher incarceration rate and 27 states have a lower incarceration rate per capita than North Carolina).

317. FRANKLIN FREEMAN, JR., ADMINISTRATIVE OFFICE OF THE COURTS, TRENDS AND OBJECTIVES FOR THE FUTURE OF THE NORTH CAROLINA JUDICIAL BRANCH OF GOVERNMENT 2 (1992). While this percentage reflects civil as well as criminal filings, most recognize that North Carolina's criminal caseload has increased in both number and complexity. *Id.* at 8.

318. Stevens H. Clarke & Emily Coleman, *County Jail Population Trends, 1975-92*, POPULAR GOV'T, Summer 1993, at 10.

319. *See* SOURCEBOOK-1992, *supra* note 16, at 145.

320. *See* Stevens H. Clarke, *Sentencing and Corrections: 1993 North Carolina Legislation*, ADMIN. OF JUST. MEMORANDUM, Sept. 1993, at 2 (University of North Carolina Institute of Government). For more on the North Carolina prison cap, see Stevens H. Clarke, *North Carolina Prison Population Cap: How Has it Affected Prison and Crime Rates?*, POPULAR GOV'T, Fall, 1992, at 11.

321. Clarke, *Sentencing and Corrections*, *supra* note 320, at 2.

322. *Id.*

323. North Carolina's justice system expenditures total approximately $186 per capita. SOURCEBOOK-1992, *supra* note 16, at 5.

324. *See* Clarke, *North Carolina's Growing Prison Population: Is There an End in Sight?*, POPULAR GOV'T, Spring 1991, at 9 (totalling capital appropriations and bond approvals). Because of these construction costs, North Carolina led all states in expenditures for justice in 1988. *Id.*

325. *See* Clarke, *Sentencing and Corrections*, *supra* note 320, at 12.

326. CLARKE & HARRISON, *supra* note 144, at 30 (1992).

Not surprisingly, the recent debate in North Carolina over crime has centered on the dichotomy between punishment and prevention.[327] Some favor expenditure of resources to root out the underlying causes of crime.[328] Others claim that the system must lay a heavier hand upon those who commit crimes.[329] Both positions contain shortcomings. The arguments of those who clamor for more resources for the prevention of crime have merit; yet communities are left with the dilemma of dealing with the immediate effects of crime. Spending money to limit the causes of crime is a farsighted and potentially worthwhile endeavor. However, it does not help society deal with crime once it occurs.

An emphasis on punishment has its own critics. Many concede that a far greater portion of the dollars appropriated in the special legislative session was pigeonholed in the punishment category.[330] Certainly, the call for greater punishment of criminals resonates with voters.[331] In response, legislators yielded to the appeal of more prisons, longer sentences, mandatory life sentences, and limited parole opportunities.[332] However, even the most diehard of "law and order" advocates must question the cost of incarcerating offenders for a long enough time to make the desired impact on crime. More law enforcement, greater conviction rates, and longer prison sentences all result in greater expenditure of limited resources.[333] These ideas have been tried in the past and have not proven to be effective.[334] While the state could certainly choose to expend a greater portion of the state budget to incarcerate and punish criminal offenders, other programs might then have to be sacrificed.

Mediation offers a creative alternative to deal with crime. Utilizing concepts such as communication, responsibility, and reparation, mediation programs not only seem to meet the needs of victims of crime, but they also

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327. *See, e.g.*, *Crime 'Fix' Elusive*, THE NEWS & OBSERVER (Raleigh), March 29, 1994, at A10. Nils Christie disdains the simplistic "twin ideologies" of prevention and deterrence. NILS CHRISTIE, LIMITS TO PAIN 27-29 (1981).

328. *Crime Fix Elusive*, *supra* note 327, at A10.

329. *Id.*

330. *See, e.g.*, Jerry Shinn, *Crime War: An Exercise in Lunacy?*, CHARLOTTE OBSERVER, Mar. 6, 1994, at B1. During the 1994 special legislative session, the North Carolina General Assembly ratified the Crime Control & Prevention Act of 1994, ch. 24, 119 N.C. Sess. Laws — (Senate Bill 150), which appropriated a total of $257 million to the criminal justice system. *Crime Fix Elusive*, *supra* note 327, at A10.

331. *See generally* SOURCEBOOK-1992, *supra* note 16, at 207 (suggesting that 24% of Americans believe that harsher punishment is the single most important tool to reduce crime). *But see id.* at 202 (stating that 61% of Americans would use resources to attack social problems, while 32% would expend funds to improve law enforcement).

332. *See supra* note 330 and accompanying text.

333. *See, e.g.*, *Being Tough on Crime Will Cost, Lawmakers Learn*, CHARLOTTE OBSERVER, Mar. 1, 1994, at C5.

334. *See infra*, notes 109-13, 326 and accompanying text.

hold offenders accountable for their actions.[335] In one sense, mediation would return the criminal conflict to its rightful owner—the parties involved—rather than have it taken over by the state.[336]

Would such a system be accepted in North Carolina? Perhaps so. North Carolina has been particularly progressive in civil mediation, piloting the mandatory mediated settlement conference in selected superior courts to encourage the use of mediation to resolve disputes.[337] In criminal matters, mediation centers have taken root in North Carolina, facilitating meetings between offenders and their victims in the district court system.[338] The first Dispute Settlement Center in this state opened its doors in Orange County in 1979[339] and was soon replicated in other counties.[340] The Mediation Network links together these autonomous mediation programs in North Carolina and provides "technical, planning, fund raising, and training assistance to the existing dispute settlement centers, as well as groups interested in establishing new centers."[341]

North Carolina legislators have actively supported the twenty mediation centers throughout the state. The General Assembly appropriated more than $7,000 to help establish the Dispute Settlement Center in Orange County in 1979.[342] In 1993, the General Assembly appropriated $40,000 to establish a mediation center in Eastern North Carolina[343] and $35,000 to organize a school mediation program in Alamance County.[344] State agencies, such as the North Carolina Administrative Office of the Courts, and local governmental units continue to provide substantial income to the me-

335. *See supra* notes 159-76 and accompanying text.

336. This idea is adopted from CHRISTIE, *supra* note 327, at 93 (1981) ("The victim in a criminal case is a sort of double loser in our society . . . . He is excluded from any participation in his own conflict. His conflict is stolen by the state, a theft which in particular is carried out by professionals.").

337. For a commentary on mediated settlement conferences in North Carolina, see John G. Mebane III, Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993).

338. North Carolina has two sets of trial courts which handle both criminal and civil claims. With respect to criminal charges, district courts handle juvenile cases, probable cause hearings for felonies, and misdemeanors (without a jury). Superior courts hear felonies, and other appeals from district court (trial *de novo* and with a jury). *See* INSTITUTE OF GOVERNMENT, GENERAL COURT OF JUSTICE: ROUTES OF APPEAL—1975 (1975). For a fuller explanation of the makeup and procedure of the North Carolina justice system, see JOAN G. BRANNON, ADMIN. OFFICE OF THE COURTS, THE JUDICIAL SYSTEM IN NORTH CAROLINA (1989).

339. CLARKE ET AL., *supra* note 19, at 8-9.

340. Bolstered by the Mediation Network, 19 other counties have since developed similar dispute resolution programs. N.C. MEDIATOR, *supra* note 71, at 2.

341. *Id.*; *see also* CLARKE ET AL., *supra* note 19, at 8-10 (detailing the history of the community dispute resolution movement in North Carolina).

342. *See Id.* at 9 & n.18.

343. Current Operations Appropriations Act of 1993, ch. 321, § 200.2, 1993 N.C. Sess. Laws 196 (Senate Bill 27).

344. 1993 N.C. Sess. Laws, ch. 561, § 6.

diation centers for their services to the courts and community.[345] In 1992-93, such funding enabled dispute settlement centers across the state to divert approximately 8500 cases from the court system.[346] The success of these centers can serve as building blocks for providing more mediation in the North Carolina criminal justice system.

It may be presumptuous to suggest that the state should automatically relinquish its monopoly on justice. Yet North Carolina can take a number of additional steps to empower communities to resolve local disputes. First, the state should make a concerted effort to include victims in the process of administering justice. Even when mediation between offenders and victims is impossible, victim participation in the criminal justice process should be secured. For example, prosecutors should solicit input from the victim regarding criminal sentencing and other procedures.[347] North Carolina legislators appear to recognize that victims should obtain increased access to state resources.[348] Meeting the needs of victims should be a high priority of the criminal justice system.

Second, the state should alter the way that it handles non-violent crime. Reparative sentences, determined by a negotiated agreement of the parties involved, should be the first objective of the criminal justice system. If the offender is unwilling to be constructive in this manner, state action may be necessary to hold him accountable for his behavior. However, even in these cases, the primary focus should center not upon the punishment of the offender (although this may be a secondary or indirect result), but on encouraging the offender to make reparations for damages.

Third, the state should encourage and permit the victims of violent crime to take the opportunity to confront the offenders in a mediated session, assuming, of course, that both parties are willing. Although such meetings would take a great deal of preparation by both parties, the benefits to the parties appear to be well worth the effort.[349]

Fourth, while dispute settlement centers have employed mediation in many counties in North Carolina,[350] many participants in criminal conflicts are shut out from a mediated process. Thus, systemic efforts should be made to encourage the growth of mediation centers in counties that are

345. *See, e.g., DSC Finances 1992-93*, RESOLUTIONS (Orange County Dispute Settlement Center, Carrboro, N.C.), 1993 at 5; *1992 Finances*, THE MEDIATION CENTER (The Mediation Center, Asheville, N.C.), 1992, at 6.

346. TRAINING MANUAL, *supra* note 53, at 4.

347. *See supra* note 128 and accompanying text.

348. As part of the Crime Control and Prevention Act of 1994, the General Assembly appropriated $150,000 to the Victims Assistance Network to meet the needs of victims of crime. Crime Control Prevention Act of 1994, ch. 24, § 28(a), 1994 N.C. Sess. Laws — (Senate Bill 150).

349. *See supra* notes 250-54 and accompanying text.

350. *See supra* note 340 and accompanying text.

without such a center and mediation in other fora, such as superior courts, should be explored. While the autonomy and independence of the centers should remain central to the process, the state can provide workable incentives for the inception and growth of such projects.[351]

Developing this process could be done in incremental stages. For example, the sentencing of all property crimes could be referred to a mediation center for resolution between victim and offender. With the help of a mediator, the parties to the incident could themselves develop the appropriate reparation. If this development proved successful, the General Assembly could direct that all property crimes be referred to a mediation center for resolution. Only if the process failed would the need for formal channels of justice be necessary. Over time, more violent crimes could be dealt with in a mediated forum.

Obviously, the intricacies of such a shift in procedure, though beyond the scope of this Comment,[352] engender many questions.[353] However, at the very least, the General Assembly should adopt a resolution that mediation within the criminal justice system is a positive response to the criminal act and should be explored and encouraged by the state criminal courts to the maximum extent possible. With legislative backing, judges and criminal court officials would be freer, and, arguably, somewhat compelled to employ mediation to resolve criminal conflicts.

North Carolina should move toward adopting a system aligned with the principles of restorative justice.[354] Certainly, such a transformation would take a great deal of time. In the meantime, communities, courts, and agencies should be encouraged to experiment with restorative justice projects and mediation initiatives. By encouraging a system that promotes restorative justice, North Carolina would have the opportunity to create a paradigm of justice radically different from the one that exists today.

Mediation will not prove to be a cure-all for the crime problems in this state. Mediation does very little to affect the underlying causes of crime and has little preventative effect on crime. It certainly is not a universal program for every criminal act, every offender, or every victim. However,

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351. *See supra* notes 216-22 and accompanying text.

352. Some have provided skeletal frameworks for such a process. *See, e.g.*, Starkweather, *supra* note 148, at 867-77. A good start on this path may be the adoption of the Indiana code. *See supra* note 219 and accompanying text.

353. For example, should the communication between the parties in mediation be confidential if the case ends up in court? How would the agreements be enforced? If the offender is unwilling to participate in the process, should the judge take this intransigence into account in her formal sentencing of the offender? If so, would this coerce the offender to participate? It is likely that many questions have been answered in civil mediation scenarios and can be transferred to the criminal area. However, the added due process rights afforded criminal defendants may prove more difficult. *See supra* notes 202-05 and accompanying text.

354. *See supra* notes 262-311 and accompanying text.

mediation does present a method of dealing with crime in a human and personal way by providing a process that brings healing and understanding to victims and offenders. Equally important, mediation requires responsibility and accountability—it is neither too lenient nor too abstract to make an effective impact on offenders. The traditional practice of incarceration and punishment has proven to be a costly and ineffective way to administer justice in North Carolina.[355] Employing a mediated alternative certainly would be a departure from the current system. Yet the American system of crime and punishment has been one that continually evolves and reacts to societal changes.[356] With a broad-based use of mediation, perhaps North Carolina can pioneer a system of justice that not only deals with crime effectively, but also helps to restore victims and offenders to the communities from which they came.

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355. *See supra* notes 323-25 and accompanying text.

356. *See* FRIEDMAN, *supra* note 16, at 11 ("[T]he story of crime and punishment over the years is a story of social changes, character changes, personality changes; changes in culture; changes in the structure of society; and ultimately, changes in the economic, technological, and social orders.").