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Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases

Rachel Alexandra Rossi*

I. INTRODUCTION

When Benjamin Graves attempted to rape a woman and “make her love him,” he did not anticipate her struggle. He blacked out and when he came to, his victim was dead, bleeding from multiple stab wounds. Benjamin then attacked her roommate Gayle, reporting another blackout and being awakened by her boyfriend pulling him off her dead body. Gayle’s mother, Ellen Smithson, sat through the lengthy criminal process, devastated. At the end of the trial Benjamin mouthed, “I’m sorry” to Ellen. She mouthed back, “It’s not enough.” The trial ended in a death sentence for Mr. Graves. Was justice served? Ellen sought more, and for fifteen years attempted to meet with Benjamin, to hold him accountable, to see him face to face, and to finally move on.¹

Society punishes criminals to achieve justice. Advocates of restorative justice do not dispute this; however, they argue that justice requires more than punishing the offender. Restorative justice recognizes that crime is not only committed against the state, but also against the victim and the community,² and seeks to restore all harmed parties including victims, co-victims, and family members of both victims and offenders.³ Victim-

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1. See Mark Umbreit et al., *Facilitated Dialogue on Death Row: Family Members of Murder Victims and Inmates Share Their Experiences*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 349, 356-58 (James Acker & David Karp eds., 2006).

2. See Chuck Colson, *Justice that Restores: A Paradigm Shift in Criminal Justice Practices*, 36 *GEO. L.J. ANN. REV. CRIM. PROC.* iii, v (2007).

3. *Id.* at v.

offender mediation (VOM) is the most common restorative technique.⁴ VOM is a controlled meeting between a victim and an offender to achieve restoration through dialogue.

Since the 1970's, VOM has increased in use, most commonly with minor offenses.⁶ More recently, VOM has been sparingly applied to serious and violent crimes, including "rape, vehicular homicide, attempted homicide, and murder."⁷ Death penalty cases have rarely been the focus of restorative justice or VOM, likely because the victim has died and the offender will soon be executed, and these two parties are traditionally the focus of restorative justice. However, while capital cases involve unique concerns and issues, VOM can still be applied in these cases. The process would only require some modification of the focus and application of VOM, such as expanding the notion of the "victim" to include all other harmed parties.⁸ Like all crimes, capital crimes not only involve an offender's breach of the law against the state, but they also cause a rupture within the community. This rupture can be particularly devastating with capital crimes. Thus, the purpose of restorative justice, to restore all injured parties after a crime is committed, is especially applicable with capital cases.

Application of restorative justice theories is needed in capital cases, not to replace punishment, but to work in conjunction with criminal adjudication.⁹ Specifically, implementation of VOM programs in capital cases should be promoted as an option after sentencing, assuming careful screening of each case and voluntary participation by all parties. This paper

4. MARK UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 5 (1994) (stating that victim-offender mediation is the clearest expression of restorative techniques).

5. *Id.* at 7 (detailing the mediation/dialogue process). Some VOM programs have included participation by more than one victim, although there are positives and negatives to including multiple parties as opposed to one-on-one mediation. MARK UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION 304-05 (2001). Also, other restorative techniques, such as conferencing circles, have facilitated dialogue among as many as 150 or more people affected by a crime. *Id.* at 310 (citing a program in Washington County, Minnesota).

6. Mark Umbreit & Betty Vos, *Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue*, 4 HOMICIDE STUDIES 63, 64-65 (2000).

7. Illyssa Wellikoff, *Victim Offender Mediation and Violent Crimes: On the Way To Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2003) (citing Mark Umbreit, *Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment* 1 W. CRIMINOLOGY REVIEW (1998), available at <http://wcr.sonoma.edu/v1n1/umbreit.html>).

8. The victim is no longer living in capital cases, so "victim" offender mediation as applied to capital cases will rather focus on co-victims and other affected parties, such as family members of the offender, which can all be defined as "victims."

9. This paper takes no position in support of or in opposition to capital punishment. Rather, it poses ideas to improve the capital process if and where capital punishment remains constitutional and is applied in the United States.

will discuss the background of restorative justice and VOM, and how traditional methods would need to be adapted for application with capital cases. This paper also will address the benefits VOM would provide victims, offenders, and family members. Next, this paper will discuss why VOM would be effective in capital cases. Finally, this paper will address concerns which may arise from VOM's use in capital cases.

II. RESTORATIVE JUSTICE AND VICTIM-OFFENDER MEDIATION

A. Restorative Justice

Restorative justice is commonly defined by "what it is an alternative to."¹⁰ Broadly speaking, restorative justice is an alternative to the traditional Western retributive justice system of punishment of the offender.¹¹ Specifically, the theory has spurred reform of criminal procedures in a variety of ways, including use of VOM.¹² Restorative justice theories contrast traditional retributive justice norms in many ways. While retributive justice views crime as an act against the state, restorative justice theories recognize crime as an act against the victim and the community.¹³ Where retributive justice focuses on punishment of the offender, restorative justice emphasizes restoration of all affected parties: victim, offender, and the community.¹⁴ Finally, retributive justice focuses on the offender's past behavior, and does not address the role of repentance or forgiveness, whereas restorative justice emphasizes the harmful future consequences of the offender's behavior, thus fostering repentance and forgiveness.¹⁵ Simply stated, restorative justice is a new paradigm that suggests that more than punishment is required to achieve justice. Accordingly, its application does not necessitate disregarding criminal adjudication altogether.¹⁶ Restorative

10. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 10 (2002).

11. Wellikoff, *supra* note 7, at 2.

12. *Id.* at 2 (stating that restorative justice has been implemented in almost every state in many forms, including victim-offender mediation).

13. UMBREIT, *supra* note 4, at 2.

14. UMBREIT, *supra* note 4, at 2. For a comprehensive discussion on specific restorative justice values see BRAITHWAITE, *supra* note 10, at 12-16.

15. UMBREIT, *supra* note 4, at 4. See also *id.* at 3-4 for more comparisons between the old paradigm of retributive justice versus the new idea of restorative justice.

16. See generally Larysa Simms, *Criminal Mediation is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making it Better*, 22 OHIO ST. J. ON

justice can and should be utilized alongside traditional criminal adjudication and punishment.¹⁷

Virtually every state has some type of restorative justice program,¹⁸ and studies show that a growing number of states have begun to implement restorative justice legislation.¹⁹ Restorative justice theories have also developed around the world and in the field of international criminal justice. As the theory has spread, restorative justice has been implemented through a variety of programs.²⁰ In the United States, restorative justice has most commonly been implemented with VOM and typically only with minor non-violent crimes.²¹ While restorative justice has reformed criminal procedures for both minor crimes and large-scale human rights atrocities, it is not commonly considered with capital crimes or for violent criminal offenses.²² However, for the same reasons VOM is effective in minor nonviolent crimes, studies have shown that it can be effective with violent crimes.²³

B. Victim-Offender Mediation

Mediation is a form of Alternative Dispute Resolution (ADR) where a neutral third party facilitates a resolution between parties as an alternative to litigation.²⁴ VOM applies mediation and ADR techniques to criminal cases as one of the many practices rooted in restorative justice theories.²⁵ Unlike

DISP. RESOL. 797 (2007). Further, "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." *Id.* at 837.

17. See Simms, *supra* note 16, at 838.

18. Mark Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 294 (2005).

19. *Id.* at 291. Twenty-nine states at least reference VOM in their codes. *Id.*

20. In the U.S. some programs include:

[C]ommunity policing, family group conferencing, peacemaking circles, sentencing circles, community reparative boards . . . victim impact panels, restitution programs, offender competency development programs, victim empathy classes for offenders, victim-directed and citizen involved community service by the offender, community based support groups for crime victims, victim advocacy programs, and community-based support groups for offenders.

UMBREIT, *supra* note 5, at xxxvii-xxxviii. For a discussion on other common techniques, see Gordon Bazemore & Curt Taylor Griffiths, *Conferences, Circles, Boards, and Mediations: The New Wave of Community Justice Decisionmaking*, in RESTORATIVE JUSTICE: CRITICAL ISSUES, 77-78 (Eugene McLaughlin et al., eds., Sage Publications 2004).

21. UMBREIT, *supra* note 5, at 255; Wellikoff, *supra* note 7, at 2.

22. UMBREIT, *supra* note 5, at 255.

23. See *id.* at 265-67.

24. Simms, *supra* note 16, at 798.

25. See UMBREIT, *supra* note 5, at xxxvii.

traditional mediation in civil disputes where parties, or “disputants,” attempt to reach some compromise, criminal mediation post-adjudication of guilt is based on the premise that one party has committed a criminal act and that the other party is a victim.²⁶ Thus, the issue of guilt or innocence is not mediated, and the focus is on restoration and reconciliation, as opposed to settlement and compromise.²⁷

VOM allows victims to meet the offender in a safe, controlled environment.²⁸ A skilled and trained mediator assists the victim in expressing how he or she has been affected by the crime, asking questions of the offender, and often the victim obtains restitution.²⁹ The mediator encourages the offender to take responsibility for his or her behavior, to understand the impact of his or her actions, and sometimes to develop a restitutionary plan.³⁰ Forms of restitution vary, including monetary compensation to the victim, community service, work for the victim, apologies, or any payback agreed to by the parties.³¹ The mediator does not represent either side, but functions to facilitate effective communication between the parties.³² Many times family members or other interested parties are present and able to participate.³³

Studies suggest VOM may be utilized at three different points in the criminal process: first, as a divergence, taking the place of prosecution; second, during the plea bargaining stage; and third, after the guilty verdict or plea.³⁴ The characteristics of programs also vary. In some cases participation in VOM is mandated by the court, and failure to comply will

26. *Id.* at xl.

27. *Id.* at xl. Some programs additionally focus on achieving a signed restitution agreement signed by both parties as a goal of VOM, but a newer model of VOM proposes this is only a secondary purpose to the dialogue and reconciliation between parties. *Id.*

28. *Id.* at xxxviii.

29. *Id.* at xxxviii. *See also* Umbreit et al., *supra* note 18, at 291 (discussing the signing of restitution agreements).

30. UMBREIT, *supra* note 5, at xxxviii.

31. Umbreit, et al., *supra* note 18, at 279.

32. HOWARD ZEHR, *MEDIATING THE VICTIM/OFFENDER CONFLICT: THE VICTIM/OFFENDER RECONCILIATION PROGRAM* 7 (1980).

33. UMBREIT, *supra* note 5, at xxxvix. There are advantages and disadvantages to both one-on-one VOM and larger conference mediations. *Id.* at 304-05. This paper will focus on the benefits of VOM with all affected parties, but will not address specifically whether all parties should mediate together or hold individual meetings. This decision is best left to the skilled mediator who has met with and interviewed all parties extensively. Many factors could play into what size group would be beneficial, depending on each individual participant.

34. Simms, *supra* note 16, at 799-800.

result in additional court-imposed sanctions.³⁵ VOM may also be used as a condition of probation.³⁶ Some programs utilize VOM at more than one stage of the criminal process.³⁷

Referral to a VOM program may be by a judge, probation officer, victim advocate, prosecutor, defense attorney, police officer, or by the victim himself.³⁸ State statutory schemes also create differences in programs. Some state statutes specifically detail when and how VOM is permitted, some states provide basic statutory provisions for VOM, and other states have little or no mention of VOM in their statutory schemes.³⁹ While programs differ in many respects, the sensitive nature of criminal and victim interaction insists that care be taken to ensure victim safety and respect of offenders in all cases.⁴⁰ Further, extensive preparation must precede meetings, care must be taken in constructing a relaxed, positive atmosphere during meetings, and follow up is essential for both parties.⁴¹ Finally, the American Bar Association enthusiastically endorses VOM, and sets forth detailed requirements for any VOM program.⁴²

35. UMBREIT, *supra* note 5, at xxxviii-xxxix.

36. *Id.* at xxxix.

37. *Id.* at xxxix. For some practical considerations on why VOM is preferable at the third stage, see Simms, *supra* note 16, at 822-26.

38. UMBREIT, *supra* note 5, at xxxvix.

39. Mark S. Umbreit et al., *Legislative Statutes on Victim Offender Mediation: A National Review*, May 1, 2001, at 1, available at http://rjp.umn.edu/img/assets/13522/Legislative_Statutes_VOM%20National_Review.pdf. This study addressed the characteristics of all U.S. states' legislation (or lack thereof) on victim offender mediations in 2001. The study considered, among other factors, age requirements of the offender, requirements of the mediator, provision of immunity to the party referring the case to mediation, confidentiality, costs to participants, requirement of participation, language differences in statutes, and types of offenses authorized for referral to VOM. *See id.*

40. *See* UMBREIT, *supra* note 5, at 19.

41. *Id.* at 19-33.

42. American Bar Association, *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, (Aug 1994), <http://vorp.com/articles/abaendors.html>. The ABA's requirements for VOM are that:

- (1) Participation in a program by both the offender and victim must be voluntary.
- (2) Program goals are specified in writing and procedures are established to meet those goals.
- (3) A plan exists for ongoing evaluation and review of goals and the steps taken to reach such goals.
- (4) Before participating in such programs, victims and offenders are appropriately screened on a case-by-case basis, are fully informed orally and in writing about the mediation/dialogue process, procedures and goals, and are specifically told that their participation in the process is voluntary.
- (5) Refusal to participate in a program in no way adversely affects an offender, and procedural safeguards are established to ensure that there are no systemic negative repercussions because of an offender's refusal to participate in the program.
- (6) A face-to-face meeting is encouraged.
- (7) When agreements are reached between victims and offenders, which may include restitution, a process is established to monitor and follow up on the agreements reached.
- (8) The

III. VICTIM-OFFENDER MEDIATION IN CAPITAL CASES

A. *Adapting the Victim-Offender Mediation Model for Violent Crimes*

Howard Zehr, an author and pioneer in the field of VOM, implemented the first Victim-Offender Reconciliation program in the U.S. in 1974, and set forth a model to assist other communities in starting programs.⁴³ VOM programs have varied in their structure since then, and most contain the same basic structural elements as seen in Zehr's simple model.⁴⁴ However, most of these VOM programs have been applied with property crimes and

statements made by victims and offenders and documents and other materials produced during the mediation/dialogue process are inadmissible in criminal or civil court proceedings. (9) Properly trained mediator-facilitators are used in the mediation/dialogue process. (10) The programs are adequately funded and staffed. (11) Mediator-facilitators are selected from a cross-section of the community to ensure that they reflect the diversity of their community in terms of race, ethnicity and gender. (12) Criminal justice professionals and the public are educated about these programs, and these programs are fully integrated with other components of the criminal justice system. (13) Participation in a program that occurs prior to an adjudication of guilt takes place only with the consent of the prosecutor and with the victim's and offender's informed consent, obtained in writing, or orally in court. If the offender is represented by an attorney, the offender's consent should be given only after the offender has had the chance to discuss with the attorney the advisability of participating in the victim-offender mediation/dialogue program. Participation in a program that occurs after an adjudication of guilt takes place only after notification to the prosecutor and defense attorney, if any.

Id.

43. ZEHR, *supra* note 32, at *about the author*. For a short biography of Howard Zehr see also HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 279-80 (1995).

44. See ZEHR, *supra* note 32, at 7. At stage one, referral may come from many different sources, but most often it comes from a probation officer or court. *Id.* The case is then recorded and screened by a coordinator or manager and then passed to the mediator. *Id.* At stage two, the mediator receives the case, contacts the victim and offender, and meets with them separately. *Id.* at 7-9. The mediator explains the program, determines whether the parties are interested in proceeding, and explores issues and feelings of each party. *Id.* at 9. This stage allows the mediator to further screen the case, and if VOM is determined to be appropriate, the preparations for the meeting begin. *Id.* Stage three is the actual meeting, which may take place in a variety of places, including the victim's home, a VOM office, or church or school. *Id.* At the meeting, the mediator will facilitate "review of [the] facts, expression of feelings, and discussion of an agreement." *Id.* at 9-10. An agreement of restitution is signed, and if no agreement can be reached, parties are advised of other options. *Id.* Finally, phase four occurs after the meeting, and the mediator prepares a report and evaluation. *Id.* at 10. The papers are returned to the VORP office where copies of the report and restitution can be sent to the referring agency. *Id.* Either the VORP program or the referring agency may enforce and collect restitution. *Id.*

minor assaults.⁴⁵ While much of the basic elements will remain the same with VOM programs for capital crimes, the heightened intensity and risk involved with violent crimes would require modification from traditional VOM models.⁴⁶ More recently a “humanistic victim offender mediation” approach has been proposed, which re-focuses the goal of VOM to be healing through dialogue rather than arriving at a restitution agreement.⁴⁷ Many later VOM programs have been adapted for cases of severely violent crimes, some highly therapeutic in form and others more “dialogue driven,” but all focusing on the dialogue as the purpose of the mediation.⁴⁸

Applying this “humanistic” approach, Umbreit has proposed a victim-sensitive offender dialogue model (“VSOD model”) for VOM with cases of violent crimes.⁴⁹ The VSOD model utilizes three phases: (1) case development; (2) victim offender dialogue; and (3) follow up.⁵⁰ The case development phase involves assessing the possibility of mediation through numerous visits with the victim, the offender, and other “associated systems.”⁵¹ Further, this phase requires developing an agreement between parties as to the expectations of mediation, and adequately preparing all parties involved.⁵² The second phase, the actual dialogue between victim and offender, requires pre-dialogue briefing, the actual mediation dialogue, and post-dialogue debriefing.⁵³ The mediator must ensure both parties are at

45. Wellikoff, *supra* note 7.

46. UMBREIT, *supra* note 5, at 299, stating that:

[T]he VOM field faces an exciting opportunity to . . . address the needs of parties affected by severely violent criminal conflict in an appropriate way. This can only happen if there is a serious commitment to reexamine the basic model and to understand its limitations; an increased awareness of the victimization experience, including posttraumatic stress and grieving; and willingness to apply tighter boundaries to when mediation is appropriate, what kind of advanced training is required, and who should serve as mediators.

47. See UMBREIT, *supra* note 4, at 5.

48. *Id.* at 258. Some examples include programs developed by Dave Gustafson in Langley, British Columbia and David Doerfler in Austin, Texas which are highly therapeutic models, as opposed to the models of Dennis Wittman in New York; Mark Umbreit in St. Paul, Minnesota; and Karen Ho in Columbus, Ohio; which have been more dialogue driven. *Id.* at 257-58. While VOM with violent crimes generally apply this “humanistic” approach, this does not necessarily mean restitution should be disregarded as another goal of VOM.

49. *Id.* at 255-56.

50. *Id.* at 259-64. While these specific phases and tasks are outlined, it is important to view the mediation as a process, not a rigid model. *Id.* at 258.

51. UMBREIT, *supra* note 5, at 259-61. “Associate systems” include “family and friends of the victim and offender, a victim advocate, a prison counselor, attorneys, psychotherapists and the correctional system.” *Id.* at 261. These parties all play important roles and must be involved in the process to minimize potential conflicts. *Id.*

52. *Id.* at 261-62.

53. *Id.* at 262-64.

ease, expectations are clear, and the dialogue is safe and constructive with minimal intervention by the mediator.⁵⁴ Finally, the third phase requires follow-up contact with parties to discuss any unmet needs and to close the case.⁵⁵

Umbreit's VSOD model recognizes the increased risks when a victim meets the offender of a serious or violent crime, requiring some adaptations of the basic model.⁵⁶ The biggest changes with the VSOD would be more thorough participant preparation and case screening, as well as use of a highly skilled mediator. This model would require mediators to have special knowledge and skills. They would need to be trained to work with severely violent crimes, possess a thorough understanding of the victimization process, and understand both the criminal justice and corrections systems.⁵⁷ Application of a model similar to this would be appropriate with capital crimes. Beyond these considerations, the adapted model should additionally consider the many issues unique to capital cases.

B. Special Considerations for Capital Cases

Due to the many post-adjudicative procedures in capital cases, two big considerations of VOM are when to hold the mediation, and ensuring support of correctional staff and the offender's attorneys.⁵⁸ VOM would necessarily be applied post-sentence, as opposed to a divergence from

54. *Id.* at 262-63; *see also* Umbreit, *supra* note 1, at 365-67 (stating that the role of the mediator is particularly important, and participants in this case noted the mediator's sensitivity to allow for silent moments, his ability to remind the victim and offender of points they wanted to discuss, his lack of preference for the victim over the offender, and his minimal interruptions were very effective).

55. UMBREIT, *supra* note 5, at 264. Follow up sessions with both parties may be appropriate, but they are generally conducted separately with each client. *Id.*

56. *Id.* at 256. The heightened intensity of these cases require: need for nonjudgmental attitude toward all parties, longer case preparation by the mediator (six to eighteen months), the need for multiple separate meetings prior to the joint session (two to four or even more), multiple phone conversations, negotiating with correctional officials to secure access to the inmate and to conduct a mediated dialogue in prison, coaching of participants in the communication of intense feelings, and boundary clarification.

Id.

57. *Id.* at 257. The mediator must be able to deal with the intense grief and loss of the victim, and also able to non-judgmentally relate to offenders in situations of heinous crimes. *Id.*

58. *See infra* note 165.

prosecution or during sentencing.⁵⁹ Beyond this, there may be additional strategic decisions to be made as to when VOM is best applied for two reasons. First, capital convictions often involve lengthy post-sentence procedures, including state and federal appeals and civil writ of habeas corpus claims, which may effect the decision of when to implement VOM.⁶⁰ Second, due to the extremely violent nature of most capital crimes, it may take a longer time for victims or offenders to be sufficiently prepared for dialogue.⁶¹ Also, it is essential to obtain support of the offender's attorney in capital cases before proceeding with mediation.⁶² Many times multiple attorneys will represent offenders at different stages of the lengthy proceedings post-adjudication, and care must be taken to notify and consult with each one.⁶³ As well as obtaining permission from any attorneys, mediators should ensure that corrections staff is aware of the procedure. There may be unique procedural or security complications on death row, and mediators should secure permission and have open dialogue with correctional staff well in advance of mediation to guarantee no complications.

Finally, two additional considerations in applying VOM to capital cases are the family of the offender and restitution. The offender's family generally experiences great loss comparable to that of co-victims, but are traditionally ignored by the judicial system and by restorative efforts.⁶⁴ Because the benefit of VOM is to bring healing to all injured parties, VOM programs should consider family members of the offender as well. Some VOM models have taken the form of conferencing circles, where multiple affected parties are present.⁶⁵ Another option is to hold one-on-one mediation or separate mediations in smaller groups.⁶⁶ Restitution is another consideration that must be addressed with capital cases. Restitution is a large focus of VOM with less serious crimes, but most models for violent crimes favor focus on dialogue and not tangible resolutions, due to the

59. Simms, *supra* note 16, at 822-26 (discussing practical considerations for applying VOM after guilt is determined).

60. *See infra* note 165.

61. Wellikoff, *supra* note 7 (describing how the case must "ripen" before VOM is appropriate with violent crimes).

62. *Id.*

63. *See infra* note 165 (discussing the post-adjudicative procedures in capital cases).

64. Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 385-86 (2003).

65. *See UMBREIT, supra* note 5.

66. *Id.*

different issues that arise with violent crimes.⁶⁷ While capital cases should place most of the focus on healing through dialogue, this does not necessarily preclude the possibility of restitution. However, it may take a much different form than with cases of minor offenses or property crimes.⁶⁸

IV. WHY VICTIM-OFFENDER MEDIATION WOULD BE BENEFICIAL

A. *Why Victim-Offender Mediation?*

Whether VOM programs would be effective in capital cases depends on what effects it would attempt to achieve.⁶⁹ Studies suggest three broad goals of VOM: (1) to benefit the victim and co-victims, (2) to benefit the offender and the offender's family, and (3) to benefit the community.⁷⁰ Specifically, VOM attempts to provide victims with the opportunity to confront their offender, to have questions answered, to participate in the criminal justice process, to be empowered through participation in developing a restitution agreement, and to forgive.⁷¹ VOM further allows offenders the opportunity to acknowledge their wrongdoing and experience sincere remorse,⁷² to bring personal healing to victims, to assist in the offender's own rehabilitation, to change the way victims view the offender, and to talk with the victim for spiritual reasons.⁷³ Further, VOM may provide countless other affected

67. Many studies focus on the high rate of success in completion of restitution agreements. UMBREIT, *supra* note 5, at 204-05. In Albuquerque, ninety-nine percent of cases resulted in successfully negotiated agreements, in Austin ninety-eight percent, in Minneapolis ninety-three percent and in Oakland ninety-one percent. *Id.* at 205.

68. Some have argued that restitution should be given from offenders to victims in capital cases. Judith Kay, *Is Restitution Possible for Murder?—Surviving Family Members Speak, in Wounds That Do Not Bind: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 323, 323-47 (James R. Acker & David R. Karp eds., 2006). Restitution would present special concerns in capital cases, due to the victims' feelings about receiving money from the person who killed their loved one. *See generally id.* at 333-44. Restitution with minor offenses has included monetary compensation, community service, work for the victim, or other agreements of the parties. Umbreit et al., *supra* note 18, at 279. Some of these, for obvious reasons, are not applicable with capital cases.

69. UMBREIT, *supra* note 5, at 133 (discussing that each program must identify what goals are important for its community).

70. *Id.* at 199-212; *see also* UMBREIT, *supra* note 4, at 61-118; *see also* BRAITHWAITE, *supra* note 10 at 45-71 (considering results of restorative justice).

71. Wellikoff, *supra* note 7.

72. *Id.* This is not generally achieved through traditional retributive punishment theories, where offenders are driven to deny responsibility to avoid punishment. *See id.*

73. *See* Umbreit et al., *supra* note 18, at 271.

parties an opportunity to participate and experience healing much in the same way. While VOM is not traditionally considered with family members of the offender, they often experience grief much like victims and co-victims and should be a part of the VOM process. Finally, the third goal of VOM is to benefit the community through active involvement in the judicial system, to provide an effective deterrence of crime, to reduce recidivism,⁷⁴ and to lower costs of administration.⁷⁵ Capital cases involve unique concerns, which may require modification of some purposes of VOM.⁷⁶ However, the core goals remain the same: to provide healing for the victim, to allow participation for the offender, and to restore the community.

B. The Victim's Need for Healing

1. History of the Victim's Role

Early notions of justice in medieval England permitted private vengeance for crimes.⁷⁷ Criminal laws evolved over time, establishing the exact opposite: punishment of offenders in the name of the state with little participation by victims in the process.⁷⁸ Up until the victim's rights movement in the 1960s, crime victims' roles had been reduced to witnesses in trials.⁷⁹ The victim rights movement brought forth significant changes in the victim's role, including legislative and constitutional initiatives requiring notice, eligibility for compensation, fair treatment, victim input at various

74. Wellikoff, *supra* note 7.

75. Umbreit et al., *supra* note 18, at 289.

76. This focus may change, as reflected by the changes in the VSOD model for serious or violent crimes. UMBREIT, *supra* note 5, at 255-59. Some examples are focus on restitution agreements or diversion of cases from traditional prosecution, which would not be as readily applicable in capital cases, if at all. *Id.*

77. See James R. Acker & Jeanna Mastrocinque, *Causing Death and Sustaining Life: The Law, Capital Punishment, and Criminal Homicide Victims' Survivors*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 141, 142-45 (James R. Acker & David R. Karp eds., 2006). Before this time, Anglo-Saxon communities as early as fifth century A.D. in England solved interpersonal conflicts as individuals, families and clans through slayings and blood feuds. *Id.* Kings slowly introduced restrictions on blood feuds and tariff systems that required victims to seek pecuniary compensation from offenders before pursuing private vengeance. *Id.* Anglo-Saxon laws gradually evolved, viewing crime as a "breach of the kings peace" instead of solely individual conflicts. *Id.* Thus, a slow transformation occurred, where victims were no longer permitted to dispense punishment or receive compensation, but were still involved as witnesses in the prosecutions of criminal offenders.

78. See *id.* at 143-44.

79. *Id.* at 145.

stages, return of property, and more.⁸⁰ However, advocates of restorative justice argue that such rights have not been enough.⁸¹ They contest the state's need for an equitable response to crime under the law must be balanced with the victim's need for emotional and material reparation.⁸² VOM is part of this ongoing effort to include victims in the process and to provide emotional and material healing, goals which have been overlooked when focus is mainly placed on punishment of the offender.

2. The Victim's Need for Healing

Victim-offender mediation with serious or violent crimes is usually initiated at the victim's request.⁸³ The high rate of victim interest in VOM is for many reasons.⁸⁴ Often, victims are left with nagging questions about the crime, and express the need to confront the offender to get answers.⁸⁵ Further, while forgiving the offender is never a presumed outcome of mediation, victims have expressed desire to forgive, and have experienced healing in doing so.⁸⁶ Victims have also expressed the need to hold the offender accountable, to share their pain with the offender, to help the offender change his behavior, and to see the offender punished.⁸⁷ Specifically with severely violent crimes, victims' primary reasons to mediate are to seek information, to show the offender the impact of his or her actions, and to have some contact with the offender.⁸⁸ One study showed that most victims initially reported restitution as their primary

80. *Id.* at 145-46.

81. There is no guarantee that an offender will be executed when victims offer testimony, which could make the victim's role seem irrelevant. *See* Acker and Mastrocinque, *supra* note 77, at 150. Further, many victims oppose the death penalty and would not want such a statement to be used for the purpose of imposing it. *See id.* Finally, the unpredictable and lengthy trial and appeal process are unlikely to provide benefits to victims. *See id.* For a general discussion of what criminal justice victims generally want, see HEATHER STRANG, REPAIR OR REVENGE 8-23 (Clarendon Press, 2002).

82. STRANG, *supra* note 81, at 5.

83. Wellikoff, *supra* note 7.

84. *See infra* note 115.

85. Wellikoff, *supra* note 7 (confronting the offender with questions about the crime has a "cathartic benefit that liberates victims from their 'haunting questions' and ruminations.").

86. *Id.* ("Through forgiveness, victims are often able to let go of their anger, resentment, and fear" and to move on).

87. Umbreit et al., *supra* note 18, at 271.

88. *Id.* at 272-73.

motivator, but the victims later reported what they valued most was the ability to talk with the offender.⁸⁹

Co-victims, family members, and friends left behind after a homicide, experience much of the same distress. Co-victims also experience added feelings of “isolation and stigmatization” within the community and are also often left out of the judicial process.⁹⁰ Many times, co-victims will experience serious psychological distress, especially child survivors of murdered siblings.⁹¹ Finally, the capital process itself creates additional psychological issues for co-victims, whether or not they support the death penalty.⁹²

3. Victim-Offender Mediation Instead of Victim Impact Statements

One area where victim’s rights have battled with the state-only prosecutorial system is with the use of victim impact statements in capital sentencing. Victim impact statements are statements of the victim and co-victims detailing how a violent crime has affected them, which the jury considers in determining whether or not death should be imposed.⁹³ In *Booth v. Maryland*, the Supreme Court ruled that victim impact statements during the sentencing phase of a capital trial were unconstitutional because the emotional impact of the surviving family was irrelevant in the determination of the defendant’s blameworthiness.⁹⁴ Just four years later, the Court overruled *Booth* in *Payne v. Tennessee*.⁹⁵ In *Payne*, the Court permitted victim impact evidence if it related to personal characteristics of the victim and the emotional impact of the crime on the victim’s family.⁹⁶ The *Payne* decision, as well as other legislative initiatives, is part of a movement toward victim involvement in the legal process, specifically in death penalty cases.⁹⁷

89. *Id.* at 271.

90. Beck et al., *supra* note 64, at 391-92.

91. *Id.* at 392-93.

92. *Id.* at 393.

93. Charles Lanier & Beau Breslin, *Extinguishing the Victims’ Payne or Acquiescing to the “Demon of Error”: Confronting the Role of Victims in Capital Clemency Proceedings*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 179, 180 (James R. Acker & David R. Karp eds., 2003).

94. *Booth v. Maryland*, 482 U.S. 496 (1987).

95. *Payne v. Tennessee*, 501 U.S. 808 (1991).

96. *Id.* at 817.

97. Some legislative initiatives intended to benefit victims include statutes that allow family members to witness executions or broadcast the execution to bring the family closure. See Acker & Mastrocinque *supra* note 77, at 148-49. For a discussion on the history of the victim movement, see STRANG, *supra* note 81, at 25-42.

While victim involvement is a core purpose of restorative justice, critics have argued that victim impact statements may result in harsher penalties and inconsistency in sentencing.⁹⁸ One critic argues that victim impact statements should not be permitted at capital sentencing because they allow irrelevant information, they permit arbitrary decisions, and they distract from the constitutional duty to weigh relevant factors.⁹⁹ Another effect of *Payne* is that families of defendants and families of victims are “unavoidably pitted against each other in court.”¹⁰⁰ Finally, studies show that victims are “not interested in changing sentencing outcomes,” and they “do not want decision making powers.”¹⁰¹ Rather, victims report that they only benefited from delivering victim impact statements because it provided an opportunity to be heard, to be treated with respect, to be informed and involved, to be taken seriously, to receive compensation, and to hear the offender’s admission of guilt.¹⁰² These are all benefits provided with VOM. Thus, there is a need for victims to participate in the judicial process, but this can be achieved without invoking the potential dangers involved with victim impact statements in sentencing. VOM would provide the same healing benefits victims have experienced with supplying victim impact statements while avoiding unnecessary prejudice in the sentencing decision because VOM takes place after sentencing.¹⁰³

98. Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 3 (2004).

99. Lanier & Breslin, *supra* note 93, at 184 (citing Logan 2000:539, 540, 549). The allowance of victim impact evidence risks imposition of the death penalty according to the perceived “social worth” of the victim. Lanier & Breslin, *supra* note 93, at 184 n.4 (citing Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statement in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 118 (1997)). Victim impact statements appeal to hatred and vengeance. Lanier & Breslin, *supra* note 93, at 184 (citing Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) and Logan: 2000).

100. Beck et al., *supra* note 64, at 390.

101. Erez, *supra* note 98, at 3.

102. *Id.* at 3.

103. Further research of the differences between victim feelings regarding victim impact statements and VOM is necessary, including whether victims desire to be included in the judicial process pre-sentence. This issue is beyond the scope of this paper.

C. *The Offender's Need To Participate*

1. The Offender

VOM programs with minor offenses have traditionally focused on rehabilitation of the offender, and have experienced success with lowered recidivism and thus deterrence of crime.¹⁰⁴ These are not obvious goals of VOM in capital cases when there is no issue of recidivism and the offender's rehabilitation, arguably, will not deter him or others from committing crimes. Further, critics would argue that rehabilitation of a condemned offender is either pointless because he faces execution, or inhumane: why rehabilitate someone and then kill him? However, at the basis of restorative justice is the theory that crime has rippling effects, and restoration must also ripple through to all parties that have been harmed, including the offender. Participation in the judicial process, through VOM, will allow the offender the ability to take responsibility for her actions;¹⁰⁵ to deconstruct "monster myths" victims may have of her; and to express feelings and apologize, sometimes for religious reasons.¹⁰⁶ Perhaps one of the most humane effects of VOM would be allowing offenders the opportunity to experience this relief before facing death, much like the religious rites traditionally provided prior to execution.¹⁰⁷

104. Umbreit et al., *supra* note 18, at 284. *See also infra* note 132 and accompanying text.

105. Traditionally, the adversarial criminal system does not encourage offenders to take responsibility for their actions. One reason for this is that the system does not allow offenders to see the full impact of their actions. Zehr *supra* note 32, at 41. The system has shifted the offender's focus to themselves instead of to the victim with the many stages of the process involving decisions affecting the disposition of the offender. *Id.* at 33-34. Thus, the offender is not confronted with the responsibility for his or her actions, being isolated from the victim and the community he or she has harmed. *Id.* at 41; *See also* Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISP. RESOL. MAG., Fall 2001, available at <http://vorp.com/articles/justice.html> (stating that in many cases, the offender has "stifled a sincere desire to approach the victim in apology and contrition."). VOM provides the offender an opportunity to face the victim(s) he or she has harmed and to see the impact of his or her actions. *Id.*

106. Studies have shown that offenders who participate in VOM desire to pay the victim back, to get the experience behind them, to impress the court, or to apologize to the victim. Umbreit et al., *supra* note 18, at 271. Studies of VOM with offenders of severely violent crimes have shown that offenders desire to apologize, to help the victims heal, to assist in their own rehabilitation, to change the way victims viewed them, and to talk with the victim for spiritual reasons. *Id.* at 273. Note, this list is not exhaustive of all the benefits that VOM may provide an offender.

107. Mark S. Umbreit & Betty Vos, *Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue*, 4 HOMICIDE STUDIES 63, 82 (2000). *See* book review of Louis Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865* AMERICAN JOURNAL OF LEGAL HISTORY, 317 (Oxford University Press 1959) (discussing the history of capital punishment practices, including that clergy would often deliver

2. The Offender's Family

Loss is extreme for the family of capital offenders. Family members experience trauma in different ways than co-victims, largely due to their perceived connection to a serious crime coupled with their loss of a loved one.¹⁰⁸ There is a social stigma attached to the family of an offender on death row, which complicates the feelings of loss when their loved one is to be executed.¹⁰⁹ Among other problems, children of offenders experience psychological trauma due to the absence of their parent and later experience many other negative consequences.¹¹⁰ However, any restorative efforts for victims traditionally ignore the family of the capital offender.¹¹¹ VOM should allow participation by the family of the offender as well, for many of the same reasons victims benefit from participation.¹¹²

sermons at the execution and allow last minute admissions of guilt and religious conversions). Religious rites are still often provided prior to execution in most states. Further, one offender stated that the opportunity to apologize to the victim made facing execution much easier. Umbreit & Vos, at 82.

108. See Beck et al., *supra* note 64, at 397. Some factors that offenders' families have to deal with include "the underlying offense, notification that the State is seeking the death penalty, institutional failure, their community, the media, the court, defense attorneys, visitation with their incarcerated family member, notice of execution, and the execution itself." *Id.* One mother of a capital offender stated, "I understand that woman lost her son, I understand her feelings because we both lost sons." *Id.* at 396. "On that tragic evening, we both lost. Both of our lives were turned upside down for the rest of our lives." *Id.*

109. *Id.* at 399.

110. *Id.* at 394-95. This study also found children to "experience truancy, aggression, and withdrawal; and suffer a decline in their social and financial conditions," and to be more likely to become involved with the criminal justice system. *Id.* at 395.

111. *Id.* at 385-86.

112. The VOM models could take the form of conferencing circles, where multiple affected parties are present, or another option is to hold one-on-one mediations, or separate mediations in smaller groups. *Id.*

V. IS VICTIM-OFFENDER MEDIATION EFFECTIVE?

A. *Is Victim-Offender Mediation Generally Effective?*

1. Benefit to the Victim

Statistics show that victims are interested in and satisfied with VOM. Studies show when victims are offered VOM as an option, participation rates range as high as 90%.¹¹³ While most victims initially reported restitution was their primary motivator, they later reported what they valued most was the ability to talk with the offender.¹¹⁴ Most studies also show high victim satisfaction with VOM “across sites, cultures and seriousness of offenses.”¹¹⁵ Mark Umbreit conducted the first multi-site analysis of VOM programs in the US,¹¹⁶ focusing on VOM for crimes of burglary, vandalism, and assault.¹¹⁷ Nine out of ten victims were satisfied with the outcome of mediation, stating that mediation gave them a chance to resolve what happened and reduced their fear.¹¹⁸ Studies of participants in traditional court processes resulted in much lower satisfaction than those participating in VOM.¹¹⁹

Another study found a majority of victims who participated in VOM no longer feared the offender after mediation.¹²⁰ Only nineteen percent of

113. Umbreit et al., *supra* note 18, at 271. One study found that victims were more likely to participate with property offenses and misdemeanors than with personal crimes. *Id.* at 272. However, the longer the time lapse between the offense and the VOM, the more likely personal crimes came to mediation. *Id.*

114. *Id.* at 271.

115. *Id.* at 273. Typically eight or nine out of ten participants report satisfaction with the process and resulting agreement. *Id.*

116. UMBREIT, *supra* note 5, at 195. While these results may not necessarily be applicable to other programs with different characteristics, it provides important insight into developing programs. *Id.* at 212-13.

117. *Id.* at 197. The programs evaluated were juvenile court programs in Albuquerque, Minneapolis, Oakland and Austin. *Id.* See *id.* at 198, 200-01 for characteristics of individuals interviewed, types of referrals and offender characteristics.

118. *Id.* at 207. It should be noted that there was a higher level of satisfaction with victims than with offenders when compared to the satisfaction level of groups not referred to mediation. *Id.* at 206. Also, these high levels of satisfaction are consistent across sites, cultures, and seriousness of offenses; typically eight or nine out of ten participants were satisfied with the process and result. Umbreit et al., *supra* note 18, at 273.

119. Umbreit et al., *supra* note 18, at 274. The factors that tended to aid in high victim satisfaction were when the victim felt good about the mediator, felt the resolution was fair, and initially had a strong desire to meet the offender. *Id.*

120. STRANG, *supra* note 81, at 99.

victims felt their sense of security was *not* restored after mediation.¹²¹ Eighty-eight percent of victims felt the meeting was helpful in solving problems, and most experienced less anger toward the offender and greater sympathy after the mediation.¹²² Further, three times as many victims felt closure from the process than those that did not,¹²³ and seventy-seven percent felt the offender's apology was sincere.¹²⁴ Finally, most victims enjoyed the mediation because of the opportunity to participate in the criminal process.¹²⁵

2. Benefit to the Offender

Offender participation in VOM, for obvious reasons, mirrors the high rate of victim participation.¹²⁶ Studies have also found that offenders were similarly satisfied with VOM. Nine out of ten offenders reported high satisfaction, some stating VOM "helped them to see the victim as a person."¹²⁷ Other studies show offenders experience "cathartic relief" in expressing their feelings, and often surprise in learning about the victim's feelings.¹²⁸ Offenders further felt they were "understood and cared about," and that the victim's feelings toward them had improved.¹²⁹ Finally, most studies comparing participants' offense rates before and after mediation have found a reduction in recidivism rates, showing some effect of rehabilitation.¹³⁰

121. *Id.* at 101.

122. *Id.* at 102-103.

123. *Id.* at 112.

124. *Id.* at 116.

125. *Id.* at 122-23. Sixty-three percent of victims participated to be involved in the process, and fifty-eight percent felt they had a civic duty to do so. *Id.*

126. In order for victims to participate, offenders must also be willing. See *supra* note 115 and accompanying text, discussing high rates of victim participation.

127. UMBREIT, *supra* note 5, at 197.

128. UMBREIT, *supra* note 4, at 207.

129. *Id.* at 102-03.

130. Umbreit et al., *supra* note 18, at 284. Some studies found re-offending youths committed less serious crimes after VOM, and some studies found little difference in recidivism rates between VOM participants and cases processed by traditional adjudication. *Id.* at 284-85. Another study showed an eighteen percent recidivism rate within a one year period following mediation, as compared to the twenty-seven percent recidivism rate among similar offenders who did not participate in mediation. UMBREIT, *supra* note 5, at 212. Finally, another study found a thirty-two percent lower recidivism rate among juvenile offenders who participated in VOM. Umbreit, et al., *supra* note 18, at 285-86.

B. Is Victim-Offender Mediation Effective with Capital Cases?

Because VOM has sparingly been applied to capital cases, few studies have been conducted on its effectiveness. In 2000 the only study of VOM effectiveness in capital cases was conducted, analyzing the first ever mediations between family members of a murder victim and the offender.¹³¹ All participants, both victims and offenders, felt “relieved and renewed.”¹³² Victims reported it was important to hear the offender take responsibility; all felt their anger had diminished and all expressed that the offender was now a person to them, and not just a murderer.¹³³ All victims expressed great benefits of “see[ing the offender] face-to-face,” and the two victims who sought answers felt that the “unknowns” became less important during the meeting.¹³⁴ Finally, one victim was pleased to be able to forgive the offender and another reported she “moved closer to forgiveness.”¹³⁵

In the same study, the two offenders were most appreciative of the opportunity to “do something, however small” to help the victims heal.¹³⁶ Both hoped their participation would increase awareness of VOM and encourage more participation amongst victims and offenders.¹³⁷ The offenders were relieved that the process seemed to “humanize” them in the minds of the victims, and both felt it was easier to face execution with this burden lifted.¹³⁸ This study has confirmed the positive effects VOM can have on participants, similar to results of studies conducted with less serious crimes.¹³⁹ While another study in 2003 suggested application of VOM

131. Mark S. Umbreit & Betty Vos, *Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue*, 4 HOMICIDE STUDIES 63, 67 (2000). The first mediation was between a granddaughter and the man who abducted, raped and murdered her grandmother and the sister of another woman he killed in 1997, and the second mediation was between a mother and the man who killed her daughter in 1998. *Id.* at 69.

132. *Id.* at 78.

133. *Id.* at 78-79.

134. *Id.* at 79-80.

135. *Id.* at 80.

136. *Id.* at 81.

137. Umbreit & Vos, *supra* note 131, at 81.

138. *Id.* at 82.

139. Linda White is another example of the success of a VOM program with a capital case. Linda met with the man who raped and murdered her pregnant daughter. RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY 225, 243-49 (2005). She stated:

Some of us say things like, 'it doesn't matter what he says. It won't bring the person back.' That is true, but even so, you can still honor the fact that the person was willing to say it . . . When Gary murdered Cathy, he didn't just break a law . . . It was a tremendous disruption of relationships in our community . . . How much good can be done just

should include family members of offenders, the only studies that have applied VOM to violent crimes have not considered the family of the offender.¹⁴⁰ Additional research is necessary to determine the effectiveness of VOM with other affected parties such as the family of the offender, and whether larger or smaller groups would be more successful. Research is also needed to determine other outcomes of VOM in capital cases and whether possible concerns, addressed in the next section, would be problems for the application of VOM in capital cases.

VI. CONCERNS ABOUT VICTIM-OFFENDER MEDIATION IN CAPITAL CASES

A. Case Screening and Preparation

It is widely accepted that VOM may not be appropriate in all cases.¹⁴¹ Careful case screening will ensure it is applied only in cases where it will be useful, and will minimize risks of concerns, such as those addressed below. For example, in cases where the offender is defiant, mentally unstable, or heavily medicated, the dialogue would not be appropriate.¹⁴² Further, if a victim is afraid of the offender or lacks desire to participate, VOM would not be beneficial.¹⁴³ Adequate preparation of all parties is also essential to

through punishment if there is no intentional rehabilitation or efforts to restore relationships?

Id. at 248-49. After her experience, Linda completed her dissertation in psychology, became an advocate for restorative justice, and became a volunteer mediator. *Id.* at 247.

140. Sarah Escholz et al., *Offenders' Family Members' Responses to Capital Crimes: The Need for Restorative Justice Initiatives*, 7 HOMICIDE STUDIES 154 (2003). This article states that in 2003 all studies that have applied restorative justice to violent crimes have focused on the victim and offender. *Id.* at 163. This author has not found studies since that study that have applied VOM to other parties besides the victim and offender.

141. ZEHR, *supra* note 32, at 5 (“Victim offender reconciliation is not a solution to all problems. It does not solve many of the basic problems of injustice that are inherent in our society and our criminal justice process. . . It may not be appropriate in [some] cases.”); *see, e.g.*, UMBREIT, *supra* note 5, at 25-36 (suggesting the following criteria be considered in determining whether VOM is appropriate: the type of offense, whether the victim is identifiable, whether the offender admits guilt, whether there were more than three prior convictions, and whether the offender suffers from major mental health problems or chemical abuse problems); *see, e.g.*, Simms, *supra* note 16, at 835-36.

142. *See, e.g.*, Simms, *supra* note 16, 835-36; UMBREIT, *supra* note 5, at 36.

143. Simms, *supra* note 16, at 835-36.

minimize these concerns. This preparation may take a long time, and may require multiple visits, questionnaires and even twelve-step programs for offenders.¹⁴⁴ Thus, with careful case screening and preparation, most problems can be prevented and the experience will be more beneficial. Finally, even when VOM is applicable, there are other concerns that should be addressed, including inequality of the parties and other concerns specific to the victim and to the offender.¹⁴⁵

B. Unequal Parties

One concern of VOM is the unequal positions of the victim and offender. Mediation generally requires parties to have equal bargaining power,¹⁴⁶ but criminal mediation is prefaced with one party's established guilt and the other party as victim.¹⁴⁷ This power imbalance creates concerns that mediation will not be fair.¹⁴⁸ However, because the goal of mediation in capital cases is not to determine guilt or innocence,¹⁴⁹ the parties remain equal for the purposes of the mediation; which is to engage in dialogue not to arrive at a sentence or resolution. Further, VOM post-sentence differs from traditional mediation in that the focus of mediation is

144. Typical preparation for the Texas Victim-Offender Mediation/Dialogue (VOM/D) Program lasts about a year. Umbreit & Vos, *supra* note 131, at 73. The program was applied to capital cases and preparation involved elaborate written materials. *Id.* Victims and offenders reported the materials were helpful in their own healing as well as in assisting them with preparing what they wanted to say in the mediation session. *Id.*

145. Another concern implementing VOM is the additional cost when capital punishment is already very costly. A 2003 study in Kansas found capital cases to be 70% more costly than non-capital cases. Amnesty International USA, Cost of Death Penalty Fact Sheet, http://www.amnestyusa.org/Fact_Sheets/Cost_of_the_Death_Penalty/page.do?id=1101084&n1=3&n2=28&n3=99 (last visited Feb 20, 2008). In Tennessee, capital cases were forty-eight percent more expensive than life without parole cases in 2004, and in California capital cases cost \$114 million per year more than life without parole. *Id.* However, most costs occur pre and during trial, not in post-conviction proceedings. *Id.* Studies have shown the costs of VOM relative to traditional correctional programs are hard to assess. Some statistics indicate cost may be lower, but VOM is relatively new, and it is difficult to predict the result of implementation on a scale "large enough to impact overall program administration." *Id.* Capital cases are different because they do not offer the opportunity to circumvent prosecution. While little solid data exists on the actual cost of using skilled mediators in capital cases, it should be noted that it would likely not be used as often as with VOM used with lesser offenses. Capital crimes are not as common, and cases must be carefully screened to ensure both parties are capable of mediation. VOM in capital cases will likely not be as frequent, and there will not be mandatory application in all capital cases. Further research will need to be conducted to determine how costly VOM will be in capital cases.

146. Gabriel H. Teninbaum, *Easing the Burden: Mediating Misdemeanor Criminal Matters*, 62 DISP. RESOL. J. 63, 64 (2007).

147. UMBREIT, *supra* note 5, at xl.

148. Teninbaum, *supra* note 146, at 64.

149. UMBREIT, *supra* note 5, at xl.

on the dialogue, rather than achieving a resolution.¹⁵⁰ For these reasons, and with a trained mediator present to ensure fairness, the status of the parties will not create inequality in use of VOM.

C. *Concerns for the Victim*

Specific concerns arise with regard to victims in VOM. Re-victimization may occur if the victim is not adequately prepared for mediation.¹⁵¹ Victims of serious or violent crimes, effectively all capital crimes, are especially vulnerable.¹⁵² Thus, sufficient time must be given to victims, to ensure they are ready for dialogue.¹⁵³ Further, if care is not taken to ensure participation is voluntary, victims may feel coerced into participation, “exacerbate[ing] the loss of control already felt by people who have been victimized by crimes.”¹⁵⁴ Finally, special care must be taken during dialogue to ensure that the victim is comfortable and that dialogue is constructive.¹⁵⁵ In a situation where a victim of a violent crime meets the offender, there may always be slight risks. However, ensuring a skilled and trained mediator is facilitating the conversation, effectively screening cases, and adequately preparing both the victim and the offender will minimize these risks considerably.¹⁵⁶

D. *Concerns for the Offender*

Finally, there are specific concerns for the offender with use of VOM. Often times VOM is used as an incentive for an offender to receive a lighter sentence, should the offender agree to participate.¹⁵⁷ Thus, VOM prior to sentencing may create a danger of coercion by forcing the offender to participate, or of insincerity if an offender only participates to achieve a

150. *Id.* at xl.

151. Umbreit et al., *supra* note 18, at 298-99 (showing some examples of bad results when victims were hurriedly introduced to VOM without preparation, and where mediators were not sufficiently trained).

152. Wellikoff, *supra* note 7.

153. *See supra* note 61 (the case must “ripen” before VOM is appropriate with violent crimes).

154. Wellikoff, *supra* note 7 (quoting *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, part 1 (Aug. 1994) <http://vorp.com/articles/abaendors.html> (last visited Oct. 21, 2008)) (internal quotations omitted).

155. UMBREIT, *supra* note 5, at 19-33.

156. *Id.* at 19-33.

157. *See Simms, supra* note 16, at 797, 830.

lighter sentence.¹⁵⁸ However, this issue is obviated if VOM takes place after sentencing. Use of VOM after sentencing may, in fact, help to ensure that the offender's participation is voluntary and dialogue is truthful because the offender receives no adjudicatory benefit.

Further concerns for the offender are confidentiality and the Fifth Amendment right against self-incrimination. The Uniform Mediation Act (UMA) permits disclosure of information discussed during mediation in criminal cases if no resolution is reached at mediation.¹⁵⁹ Thus, in the few states that follow the UMA, a defendant may provide information during mediation that could be permitted to enter into evidence in later proceedings.¹⁶⁰ Conversely, the ABA has recommended that any VOM program should require information discovered in mediation to not be admissible in later criminal proceedings.¹⁶¹ Thus, depending on the jurisdiction, there may be a danger of offending Fifth Amendment rights in cases where VOM takes place pre-charge, pre-sentence, or within the sentencing stage.¹⁶² However, if VOM in capital cases takes place post-sentence, there is less concern that Fifth Amendment issues will arise. Confidentiality, and use of statements in further appellate or habeas proceedings may still be a concern, however, and the mediator should be aware of such laws in the state and should discuss any issues with the offender before mediation.¹⁶³

158. *Id.* at 797, 830.

159. Teninbaum, *supra* note 146, at 65.

160. *Id.* at 65.

161. American Bar Association, *supra* note 42.

162. Simms, *supra* note 16, at 834.

163. Capital defendants are guaranteed the right to their first appeal, which is usually before the highest court in the state. ROLANDO DEL CARMEN ET AL., THE DEATH PENALTY: CONSTITUTIONAL ISSUES, COMMENTARIES AND CASE BRIEFS 243 (2005). After exhausting state and federal appellate procedures, capital defendants have a right to a writ of habeas corpus, which is a civil claim against the state alleging the offender is unconstitutionally or illegally confined. *Id.* at 244. Thus, proceedings for capital offenders may continue for up to thirty years. Statements made in mediation could possibly be introduced at a capital offender's later appellate or habeas proceeding. Some have argued that the nine states that have adopted the UMA should amend the confidentiality exception for criminal cases. See Teninbaum, *supra* note 146, at 65. However, other states have strict confidentiality agreements to protect offenders who participate in VOM. *Id.* For a discussion on why the UMA's qualified privilege is unconstitutional as applied in criminal proceedings, see Shawn P. Davisson, *Balancing the Scales of "Confidential" Justice: Civil Mediation Privileged in The Criminal Arena – Indispensable, Impracticable or Merely Unconstitutional?*, 38 MCGEORGE L. REV. 679 (2007).

VII. CONCLUSION

The story of Benjamin Graves and Ellen Smithson did not end after the death sentence. Ellen and Benjamin met with a mediator through Texas's Victim-Offender Mediation/Dialogue (VOM/D) program, where Ellen found the ability to forgive Benjamin.¹⁶⁴ Ellen learned of Benjamin's history of childhood physical and sexual abuse, as well as his involvement with drugs and alcohol.¹⁶⁵ Benjamin was relieved that he had not "robbed" Ellen of the chance to bear grandchildren when he learned that she had other children.¹⁶⁶ Benjamin likewise faced the reality that an entire family had been affected by his crime, not only the victim he murdered.¹⁶⁷ Ellen was surprised to find her view of Benjamin had changed; no longer was he "the man who murdered [her] daughter," but a person.¹⁶⁸ She reported that the "heaviness" left her heart, she was relieved to hear Benjamin take responsibility, and her negative feeling diminished.¹⁶⁹ In her own words:

When I first decided I was going [to be] a witness [at Benjamin's execution], it's because I wanted my face to be the last thing that he saw, to be aware that he's where he is because of what he did to my daughter. And now I want him to see his victim's mother who has forgiven him.¹⁷⁰

While forgiveness is not necessarily the goal of VOM, this is one example of the healing that dialogue can provide. Capital punishment may seem contradictory to restorative justice, but not applying VOM in cases with inmates who are awaiting execution will "strip those most directly affected by the horror of the crime of the opportunity to find some degree of meaning, healing and closure: a fundamental pillar of restorative justice."¹⁷¹ Programs based on restorative justice theories have been implemented in numerous areas of the criminal justice system, but not often enough in capital cases. Application of VOM in capital cases will bring healing to the victim, the offender and the community, in cases where the greatest harm is caused.

164. Umbreit et al., *supra* note 1, at 357.

165. *Id.* at 356.

166. *Id.* at 366.

167. *Id.* at 366.

168. *Id.* at 369.

169. *Id.* at 368-69.

170. Umbreit et al., *supra* note 1, at 365.

171. *Id.* at 352 (citation omitted).

Implementation of victim-offender mediation programs in capital cases should be promoted and encouraged as an option after sentencing, as restoring affected parties is a necessary element of justice. Capital cases involve unique concerns and issues, but like all other crimes, they not only involve an offender's breach of the law against the state, but a rupture within the community. Punishment of the offender alone is not sufficient when the criminal act does not affect the offender alone. "Death *is* different,"¹⁷² but precisely for this reason, capital cases require application of restorative techniques.

172. Ford v. Wainright, 477 U.S. 399, 411 (1986) (famous quote of Thurgood Marshall, discussing the heightened standard of reliability of fact-finding procedures in death penalty cases) (emphasis added).