

Criminal Mediation is the BASF¹ of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making It Better

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I. INTRODUCTION

Stephen has served more than three years of his nine-year prison sentence for the June 2002 alcohol-related car crash that killed two girls, ages thirteen and fourteen.² In 2004, after turning eighteen years old, Stephen asked the court to reduce his nine-year sentence to three years, based on his “extraordinary rehabilitation” which made him “deserving of an expedited opportunity to re-enter society.”³ His lawyer requested the two victims’ families attend a criminal mediation with Stephen to create an agreement to serve as a recommendation to the court to reduce his sentence.⁴

This opportunity for criminal mediation represents just one of a myriad of such mediations that have quietly but pervasively spread throughout the criminal justice system for more than twenty-five years.⁵ As a part of the

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¹ BASF, The Chemical Company, Helping Make Products Better™, <http://www.basf.com/corporate/index.html> (last visited Jan. 23, 2007). BASF commercials claim that BASF does not create products, it just makes existing products better. Similarly, criminal mediation does not replace traditional adjudication within the criminal justice system, it just makes the criminal justice system better.

² Pat Moore, *Driver in Fatal Crash Seeks Sentence Reduction*, PALM BEACH POST, Sept. 1, 2004, at 1C.

³ *Id.*

⁴ *Id.*

⁵ Terenia Urban Guill, Comment, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1327 (1997); see also Mark W. Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1480 (1994). Criminal procedure has a long history of implementing many alternative dispute resolution (ADR) processes, practices, and techniques, including hostage negotiation, domestic violence intervention, and traditional policing efforts based on negotiation, facilitation, and mediation. Maria R. Volpe, *Promises and Challenges: ADR in the Criminal Justice System*, 7 DISP. RESOL. MAG. 4, 5 (2000). Interestingly enough, despite their extensive history of using ADR techniques, the police often do not

alternative dispute resolution (ADR) movement, mediation espouses two key attributes: party autonomy and judicial economy.⁶ Party autonomy is inherent in mediation, a process wherein a neutral third party facilitates a mutually acceptable resolution between disputing parties.⁷ Mediation's judicial economy serves as a selling point, offering an alternative to litigation that is relatively inexpensive and time efficient.⁸

Criminal mediation has grown beyond its original status as a vague concept focused on misdemeanors, juveniles, and victim-offender programs, to now address serious violent crimes as well.⁹ By entering the realm of

consider their practices to constitute ADR. *Id.* This trend of disassociation from ADR is one of several trends that may help explain why, despite its incredible growth, criminal mediation has developed largely unnoticed. *Id.* Indeed, mediation's lack of official recognition in the criminal context may be due to the criminal procedure ADR lexicon. *Id.* More specifically, criminal ADR programs are not often identified by their exact nature; instead they spawn a multiplicity of labels such as community mediation, dispute resolution settlement, neighborhood justice, victim-offender mediation, victim-offender reconciliation, restorative justice, family group conferencing, sentencing circles, and peacemaking circles. *Id.* In addition, because criminal ADR methods have developed under assorted program names for years, they are accepted as "the norm" in the criminal context, thereby obviating any hype associated with being branded as "new," which is how ADR is viewed in other fields of law. *Id.* at 7. Please note that the aforementioned short list of rationales is not exhaustive in providing explanations for why criminal mediation has grown without much fanfare.

⁶ Guill, *supra* note 5, at 1313-14 (explaining that with the party autonomy and judicial economy aspects of ADR, mediation's efficiency and cost effectiveness satisfy a population "starving for accessible justice").

⁷ Paul A. Long, *Criminal Mediation to Continue: Judge Considering Future of Program*, CINCINNATI POST, Oct. 3, 2005, at K2 (describing how criminal mediation puts defendants, lawyers, victims, and an impartial observer-mediator in one room to come to an appropriate resolution to the crime in question by delineating realistic case weaknesses and strengths).

⁸ Melody L. Luetkehans, *Misdemeanor Criminal Mediation*, NEVADA LAWYER, Aug. 2, 1994, at 24, 24 (outlining the need to find relief alternatives to criminal prosecution due to the overcrowded criminal justice system). The criminal justice system can save time, resources, and tax money by implementing ADR case intervention to avoid needless prosecution. *Id.* at 25. There is room for ADR because the traditional adversarial criminal justice process is not always the most appropriate, effective, or efficient way to resolve criminal issues. Volpe, *supra* note 5, at 4.

⁹ Maureen E. Laflin, *Case-Management Criminal Mediation Offers Promise but Requires Caution*, 47 ADVOCATE 15, Nov. 2004, at 15 (mentioning that mediation can address anything from major murder cases to average possession and destruction of property cases). While some critics may assume that mediation cannot function within the serious crimes context, this assumption has proven to be a misnomer. See Deborah Levi, *Why Not Just Apologize? How to Say You're Sorry in ADR*, 18 ALTERNATIVES TO

serious crimes, which pose potentially significant threats to offenders' liberty, criminal mediation evokes both practical¹⁰ and controversial¹¹ constitutional concerns¹² about its place in the criminal justice system.¹³

Criminal mediation's particular characteristics, benefits, and limitations, once understood and carefully applied, compliment the traditional adversarial adjudication process operating within the criminal justice system.¹⁴ This Note identifies and examines the specific functions of criminal mediation, limiting its role to three distinct points in the criminal justice system to effectively establish a three prong model of mediation's role within the traditional criminal justice system.

Part II of this Note identifies criminal mediation's first point of insertion within the criminal justice system, to establish the first prong of the criminal mediation model: minor crimes mediation used to create efficiencies in the criminal justice system by making room on court dockets to grapple with serious crimes. Next, Part III outlines criminal mediation's second point of insertion within the criminal justice system, defining the second prong of the criminal mediation model at the plea bargaining stage. Part IV details

HIGH COST LITIG. 147, 167 (2000). In fact, experience demonstrates that apologies expressed during mediation sessions are critical to facilitating the success observed in mediating serious crimes like murder. *Id.*

¹⁰ As a traditional institution, the criminal justice system imposes practical obstacles to establishing mediation programs. Volpe, *supra* note 5, at 4. These obstacles revolve around both the public's preference for punishment over facilitation, and the practical problems associated with handling large numbers of participants in mediation. *Id.* Indeed, the mediation method's alternative technique of incorporating healing, rather than just punishing offenders, challenges the deeply-held public preference for retributive concepts like retaliation and revenge. *Id.* The public may view mediation as a "soft" and "inappropriate" response to crime in comparison to traditional criminal justice system values such as retribution. *Id.* at 7.

¹¹ Criminal mediation has been referred to as "one of the most controversial aspects of Alternative Dispute Resolution." *Id.* at 4.

¹² There are constitutional concerns regarding offender due process rights and the Fifth Amendment privilege against self-incrimination. See *infra* Part V (addressing the various constitutional issues surrounding mediation in the criminal context).

¹³ See Guill, *supra* note 5, at 1313–15 (explaining the framework Guill uses in her article to analyze the use of ADR in discrete situations, including the use of ADR in the field of criminal law). "Criminal mediation highlights the extremes of the ADR movement and the potential for constitutional conflict." *Id.* at 1314.

¹⁴ Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 672 (2005) (noting that despite the fact that United States jurisdictions have not "fully embraced" restorative practices such as ADR, many ADR programs function to compliment the traditional criminal justice system).

criminal mediation's third point of insertion, establishing the third prong of the criminal mediation model near the end of the criminal adversarial adjudication process, after the guilty verdict or guilty plea. After outlining criminal mediation's three prong model, spanning minor crimes, plea bargaining, and the post guilty verdict/guilty plea stage, Part V addresses and responds to constitutional concerns regarding mediation's role within the criminal justice system. In conclusion, Part VI explains that by establishing parameters through careful and limited application of criminal mediation to the three defined predetermined points in the criminal justice system, the three prong model of criminal mediation partners well with the existing traditional criminal adjudication process. The adversarial methods used to adjudicate guilt and mete out punishment do not exclusively and completely balance the criminal justice system;¹⁵ justice is further developed through mediation's role in minor crimes, plea bargaining,¹⁶ and rehabilitating offenders while helping victims after the guilty plea or verdict.¹⁷

¹⁵ Luetkehans, *supra* note 8, at 24 (explaining that traditional adversarial adjudication is not always the best way to achieve justice); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 148 (2004) (detailing how “[c]riminal punishment is one essential part of balancing the scales of justice, but it is not the only part”). The criminal justice system should address more than just procedural values like efficiency, accuracy, and fairness. *Id.* The criminal justice system should also address the social, psychological, and relational aspects of offenses for those parties who wish (volunteer) to engage those aspects. *Id.* Criminal mediation represents a form of restorative justice, a concept which fills in the justice ideal beyond the realm of doling out punishment through the traditional adjudicatory process. *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 235 (2000). The restorative justice concept revolves around values such as repairing harm, healing, and rebuilding relations for victims, offenders, and communities. *Id.* While these restorative justice values are used in this Note to support criminal mediation's role within the criminal justice system, the restorative justice ideal—namely that government should surrender its dominant role in the response to crime, victims, offenders, and the community—is not supported by this Note's position on the role of mediation within the criminal justice system. *See id.* While this Note holds that the goal of restoring the victim and the offender to rebuild relationships damaged by crime represents an important aspect of criminal mediation's role for those parties who wish to engage in such restoration and rebuilding, that goal does not completely replace the traditional role of adjudication in determining guilt and punishment in the criminal justice system. *See id.*

¹⁶ *See infra* Part II.

¹⁷ Luetkehans, *supra* note 8, at 24 (stating that in some cases, traditional prosecution fails to rehabilitate offenders, help victims, or protect society).

II. THE FIRST PRONG OF THE CRIMINAL MEDIATION MODEL: FACILITATING CRIMINAL JUSTICE SYSTEM EFFICIENCIES THROUGH CRIMINAL MEDIATION'S MINOR CRIMES ROLE

In its first point of insertion in the criminal justice system, criminal mediation provides for vast potential impact in alleviating and controlling crowded criminal dockets—by addressing misdemeanors and providing an alternative to their traditional criminal prosecution¹⁸—to establish the first prong of the criminal mediation model. Mediation's impact on criminal dockets has already been demonstrated in court systems across the country.¹⁹ The benefits of and operations involved in criminal mediation's role in the minor crimes context are best illustrated by the following two real-world examples.²⁰ Each exemplar provides insight into the function of criminal mediation in the minor crimes context, delineating the documented reasons for its success in alleviating overcrowded criminal dockets and effectively addressing issues underlying minor crimes.²¹

¹⁸ See *id.* at 25 (explaining that ADR can be used to flexibly alleviate prosecutorial caseloads by resolving low impact criminal cases that are serious enough to merit state intervention); see also Daniel E. Klein, Jr. et al., *Report to the ADR Commission on Existing Alternative Dispute Resolution in the District Court of Maryland Second Report, Overview of the District Court*, in *MEDIATION: A HANDBOOK FOR MARYLAND LAWYERS*, 1999 (stating that the primary purpose of ADR appears to be docket control and reduction). Courts may also lighten their dockets by referring misdemeanor cases to community-based mediation. Volpe, *supra* note 5, at 6. Community-based mediation programs are often free, or they assess nominal charges to address civilian complaints that would otherwise be handled by the courts. *Id.* The civilian complaints may involve assaults, harassment, trespass, and other interpersonal conflicts which have the potential to escalate into serious offenses. *Id.* Community-based mediation programs vary in sponsorship, goals, and size, using the help of trained volunteers. *Id.* In addition to originating with the courts, referrals to community-based mediation may also come from district attorneys, legal aid staff, the police, public and private agencies, and schools. *Id.* Most referrals to community-based mediation occur before individuals have been arrested or prosecuted, thereby circumventing the already overburdened court system. See *id.*

¹⁹ See *infra* Parts II.A and II.C (documenting criminal mediation successes in both Delaware and the District of Columbia). These criminal mediation programs demonstrate the establishment of formal control over minor crimes that were previously ignored by the criminal justice system. Kurki, *supra* note 15, at 241.

²⁰ *Infra* Parts II.A and II.C (discussing criminal mediation programs in the New Castle County Common Pleas Court in Delaware and District of Columbia United States Attorney's Office, respectively).

²¹ See *infra* Part II.B (documenting the reasons for criminal mediation's successes in both alleviating crowded court dockets and addressing minor crimes). An exemplar is a model.

A. Exemplar of Minor Crimes Criminal Mediation Success in County Courts

Many courts across the country experience procedural pressures like those Chief Clerk Kirshner describes in the New Castle County Common Pleas Court in Delaware.²² The New Castle County Court constantly struggles to comply with ninety day speedy trial requirements in the midst of an overwhelming criminal caseload.²³ Kirshner explains that the 2001 establishment of a federally-funded criminal mediation program in New Castle County has benefited both the county and its citizens.²⁴

The New Castle County criminal mediation program addresses misdemeanors and disputes that arrive in court with criminal charges which optimally should not result in criminal convictions.²⁵ Mediation quickly addresses the disputes and often results in both offenders avoiding criminal convictions, and claimants receiving restitution according to mediated agreements.²⁶ Kirshner extols the value of criminal mediation for disputes and minor crimes, explaining that “[p]eople tend to be able to go back and get beyond [the offense] more easily than if there’s a criminal conviction, [in

²² Jennifer Batchelor, *Changes and Challenges: C.P. Court Administrator Carole Kirshner*, DEL. L. WKLY., VOL. 7 NO. 35, Sept. 1, 2004.

²³ *Id.* (adding that the Delaware court’s “staggering caseload” is its chief battle as well as Kirshner’s most significant challenge).

²⁴ *Id.* (explaining that the county has benefited from the criminal mediation program because it alleviates the New Castle County Court’s criminal caseload, a caseload which doubled overnight after the New Castle County Court merged with the former Municipal Court of the city of Wilmington). In terms of the criminal mediation program’s benefits to citizens, Kirshner states that criminal mediation is not something that “get[s] a lot of attention, but [it] make[s] a difference . . . for the people who come to the court.” *Id.*

²⁵ *Id.* (stating that escalated neighborhood altercations are examples of the misdemeanors and disputes that come to court with criminal charges but probably should not result in criminal convictions). Many neighborhood disputes that come to the court are examples of situations in which “[things] escalate to the point that somebody gets mad and files a charge[,] and then we get a countercharge.” *Id.* Kirshner adds that “[t]hey’re always difficult cases to deal with, and often they really need to be settled outside of the criminal process; but once we [the court] have them, we have to deal with them.” *Id.*

²⁶ *Id.* This method approaches the crime as not just involving an incident or offender, but a social problem as well. Kurki, *supra* note 15, at 237. The concept is based on preventing future crimes rather than merely focusing on arresting, prosecuting, adjudicating, and punishing offenders after the commission of a crime. *Id.*

which case] there's still a lot of anger and resentment about the process."²⁷ Criminal mediation's minor crimes role provides court system efficiencies by diverting high volume minor crimes cases from court dockets while simultaneously catering to the particular needs underlying each minor crime and dispute.²⁸

B. *Reasons for Criminal Mediation's Success in the Minor Crimes Context*

As demonstrated by its role in Delaware's New Castle County Common Pleas Court, minor crimes mediation reduces the prosecutorial and court caseload of low-impact crimes that are serious enough to warrant state intervention,²⁹ thereby saving time, court resources, and tax dollars.³⁰ In addition, mediation of low-impact crimes provides victim restitution and psychological satisfaction resulting from victims' active participation in the

²⁷ Batchelor, *supra* note 22. To obviate the possibility of repeated crimes based on the same underlying issues (recidivism), criminal mediation programs focus on the minor disorders associated with the misdemeanor level of crimes in order to quash the potential for further community erosion and the subsequent downward spiral into increased crime, fear, and neighborhood deterioration. Kurki, *supra* note 15, at 237. This particular focus on the minor disorders associated with misdemeanor crimes is based on evidence that high levels of disorder correlate with high levels of crime. *Id.* at 247.

²⁸ See Part II.A.

²⁹ Luetkehans, *supra* note 8, at 25 (explaining that "prosecution is not always viable even for legally sufficient cases . . . [because] a legally sufficient case is not necessarily a trial sufficient case . . . [which must be] strong enough to support a conviction."). *Id.* at 24. In addition, the move to incorporate criminal mediation into the criminal justice system may suit the public's thirst for criminal justice, given that the public's perspective on addressing crime has recently shifted from the typical punitive (retributive) focus of the traditional criminal justice system, to a view promoting the need to address the social problems underlying crimes as a way to reduce the crime rate. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 423 (2003). A poll conducted in 2000 found that 68% of the public believes in "attacking social problems" to lower the crime rate. *Id.* This poll's feedback represents a significant change from 1994, when only 51% of the public wanted to address the social causes of crime. *Id.* This shift in the public's perspective over time suggests a trend in the public's perceived need for addressing crime's underlying social causes, in the way which mediation addresses the underlying causes of minor crimes. See *id.*

³⁰ Luetkehans, *supra* note 8, at 25 (adding that cases that are neither legally sufficient nor sufficient for trial may nonetheless be addressed by using ADR). *Id.* at 24.

process, while offenders learn to accept responsibility for their wrongful conduct.³¹

ADR processes like mediation are deemed most effective in the minor crimes context when the relationship between the disputing parties is marginal rather than intimate.³² Marginal relationships include those involving daily interactions without deep emotional connections, spanning groups like neighbors, commercial interaction participants, classmates, and landlords and tenants.³³ Mediation is effective in the minor crimes context because it is designed to address a dispute's underlying issues,³⁴ give the

³¹ *Id.* at 25. The offender is required to "accept responsibility by realizing she 'can't get away' with her criminal behavior even if it was 'minor.'" *Id.* In addition, the use of ADR techniques—like mediation for first-time offenders—can provide flexibility, obviate the need for court intervention, and require defendants to seek counseling. *Id.*

³² *Id.* However, disputes in intimate relationships may also be addressed by ADR. *See id.* at 24–25. For example, a woman whose car's tires were being slashed repeatedly was also enduring stressful divorce proceedings, so she assumed her exhusband was the culprit. *Id.* at 24. After filing multiple police reports, the woman hired a private detective who identified the tire slasher the police subsequently arrested. *Id.* Interestingly, the tire slasher was actually the woman's lover who feared she would return to her husband. *Id.* After her lover was identified as the tire slasher, the woman decided she did not want to prosecute but only wanted restitution and to be left alone. *Id.* After participating in ADR, the defendant lover reimbursed the woman, her car insurance company, and at the woman's request, he promised never to see her again. *Id.* at 24–25. This particular case came before Melody L. Luetkehans during her tenure with the San Diego Dispute Resolution Office. *Id.* at 24.

³³ *Id.* at 25. One example of ADR implementation in the context of a marginal relationship involved a case in which a frustrated consumer, unsuccessful in his multiple attempts to resolve a billing issue, slammed a glass door behind him as he exited the store, shattering the door. *Id.* at 24. The defendant obviously did not have criminal intent in breaking the glass door, so when the police report was presented to the city attorney who screened incoming cases, he decided not to prosecute. *Id.* However, because the defendant caused property damage and exercised inappropriate violent behavior, his actions needed to be addressed. *Id.* After the city's dispute resolution office conducted defendant and victim interviews, the defendant agreed to pay for the broken door and resolved his initial billing complaint with the store owner. *Id.* This particular case came before Melody L. Luetkehans during her tenure with the San Diego Dispute Resolution Office. *Id.*

³⁴ *Id.* at 26. The underlying issues involved in misdemeanor cases are usually not addressed by traditional prosecution, especially when the parties maintain an ongoing relationship. *Id.* By addressing the underlying issues of misdemeanors, mediation works within the framework wherein crime is viewed as a social problem affecting communities, establishing that prevention is a critical part of the criminal justice system's role in addressing crimes. Kurki, *supra* note 15, at 236.

parties a chance to be fully heard,³⁵ and provide follow-up to reduce potential recidivism.³⁶ Minor disputes, especially those involving ongoing relationships, are best resolved outside the adversarial system and in mediation, which is more user-friendly and democratic.³⁷ In sum, mediation alleviates overcrowded criminal dockets while effectively addressing the issues underlying minor crimes.³⁸

C. Exemplar of Minor Crimes Criminal Mediation Success in the United States Attorney's Office

The value of minor crimes mediation outlined in Part II.B is reflected in the District of Columbia United States Attorney's Office's successful mediation program, which is designed to divert pre-arrest and post-arrest misdemeanor cases to voluntary mediation.³⁹ After the Justice Department Office of Dispute Resolution funded the criminal mediation pilot program in July 2000, the program quickly gained formal acceptance, screening eligible cases spanning simple assaults, threats, long-term disputes, unlawful entries, and destruction of property claims.⁴⁰ Addressing simmering minor disputes

³⁵ Luetkehans, *supra* note 8, at 26 (citing the fact that when an offender has the opportunity to tell their story beyond the victim's version that is detailed in the police report, the potential for that offender to commit additional offenses is reduced).

³⁶ *Id.* (explaining that by addressing the misdemeanor's underlying issues, as well as by providing follow-up monitoring, mediation decreases the likelihood of recidivism). This community justice approach addresses crime as a social problem that diminishes communities' quality of life, asking the criminal justice system to step beyond its traditional role in espousing punishment, deterrence, and rehabilitation of individual offenders, to take on crime prevention and resolve neighborhood conflicts as well. Kurki, *supra* note 15, at 236.

³⁷ Bakker, *supra* note 5, at 1486. Mediation is "more user-friendly" because it does not include many of the procedural formalities and legalisms of traditional adjudication. *Id.* at 1486–87. The process is democratic because the parties dictate the content, progress, and resolution of the mediation rather than abdicating those elements to lawyers and judges. *Id.*

³⁸ *See generally* Part II.B (concluding that by handling minor crimes, criminal mediation not only alleviates overcrowded court dockets, but also addresses the underlying issues of those crimes).

³⁹ Staff Reporters, *Justice Department to Fund DC Criminal Mediation Program*, ADRWORLD.COM, Aug. 21, 2003, <http://www.adrworld.com/sp.asp?id=27032>.

⁴⁰ *Id.* The District of Columbia United States Attorney's Office and the nonprofit Center for Dispute Settlement both screen cases to determine whether the cases are appropriate for mediation. *Id.* In addition, if a case is referred to mediation, the parties are contacted to ascertain whether they will agree to mediate. *Id.*

by using criminal mediation's problem-solving approach resulted in an eighty-five percent success rate in resolving disputes and restoring relationships.⁴¹

The successes experienced by the Delaware and District of Columbia minor crimes mediation programs are likely experienced across the country as the criminal mediation process has grown for more than twenty-five years.⁴² By efficiently diverting and absorbing the majority of minor crimes cases into mediation to better address the nature and resolution of those crimes, overburdened court systems are in a better position to grapple with more serious crimes. The first prong of the criminal mediation model is grounded in mediation's ability to create these effective efficiencies in the criminal justice system by addressing minor crimes.⁴³

III. THE SECOND PRONG OF THE CRIMINAL MEDIATION MODEL: IMPROVING THE PLEA BARGAINING PROCESS IN THE MIDST OF THE ADVERSARIAL ADJUDICATION PROCESS

Criminal mediation's second point of insertion in the criminal justice system is in the midst of the criminal adjudicatory process: mediating plea cases diverted for traditional plea bargaining,⁴⁴ thus establishing the second prong of the criminal mediation model. Plea bargaining is used as an alternative means of case resolution to alleviate the overburdened criminal

⁴¹ *Id.* Anthony Asuncion, Chief of the Misdemeanor Section at the District of Columbia United States Attorney's Office, explains that if the parties reach an agreement through mediation, their case will be dismissed, which fulfills the United States Attorney's Office's problem-solving method. *Id.* Asuncion adds that in "the misdemeanor context[,] there are better ways to solve problems[,] and one way is through mediation." *Id.*

⁴² Guill, *supra* note 5, at 1327. Criminal mediation has received relatively little attention despite its widespread use. *Id.* In 1993, Victim Offender Mediation (VOM) programs handled 16,500 cases. *Id.* As of 1994, there were over 125 mediation programs operating within the United States and Canada. *Id.* Also notable is the fact that VOM programs have flourished in other countries such as Austria, Belgium, England, Scotland, France, Germany, Finland, Norway, and the Republic of South Africa. *Id.*

⁴³ See Part II.A.

⁴⁴ See Volpe, *supra* note 5, at 5. In the traditional plea bargaining context, prosecutors, defense counsel, and defendants use negotiation rather than mediation in an attempt to produce a "mutually agreed upon outcome." *Id.*

justice system.⁴⁵ In fact, with ninety-five percent of cases never going to trial,⁴⁶ plea bargaining plays a crucial and definitive role in providing case resolution for overcrowded criminal prosecution caseloads.⁴⁷ Criminal mediation can improve the heavily used traditional plea bargaining process⁴⁸ by addressing and correcting for its faults and weaknesses.⁴⁹ This Part presents the theoretical contextual analysis of criminal mediation's role in plea bargaining,⁵⁰ followed by real-world examples of criminal mediation plea bargaining success in practice.⁵¹

A. Analysis of Criminal Mediation's Role in Plea Bargaining

The major issues with the traditional plea bargaining process revolve around the due process aspects of defendant rights and prosecutorial power.⁵²

⁴⁵ Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 566 (2005) (citing Brady v. United States, 397 U.S. 742, 755 (1970)).

⁴⁶ Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450 (2005) (citing the Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics tbls. 5.17 & 5.46 (2002)).

⁴⁷ See Luetkehans, *supra* note 8, at 25 (referring to overburdened prosecutorial caseloads to explain that ADR can be used to flexibly alleviate those prosecutorial caseloads by resolving low impact criminal cases that are serious enough to merit state intervention).

⁴⁸ See Lester, *supra* note 45 and accompanying text; see Natapoff, *supra* note 46 and accompanying text.

⁴⁹ See Lester, *supra* note 45, at 566–67 (noting that the traditional plea bargaining system imposes sentences on offenders without due process procedural requirements). In the United States, all states and the District of Columbia, as well as the federal government, have different sentencing systems based on divergent plea bargaining standards and wide prosecutorial discretion to manipulate charges. Kurki, *supra* note 15, at 286–87. The traditional criminal justice system plea bargaining method is therefore fraught with inconsistencies, inequality, and disproportionate sentencing results. *Id.* at 287.

⁵⁰ See *infra* Part III.A (analyzing criminal mediation's role in plea bargaining).

⁵¹ See *infra* Part III.B (documenting criminal mediation's success in the context of real-world plea bargaining practices).

⁵² See Lester, *supra* note 45, at 566, n.12 (explaining that while criminal trial due process requires that defendants who are not proven guilty beyond a reasonable doubt are also not punished, traditional plea bargaining permits the imposition of sentences based on prosecutors' minimal belief that a given defendant is "guilty and dangerous," and as such should not be acquitted, even in the absence of evidence supporting this belief beyond a reasonable doubt). *Id.* In this way, the traditional plea bargaining process

In plea bargaining, a defendant's lawyer negotiates terms with the prosecutor in the absence of any oversight or due process.⁵³ Because the majority of the negotiating power resides within the prosecutor's control⁵⁴—in the absence of any oversight in the bargaining process⁵⁵—the resulting unequal power between the parties can detrimentally impair the negotiation process for the defendant.⁵⁶ The defendant's fundamental constitutional right to due process must outweigh any administrative concerns in the plea bargaining process regarding the burden of the prosecutorial caseload.⁵⁷

Criminal mediation, with its characteristic enhanced communication attributes and neutral third party facilitation and oversight, addresses the traditional plea bargaining concerns.⁵⁸ By promoting mutual understanding between the defendant and prosecutor, and forcing defense lawyers to focus on the individual defendant and the case, criminal mediation in plea bargaining addresses the issue of pressuring defendants to plead guilty to

circumvents the fundamental due process standard of defendants being innocent until proven guilty beyond a reasonable doubt. *Id.*

⁵³ *Id.* at 566–67. In his Note, Lester argues that the absence of oversight or due process in the traditional criminal justice system's approach to negotiated plea bargaining results in several key issues, including innocent defendants pleading guilty and prosecutors presenting unfair bargains. *Id.* at 569–76.

⁵⁴ *Id.* at 574 (describing how the prosecutor acts as judge, jury, and executioner by imposing their will and favored sentence, while the defendant has no way to invoke the constitutional protections they would have in the traditional adjudicatory process). In this way, the prosecutor practices monopoly power in the traditional plea bargaining process. *Id.*

⁵⁵ *Id.* at 576 (elaborating on the idea that the prosecutor's dominance in plea bargaining combined with a lack of neutral oversight makes the plea bargaining process one of basic surrender for the defendant).

⁵⁶ *See id.* The traditional plea bargaining process is seen as “inherently coercive,” with prosecutors threatening severe penalties to force defendants to relinquish their constitutional rights. *Id.* at 576 n.49 (citing *Leading Cases*, 109 HARV. L. REV. 111, 256–57 (1995)). The next logical conclusion is that regulating traditional plea bargaining means regulating prosecutorial discretion. *Id.* (citing Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601 (1997)).

⁵⁷ *Id.* (citing F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 231 (2002)).

⁵⁸ Lester, *supra* note 45, at 584–85 (explaining that mediation can address many of the traditional plea negotiations process concerns by using neutral mediator oversight to improve communication).

inflated charges.⁵⁹ The presence of a mediator acting as a neutral third party to oversee the plea bargaining process puts prosecutorial power in check and therefore reduces the probability and dangers of unconscionable plea bargains.⁶⁰ The aforementioned theoretical success of criminal mediation in correcting the faults of traditional plea bargaining is further developed by the success of real-world criminal mediation program implementation.

B. *Success Established in Criminal Mediation's Real-World Application to the Plea Bargaining Process*

Criminal plea mediations are successful in practice.⁶¹ In Idaho, Judge Monte Carlson mediated seven homicides, one rape, and one conspiracy to commit murder.⁶² Six of the seven homicides reached plea agreement, with the seventh homicide going to trial.⁶³ The fundamental rule underlying Judge Carlson's mediations was the voluntariness requirement: mediation for these serious crimes scheduled for plea bargaining was voluntary, with the

⁵⁹ See *id.* at 585. Defense counsel often plays a substantial role in defendant guilty pleas at the plea bargaining stage. *Id.* at 585–86. This is because public defenders may have overwhelming caseloads which force them to deal quickly, or because private defense counsel may see a quick bargain as a way to profit quickly with minimal effort. *Id.* at 586 (citing Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 952 (1997); Joseph S. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1332 (1999); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 208–09 (2002); Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 128 (1997); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 78–79 (1995)).

⁶⁰ Lester, *supra* note 45, at 590 (adding that a neutral mediator can block the unfair deals—based on unchecked prosecutorial discretion under the traditional plea bargaining system—that are inconsistent with the goals of the criminal justice system).

⁶¹ See *infra* Part III.B (documenting examples of successful criminal mediation in the plea bargaining context).

⁶² Cathy Derden, *Criminal Mediation*, ADVOCATE, Feb. 2002, at 25. Judge Carlson was also a member of the Criminal Mediation Committee which drafted a rule for criminal mediation in felony, misdemeanor, and juvenile cases. *Id.* For further information about the rule, see *id.*

⁶³ *Id.* The success rate Judge Carlson achieved in mediating the nine serious criminal cases contributed to his Criminal Mediation Committee role in drafting a rule for criminal mediation in felony, misdemeanor, and juvenile cases. See *id.*

established understanding that defendants could withdraw without penalty at any time during the mediation process.⁶⁴

In Kentucky's busy Boone County,⁶⁵ handling the state's largest caseload, Judge Tony Frohlich has successfully experimented with both minor crimes and serious crimes plea mediations.⁶⁶ Judge Frohlich originally initiated the pilot criminal mediation program to cut the burgeoning criminal docket that was burdened by a backlog of criminal cases.⁶⁷ Judge Frohlich decided to experiment with criminal mediation after he observed that the civil suit "Settlement Week" program was successfully implemented by the Administrative Offices of Courts.⁶⁸ He explained that the criminal mediation experiment was intended to pinpoint mediation's worth to the criminal justice system, while addressing the problems associated with having many individuals stuck sitting in jail awaiting delayed hearings and trials.⁶⁹ He felt the court system was "ripe" for the opportunity to have a mediator act as an independent observer to review cases while parties learn both sides of their case and define issues directly.⁷⁰

⁶⁴ *Id.* (detailing that mediation participation depends on voluntary participation by all of the parties involved, adding that any participant may withdraw during the process without penalty).

⁶⁵ Long, *supra* note 7, at K2 (stating that Boone County has the highest caseload in Kentucky).

⁶⁶ *Id.* (explaining that the difficult cases included violence and victims). If a plea agreement is established, the case is returned to Judge Frohlich for review and approval. *Id.* The plea mediation procedure, wherein Judge Frohlich makes the final determination, is in accord with the Federal Rules of Criminal Procedure rule regarding pleas. *See* FED. R. CRIM. P. 11. Under this rule, the court (judge) does not engage in the discussions which lead to a plea agreement. FED. R. CRIM. P. 11(c). The court (judge) must finalize the plea agreement: "the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." FED. R. CRIM. P. 11(c)(3)(A). In this way, both the federal courts and Judge Frohlich have the final decision is determining how to dispose of a mediated plea agreement. *See* FED. R. CRIM. P. 11.

⁶⁷ Paul A. Long, *Mediation May Trim Court Docket: Used to Resolve Criminal Cases*, CINCINNATI POST, Sept. 8, 2005, at K2.

⁶⁸ *Id.* (describing how "Settlement Week" involved volunteer mediators who helped resolve civil lawsuits in "fast-paced legal sessions" in which disputing parties were brought face-to-face).

⁶⁹ Paul A. Long, *Mediation Plan May Cut Backlog of Criminal Cases*, CINCINNATI POST, Mar. 16, 2005, at K5. (explaining that individuals are often stuck sitting in jail waiting for hearings that must sometimes be delayed because neither the prosecutor nor defense counsel have been able to review the case and meet with the offender).

⁷⁰ Long, *supra* note 67, at K2 (including defense counsel David Drake's statements that plea mediations prove helpful because they enable neutral review for cases, and

The first Boone County criminal mediation pilot program addressed minor victimless crimes, such as drug and property offenses.⁷¹ All of the seventeen first round criminal mediations reached plea agreements—a one hundred percent success rate for mediating minor crimes.⁷² The second Boone County pilot program expanded to encompass more difficult criminal cases involving both violence and victims.⁷³ While the second round of criminal mediations took longer to resolve, seventeen of the twenty-one cases reached plea agreements.⁷⁴ While the settlement success rates indicate program success, Judge Frohlich insists that the true measure of the criminal mediation program's success is whether it helped bring parties together in difficult cases.⁷⁵

The success of Judge Frohlich's criminal mediation program is due in part to its use of three retired judges who serve as mediators, emphasizing their role as impartial observers without the normal restrictions attendant to serving as a judge.⁷⁶ The mediators reviewed the strengths and weaknesses of each party's case to encourage a realistic understanding of the particular merits and issues.⁷⁷ As a result, most of the pilot program participants were generally happy with their experience and felt the process was fair.⁷⁸ Judge

because they help both parties learn all sides of the case with more direct definition of the issues).

⁷¹ *Id.* The success of the first Boone County program in handling minor crimes led Circuit Judge Tony Frohlich to add that he hopes to “do it [conduct the criminal mediation program] twice a year with the criminal docket, which gets really backed up.” *Id.*

⁷² *Id.* The 100% success rate convinced Boone County officials that they could further cut back on the circuit court's burgeoning criminal docket by implementing the mediation program. *Id.*

⁷³ Long, *supra* note 7, at K2. Judge Frohlich noted that mediating the violent criminal cases was more difficult and took a lot longer than mediating the first round of cases in which the crimes were victimless. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* “As an impartial observer, the mediator-judge will be able to look at the cases in ways neither [the] defense nor [the] prosecutor can . . .” *Id.*

⁷⁷ Long, *supra* note 7, at K2. The three retired judges, Ray Lape, William Wehr, and Leonard Kopowski, started mediating the serious criminal cases at 9 a.m. and did not finish until long after 7 p.m. *Id.*

⁷⁸ *Id.* The only program participants who were not satisfied with the process were those defendants who presumed they would be granted leniency for agreeing to mediate. *Id.*

Frohlich explains that in most cases, offenders just need the opportunity to sit down and discuss what happened.⁷⁹

Injecting criminal mediation into the fundamentally important but troubled plea bargaining process improves the criminal justice system.⁸⁰ Prosecutors and defendants can reach a more just agreement in most cases amenable to traditional plea agreements by using a neutral and independent mediator.⁸¹ One important corresponding caveat is that criminal mediation is not appropriate in cases wherein traditional plea negotiations are inappropriate;⁸² it is never appropriate to mediate cases in which defendants insist they are innocent.⁸³ Despite the aforementioned caveat, criminal mediation is a necessary improvement in the current plea bargaining system, establishing mediation's second point of insertion in the criminal justice system and affirming the second prong of the criminal mediation model.

IV. THE THIRD PRONG OF THE CRIMINAL MEDIATION MODEL: UPGRADING THE END OF THE ADJUDICATORY PROCESS AFTER GUILT IS ESTABLISHED

Criminal mediation's third point of insertion in the criminal justice system is in facilitating victim-offender interaction after guilt has been

⁷⁹ Long, *supra* note 69, at K5. See *infra* Part IV.B (discussing the importance of offenders having an opportunity to explain what happened [with the crime], take responsibility for their conduct, make amends to both the victim and the community, and learn about their victim's suffering).

⁸⁰ See Lester, *supra* note 45, at 594. In addition, it is notable that in an overcrowded criminal justice system which heavily relies on plea bargaining to alleviate prosecutorial caseloads and criminal court dockets, mediation properly shifts the focus of the courts and prosecutors from the traditional "trail 'em, nail 'em, jail 'em" mentality that is characteristic of the traditional criminal justice system, to a perspective that considers each individual case in terms of what outcome best addresses the needs of the parties involved. Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 *FORDHAM URB. L.J.* 1651, 1652 (2000).

⁸¹ Derden, *supra* note 62, at 25 (adding that a neutral and independent mediator can "bring the state and the defendant together in a mutually acceptable plea agreement that can ultimately save the county a substantial amount in trial costs").

⁸² See Lester, *supra* note 45, at 594-95 (explaining that plea mediation, like traditional plea bargaining negotiations, should only be used to efficiently resolve criminal cases without doing damage to the basic constitutional underpinnings of the criminal justice system).

⁸³ Reimund, *supra* note 14, at 684 (specifying that constitutional due process concerns are diminished when the offender voluntarily participates after pleading guilty).

determined in the adjudicatory process,⁸⁴ thus establishing the third prong of the three prong criminal mediation model. More specifically, victim-offender mediation (VOM) is in some circumstances an appropriate option for parties after a guilty plea or verdict is entered,⁸⁵ enabling the parties to channel residual issues of the crime that are not addressed by the declaration or assessment of guilt.⁸⁶ Families of serial killer Gary Leon Ridgway's victims were able to deal with the residual effects of their loved ones' murders by

⁸⁴ *Id.* Guilt is determined in the criminal justice system either by guilty plea or guilty verdict after adjudication. Facilitating offender-victim interaction with an offender's apology to the victim, delivered in the context of a victim-offender mediation (VOM) session, can address the victim's psychological and physical injuries which resulted from the crime. Levi, *supra* note 9, at 165. In fact, the apology-driven interaction may satisfy the victim in a way that even the award of monetary damages would not. *Id.*; *see also* Volpe, *supra* note 5, at 5 (mentioning that probation, parole, and corrections practitioners use mediation and other ADR methods to manage their daily work with offenders, victims, and the community).

⁸⁵ Natapoff, *supra* note 46, at 1497. At least half of the criminal mediation programs require offenders to plead guilty or admit guilt before they participate in VOM. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J. L. 1, 8 (2004).

⁸⁶ *See generally* Bibas & Bierschbach, *supra* note 15. The traditional adversarial criminal justice system offers four forms of justice. Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, in RESTORATIVE JUSTICE ON TRIAL, 551, 552–53 (Heinz Messmer & Hans-Uwe Otto eds., 1992). First, retribution focuses on punishing the offenders. *Id.* at 553. Second, restitution seeks to repair the harm that the offenders cause. *Id.* at 552. Third, compensation offers the victims something of value in lieu of repairing the harm the offender has caused. *Id.* at 552–53. Fourth, reconciliation gives the victims an opportunity to forgive the offenders, either with or without apology. *Id.* at 555. The traditional criminal justice system rarely generates more than one form of justice as a remedy for victims. Levi, *supra* note 9, at 167. Because the traditional adversarial system of criminal justice is often one dimensional in remedying offenses, mediation may play a critical role in supplementing any existing retribution, restitution, or compensation by providing a mode of reconciliation. *See id.* Theorists agree on five basic concepts that indicate that crime exceeds the bounds traditionally ascribed to it by the traditional criminal justice system. Kurki, *supra* note 15, at 265. First, crime is more than a violation of criminal law and defiance of government authority. *Id.* Second, instead of being more than a violation of criminal law, "crime involves disruptions in a three-dimensional relationship [between] the victim, the offender, and the community." *Id.* "Third, crime [negatively affects] the victim and the community, and the [focus] should be to restore the victim and community, repair harms, and rebuild relationships among the victim, the offender and the community." *Id.* at 265–66. Fourth, the victim, the community, and the offender should each participate in determining what happens [next]. *Id.* at 266. Fifth, the ultimate decision should be based on the victim's and community's needs, and not just on the offender's culpability or the dangers he presents with his established criminal history. *Id.*

expressing their anger and sense of loss to the offender, while Ridgway apologized and communicated his sorrow to provide the families with a sense of closure.⁸⁷ While criminal mediation is not a substitute for punishment, it helps heal victims and offenders by potentially providing psychological solutions for relief, closure, and reconciliation,⁸⁸ without humiliating either party by subjecting their communication to a public forum like a courtroom.⁸⁹ This Part presents an introductory explanation of VOM,⁹⁰ followed by analysis of its benefits to parties involved in criminal mediation for serious crimes.⁹¹ Next, this Part examines the practical considerations

⁸⁷ Bibas & Bierschbach, *supra* note 15, at 88.

When victims' relatives confronted serial killer Gary Leon Ridgway at sentencing, they sobbed and poured out their anger and loss. The judge expressed the community's moral condemnation and spoke of bringing peace and closure. In return, Ridgway expressed sorrow and apologized, and at least one victim's relative forgave him and expressed a feeling of peace. Ridgway's remorse and apology were no substitute for punishment, but they helped to begin the healing process.

Id. at 87–88.

⁸⁸ *Id.* at 100–01. Criminal mediation offers a different spin on the criminal justice system's function. *See* Reimund, *supra* note 85, at 4. Whereas the traditional adversarial criminal justice system takes a retributive or restorative view of crime as offenses against the state for which punishment is to be distributed, mediation focuses on crime as offenses against individuals for which solutions to repair, reconcile, and reassure victims are sought. *Id.*; *see also* Volpe, *supra* note 5, at 5 (noting that research indicates that mediation and other related informal ADR methods are successful in the criminal context, explaining that parties seem satisfied because victims feel heard, offenders keep their agreements, and communities are given the opportunity to heal). Criminal mediation, with its restorative justice focus on healing, takes some of the focus away from punitiveness, which has been the traditional primary goal in American criminal justice policy. Beale, *supra* note 29, at 413.

⁸⁹ Bibas & Bierschbach, *supra* note 15, at 91. While 74% of offenders given the opportunity to apologize to victims in mediation did in fact apologize, only 29% attempted to apologize in the courtroom after traditional adjudication. *Id.* at 116. Offenders were 6.9 times more likely to apologize, even when they initially vowed not to apologize, if they had the opportunity to meet their victims. *Id.* A substantial percentage of victims want to meet with their offenders because they value emotional reconciliation more than material or financial reparations. *Id.*

⁹⁰ *See infra* Part IV.A (describing the general features and operations of VOM). For a description of the North American origins and the historical development of VOM from its early days as a Mennonite Central Committee program in Kitchener, Ontario, *see* Kurki, *supra* note 15, at 263–68.

⁹¹ *See infra* Part IV.B (analyzing the benefits of VOM for both victims and offenders involved in serious crimes).

surrounding the implementation of VOM in the serious crimes context,⁹² establishing a model to address parties' general access to VOM⁹³ and the critical timing considerations associated with implementing VOM in the criminal justice process.⁹⁴

A. *An Introduction to VOM*

VOM is the most common form of criminal mediation,⁹⁵ developing for more than twenty years to operate over four hundred programs today in the United States.⁹⁶ VOM may also be referred to as victim-offender reconciliation, victim-offender conferencing, victim-offender dialogue, victim-offender meeting, or community conferencing.⁹⁷ While the majority of VOM programs contend with misdemeanors, property crimes, and

⁹² See *infra* Part IV.C (discussing both practical VOM party access considerations and critical timing considerations for the placement of VOM within the criminal adjudication process). Note that unlike many other countries which mediate serious criminal cases, the United States has generally used VOM for diversion programs involving juveniles in minor, nonviolent, and nonsexual crimes. Kurki, *supra* note 15, at 240. The United States may have more to learn about mediating serious criminal cases from model serious crimes mediation programs in Germany and Austria. See *id.* In Germany, approximately 70% of VOM cases were violent crimes in 1995. *Id.* In Austria, 73% of VOM cases in 1996 involved violent crimes. *Id.*

⁹³ See *infra* Part IV.C.1 (describing practical considerations about parties' access to VOM).

⁹⁴ See *infra* Part IV.C.2 (establishing VOM timing within the criminal adjudication process).

⁹⁵ Guill, *supra* note 5, at 1327. Of the crimes sent to alternative programs such as mediation, two-thirds of the cases are misdemeanors, while the remaining one-third of cases are felonies. Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 *MEDIATION Q.* 235, 239 (1999). The most commonly referred offenses include vandalism, minor assaults, theft, and burglary, leaving a small number of cases coming in from small property and severely violent crimes. *Id.*

⁹⁶ Reimund, *supra* note 14, at 673. Criminal mediation programs fall into one of three categories. Reimund, *supra* note 85, at 7. First, criminal mediation may be private and community-based. *Id.* Second, criminal mediation programs may be church-based. *Id.* Third, criminal mediation programs may be system-based, relying on administration by correctional departments, police departments, and prosecutors' offices. *Id.*

⁹⁷ Reimund, *supra* note 14, at 673. "Despite the variation in names, most [mediation programs] follow a similar process by 'provid[ing] a safe place for dialogue among the involved parties'" *Id.* (citing Mark S. Umbreit, *Victim Offender Mediation in Juvenile or Criminal Courts*, in *ADR HANDBOOK FOR JUDGES* 225, 230 (Donna Steinstra & Susan M. Yates eds., 2004).

juveniles, the push to work with more serious crimes such as sexual assault, attempted homicide, and murder continues to grow as VOM matures with experience and trust in the VOM process builds.⁹⁸

The typical VOM procedure includes six basic steps.⁹⁹ First, the mediator introduces the mediation session with an opening statement.¹⁰⁰ Second, the victim and offender engage in telling their stories.¹⁰¹ Third, the mediator facilitates fact clarification and the explanation of feelings.¹⁰² Fourth, the parties review the victim's losses, and if appropriate, any options for compensation from the offender.¹⁰³ Fifth, if appropriate, the parties develop a written restitution agreement.¹⁰⁴ Sixth, the mediator ends the session with a closing statement.¹⁰⁵

⁹⁸ *Id.* at 676; see also MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE* 148–62 (1995); *20/20: Healing Justice* (ABC television broadcast Apr. 26, 1999). As programs continue to mature, other serious crimes which are addressed by criminal mediation include assault with a deadly weapon, assault with bodily damage, sexual assault, negligent homicide, attempted murder, and murder. Umbreit & Greenwood, *supra* note 95, at 239. In fact, mediation has been used for serious crimes in other countries like Austria and Germany. Beale, *supra* note 29, at 420. Approximately 70% of the cases mediated in Germany in 1995 were violent crimes, while nearly 75% of the adult cases mediated in Austria involved violence. *Id.* The mediation programs in Germany and Austria serve as official parts of the criminal justice system available for both juveniles and adults in all jurisdictions. Kurki, *supra* note 15, at 268. In other countries like Finland, criminal mediation programs are widely used despite being unregulated and operated outside of the criminal justice system. *Id.* Despite the widespread use of criminal mediation for serious crimes in other nations, United States criminal mediation programs are traditionally focused on addressing minor crimes. Beale, *supra* note 29, at 421.

⁹⁹ Reimund, *supra* note 14, at 673–74. Cases are referred to criminal mediation by judges, probation officers, prosecutors, and police. Reimund, *supra* note 85, at 8.

¹⁰⁰ Reimund, *supra* note 14, at 673.

¹⁰¹ *Id.* Storytelling and the opportunity to be heard are both important experiences that mediation provides for both victims and offenders. See *infra* Part IV.B (describing the various benefits associated with VOM for both victims and offenders).

¹⁰² Reimund, *supra* note 14, at 674; see *infra* Part IV.B (documenting the various psychological benefits associated with VOM for both victims and offenders).

¹⁰³ Reimund, *supra* note 14, at 674.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

B. Analysis of VOM Benefits for Parties After Guilt is Determined

VOM offers benefits to both the victims¹⁰⁶ and the offenders who participate.¹⁰⁷ Through VOM, victims obtain an opportunity to meet the offender, explain how the crime affected their lives, discuss the physical, emotional, and financial impact of the crime, and receive answers to any residual questions regarding the crime and the offender.¹⁰⁸ As a result, victims may receive assurance that the crime was not their fault, they may overcome a degree of resentment, and they may learn to see the offender as a potentially redeemable human being.¹⁰⁹ These benefits for victims aid in vindication, their denouncing the crime, and their lamenting and

¹⁰⁶ *Id.* The traditional criminal justice system offers the victim almost no role or control in the process. *Id.* Mediation has been characterized as a method that may be used to avoid this double victimization by empowering victims. Kerry M. Hodak, Note, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1118 (2004).

Many victims allege that criminal justice officials neglect their plight—that their suffering is secondary to the threat to social order. Even simple requests, such as for information regarding the crime or the offender, may fall on deaf ears. Thus, victims are said to be victimized twice: first by the perpetrator of the crime and then by a system that treats them impersonally.

Bakker, *supra* note 5, at 1494–95.

¹⁰⁷ Reimund, *supra* note 14, at 674. In fact, “[i]f [criminal] cases are mediated, there is no doubt about success: in the vast majority of instances, victims, offenders, and other participants are satisfied, an agreement is reached, and a reparation plan is fulfilled by the offenders.” Kurki, *supra* note 15, at 240. Satisfaction, agreement, and completion rates range between 75% and 100%. *Id.* Mediation equally addresses victims and offenders, with both victims’ and offenders’ rights being balanced against each other. *Id.* at 266. The victim, community, and offender are equally important, and each must agree on the resolution. *Id.*

¹⁰⁸ Reimund, *supra* note 14, at 674. Victims often view emotional healing and growth as their most important goals. Kurki, *supra* note 15, at 270. In fact, victims consistently cite the most critical element of mediation is the opportunity to speak with the offender and to express their feelings. *Id.* This critical element offered in mediation is absent in the traditional criminal justice system, wherein “the offender interacts with justice professionals rather than speaking directly with the victim and the community damaged by the crime in the prevailing system, and the system encourages the offender to minimize and deny his or her actions, rather than take responsibility for the harm caused.” Gretchen Ulrich, *Current Law and Policy Issue: Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLIN J. PUB. L. & POL’Y 419, 437 (1999).

¹⁰⁹ Bibas & Bierschbach, *supra* note 15, at 115.

deminimizing the experience.¹¹⁰ VOM also provides equity for victims via reparation, reconciliation, and forgiveness.¹¹¹ Traditional adjudication offers some forms of vindication and equity, but VOM programs enhance the offering by advancing material and psychological benefits that traditional adjudication does not provide.¹¹²

Victims are not the only parties who benefit from VOM. Through VOM, offenders can explain what happened, take responsibility for their conduct, make amends to both the victim and the community,¹¹³ and learn about their victim's suffering,¹¹⁴ thereby absorbing the real-world consequences of their actions.¹¹⁵ While offenders must be held accountable for their conduct, VOM offers them the chance to meet any emotional needs associated with guilt, anger, and low self-esteem.¹¹⁶ Meeting their victims may provide offenders with the opportunity to apologize, to let their victims know that they are not

¹¹⁰ Bakker, *supra* note 5, at 1516. The underlying premise is that "crime is a violation of people and relationships. It creates obligations to make things right. . . . [Mediation] involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance." *Id.* at 1515 (citing HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (1990)).

¹¹¹ *Id.* In the realm of forgiveness, successful apologies require participation from both victims and offenders because victims are unlikely to forgive offenders when expressions of remorse come from offenders' lawyers as opposed to the offenders themselves. Levi, *supra* note 9, at 165.

¹¹² Bakker, *supra* note 5, at 1516. Victim vindication may include denunciation, lament, truth-telling, deprivatization, and demonization. *Id.* Victims feel a need for empowerment via participation and safety in the mediation process. *Id.* Victims also need reassurance, support, clarification of responsibility, and prevention. *Id.* In addition, victims seek a sense of the meaning for the crime, including information, fairness, answers, and a sense of proportion. *Id.*

¹¹³ Reimund, *supra* note 14, at 674. The process may be deemed one in which all the parties with a stake in the offense gather to resolve together how to deal with the offense's aftermath and future implications. Kurki, *supra* note 15, at 266.

¹¹⁴ Bibas & Bierschbach, *supra* note 15, at 131. By learning more about their victim's suffering, an offender's capacity for accountability, understanding, and prevention of future offenses is addressed through the mediation construct. Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 970 (1998).

¹¹⁵ Bibas & Bierschbach, *supra* note 15, at 115. In addition, critics of the traditional criminal justice system assert that offenders are not given a chance to empathize with the victim, resulting in the loss of an important deterrent to future crime. Ulrich, *supra* note 108, at 437. By offering the offender an opportunity to empathize with the victim, mediation reinforces the associated deterrent effect. *See id.*

¹¹⁶ Bakker, *supra* note 5, at 1517. The focus on the offender's needs illustrates the idea that "[t]he needs tautology does not end with the victim. . . ." *Id.* at 1516.

inherently bad, to explain their behavior, and to communicate that the crime was not personal.¹¹⁷ In addition, an offender's apology may elicit positive consideration from a judge contemplating sentencing.¹¹⁸

Both victims and offenders may use VOM as an opportunity to humanize the crime, reduce pride, fear, pain, and anxiety, and overcome any psychological barriers to offenders accepting responsibility for their conduct.¹¹⁹ In fact, an apology delivered through a VOM session has been proven much more effective in criminal mediations where the offense is horribly severe.¹²⁰ As Circuit Court Judge Tracy McCooey explains, with the overcrowded prison system and vanishing social programs, focusing on solutions rather than problems in the system leads to considerations such as the implementation of VOM programs.¹²¹

Meta-analysis of empirical studies indicates VOM programs achieve more success in meeting victim and offender needs than traditional adversarial criminal adjudication.¹²² More victims and offenders believe the

¹¹⁷ Bibas & Bierschbach, *supra* note 15, at 116–17. Offenders report that the opportunity mediation affords them to explain “what happened [with the offense] is often more important than [any] restitution agreement” that may be sought. Kurki, *supra* note 15, at 270.

¹¹⁸ See Levi, *supra* note 9, at 166. Evidence of an offender apology can evoke the sympathy of a judge, while an offender's refusal to apologize may have the opposite effect. *Id.*

¹¹⁹ Bibas & Bierschbach, *supra* note 15, at 115. Theorists believe that “developing an offender's empathy for the victim has individual preventive effects and reduces subsequent criminal behavior.” Kurki, *supra* note 15, at 270.

¹²⁰ Levi, *supra* note 9, at 199. Further support for the idea of implementing VOM in the serious crimes context is garnered by a survey which found that 89% of victims of serious violent crimes wanted to meet the offender in a safe environment while only 11% would have refused to meet the offender in any circumstances. Kurki, *supra* note 15, at 270. Serious crimes are typically mediated on an individual case-by-case basis, and there is growing need for permanent serious crimes mediation programs. *Id.*

¹²¹ Deidra M. Lemons, *Good Neighbor Profile: Judge Tracy McCooey*, MONTGOMERY ADVERTISER, May 4, 2004, at B2. “Nothing will ever change or even get done if we always say . . . ‘It won't work.’” *Id.*

¹²² Bibas & Bierschbach, *supra* note 15, at 131–32. Meta-analysis is the “systematic analysis of a set of existing evaluations of similar programs in order to draw general conclusions, develop support for hypotheses, and/or produce an estimate of overall program effects.” Bureau of Justice Assistance Center for Program Evaluation, http://www.ojp.usdoj.gov/BJA/evaluation/glossary/glossary_m.htm (last visited Mar. 14, 2006). In addition to the positive results indicated by the meta-analysis of empirical studies, the success associated with VOM—as opposed to the traditional adversarial criminal adjudication process—is visible in a hypothetical explanation of the role VOM may play in the resolution of the serious crime of rape. See Deborah Gartzke Goolsby,

criminal justice system is fair after they participate in criminal mediation.¹²³ In addition, most victims and offenders who mediate are satisfied with how their cases are handled.¹²⁴ Victims in VOM programs are more likely to have a chance to tell their stories than those in the traditional adjudication system.¹²⁵ Similarly, offenders in VOM programs are also more likely to have a chance to tell their stories than those in the traditional adjudicatory system.¹²⁶ VOM participants are more likely to feel their opinions are adequately considered in the criminal process.¹²⁷ VOM victims and offenders

Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1213–14 (1990).

Mediation, a process in which the victim and offender meet with the aid of a neutral third party, avoids the bias of the criminal justice system against the rape victim. Mediation provides a victim with assistance in overcoming the feelings of powerlessness that resulted from the rape. Mediation also allows the victim and offender to confront each other and to deal with any miscommunication or misinterpretation of behavior that led to the rape. Ultimately, mediation allows an offender to face up to what he has done Mediation, therefore, represents a more effective and more healing solution than the court system to the problem of a simple rape in our society.

Id. (citations omitted).

¹²³ Bibas & Bierschbach, *supra* note 15, at 131. While 82% of victims who participated in VOM believed the criminal justice system to be fair, only 56% of victims who used traditional adjudication felt the system to be fair. *Id.* For VOM offenders, 91% believed the criminal justice system to be fair, while 78% of traditional adjudication offenders reported experiencing fairness in the system. *Id.*

¹²⁴ *Id.* at 131–32. In terms of experiencing satisfaction with how their cases were handled, 78% of victims and 84% of offenders who participated in VOM programs were satisfied, while their traditional adjudication counterparts were 56% (victims) and 73% percent (offenders) satisfied. *Id.* The option for a victim to file a civil suit to seek the justice (and offender apologies) not available in the criminal justice system usually proves fruitless. *See id.* Most offenders will not apologize or speak to victims during the adversarial adjudicatory process because of their fear that such discussion will prejudice their case. *Id.* at 87 n.4.

¹²⁵ *Id.* at 132. Ninety-four percent of victims in mediation, as compared to 64% of victims in the traditional adjudicatory process, felt they were able to tell their stories. *Id.*

¹²⁶ *Id.* Eighty-eight percent of offenders in mediation, as compared to 64% of offenders in the traditional adjudicatory process, felt they were able to tell their stories. *Id.*

¹²⁷ *Id.* Ninety-four percent of victims in mediation felt their opinions were adequately considered in the mediation process, versus 92% of victims in traditional adjudication who felt their opinions were adequately considered in the traditional adjudication process. *Id.* While 72% of offenders in mediation felt their opinions were adequately considered, only 55% of offenders in traditional adjudication process felt their opinions were adequately considered. *Id.*

are also more likely to find the process outcome more fair and satisfactory than their counterparts in the traditional adjudicatory system.¹²⁸ Victims who participate in VOM are more likely to believe the offender has been held accountable for the crime.¹²⁹ After participating in VOM, offenders are more likely to apologize to victims, and victims are more likely to forgive offenders.¹³⁰ Victims who participate in VOM programs are not only less likely to remain upset, but they are also less likely to fear revictimization.¹³¹ Mediation functions even better to decrease the number of violent crimes than it does to decrease the number of property crimes, perhaps because there are stronger emotions involved in violent crimes, which produce more powerful remorse to in turn reduce recidivism.¹³²

¹²⁸ Bibas & Bierschbach, *supra* note 15, at 132. While 73% of victims considered the mediation process outcome to be fair and satisfactory, only 54% of victims in the traditional adjudicatory process found the traditional process outcome to be fair and satisfactory. *Id.* As for offenders, 77% of those in mediation programs felt the process outcome was fair and satisfactory, as opposed to the 67% of offenders in the traditional adjudicatory process who considered the process outcome to be fair and satisfactory. *Id.*

¹²⁹ *Id.* While 92% of victims and 82% of offenders in mediation programs were more likely to believe the offender was held accountable for the crime, only 82% of victims and 49% of offenders in the traditional adjudicatory process were more likely to believe the offender was held accountable for the crime. *Id.*

¹³⁰ *Id.* Seventy-four percent of offenders in mediation programs were more likely to apologize to their victims, whereas only 29% of offenders in the traditional adjudicatory process were likely to apologize to their victims. *Id.* As for the victims, 43% of those who participated in mediation were more likely to forgive the offender, while only 22% of victims in the traditional adjudicatory process were likely to forgive the offender. *Id.*

¹³¹ *Id.* While only 28% of the VOM victims remained upset, 57% of the traditional adjudicatory process victims remained upset. *Id.* In addition, 15% of VOM victims feared revictimization, whereas 34% of the traditional adjudicatory process victims feared revictimization. *Id.* A separate study found that while 21% of victims who participated in mediation feared revenge, 40% of those who did not participate in mediation feared revenge. Kurki, *supra* note 15, at 271.

¹³² Bibas & Bierschbach, *supra* note 15, at 133–34. In fact, one survey showed that 89% of serious and violent crime victims wanted to meet their offenders. Leena Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections*, SENT'G & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, Sept. 1999 No. 3, at 1, 4. Statistics indicate that the crime severity does not implicate mediation effectiveness. Bakker, *supra* note 5, at 1513.

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. 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.

C. *Practical Considerations for Applying VOM Near the End of the Traditional Adjudicatory Process*

There are several practical considerations for implementing VOM after guilt is determined. First, general access to VOM should be disclosed and provided to parties.¹³³ Second, VOM that is offered after guilt is determined may be offered either before or after sentencing.¹³⁴ The ramifications of VOM implementation as it relates to sentencing are outlined in this Part.

1. *General Party Access Considerations for VOM Programs*

Given the aforementioned potential benefits for both victim and offender VOM participants, it is advisable to provide access to and notice of VOM programs to criminal parties.¹³⁵ Important considerations for mediation programs provided by the court include making mediation free of charge, supporting options for conducting mediations outside of the courthouse and after business hours, and maintaining that parties who refuse to mediate will not be penalized.¹³⁶ VOM participation is also beneficial to offenders who may show mediation attempts or agreements to judges for sentencing considerations, importantly demonstrating that they have apologized and begun reform.¹³⁷

In terms of practical considerations for VOM program implementation, both victims and offenders must have the option to participate in as much or as little mediation as they like.¹³⁸ Trauma and sex crime victims may be too afraid to mediate with their offenders, and stubborn offenders may refuse to mediate.¹³⁹ In addition, the capacity for a VOM-implemented apology to

Id.

¹³³ See *infra* Part IV.C.1.

¹³⁴ See *infra* Part IV.C.2.

¹³⁵ Bibas & Bierschbach, *supra* note 15, at 133. “[T]he law ought to make mediation more widely available. From arrest to incarceration, both parties should have easy access to and notice of victim-offender mediation, so they can use it whenever the time is right.” *Id.*

¹³⁶ *Id.* For example, mediation can take place in a school, church, or home, either in the evening or on the weekend. *Id.*

¹³⁷ *Id.* The use of a stenographer to transcribe the mediation would be helpful so that a judge could later use the transcript at sentencing. *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* “Interestingly, however, mediation seems to work even better to reduce violent crimes than property crimes. Perhaps the stronger emotions in these cases produce more powerful remorse and empathy, which in turn may reduce recidivism.” *Id.*

address the victim's injuries must be considered in the case mediation screening process.¹⁴⁰ A VOM session's capacity to heal the victim depends in part on the victim's perception that the offender's words or gestures demonstrate a genuine sense of remorse.¹⁴¹ Healing capacity depends on the elements embodied in the optimal VOM scenario, one in which the offender recognizes the harm done to the victim, takes responsibility for that harm, and expresses regret in order to heal any shame the victim harbors as a result of being victimized.¹⁴² If the VOM session is likely to be one in which the victim will perceive the offender's contribution as insincere, the effectiveness of the apology itself is prone to backfire and cause additional pain and hostility for the victim.¹⁴³ Therefore, the VOM screening process must carefully examine the offender's level of remorse, the offender's ability

¹⁴⁰ Levi, *supra* note 9, at 167. During the intake stage of VOM, cases are screened to determine whether they are appropriate for mediation. Hodak, *supra* note 106, at 1102. To pass the screening stage, both parties must want to proceed through mediation. *Id.* Certain types of parties or cases may not be appropriate for mediation. Luetkehans, *supra* note 8, at 25. If a party behaves irrationally or demonstrates instability, then it is likely that no effective understanding of their responsibility in the dispute or in the subsequent discussion and agreement can be obtained. *Id.* In addition, if there is evidence of extreme substance abuse, the crime's underlying problems may be too complex to be effectively handled by mediation alone. *Id.* An addicted offender is more likely to repeat the crime if the underlying addiction is not addressed. *Id.* However, this likelihood is unavoidable whether mediation or traditional prosecution is used to deal with the crime. *Id.* Once the parties agree to mediate, the mediator meets individually with the victim and the offender to prepare for the mediation. Hodak, *supra* note 106, at 1102. If the mediator determines at this pre-mediation stage that either party is not truly ready or willing to mediate, the case is returned to the traditional judicial process. *Id.* If the mediator determines that the parties are ready and willing to mediate, the mediation may still be discontinued and the case returned to the court at any time either of the parties' readiness and willingness to mediate disappears. *Id.*

¹⁴¹ Levi, *supra* note 9, at 164.

In U.S. culture, however, where a common cultural assumption is that each individual has his or her own set of values and priorities and where "being right" is at least as high a priority as peace and harmony, the ability of an apology to repair injuries is more likely to hinge on the perception of the particular injured person that the apologizer's words or gestures embody his or her deep feelings of remorse.

Id.

¹⁴² *Id.* at 164–65. "Where the injured person lost self-esteem as the result of the injury, she is more likely to want an apology than where her self-image is disengaged from the dispute." *Id.* at 165.

¹⁴³ See *id.* at 165. "Ironically, an apology that is harder to obtain because the wrongdoer views apologizing as humiliating is likely to be more meaningful to the injured person." *Id.*

to communicate that remorse to the victim, and the victim's genuine interest in seeking the remorseful communication.¹⁴⁴

Vicarious mediation programs are beneficial for parties who seek but cannot partake in criminal mediation because the other party is unwilling to participate.¹⁴⁵ Vicarious mediation programs send groups of victims to correctional facilities to engage in discussions with willing offenders about crime and its impact on victims and offenders.¹⁴⁶ While vicarious mediation participants are not related by a common criminal event, vicarious programs have positive effects on those victims and offenders who participate.¹⁴⁷ The vicarious mediation programs are relatively easy to administer, and because offender sentences are unaffected, voluntary participation is assured.¹⁴⁸

¹⁴⁴ See *id.* at 164–65. In screening cases for VOM participation, several fundamental considerations must be taken into account for the victim's benefit. See *id.* at 165. First, when the victim's self-esteem is damaged by the offender's crime, that victim is more likely to seek an apology from the offender. *Id.* Second, the victim may feel that asking for an apology from the offender will only expose and enhance the victim's vulnerability. *Id.* Third, from the offender's perspective, the offender might be opposed to apologizing to the victim if apologizing is seen as an act that will cost the offender's self-image. *Id.* Fourth, offenders are screened to determine the degree of sincerity of their remorse. *Id.* at 167. Indeed, offenders are generally expected to communicate remorse; the victim-offender interaction would otherwise prove pointless or even detrimental to the offender if the offender does not feel they did anything wrong or is waiting for complete vindication via traditional adversarial proceedings. See Volpe, *supra* note 5, at 5.

¹⁴⁵ Bakker, *supra* note 5, at 1514. The mediation is considered vicarious because the participating victim and offender are not related by the same offense. *Id.* at 1513.

¹⁴⁶ *Id.* For further information on such programs, see Gilles Launay & Peter Murray, *Victim/Offender Groups*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 113, 124 (Martin Wright & Burt Galaway eds., 1989).

¹⁴⁷ Bakker, *supra* note 5, at 1513–14. "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." *Id.* at 1514 n. 258 (citing Januarius E. Rodrigues, *Victim Advocacy in Corrections* 6 (May 17, 1991) (unpublished manuscript, on file with the North Carolina Law Review) (presented at the Seventh International Institute of Victimology, Onata, Spain)).

¹⁴⁸ Bakker, *supra* note 5, at 1514. Serious crimes mediation conducted within prisons is not designed to achieve a tangible goal like agreement on restitution, and the offender does not obtain benefits like early release or parole consideration. Kurki, *supra* note 15, at 269–70. Typically, the victim wants to meet the offender to learn more about what happened so they may get past the fear and anger associated with the victimization and to facilitate healing. *Id.* at 270.

2. *Timing Considerations for VOM After Guilt is Determined*

The second practical consideration for VOM program implementation is program timing in the criminal process. While VOM is offered after either the guilty plea or the guilty verdict by adjudication, the sessions may occur either before or after sentencing.¹⁴⁹ Family group conferencing and sentencing circles are two particular forms of mediation related to VOM which can be used effectively after guilt is determined.¹⁵⁰

For presentencing purposes, sentencing circles function to mediate resolution and facilitate recommendations that the court may use in deciding on sentencing.¹⁵¹ A particular sentencing circle—by using the actual structural shape of a circle—gathers the victim, the victim's supporters, the offender, the offender's supporters, the judge, court personnel, the prosecutor, defense counsel, the police, and members of the community to address any level of offense, minor or serious.¹⁵² Sentencing circle participants partake in many of the same activities as VOM and family group conferencing participants, seeking understanding of the crime, establishing

¹⁴⁹ Reimund, *supra* note 85, at 9. VOM used before sentencing—when the offender has either admitted guilt or been adjudicated as guilty and is awaiting sentencing—can be used to create sentencing recommendations for the judge. *Id.*

¹⁵⁰ *Id.* at 10–12. To learn more about the Native Canadian and American peacemaking origins and historical development of family group counseling and sentencing circles, see Kurki, *supra* note 15.

¹⁵¹ Reimund, *supra* note 85, at 11–12. Offenders must agree to sentencing circle outcomes for the results to be officially passed on as recommendations to the judge for sentencing. *Id.* at 20–21. In most cases, the judge will accept the sentencing circle's recommendation unless legal issues would make it impossible to do so. David Hines, *Current Restorative Practices in Law Enforcement Community Circles in Woodbury Minnesota Department of Public Safety 3*, WILLIAM MITCHELL COLLEGE OF LAW (Mar. 2000). Sentencing power remains with the court which must affirm any sentencing circle recommendation. Reimund, *supra* note 85, at 21.

¹⁵² Reimund, *supra* note 85, at 10–11 (citing Gordon Bazemore & Curt Taylor Griffiths, *Conferences, Circles, Boards and Mediations: The "New Wave" of Community Justice Decisionmaking*, 61 FED. PROBATION, June 1997, at 25, 27). Sentencing circles are generally organized in one of two different ways. Kurki, *supra* note 15, at 280. First, judges may refer cases to sentencing circles and use the agreements reached in the circles as sentencing recommendations. *Id.* at 280–81. Second, the judge, the prosecutor, and defense counsel may participate in the sentencing circle, with the agreement acting as the final sentence. *Id.* at 281.

the next steps necessary for healing, and learning how to prevent the crime from occurring again.¹⁵³

Family group conferencing, used for post-sentencing purposes, is similar to VOM, but incorporates additional parties including family, friends, and supporters for both the victim and the offender.¹⁵⁴ The same activities practiced in VOM sessions are used in family group conferencing, including discussions about how the crime affected the parties' lives, expressions of concerns and feelings, and opportunities for the offender to take responsibility for the crime and learn how the crime affected all of the participating parties.¹⁵⁵

The third prong of the criminal mediation model is grounded in mediation's beneficial role outlined in this Part. By facilitating victim-offender interaction after guilt has been determined in the adjudicatory system, criminal mediation must be accessible and available either before or after sentencing.¹⁵⁶

V. ASSUAGING CRIMINAL MEDIATION CONCERNS AND CRITICS

Despite the aforementioned benefits criminal mediation offers to the existing criminal justice system,¹⁵⁷ critics question its use¹⁵⁸ and its

¹⁵³ Reimund, *supra* note 85, at 12. The sentencing circle's central goal is to achieve "real differences in the behaviour, attitudes, life style, and conditions of all parties, and to make real differences in the well-being of the immediate personal and geographic communities affected by crime." Kurki, *supra* note 15, at 280 (citing Barry Stuart, *Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System*, 20 INT'L J. COMP. & APPLIED CRIM. JUST., 291, 309 (1996)).

¹⁵⁴ Reimund, *supra* note 85, at 10–11. There are two main differences between family group counseling and traditional VOM. Kurki, *supra* note 15, at 273. First, since family group conferencing involves a broader range of people and family members, supporters often take collective responsibility for the offender, so that this technique may be more effective in creating positive community involvement. *Id.* Second, family group counseling often relies more on official agencies and police and probation officers to organize and facilitate sessions. *Id.*

¹⁵⁵ Reimund, *supra* note 85, at 10–11. These family group conferencing activities function similarly to those characteristic of VOM, providing multiple parties an opportunity to address outstanding emotional issues. *Id.* at 11.

¹⁵⁶ See Part IV.

¹⁵⁷ See generally Parts II, III, IV (documenting the benefits and functions of criminal mediation in the minor crimes context, the plea bargaining process, and near the end of the criminal adjudication process after the determination of guilt, respectively).

¹⁵⁸ See *infra* Part V.A (discussing critics' concerns about criminal mediation's impact on victims).

constitutional implications.¹⁵⁹ The critics' charges are best leveraged to improve the implementation of criminal mediation and to determine its specific applications and limits,¹⁶⁰ rather than to prevent criminal mediation from benefiting the criminal justice system.¹⁶¹ This Part is divided into three sections which further develop the three prong criminal mediation model. The first section of this Part dissects and addresses concerns regarding victims who participate in criminal mediation.¹⁶² Next, the second section of this Part analyzes and provides answers to constitutional concerns for offenders who participate in criminal mediation.¹⁶³ Finally, the third section of this Part addresses when criminal mediation is inappropriate.¹⁶⁴ By considering and defining mediation's limitations informed by critics' concerns, each section of this Part further develops the three prong criminal mediation model.

A. Addressing Criminal Mediation Concerns Regarding the Victim

Criminal mediation critics contend that programs like VOM disserve both victims and offenders.¹⁶⁵ The critics explain that victims are disserved when they are advised to forgive and reconcile with offenders before they experience any vindication by the public (trial) finding of offender guilt, charging that criminal mediation forces victims to suppress any existing

¹⁵⁹ See *infra* Part V.B (explaining critics' constitutional arguments against the use of criminal mediation).

¹⁶⁰ See generally, *infra* Parts V.A, V.B, V.C (documenting critics' charges against criminal mediation's use regarding victim needs, offender rights, and implementation limits, respectively).

¹⁶¹ See generally Parts II, III, IV (documenting the myriad of benefits criminal mediation offers to the existing criminal justice system).

¹⁶² See Part V.A (discussing and answering critics' concerns about criminal mediation's impact on victims).

¹⁶³ See Part V.B (explaining critics' constitutional arguments against the use of criminal mediation, and then using those arguments to inform the recommended structure and use of criminal mediation within the criminal justice system).

¹⁶⁴ See Part V.C (discussing circumstances in which criminal mediation is inappropriate).

¹⁶⁵ Jennifer G. Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1249–50 (1994). "The thesis of this Article is that placing such control [of the offender's fate] in the hands of the victim is inconsistent with the character and purpose of the criminal law as it has evolved since ancient times." *Id.* at 1249.

outrage and sense of loss.¹⁶⁶ However, the careful implementation of criminal mediation for serious crimes *after* conviction will obviate this particular concern.¹⁶⁷ Criminal mediation implemented after a guilty verdict or plea (via bargaining) provides the victim not only with vindication through the public finding of the offender's guilt, but also provides the opportunity to heal by mediating with the offender.¹⁶⁸

The concern that a victim may feel psychological or moral pressure to participate in mediation highlights the fundamental need for voluntariness in mediation participation.¹⁶⁹ If an official pressures a victim to mediate, any refusal to participate may cause the victim to feel uncooperative or selfish.¹⁷⁰ The voluntariness issue is resolved by ensuring that criminal mediation is presented as a voluntary, optional tool to serve victims to compensate for any alienation they may have felt during the criminal adjudication process.¹⁷¹ Both the victim and the offender should receive an up-front explanation that refusal to participate in mediation will not result in any penalties.¹⁷² In addition, careful screening for power inequalities between the parties must be exercised both before offering mediation and during the mediation sessions.

¹⁶⁶ *Id.* Brown argues that VOM cannot assume a victim's negative feelings of outrage and loss can be expressed and resolved during a meeting with the offender. *Id.* at 1250.

¹⁶⁷ Reimund, *supra* note 85, at 24. Cases must be decided in the courts when offender guilt is in dispute. *Id.*

¹⁶⁸ See generally Part IV.

¹⁶⁹ Brown, *supra* note 165, at 1266. "Both the victim and the offender may agree to participate in mediation despite their preference for adjudication because the prosecutor can create a 'victim-offender dilemma' and exploit the parties' lack of information about what will happen in the criminal justice system." *Id.* For further information about the "victim-offender dilemma," see *id.*, at 1266-72.

¹⁷⁰ *Id.* at 1267.

In addition to the pressure inherent in interactions with government representatives, the victim may feel some moral or psychological pressure to participate. The very rhetorical appeal of the program may induce a sense of guilt in a reluctant victim. If the victim is asked to take part in a program that is intended to "enable the parties to communicate and reach some understanding, rather than to force an outcome," the victim may feel obstructionist, selfish, or uncooperative if she chooses not to participate. This could be traumatizing to victims who may already be experiencing a sense of vulnerability and loss of control.

Id. at 1266-67.

¹⁷¹ Bibas & Bierschbach, *supra* note 15, at 134.

¹⁷² *Id.* "Officials must judiciously respect offenders' and victims' free choices not to participate, whether out of self-interest, fear, or anger. Thus, parties should suffer no penalties for refusing to mediate." *Id.*

Party inequalities resulting in potential mediation power imbalances that must be considered include: language barriers, economic variance, cultural variance, gender differences, lack of inherent interest in settling, diametrically opposed interests, and vastly different norms.¹⁷³

Criminal mediation critics charge that the process incorrectly presumes that a victim's negative feelings can be expressed and addressed in a couple of hours spent mediating with the offender.¹⁷⁴ While a victim's emotional issues arising from the crime are ultimately best addressed by a mental health professional, criminal mediation offers the victim an opportunity they do not have via traditional adjudicatory criminal proceedings: to meet and confront their offender.¹⁷⁵

Because victim recovery is a delicate process, victim preferences and expectations for mediation must be carefully considered.¹⁷⁶ Empirical studies demonstrate that victims are far less vengeful and punitive than lawyers assume.¹⁷⁷ Victims' criticisms do not allege criminal justice system leniency for offenders, but rather find fault in the system's degradation of their rights and role as victims in the process.¹⁷⁸ One survey indicates that more than seventy-five percent of victims want to be heard and involved in the criminal

¹⁷³ Luetkehans, *supra* note 8, at 26. In the absence of any equal grounds on which they may meet, parties are not connected by any form of ongoing social network that could "impose pressures on them to restore peace . . ." *Id.* (citing Sally Engle Merry, *Defining "Success" in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 172, 180 (Roman Tomasic & Malcom M. Feeley eds., 1982)).

¹⁷⁴ Brown, *supra* note 165, at 1250.

¹⁷⁵ Bibas & Bierschbach, *supra* note 15, at 136. In this way, the mediation option extends victim's rights. *Id.* The victim who has been alienated by the criminal adjudicatory process gains a structured opportunity to meet with the offender and potentially heal. *Id.*

¹⁷⁶ Brown, *supra* note 165, at 1273-74. Violent crime encounters may force many people to deal with "the reality of the unpredictable, the threat of death, the dilemma of meaning, the responsibility for choice, and the reality of isolation" such that officials must "only seek to avoid interfering with or denying the . . . victim's efforts to resolve those questions." *Id.* at 1273 (citing Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 965 (1985)).

¹⁷⁷ Bibas & Bierschbach, *supra* note 15, at 137. Victims value emotional healing and apology in order to regain the sense of control they lost by being victimized by the offender. *Id.* at 138.

¹⁷⁸ *Id.* at 137. The traditional adjudicatory role for victims, if any, is to provide witness testimony. This passive and reactive role does not address the victim's needs. *Id.* at 138.

process.¹⁷⁹ Building flexibility and assuring voluntariness in criminal mediation addresses this concern, giving both victims and offenders the option to participate in as much or as little mediation as they like.¹⁸⁰

B. Addressing Criminal Mediation Concerns Regarding the Offender

This section of Part V addresses the fundamental constitutional concerns critics champion to argue against the use of criminal mediation.¹⁸¹ In this section, each documented concern is explained and then leveraged to inform the proper implementation of criminal mediation in the criminal justice system.¹⁸²

1. Considering the Potential for Victim Advantage in Exchange for Offender Disadvantage

Critics charge that criminal mediation unfairly extends an advantage to victims by pressuring offenders to not only agree to mediate, but to abdicate their interests to victims' terms of agreement in order to avoid the uncertainty of trial.¹⁸³ These concerns emphasize the importance of criminal mediation's placement within the criminal procedure chronology: mediation for serious crimes must occur after guilt is determined in order to eliminate pressurized coercive situations for offenders.¹⁸⁴ The danger of coercion exists if parties mediate early in the criminal process, before guilt is determined, because the offender lacks information about the likely outcome of a trial, and the

¹⁷⁹ *Id.* at 138. Victims in the survey cited their need to be involved in bail hearings, plea discussions, parole hearings, and sentencing. *Id.*

¹⁸⁰ *Id.* at 133. The goal is to provide the parties with easy access to and notice of VOM so they may use it whenever "the time is right." *Id.* For further information regarding jurisdictions which are moving in this direction, see Bibas & Bierschbach, *supra* note 15, n.184–88 and accompanying text.

¹⁸¹ See generally *infra* Parts V.B.1, V.B.2, V.B.3 (explaining and addressing offender leverage, due process concerns, and Fifth Amendment concerns, respectively).

¹⁸² See generally Parts V.B.1, V.B.2, V.B.3 (explaining and addressing offender leverage, due process concerns, and Fifth Amendment concerns, respectively, and using those charges to inform the structure and function of criminal mediation implementation in the criminal justice system).

¹⁸³ Brown, *supra* note 165, at 1250, 1268–69. Moreover, compulsion in the mediation environment would deprive an offender of their fundamental due process rights. Reimund, *supra* note 85, at 24.

¹⁸⁴ Brown, *supra* note 165, at 1251.

prosecutor can exploit any uncertainty regarding the likelihood and severity of punishment.¹⁸⁵

2. *Assessing the Potential for Jeopardizing the Offender's Constitutional Due Process Rights*

One of the most contentious and significant concerns associated with criminal mediation is based on the comparison of offender rights in mediation to offender rights in traditional adjudicatory proceedings.¹⁸⁶ Critics argue that criminal mediation eliminates the fundamental procedural protections on which offenders rely in the traditional adversarial adjudication system.¹⁸⁷ More specifically, critics assert that mediation's informal structure does not incorporate the due process protections and the rigid rules of evidence that exist in adjudicatory proceedings.¹⁸⁸ However, constitutional due process concerns are not implicated when the determination of guilt is kept within the realm of the adjudicatory process, which is based on these procedural safeguards; criminal mediation occurs only when case facts are no longer in dispute.¹⁸⁹ Due process concerns diminish after the offender pleads

¹⁸⁵ *Id.* at 1264, 1268. "As an offender's case progresses through the system, the offender may gather information about the evidence, the severity of the charges, and the likelihood of conviction. The fear of state punishment may lead offenders to agree both to mediation generally and to a victim's demands specifically." *Id.* at 1264.

¹⁸⁶ *See id.* at 1250. The possibility for violating an offender's constitutional rights is real because mediation involves the State as an acting party. Reimund, *supra* note 85, at 12–13.

¹⁸⁷ Brown, *supra* note 165, at 1250. However, criminal mediation proponents do not contend that "it is necessary . . . to weaken procedural protections for offenders to ensure restoration of victims . . ." Gordon Brazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME AND DELINQ. 296, 308 (1995).

¹⁸⁸ Brown, *supra* note 165, at 1250. While mediation is a less formal process than traditional adversarial adjudication, the lesser degree of formality does not necessarily equate to a loss of legal rights for the offender—such as the presumption of innocence or the right to defense. Reimund, *supra* note 85, at 18.

¹⁸⁹ Reimund, *supra* note 14, at 683–84. Courts remain "truth machines" to sort out disputed case facts. *Id.* While recommendations may be produced in mediation, actual implementation of sentencing occurs through the courts, wherein due process protections are embedded, thus preserving offender constitutional due process rights. Reimund, *supra* note 85, at 24–25.

guilty or is convicted, which is when the criminal mediation option comes into play.¹⁹⁰

Due process is not compromised in mediation to any greater extent than it is in traditional plea bargaining, which sidesteps the fundamental due process and proof standards enforced at trial.¹⁹¹ It is vital to recognize that the traditional plea bargaining process itself contains very coercive elements; yet plea bargaining still occurs in at least ninety percent of felony prosecutions.¹⁹² Because traditional plea bargaining evades fundamental due process elements and standards of proof, due process concerns about mediation therefore may be addressed in the more specific terms of whether mediation participation is compelled.¹⁹³ Voluntariness is key to curing any detrimental coercive effects that could potentially exist within the criminal mediation construct.¹⁹⁴ Due process in the mediation context is therefore protected by giving an offender the choice to opt out of the mediation process at any time.¹⁹⁵ The opt out feature is critical for plea mediations, when an offender should be notified up front that they may opt out of mediation at any

¹⁹⁰ Reimund, *supra* note 14, at 684. There have been mediations between offenders and families of homicide victims wherein the offenders have already been sentenced to life in prison or the death penalty, so the meetings with the victims' families do not result in anything that would affect the offender's sentence. Reimund, *supra* note 85, at 19–20. Post-sentence mediations reduce the threat of due process concerns regarding the offender's right to life, because the mediation process does not deprive the offender of anything that has not already been taken from them by the adjudicatory process with its "full panoply of rights." *Id.* at 20; *see also* Kurki, *supra* note 132, at 4.

¹⁹¹ Reimund, *supra* note 14, at 684. "Plea bargaining 'circumvents . . . rigorous standards of due process and proof imposed during trials.'" *Id.* (citing Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 768 (1998)).

¹⁹² *Id.*

¹⁹³ *Id.* When the American Bar Association endorsed VOM in 1994, the first priority of the program requirements was to ensure that participation by both the offender and victim is voluntary. *Id.* For additional detail regarding voluntariness and due process, *see* Reimund, *supra* note 85, at 12–31.

¹⁹⁴ Reimund, *supra* note 14, at 684–85. "Voluntariness can remedy coercive elements of . . . practices that have a tendency to impede due process." *Id.*

¹⁹⁵ *Id.* at 685. One way to safeguard an offender's constitutional rights is to provide the offender with the option to walk away from the mediation session at any time and take the case to court, wherein the criminal justice system affords the full panoply of rights. Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 78–79 (1998).

time to have their case tried in a traditional adjudicatory trial.¹⁹⁶ In sum, this model of mediation preserves due process rights by improving the traditional plea bargaining process which evades due process fundamentals.¹⁹⁷

3. *Assessing the Potential for Jeopardizing the Offender's Constitutional Fifth Amendment Rights*

In addition to due process concerns, critics also assert concerns about the offender's Fifth Amendment privilege against self-incrimination in criminal mediation.¹⁹⁸ Mediation does not legally guarantee that the offender's statements and documents produced during the mediation will be protected and rendered inadmissible during any later criminal or civil proceedings.¹⁹⁹ The Uniform Mediation Act does not provide protections like those afforded by the American Bar Association Guidelines,²⁰⁰ which recommend that statements made by victims and offenders and any documents or other materials produced during mediation should be rendered inadmissible in criminal and civil court proceedings.²⁰¹ However, self-incrimination issues are diminished if the offender pleads guilty prior to participating in mediation.²⁰²

¹⁹⁶ Reimund, *supra* note 14, at 685. The type of program which contradicts the notion of voluntariness is one in which the offender is ordered to mediate as part of their sentence. *Id.* This type of program deprives the offender of their ability to be a voluntary participant and dampens the victim's needs because the options regarding the terms of agreement established during a VOM session would be reduced. *Id.*

¹⁹⁷ See *supra* Part III (analyzing the traditional plea bargaining process).

¹⁹⁸ Reimund, *supra* note 14, at 685; See U.S. CONST. amend. V (stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.>").

¹⁹⁹ Reimund, *supra* note 14, at 685–86. While an alleged offender's constitutional rights could be violated if they were not given a warning about their rights against self-incrimination and then they revealed information which later could be used against them in court, most programs "do not legally guarantee the American Bar Association's . . . guideline that 'statements made by victims and offenders and documents and other material produced during the mediation . . . [should be] inadmissible in criminal or civil court proceedings.'" *Id.*

²⁰⁰ *Id.* at 686. However, the Uniform Mediation Act does contain provisions regarding mediation confidentiality. *Id.* For further information about the impact of the Uniform Mediation Act on VOM, see Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401, 419–26 (2004).

²⁰¹ Reimund, *supra* note 14, at 685–86. See Am. Bar Ass'n, Victim/Offender Mediation/Dialogue (Aug. 1994), available at <http://www.abanet.org/crimjust/policy/index.html>.

²⁰² Reimund, *supra* note 14, at 686.

Critics contend that the offender's Fifth Amendment privilege against self-incrimination is in play throughout the precharge, presentence, and sentencing stages of the criminal justice process.²⁰³ However, by ensuring the offender's voluntary participation in mediation, the custodial condition implicating the Fifth Amendment privilege against self-incrimination is eliminated.²⁰⁴ Fifth Amendment self-incrimination concerns are precluded because the other triggering condition for the Fifth Amendment privilege, interrogation, is not present in mediation.²⁰⁵ In addition, most mediation programs require a guilty plea or verdict before an offender may participate, thus obviating any Fifth Amendment self-incrimination concerns.²⁰⁶

The possibility that an offender might admit to crimes other than those in the charges for which the mediation is conducted is potentially dangerous because that information could be used against the offender in later civil or criminal prosecution.²⁰⁷ While this possibility is generally remote, mediators must prepare for such situations by stopping the mediation session to avoid hearing the potentially incriminating statement, and by avoiding matters peripheral to the particular case being mediated.²⁰⁸ At each session,

²⁰³ Reimund, *supra* note 85, at 28 (citing *Mitchell v. United States*, 526 U.S. 314 (1999) and Anthony J. Phelps, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing: Mitchell v. United States Settles the Conflict*, 38 BRANDEIS L.J. 107 (1999–2000) (providing a detailed explanation of *Mitchell v. United States*, which held that an individual's privilege against self-incrimination is still valid during sentencing)).

²⁰⁴ *Id.* The mediator does not have to be concerned with administering *Miranda* warnings to address Fifth Amendment self-incrimination concerns if the requisite triggering condition of custody does not exist due to the voluntariness of the offender's participation in the mediation. *Id.*

²⁰⁵ *Id.* at 29.

Even in the extraordinary case where custody is found, it is improbable that questioning or its functional equivalent has taken place. Although some questions might be asked . . . one would be hard pressed to think that they rise to the level of interrogation. The whole idea behind [mediation] is to create a non-coercive environment where victims and offenders can get answers to a question like, "why me?," and the offender can explain their actions in a safe place for verbal exchange. Providing a safe environment for dialogue . . . is quite far removed from giving even the appearance of any questioning resembling interrogation.

Id. at 27.

²⁰⁶ *Id.* at 30. Critics who argue that VOM could prejudice an offender's defense at trial assume the offender is mediating before entering a plea to the charge. *Id.*

²⁰⁷ Reimund, *supra* note 14, at 686. Disclosure of other crimes is not frequent, however it does occur. *Id.*

²⁰⁸ *Id.*

mediators should verbally reiterate the mediation consent forms' express disclaimers that advise parties of potential confidentiality pitfalls.²⁰⁹ The mediation consent forms should also serve notice to the parties that mediation information may be disclosed when someone is physically harmed, when someone is in danger of being physically harmed, or when someone commits a felony or sexual assault.²¹⁰ In sum, the basic cure for self-incrimination concerns is to have the mediator discuss confidentiality up front with the mediating parties, clarifying what will and what will not be held confidential, prior to their participation.²¹¹

C. Assessing When Criminal Mediation is Inappropriate

Criminal mediation may be difficult to implement in all situations.²¹² During the initial case screening process, there are several key factors to consider when deciding whether to mediate.²¹³ First, some offenders are defiant or psychotic, and therefore lack the capacity for remorse and for

²⁰⁹ *Id.* The verbal reiteration of consent form content could take place after the mediator's opening statement, before the victim and offender engage in telling their stories. See *supra* Part IV.A (outlining the six basic steps involved in a typical VOM session).

²¹⁰ Reimund, *supra* note 14, at 686–87. The Consent to Participate form in Milwaukee's Community Conferencing Program contains these particular disclosures of when mediation information may be disclosed outside of the boundaries of the mediation session. *Id.* at 687 n.144.

²¹¹ *Id.* at 687. "If these precautions are taken, it is less likely that legal conflicts will exist. Also, the potential to infringe on participants' rights in restorative processes would be greatly reduced." *Id.*

²¹² Bibas & Bierschbach, *supra* note 15, at 145. Criminal mediation may be difficult to implement across all situations because in some cases, offenders may be obstinate and defiant. *Id.* Some offenders may be psychopaths, meaning they do not have the requisite capacity to empathize and express remorse. *Id.* Some victims may be rationally or irrationally afraid of meeting their offenders and experiencing the trauma again. *Id.* There may be some victims and offenders who do not really care about expressing any healing remorse or communicating effectively and are instead more interested in exacting vengeance. *Id.* These potential issues emphasize the importance of properly screening appropriate cases for mediation. See *supra* note 140 and accompanying text (describing the screening process for VOM).

²¹³ See Bibas & Bierschbach, *supra* note 15, at 145. See *supra* note 140 and accompanying text (addressing some factors to consider in deciding whether or not to mediate). See also Bibas & Bierschbach, *supra* note 15, at 145–49 (detailing additional considerations in the decision whether or not to mediate).

participation in mediation.²¹⁴ Second, victims who fear meeting offenders and possibly reliving the crime by meeting their offenders, should not be considered for mediation.²¹⁵ Third, victimless and inchoate crimes such as drug possession, tax evasion, and perjury are not particularly appropriate for mediation.²¹⁶ By adding the psychological and constitutional dimensions outlined in the previous sections of this Part to the criminal mediation analysis, the critics' concerns are leveraged to inform the proper structure and implementation of the three prong criminal mediation model.

VI. CONCLUSION

In an overcrowded criminal justice system, wherein full access to justice for everyone is remote, the need to meet demand given limited legal resources grows each day.²¹⁷ Traditional adversarial adjudication resolves some of the problems associated with crime by exacting retributive punishment. However, there is room for mediation to alleviate overcrowded criminal dockets, ameliorate the flawed plea bargaining process, and serve victim and offender needs that are not met in the traditional criminal justice system.²¹⁸

²¹⁴ Bibas & Bierschbach, *supra* note 15, at 145. Not all offenders are willing to mediate, some may be insincere, and "some lack the mental capacity for remorse." *Id.* at 91. For additional information about psychopathy and its effects on the conscience and capacity to empathize and feel remorse, see ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 40–46 (1999).

²¹⁵ Bibas & Bierschbach, *supra* note 15, at 145. In addition, some victims may be angry and seek vengeance—although most surveys demonstrate that the majority of victims do not feel this way. *Id.* at 148, n.298.

²¹⁶ *Id.* However, "apology is powerful and desirable even if it must be addressed to a broad audience or to a representative sample of all victims." *Id.* at 146. For additional detail about addressing victimless and inchoate crimes, see *id.*

²¹⁷ Robert B. Kershaw, *Access to Justice in Maryland—A Visionary's Model*, MD. B.J. 50, 50 (2004). Maryland's system for providing legal access to the poor is known as the national visionary model for accessible justice. *Id.* The term "Full Access Justice" means "availability of legal assistance to poor and low income people everywhere to a level needed for them to function as a responsible member, not a victim, in our society." *Id.* Despite the existence of Maryland's model for accessible justice, the need for legal services still outweighs the resources available to provide such access to justice. *Id.*

²¹⁸ See Bakker, *supra* note 5, at 1480. Criminal mediation is not on a "collision course" with constitutional requirements such as due process and the Fifth Amendment privilege against self-incrimination, and therefore works well to fill the restorative and reconciliatory voids left by the traditional criminal justice system's retributive approach

While legal systems generally adapt to change slowly,²¹⁹ the three prong model of mediation should be implemented to address minor crimes, the faulty traditional plea bargaining process, and the post guilt determination needs of victims and offenders,²²⁰ to enhance the justice traditionally meted out in the criminal justice system. Criminal mediation is not a cure-all for every crime, victim, and offender, but it successfully supplements—not supplants—the traditional adversarial adjudicatory criminal process.²²¹ Criminal mediation offers victims and offenders an opportunity to meet face-to-face to address the social, psychological, and relational aspects of crime that the traditional criminal justice system misses.²²² Critics' charges against

to justice, by providing more than one form of justice at a time. Reimund, *supra* note 85, at 31.

²¹⁹ Reimund, *supra* note 14, at 681.

[T]he legal system has never been a system that is designed to encourage change rapidly. Because the law is driven by precedent, looking toward the future rather than at the past is foreign to those trained in the law. This legal mindset does not encourage new and different theories for the criminal justice system, such as restorative justice.

Id.

²²⁰ See *infra* Parts II, III, IV. Mediation agreements which serve as presentence recommendations have the potential to influence offender due process rights to liberty, but because these programs only make recommendations, any direct deprivation of rights to liberty derive from actual court decisions wherein due process protections are systematically built. Reimund, *supra* note 85, at 32. Voluntary offender participation in mediation alleviates additional constitutional rights concerns at the plea bargaining stage, wherein under the current traditional plea bargaining system, the offender relinquishes a considerable amount of their constitutional rights, such as the presumption of innocence and the right to trial by jury. *Id.* at 32–33. Fifth Amendment concerns are likewise diminished by the mediation format itself, wherein the Fifth Amendment trigger of custodial interrogation by law enforcement is not present. *Id.* at 33. In addition, if mediation occurs after sentencing, self-incrimination concerns are absent regarding the charges at issue. *Id.* The only issue lies in the potential for the offender to disclose additional information about unrelated crimes in the course of mediating. *Id.* This concern may be addressed by proper mediator training and administration of confidentiality consent forms to prevent and cut off any such incidents. Reimund, *supra* note 14, at 686–87. Please also refer to Part V.B.3 (addressing consent forms and mediator behavior).

²²¹ Bibas & Bierschbach, *supra* note 15, at 134. Mediation can serve as an adjunct to the criminal justice system without abandoning the traditional adjudicatory processes. *Id.*

²²² *Id.* at 148. Criminal procedure should involve more than narrow procedural values like efficiency, accuracy, and procedural fairness. *Id.* By expanding into social and relational aspects of criminal offenses, values like moral education, catharsis, healing, and reconciliation inform procedural decisionmaking. *Id.*

criminal mediation inform the recommended three prong model of criminal mediation.²²³ Mediation's role in the criminal justice system is best explained by Chief Judge Bell of the Maryland court system:

[M]ediation is not a panacea. It is not always appropriate, and it does not always work. When it does work, however, it can go far beyond the simple goal of a fast compromise It is a process that can help people in conflict develop the skills to sit down together, to deepen their understanding of the underlying issues, and to work on creative win/win solutions. . . . [S]uch real human benefits far outweigh the benefits we are achieving in the area of docket control. . . . [We are achieving] real justice for all.²²⁴

By alleviating criminal dockets overcrowded with misdemeanors and minor crimes,²²⁵ operating selectively to improve current plea bargaining processes,²²⁶ and addressing victim and offender needs after guilt is determined,²²⁷ the three prong criminal mediation model does not threaten to replace traditional adversarial adjudication, but rather promises to improve the criminal justice system. Indeed, by functioning as the BASF²²⁸ of the criminal justice system, the three prong criminal mediation model teams with traditional adjudication processes to advance the entire criminal justice system toward the goal of providing justice for all.²²⁹

²²³ See generally *supra* Part V (documenting and then providing answers to critics' charges against the use of criminal mediation in the criminal justice system).

²²⁴ Kershaw, *supra* note 217, at 52–53.

²²⁵ See generally *supra* Part II (documenting the benefits and function of criminal mediation in the minor crimes context).

²²⁶ See generally *supra* Part III (explaining the role of criminal mediation in the plea bargaining context).

²²⁷ See generally *supra* Part IV (advocating for criminal mediation's use near the end of the adjudicatory process, after guilty verdicts and guilty pleas are entered).

²²⁸ BASF, *supra* note 1.

²²⁹ See Kershaw, *supra* note 217, at 50.