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### Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration, 68 UCLA L. Rev. Discourse 302 (2020)

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# U.C.L.A. Law Review

## Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration

Hugh M. Mundy

### ABSTRACT

Laws enacting victim impact statements flourished in the 1980s and 90s, a period defined by draconian crime control measures and mass incarceration. During an emerging era of decarceration, the effect of victim impact statements on excessive prison sentences has been largely overlooked. Reshaping retributive laws governing victim impact statements is essential to comprehensive sentencing reform. Victims' rights laws must integrate meaningful opportunities for victim-offender reconciliation. First, victim-offender reconciliation is integral to landmark revisions to the Model Penal Code geared to reduce prison populations. Further, victim-offender reconciliation is consistent with judicial precedent and recent legislative trends as to the purpose and admissibility of victim impact statements. Finally, victim-offender reconciliation embraces the public policy goals of victims' rights laws: to restore dignity to victims, to educate defendants about the human consequences of their crime, and to fully inform courts about the crimes' societal harms.

### AUTHOR

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## INTRODUCTION

On November 15, 2019, Mark Gibbs<sup>1</sup> appeared in a Jonesboro, Illinois courthouse to face sentencing for the murders of his parents, Richie and Betty.<sup>2</sup> The sentencing hearing was nearly thirty years in the making. Mark committed the crimes in 1992 as a high school sophomore.<sup>3</sup> Though still a child, he was tried as an adult by the Union County State’s Attorney.<sup>4</sup> Mark confessed and pleaded guilty, triggering an automatic term of life in prison without the possibility of parole.<sup>5</sup>

Mark’s opportunity for a sentencing hearing arose by virtue of *Miller v. Alabama*, a 2012 U.S. Supreme Court case declaring unconstitutional mandatory life sentences for juveniles convicted of crimes.<sup>6</sup> In its ruling, the Court stressed that juvenile life sentences foreclose essential sentencing considerations such as the child’s cognitive development at the time of the crime, his “family and home environment,” and “the possibility of rehabilitation.”<sup>7</sup> After weighing factors unique to childhood, a court may reimpose a sentence of life imprisonment only on the “rare” juvenile convicted of an offense—those deemed “irreparabl[y] corrupt[ed]” or “irretrievably depraved.”<sup>8</sup>

At the sentencing hearing, Melissa Mahabir, a forensic social worker, testified that Richie Gibbs battled alcoholism and physically abused Mark and Betty.<sup>9</sup> Richie abused Mark due, in part, to Mark’s struggles in school.<sup>10</sup> Mahabir characterized the violence as a “loop”—“[Mark] got poor grades because of his home life” and “when he wasn’t able to perform in school and he had bad grades, that increased the violence that he received.”<sup>11</sup> Betty was unable to adequately care for Mark as “she was also getting abused in the

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1. I, along with lawyers and students from the UIC John Marshall Law School Pro Bono Litigation Clinic, represented Mark Gibbs at his sentencing hearing.
  2. Transcript of Record at 1, 76, *People v. Gibbs*, Nos. 1992-CF-4, 1992-CF-5 (Ill. Cir. Ct. Nov. 15, 2019) [hereinafter *Gibbs Sentencing Transcript One*].
  3. Petition for Post-Conviction Relief at 1, *People v. Gibbs*, Nos. 1992-CF-4, 1992-CF-5 (Ill. Cir. Ct. July 22, 2018).
  4. *Id.* at 1–2.
  5. *Gibbs Sentencing Transcript One*, *supra* note 2, at 14–15.
  6. *Miller v. Alabama*, 567 U.S. 460 (2012).
  7. *Id.* at 477–78.
  8. *Id.* at 479–80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)); *id.* at 490 (Breyer, J., concurring).
  9. *Gibbs Sentencing Transcript One*, *supra* note 2, at 2, 115, 136–37.
  10. *Id.* at 187–88.
  11. *Id.*

home and suffered domestic violence.”<sup>12</sup> Mahabir viewed the crimes as trauma-induced and spurred by adolescent impulse.<sup>13</sup> “Mark wanted the pain to end,” she testified, “[but] he didn’t see a way out.”<sup>14</sup>

Mahabir also described her extensive review of Mark’s prison records and interviews with correctional officers.<sup>15</sup> Through her investigation, she discovered that Mark harbors “consistently deep remorse” for the crimes and “[has] tried to live a life of integrity” in prison.<sup>16</sup> Mahabir was sanguine about Mark’s postrelease prospects, remarking, “[e]ven the correctional officers . . . believe that he should be [released].”<sup>17</sup> She concluded, “[o]ne of them said, ‘He could live down the street from me.’”<sup>18</sup>

Despite the mitigating evidence, prosecutors pushed for another life sentence.<sup>19</sup> With support and guidance from Kim Peppers, a victim advocate employed by the Union County prosecutor, eight members of Richie Gibbs’s family gave victim impact statements at the sentencing hearing.<sup>20</sup> Among them, Gary Gibbs, Richie’s brother, painted a macabre crime scene: Richie was “laying on the floor . . . cold,” Betty was “blowing bubbles in her own blood.”<sup>21</sup> Wendy Charles, a cousin, claimed Mark had “quite a giggle in his talk” when he telephoned her family’s home immediately after the shootings.<sup>22</sup> Linda Gibbs Samuels, an aunt, cast Mark’s act as “cold, calculated evil” and alleged that when she visited him in jail, “the first words out of his mouth was [sic], ‘Surprise, surprise.’”<sup>23</sup> The victim advocate herself read aloud two statements on behalf of Richie’s family members.<sup>24</sup> None of the victims’ unsworn statements were otherwise corroborated by evidence in the record.<sup>25</sup> All implored the judge to impose a life sentence.<sup>26</sup>

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12. *See id.* at 177.

13. *Id.* at 139–42.

14. *Id.* at 140.

15. *Id.* at 142–43.

16. *Id.* at 142.

17. *Id.* at 143.

18. *Id.*

19. *See* Transcript of Record at 69, *People v. Gibbs*, Nos. 1992-CF-4, 1992-CF-5 (Ill. Cir. Ct. Nov. 22, 2019) [hereinafter *Gibbs Sentencing Transcript Two*].

20. *See* *Gibbs Sentencing Transcript One*, *supra* note 2, at 68.

21. *Id.*

22. *Id.* at 69, 72.

23. *Id.* at 76–77.

24. *Id.* at 83, 85.

25. *Id.* at 60.

26. *See id.* at 67, 76, 80.

Prosecutors never contacted Betty Gibbs's family about the sentencing hearing.<sup>27</sup> Instead, her survivors learned about their right to give victim impact statements from Mahabir, the mitigation specialist. At the hearing, Donna Gibbs, Betty's younger sister, recalled a "very close" relationship with Betty.<sup>28</sup> Donna described her sister as "a Christian [who] would have supported Mark fully and been there for what he needed."<sup>29</sup> She wrote, "I believe that Mark knows what he did was wrong. He is my nephew, and I love him, and I will be here for him like my sister would have wanted. I would love for him to come home."<sup>30</sup>

Etha Anderson, Betty's other sister, also offered a statement.<sup>31</sup> She "truly believe[d]" Mark's confession on the night of the shootings signaled "the beginning of his remorse."<sup>32</sup> Etha remembered that Mark "many years ago in prison, . . . told [her] he [had] confessed his sins to God."<sup>33</sup> She concluded, "I think he will do fine once released. I'm very grateful Mark is having this opportunity to get an out-of-prison date. I hope it is sooner [rather] than later."<sup>34</sup> In a final statement, Mary McWhorter, Betty's mother, told the court:

I lost my daughter and then my grandson. This whole situation has been extremely painful, and the prosecutor does not care about my story. The victim advocate has never reached out to me or my daughters, and we can't understand why. We are victims, but we have forgiven Mark. Our faith tells us to forgive. . . .

Mark is the last piece of my daughter that I have left. I would give anything in the world to have him out while I'm still here.<sup>35</sup>

Jeffrey Farris, the sentencing judge, noted that he was "saddened" by the prosecutor's failure to contact Betty's family but "pleased" that "[they] were [still] able to make [their] statements."<sup>36</sup> Farris, a career prosecutor before his

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27. *Id.* at 213.

28. *Id.* at 205.

29. *Id.* at 206–07.

30. *Id.* at 207.

31. *Id.*

32. *Id.* at 208.

33. *Id.* at 211.

34. *Id.*

35. *Id.* at 211, 213–14; *see also* Susan A. Bandes, *What Are Victim-Impact Statements For?*, ATLANTIC (July 23, 2016), <https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443> [<https://perma.cc/XC3T-N9LL>] (stating that "[v]ictims generally draft statements with the help of the prosecutor's office, whose goals are not always the victim's goals. The conflict between the victim and the prosecution is especially acute for murder victims' families").

36. Gibbs Sentencing Transcript Two, *supra* note 19, at 1, 107–09.

election to the bench,<sup>37</sup> stressed his belief in “strict compliance” with the Illinois Victims Bill of Rights but took no corrective action against the State.<sup>38</sup> Indeed, moments before recondemning Mark to natural life in prison, Farris expressed incredulity at the notion of victim-offender reconciliation.<sup>39</sup> He pondered Mary’s “forgiving heart” as “an enigma, a conundrum, a paradox, to most of us” and admitted, “I cannot unravel that enigma or that paradox or that conundrum. Folks, it doesn’t add up to me.”<sup>40</sup>

The prosecutor’s strategy to deny Betty Gibbs’s family their rights as victims violated Illinois law.<sup>41</sup> The Illinois Victims Bill of Rights provides for “the right to [receive] timely notification of” and “to be heard” at sentencing hearings, the right “to communicate with the prosecution” and have “an advocate [present]” at sentencing hearings, and “[t]he right to be treated with fairness” throughout the judicial process.<sup>42</sup> Illinois statutes afford comparable protections, broadly defining a “victim” and imposing no restrictions on a statement’s content.<sup>43</sup> Further, the law includes a mandate that “victim advocate personnel” shall contact victims and lend support to “deal with trauma, loss and grief.”<sup>44</sup> Yet Farris looked past the State’s breach, save for his passing condolence to Betty’s family.<sup>45</sup>

In light of Farris’s professed incapacity to discern the “forgiving heart,” one assumes he would not have been moved had the victim-witness coordinator amassed victims’ pleas for mercy at the expense of impact

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37. Judge Jeffrey Farris had been a prosecutor from 1992 until he was appointed Circuit Judge in 2015. Press Release, S. Ill. Univ. Sch. of L., Jeffery Farris, Class of '89, Appointed Circuit Judge (Jan. 9, 2015), <https://law.siu.edu/news/2015/01-09-2015.html> [<https://law.siu.edu/news/2015/01-09-2015.html>].

38. Gibbs Sentencing Transcript Two, *supra* note 19, at 108–09; *see also* 725 ILL. COMP. STAT. 120/4.5(c-5)(5)(A) (2020) (explaining that a court may award “appropriate relief” to victims denied their right to be heard). While a defendant cannot prevail on appeal of a violation of victims’ rights laws, the prohibition does not alleviate the trial court’s responsibility to exercise appropriate discretion at sentencing. *People v. Richardson*, 751 N.E.2d 1104, 1107–08 (Ill. 2001). Plus, the trial court’s failure to fairly weigh evidence presented in aggravation and mitigation can violate due process. *Cf. People v. Hestand*, 838 N.E.2d 318, 325 (Ill. App. 4th 2005) (holding that the admission of a victim-impact statement did not violate due process, in part because of evidence of aggravation and mitigation).

39. Gibbs Sentencing Transcript Two, *supra* note 19, at 135, 137 (“I do believe that . . . [Mark’s] acts do demonstrate to me clearly . . . irretrievable depravity, whatever that definition is, or permanent incorrigibility.”).

40. *Id.* at 135.

41. ILL. CONST. art. 1, § 8.1; 725 ILL. COMP. STAT. 120/6 (2020).

42. ILL. CONST. art. 1 § 8.1(a)(1), (a)(3), (a)(4), (a)(5), (a)(11).

43. 725 ILL. COMP. STAT. 120/4.5 (2020).

44. *Id.* § (b)(3.5).

45. *Id.* § (c)(5)(A).

statements seeking vengeance.<sup>46</sup> Nonetheless, his muted response reveals a different paradox—that is, the broad language of access, inclusion, and empowerment for all victims under the Illinois law versus the absence of any meaningful inroads for those seeking reconciliation.<sup>47</sup> The omission is not atypical among states—and can be traced to the origins of victim impact statements.<sup>48</sup>

Laws enacting victim impact statements flourished in the 1980s and 90s, a period defined by draconian crime control measures and mass incarceration.<sup>49</sup> In effect, if not in intention, the laws suppress the voices of victims who forgive their assailants.<sup>50</sup> Presently, though, we are in the midst of a reckoning with the failed law enforcement strategies of the past four decades.<sup>51</sup> Essential to criminal justice reform is deescalating punitive sentencing practices.<sup>52</sup> To that end, advocates and lawmakers have rightly focused on reforms to mandatory minimum sentences, so-called “three strikes” laws, and onerous sentencing guidelines.<sup>53</sup> Still, in an emerging era of decarceration, the effect of victim impact statements on excessive prison sentences has been largely overlooked.<sup>54</sup>

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46. Gibbs Sentencing Transcript Two, *supra* note 19, at 135.

47. See ILL. CONST. art. 1, § 8.1; see also 725 ILL. COMP. STAT. 120/6(b) (2020) (stating only a single reference to statements offered in mitigation).

48. MODEL PENAL CODE: SENT’G § 6.14 cmt. a (AM. L. INST., Tentative Draft No. 4, 2016) [hereinafter MODEL PENAL CODE: SENT’G, Tentative Draft 4] (noting that no U.S. jurisdiction offers a comprehensive statutory structure for restorative justice initiatives).

49. See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/4P2U-EAAA>] (explaining that the prison population “truly exploded during President Ronald Reagan’s administration” and continued to grow as a result of the Violent Crime Control and Law Enforcement Act of 1994); see also Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL’Y PRAC. 77, 77–78 (2015) (noting the continued increase in incarceration rates since the 1990s even while crime rates have declined).

50. See Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims’ Rights Act*, 26 YALE L. & POL’Y REV. 431, 473 (2008) (discussing the “often-inaccurate dichotomy of the innocent and vengeful victim seeking a harsh punishment for the reprehensible defendant” and the relevance of “circumstances at sentencing where victims express statements of mercy [or] forgiveness”).

51. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/KRG6-TFFQ>].

52. *Id.* (stating that “[c]riminal justice reform starts with sentencing reform”).

53. *Id.*; see also Sliva & Lambert, *supra* note 49, at 78 (noting the “shift in response after a decades-long focus on punitive sentencing” as reflected in reform to drug sentencing policies).

54. See Jill Lepore, *The Rise of the Victims’-Rights Movement*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>

As I propose in this Article, reshaping retributive laws governing victim impact statements is essential to comprehensive sentencing reform.<sup>55</sup> Specifically, in both structure and substance, victims' rights laws must integrate meaningful opportunities for victim-offender reconciliation.<sup>56</sup> A foundational restorative justice technique, victim-offender reconciliation—also referred to as “mediation” or “conferencing”—brings together a victim and an offender in a facilitator-guided dialogue.<sup>57</sup> First, victim-offender reconciliation is integral to landmark revisions to the Model Penal Code geared to reduce prison populations. Further, victim-offender reconciliation is consistent with Supreme Court precedent and recent legislative trends regarding the purpose and admissibility of victim impact statements. Finally, victim-offender reconciliation embraces the fundamental public policy goals of victims' rights laws: to empower and restore dignity to victims, to educate defendants about the human consequences of their crime, and to fully inform courts about the crimes' societal harms.<sup>58</sup>

In Part I, I examine the origins of state victims' rights laws in the era of mass incarceration. In Part II, I explore recent guidance in the Model Penal Code proposing principles for presentencing victim-offender reconciliation. In Part III, I survey state victims' rights laws to see how, if at all, the laws contemplate presentence victim-offender reconciliation. In Part IV, I construct a legal and public policy framework in support of victim-offender reconciliation. Finally, in Part V, I offer a proposal to strengthen opportunities for presentencing

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- [https://perma.cc/M352-DK9G] (explaining that, “[i]n a national conversation about criminal justice reform, the Reagan-to-Clinton-era guidelines for federal sentencing have been questioned, but the gains of the victims' rights movement are generally taken for granted”).
55. Retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases. In contrast, restorative theory argues that “what truly vindicates [victims] is acknowledgement of [their] harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.” HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 59 (2002). For a broader discussion, see Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 269–71 (2005).
  56. See Umbreit et al., *supra* note 55, at 269; see also Sliva & Lambert, *supra* note 49, at 79 (listing “face-to-face” victim-offender dialogues as a common restorative justice practice).
  57. See Umbreit et al., *supra* note 55. It should be noted that victim-offender dialogue long predates the U.S. criminal justice system and is traced to Native American peace circles, Native Hawaiian *ho 'oponopono*, and Tswana *kgotlas*. See RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH 13 (Murphy & Seng eds., 2015).
  58. See Giannini, *supra* note 50, at 444; Sliva & Lambert, *supra* note 49, at 77–78 (proposing restorative justice practices as a method to address the “[v]ictims' critical needs for acknowledgement, information, privacy, safety, and involvement” which “remain unmet by an adversarial justice system”).

victim-offender reconciliation and to foster equal access to the victims' statement processes under state victims' rights laws.

### I. THE EMERGENCE OF VICTIMS' RIGHTS LAWS IN THE MASS INCARCERATION ERA

On June 27, 1987, police officers discovered the bodies of Charisse Christopher and her two-year-old daughter, Lacie Jo, stabbed to death on the kitchen floor of the family's Millington, Tennessee apartment.<sup>59</sup> Christopher's three-year-old son, Nicholas, lay nearby bleeding profusely.<sup>60</sup> Charisse was stabbed over eighty times.<sup>61</sup> Lacie Jo sustained fatal wounds to her chest and abdomen.<sup>62</sup> After seven hours of surgery, Nicholas "miraculously" survived.<sup>63</sup>

Shortly after the attack, a police officer saw Pervis Payne running from the building "so covered with blood that he appeared to be 'sweating blood.'"<sup>64</sup> Police later located Payne hiding in an ex-girlfriend's attic.<sup>65</sup> He had scratches on his body and blood on his clothing matching the victims' blood types.<sup>66</sup> An overnight bag containing a bloodstained t-shirt was found in a nearby dumpster.<sup>67</sup> Investigators matched Payne's fingerprints to those lifted from three cans of malt liquor on a table near the bodies.<sup>68</sup>

A jury convicted Payne on two counts of first-degree murder and one count of assault with intent to commit murder.<sup>69</sup> Prosecutors sought the death penalty.<sup>70</sup> At the sentencing hearing, prosecutors asked Mary Zvolanek, Charisse's mother, how the crime affected Nicholas.<sup>71</sup> She responded:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many

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59. Payne v. Tennessee, 501 U.S. 808, 812–13 (1991).

60. *Id.* at 812.

61. *Id.* at 813.

62. *Id.*

63. *Id.* at 812.

64. *Id.*

65. *Id.* at 813.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 811.

70. *Id.* at 815.

71. *Id.* at 814.

times during the week and asks me, Grandmama, do you miss my Lacie[?] And I tell him yes. He says, I'm worried about my Lacie.<sup>72</sup>

Prosecutors highlighted Zvolanek's testimony in their closing arguments, telling jurors that Nicholas would never hear his mother "sing him a lullaby" or "watch cartoons" with his sister again.<sup>73</sup> The jury sentenced Payne to death.<sup>74</sup>

On appeal, Payne contended that Zvolanek's testimony violated his Eighth Amendment right against the "arbitrary" imposition of the death penalty.<sup>75</sup> He relied on the U.S. Supreme Court's reasoning in *Booth v. Maryland* that victim's statements "may be wholly unrelated" to the defendant's blameworthiness and "could divert the jury's attention away" from the relevant consideration of the defendant's own background.<sup>76</sup> The Tennessee Supreme Court agreed that Zvolanek's testimony was "technically irrelevant," but concluded that the error was harmless.<sup>77</sup>

After granting *certiorari*, the Supreme Court ruled in a 5–4 decision that Zvolanek's statements were relevant to the jury's consideration of Payne's sentence.<sup>78</sup> In so holding, the Court all but inverted *Booth's* logic. Writing for the majority, Chief Justice Rehnquist opined that "like the murderer . . . so to the victim is an individual whose death represents a unique loss to society and in particular to his family."<sup>79</sup> Thus, *Booth's* wont to turn the victim into a "faceless stranger" deprives the prosecution from presenting relevant evidence to a jury determining a capital defendant's fate.<sup>80</sup> After the Court's ruling affirming Payne's conviction, Zvolanek told a reporter, "[i]t's four years ago today that this happened, and we're still living with it. And in a way, as the years go by, it just gets harder to deal with."<sup>81</sup>

The advent of victim impact statements predates *Payne* by over a decade.<sup>82</sup> The statements became a part of the state sentencing lexicon in the

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72. *Id.* at 814–15.

73. *Id.* at 816.

74. *Id.*

75. *Id.*

76. *Booth v. Maryland*, 482 U.S. 496, 504–05 (1987).

77. *Payne*, 501 U.S. at 816–17.

78. *Id.* at 825.

79. *Id.*

80. *Id.* (citing *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

81. *High Court Ruling Comforts Family Torn By 2 Murders*, N.Y. TIMES, June 28, 1991, at A15.

82. Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 349 (2009); see Lepore, *supra* note 54 (explaining that "[t]he movement usually dates its origins to 1975, when, with the aid of the Heritage Foundation, a lawyer named Frank G. Carrington published a book called 'The Victims'"); see also OFF. OF VICTIMS CRIMES, U.S. DEP'T OF JUST., NEW DIRECTIONS FROM

early 1980s.<sup>83</sup> In 1982, President Ronald Reagan commissioned a task force on victims of crime.<sup>84</sup> In the report produced by the 1982 Presidential Task Force on Crime Victims, the chairman's introductory statement portrayed violence run amok—"[e]very 23 minutes a person is murdered [and] [e]very six minutes a woman is raped"—and slammed the "neglect" of crime victims as "a national disgrace."<sup>85</sup> The first chapter imagined a brutal rape after which the "terrified" and "powerless" female victim is mistreated by the justice system at every turn, taunted by her "smirking" attacker in court, and ultimately denied an opportunity to speak to the judge about her trauma.<sup>86</sup>

The Task Force highlighted that "[v]ictims, no less than defendants, are entitled to have their views considered" at sentencing hearings.<sup>87</sup> To that end, the report encouraged courts to allow victims to be heard at hearings and for legislatures to enact laws "requiring victim impact statements."<sup>88</sup> On its face, the language establishing the content of victim impact statements was not overtly retributive.<sup>89</sup> Rather, the Task Force recommended the sentencing judge's consideration "of all financial, social, psychological, and medical effects on the crime victim."<sup>90</sup> The information was intended to promote a "just penalty" and "fair adjudication of the case" for offender and victim alike.<sup>91</sup> Perhaps owing to the televangelist Pat Robertson's membership on the Task Force, the report also called on religious communities to develop training "on ways to restore [victims'] spiritual and mental health."<sup>92</sup> As part of the victims' healing process, the report encouraged clergy to "listen and pray and give counsel" in addition to offering emergency food, housing, and clothing.<sup>93</sup>

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THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 3 (1997) (noting that, in 1980, Wisconsin became the first state to enact a bill of rights for crime victims).

83. Roberts, *supra* note 82.

84. See LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982); see Victim & Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (providing for victim impact statements under federal law as part of the Victim and Witness Protection Act of 1982).

85. HERRINGTON ET AL., *supra* note 84, at vi–vii.

86. *Id.* at 4, 7, 11.

87. *Id.* at 76.

88. *Id.* at 33, 76–78.

89. See *id.* at 33.

90. *Id.*

91. *Id.* at 78, 80.

92. *Id.* at 95.

93. *Id.* at 96.

In the context of the report's stark depiction of victimhood, however, the victim impact statement was, by design, a prosecutorial cudgel.<sup>94</sup> For his part, Reagan touted the report as a panacea for a collapsing criminal justice system.<sup>95</sup> In a speech to several thousand cheering police officers, Reagan expressed regret that he had not authorized more executions as governor of California and offered a "detailed account of [his] hardline law-enforcement philosophy."<sup>96</sup> That philosophy, as embraced and advanced by federal and state lawmakers, ushered in a decades-long period of mass incarceration.<sup>97</sup>

The Task Force also recommended an amendment to the Bill of Rights to the U.S. Constitution, entitling "the victim, in every criminal prosecution [to] the right to be present and to be heard at all critical stages of judicial proceedings."<sup>98</sup> Though the U.S. Congress never ratified the amendment, the recommendation gained considerable traction in state legislatures.<sup>99</sup> Beginning in 1982, thirty-two states passed victim-oriented constitutional amendments.<sup>100</sup> Twenty-two years after the Task Force's report, its impact still resonated. In 2004, proponents of a federal constitutional amendment were successful in winning the passage of the Crime Victims' Rights Act (CVRA), a comprehensive list of statutory protections—including a victim's right to be heard at any hearing involving release, plea, or sentencing.<sup>101</sup>

Today, all states allow victims to make a statement at sentencing hearings by way of statute, constitutional amendment, or both.<sup>102</sup> Judicial interpretation of the laws invariably focuses on the harm suffered by the victims at the hand of the defendant.<sup>103</sup> Popular perception—largely driven by prosecutors and so-called victims' rights advocates—predictably follows

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94. The retributive intent of victim impact statements is supported by the other law enforcement-oriented recommendations by the task force, including severe restrictions on bail, increases to mandatory minimum sentences, and parole abolishment. *Id.* at 17–18, 22.

95. Howell Raines, *Reagan Proposes Revisions of Laws to Combat Crime*, N.Y. TIMES, Sept. 29, 1981, at A1.

96. *Id.*

97. See Cullen, *supra* note 49.

98. HERRINGTON ET AL., *supra* note 84, at 114.

99. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 614 (2009).

100. *Id.*

101. 18 U.S.C. § 3771(a)(4).

102. Roberts, *supra* note 82, at 349.

103. See, e.g., *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002) (noting that victim impact statements are "designed to remind the jury that murder has foreseeable consequences to . . . family members and friends who also suffer harm from murderous conduct").

suit.<sup>104</sup> In his 2009 “defense” of victim impact statements, longtime proponent Paul Cassell offered a “real world example” of a statement.<sup>105</sup> Cassell selected a bereaved parent’s impassioned plea for the “maximum sentence” for a defendant who unlawfully sold a firearm used to murder “a young woman in the prime of her life” in a mass shooting.<sup>106</sup> While Cassell’s endorsement of victim impact statements cites their therapeutic value, he views catharsis through a lens of retribution.<sup>107</sup> In turn, a statement’s bottom-line utility is that “[p]roper punishment . . . [is] meted out” by a sentencing court.<sup>108</sup>

Cassell’s perspective, when coupled with the history behind victims’ rights laws, tells two fundamental truths. First, victim impact statements were created to increase prison sentences.<sup>109</sup> In turn, victims are effectively adjuncts to the prosecution. With those truths in mind, victims’ rights laws have proved understandably resistant to the language of reconciliation. The still-nascent movement toward sentencing reform, including watershed legislative guidance in the Model Penal Code, may turn the legislative tide.

## II. THE AMERICAN LAW INSTITUTE WEIGHS IN ON VICTIM-OFFENDER RECONCILIATION

In 2001, the American Law Institute (ALI) launched a project to consider new sentencing provisions in the Model Penal Code.<sup>110</sup> Over the next fifteen years, the sentencing project resulted in several additions to the Code, including updated language as to the general purposes of the sentencing

104. The National Institute of Corrections, an agency of the U.S. Department of Justice, provides three samples of victim impact statements as a reference for crime victims. All three samples involve sentencings for violent crimes, including sexual abuse and domestic assault, at which the victim requested the maximum sentence. *Sample Victim Impact Statements*, NAT’L INST. CORR., <https://nicic.gov/sample-victim-impact-statements> [<https://perma.cc/9ERA-7ZEQ>] (last visited Aug. 26, 2020); see Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques Into Chicago’s Juvenile Justice System*, 104 J. CRIM. L. & CRIMINOLOGY 635, 655 (2014) (stating that “it may be hard to convince communities that restorative justice practices properly address the goals of a criminal justice system” as “the American justice system has embraced a punitive [sentencing] paradigm”).

105. Cassell, *supra* note 99, at 616.

106. *Id.* at 616–18.

107. *Id.* at 622 (“I got to tell my step-father what he did to me. Now I can get on with my life.”).

108. *Id.* at 632.

109. *Cf.* Lepore, *supra* note 54 (explaining that “[i]n both capital and non-capital cases, victim-impact evidence has been shown to affect sentencing” and arguing “that’s why prosecutors introduce it”).

110. MODEL PENAL CODE: SENT’G, Tentative Draft 4, *supra* note 48, at xiii.

system, victim compensation and restitution, and consideration of criminal history in sentencing guidelines.<sup>111</sup> As the project neared completion in 2016, its contributors proposed a new section entitled “Restorative Justice Practices.”<sup>112</sup> The section set forth “principles of legislation to guide the development of laws regulating the formal use of restorative justice practices within criminal cases.”<sup>113</sup> It stopped short of “attempt[ing] to legislate” restorative justice practices but—with an aspirational bent—“encourage[d]” their use “in appropriate cases.”<sup>114</sup>

The ALI proposal defined “restorative justice practices” as “formalized opportunities for guided dialogue between defendants and crime victims” designed “to repair harm to crime victims, families, and communities; to facilitate the rehabilitation and reintegration of offenders into the law-abiding community; and to increase a sense among victims . . . that their voices [are] heard and that a fair process has been employed for the resolution of harm.”<sup>115</sup> The section not only endorsed restorative justice practices as a pragmatic means to facilitate a recommended sentencing disposition but also to advance more therapeutic ends.<sup>116</sup> Additionally, while the proposal recognized the utility of restorative justice practices as a “potential alternative to traditional sentencing” it also noted that the same “inclusive processes” hold value “even when a traditional sentence is also imposed.”<sup>117</sup> To guard against magnifying “existing power inequities” between offender and victim or pressuring victims into “minimizing the seriousness of harms caused to them,” the section recommended that trained, neutral facilitators participate to “ensure the moderating influence of a third party” in proposed sentencing outcomes.<sup>118</sup>

In April 2017, the ALI presented the draft to its members with two notable revisions.<sup>119</sup> First, the updated section replaced “Restorative Justice

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111. *See id.*

112. *Id.*

113. *Id.* at xxi.

114. *Id.*

115. *Id.* § 6.14(2)–(3).

116. *See id.* § 6.14 cmt. a.

117. *Id.* § 6.14 cmt. a; *see id.* § 6.14(1) (positing that “trial courts should be authorized to make use of restorative justice practices in criminal cases, either as an alternative to traditional adjudication or as a supplement to the adjudicative process”).

118. *Id.* § 6.14 cmt. e, reporter’s note e. *But see* John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563, 565 (2002) (noting the importance of avoiding standards for facilitators that “are so prescriptive that they inhibit restorative justice innovation”).

119. MODEL PENAL CODE: SENT’G § 6.14(a) reporter’s note (AM. L. INST., Proposed Final Draft, 2017) [hereinafter MPC: SENT’G, Proposed Final Draft].

Practices” with “Victim-Offender Conferencing.”<sup>120</sup> The change sought to distill the “many meanings” of “restorative justice” into “one of the most common” restorative justice practices employed in criminal proceedings.<sup>121</sup> Secondly, the provision took a more compulsory tack than its predecessor—stating plainly that the victim-offender conferencing principles “should be advanced by laws that authorize courts to experiment with the use of victim-offender conferencing in criminal cases.”<sup>122</sup>

As in the previous draft, the section defined victim-offender conferencing as a “formalized opportunity for guided dialogue between one or more defendants and crime victims.”<sup>123</sup> Again, it recognized the use of conferencing “as an opportunity for dialogue that augments, rather than replaces, traditional sentences.”<sup>124</sup> The drafters emphasized that the conferencing parameters in the provision—including informed consent by all participants, involvement of a facilitator, and the right to withdraw—were designed to “safeguard the rights of defendants and victims, and advance the purposes of sentencing set forth in the Code.”<sup>125</sup>

In May 2017, Model Penal Code: Sentencing won approval, marking the first revisions to the Code’s sentencing provisions since its creation in 1962.<sup>126</sup> The victim-offender conferencing section, though, reverted to an equivocal tone, stating that state legislatures should merely “seek to effectuate” the recommendations when “authorizing such experimentation.”<sup>127</sup> Moreover, the approved version was relegated to an appendix and included the caveat

120. *Id.*

121. *Id.* reporter’s note a; see Memorandum From Reporters Kevin R. Reitz & Cecilia M. Klingele to the Model Penal Code: Sentencing Council (Dec. 16, 2013) (“After considering the comments made at the [2016 Council] meeting, along with subsequent conversations with Council members, the provision has been redrafted with a focus on one category of restorative justice: victim-offender conferences.”).

122. MODEL PENAL CODE: SENT’G app. A (AM. LAW INST., Proposed Final Draft 2017) (explaining that the proposed final draft returned to a more neutral stance and that the provision was not “drafted in the form of formal legislation” and set forth principles that a legislature should “seek to effectuate when authorizing . . . experimentation with the use of victim-offender conferencing”).

123. *Id.* § 6.14 cmt. a.

124. *Id.*

125. *Id.*

126. *Prof. Kevin R. Reitz Leads Massive 15-Year American Law Institute Sentencing Project*, UNIV. MINN. L. SCH. (May 5, 2017), <https://www.law.umn.edu/news/2017-05-25-prof-kevin-r-reitz-leads-massive-15-year-american-law-institute-sentencing-project> [<https://perma.cc/2Q2W-5TBZ>] [hereafter *American Law Institute Sentencing Project*].

127. MODEL PENAL CODE: SENT’G § 6.16 (AM. L. INST., Official Statutory Text, 2017) [hereinafter MPC: SENT’G, Official Statutory Text]. The official text notes that “[t]his Section was numbered Section 614 in the pre-approval drafting process.” *Id.* § 6.16 n.62.

that “[t]he Institute does not advance a specific legislative scheme for experimentation with the use of victim-offender conferencing, nor is the provision drafted in the form of model legislation.”<sup>128</sup>

A press release accompanying *Model Penal Code: Sentencing* described the project as emblematic of a philosophical change in sentencing practices since the Code’s original publication.<sup>129</sup> The guide addressed “some of the most important issues that courts, corrections systems, and policymakers are facing today,” including the rights of crime victims.<sup>130</sup> Kevin Reitz, the project’s principal drafter since its beginnings, said the report’s central purpose is to offer “workable solutions to problems of mass punitiveness that have grown since the 1970s.”<sup>131</sup> In explaining “mass punitiveness,” Reitz commented:

While [the U.S. is] the undisputed leader in incarceration rates worldwide, we suffer from much more than “mass incarceration.” It would be more accurate to say that we have blundered into *mass punishment* of all kinds. Internationally, America is in the highest tier of harsh justice with our astonishingly high probation supervision rates, intrusive and counterproductive probation conditions, crushing economic penalties, uncountable collateral consequences of conviction, outsized parole supervision rates, and massive revocations of people from community supervision into our prisons and jails.<sup>132</sup>

Though *Model Penal Code: Sentencing* rightly functions to rebuke the harsh crime control measures endemic to the Reagan era, the victim-offender conferencing provision shares a fundamental goal with the 1982 Presidential Task Force on Crime Victims: to “increase a sense among victims and offenders that their views have been heard through a fair process.”<sup>133</sup> To that end, *Model Penal Code: Sentencing* cites the influence of the Task Force in the ascendancy of victims’ advocacy groups and “the return of the victim to

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128. *Id.* § 6.16.

129. *American Law Institute Sentencing Project*, *supra* note 126.

130. *Id.*

131. *Id.*; see Hon. Joan Gottschall & Molly Armour, *Rethinking the War on Drugs: What Insights Does Restorative Justice Offer?*, in *RESTORATIVE JUSTICE IN PRACTICE*, *supra* note 57, at 83.

132. Kevin R. Reitz, *New Model Penal Code for Criminal Sentencing Approved by the American Law Institute: Comprehensive Reform Recommendations for State Legislatures*, UNIV. MINN.: ROBIN A INST. CRIM. L. & CRIM. JUST. (June 5, 2017), <https://robinainstitute.umn.edu/news-views/new-model-penal-code-criminal-sentencing-approved-american-law-institute-comprehensive> [<https://perma.cc/FVZ2-QYUX>].

133. MPC: SENT’G, Proposed Final Draft, *supra* note 119, reporter’s note a.

[center] stage in criminal justice policy.”<sup>134</sup> Still, the revisions were written on a “clean slate” as the Code’s original incarnation did not consider the role of victims in the criminal justice process.<sup>135</sup> As such, the “slate’s” essential inscriptions on the role of victims at sentencing invoke the Code’s bedrock sentencing objectives: punishment, deterrence, incapacitation, and rehabilitation.<sup>136</sup> In concert, the section endeavors to synthesize the “freestanding” interests of crime victims popularized in the 1980s—“empowerment,” “dignity,” and “vindication”—with the traditional goals of sentencing to achieve “a consistent framework for resolving [victims’ rights] questions throughout the Code.”<sup>137</sup>

### III. THE RESISTANCE OF STATE VICTIMS’ RIGHTS LAWS TO RESTORATIVE PRACTICES

The Model Penal Code’s outside influence on the structure, substance, and interpretation of state criminal laws is beyond question.<sup>138</sup> *Model Penal Code: Sentencing* emerged from years of discourse and debate.<sup>139</sup> Nonetheless, a survey of state victims’ rights laws shows that victim-offender reconciliation has yet to make a faint legislative imprint.

To be sure, many states incorporate aspects of restorative justice into components of criminal or juvenile justice codes.<sup>140</sup> In various facets, the language of restorative justice in state laws shares *Model Penal Code: Sentencing*’s “experimental” dimensions.<sup>141</sup> References are broad and general in state codes, “but with few mandates and little structure to support systemic

134. *Id.* at 597, app. B n.154 (citing DAVID GARLAND, *THE CULTURE OF CRIME CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 11–12 (2001)).

135. *Id.* at 597, app. B. In a 1960 address on sentencing in the Model Penal Code, Herbert Wechsler, the Code’s chief architect, did not reference victims’ rights—aside from a reference to the right to compensation and restitution. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 472 n.14 (1961).

136. MPC: SENT’G, Proposed Final Draft, *supra* note 119, at 597, app. B.

137. *Id.*; MODEL PENAL CODE: SENT’G, at xxiii (AM. L. INST., Council Draft No. 6, 2017).

138. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 327 (2007).

139. MPC: SENT’G, Proposed Final Draft, *supra* note 119, at xxiii (explaining the addition of a separate Reporter’s Memorandum on victims’ rights in a model sentence system because “these questions are difficult and produce strong differences of opinion”).

140. See Sliva & Lambert, *supra* note 49, at 88 (observing that “[w]hile many states’ criminal and juvenile codes contain references to restorative justice generally or specific restorative justice practices, few provide detailed support and structure to ensure implementation”).

141. MPC: SENT’G, Proposed Final Draft, *supra* note 119, app. A; see Sliva & Lambert, *supra* note 49 (noting that state legislation often gives “general statements of support” for restorative justice practices).

use.”<sup>142</sup> As a consequence, the “intent, implementation, and impact” of restorative justice practices is dubious, even in the most progressive jurisdictions.<sup>143</sup>

Colorado, a forerunner in restorative justice legislation, has thirty-seven statutes referencing restorative justice practices—four times more than every state but Vermont.<sup>144</sup> Its victims’ rights law entitles affected populations to information about “restorative justice practices, which includes victim-offender conferences.”<sup>145</sup> The law, however, merely requires victims to receive information about the “possibility” of restorative justice practices without additional guidance, instruction, or definition.<sup>146</sup> Additionally, a model state victim impact statement template fails to reference reconciliation but instead advises victims to “include things like fear and lifestyle changes” as effects of the crime.<sup>147</sup>

The Colorado process highlights another obstacle to victim-offender reconciliation. Like most states, the law requires the prosecutor to contact victims.<sup>148</sup> As a result, the “victim-witness” coordinators (or “directors” in Colorado) tasked with outreach are employed by the district attorney’s office.<sup>149</sup> The directors’ affiliation and responsibilities render restorative justice an outlier. A recent job posting describes duties such as assisting prosecutors in “case preparation and problem solving with witnesses,” scheduling witness interviews with prosecutors, and “inform[ing]

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142. Sliva & Lambert, *supra* note 49, at 77, 88, 92–93 (indicating that, through the results of a study of thirty-two states with statutory support for the use of restorative justice, few states “provide detailed support and structure to ensure implementation” of restorative justice laws and that many laws are “open-ended” and are subject to interpretation). The Virginia victim-offender reconciliation statute, VA. CODE ANN. § 19.2-11.4 (2010), exemplifies this point, providing that “any Crime Victim and Witness Assistance Program *may* establish a victim-offender reconciliation program.” *Id.* § 19.2-11.4(a) (emphasis added).

143. Sliva & Lambert, *supra* note 49, at 92. The jurisdictions I define as “progressive”—Colorado, Vermont, Texas, and Montana—are four of the seven states that “have structured support for a restorative justice practice.” *Id.* at 88.

144. *Id.* at 86 (stating that Vermont has twenty-one statutes addressing restorative justice).

145. COLO. REV. STAT. § 24-4.1-302.5(1.5) (2016).

146. *Id.*; see Sliva & Lambert, *supra* note 49, at 91 (observing that “there is no way to know how [victim-offender meeting] programs are structured” based on statutory language alone).

147. *Victim Impact Statement*, 5TH JUD. DIST. ATT’Y, [https://www.da5.us/wp-content/uploads/2011/02/Victim\\_Impact\\_Statement.pdf](https://www.da5.us/wp-content/uploads/2011/02/Victim_Impact_Statement.pdf) [<https://perma.cc/3HVX-CZNA>] (last visited Oct. 14 2020).

148. COLO. REV. STAT. § 24-4.1-303(11)(g) (2016).

149. *Victim Witness Directors*, COLO. DEP’T PUB. SAFETY (Jan. 2019), <https://cdpsdocs.state.co.us/ovp/VRA/DA-victim-witness-directors.pdf> [<https://perma.cc/83DH-AK3M>].

[prosecutors] of any potential witness problems.”<sup>150</sup> The over one thousand–word description does not reference restorative justice practices.<sup>151</sup>

Vermont, also a legislative leader in restorative justice, established an innovative probation program in 1995 to “steer[] adult criminals convicted of minor and non-violent offenses away from jail” and toward reparative outcomes crafted by affected communities.<sup>152</sup> Today, the state department of corrections funds restorative justice centers in every county, including reentry programs for individuals convicted of crimes and deemed high risk.<sup>153</sup> Nonetheless, Vermont’s victims’ rights laws make no mention of opportunities for reconciliation.<sup>154</sup> The operative statute provides victims the right to appear at sentencing and “express reasonably his or her views concerning the crime,” including the need for restitution.<sup>155</sup> The laws lack guidance as to what constitutes a “reasonable” view of the crime.<sup>156</sup> Like Colorado, Vermont’s victim assistance programs are operated through prosecutors’ offices.<sup>157</sup> One website includes general information about

150. Off. Dist. Att’y 18th Jud. Dist., *Victim Witness Specialist*, ZIPRECRUITER (May 15, 2020), <https://www.ziprecruiter.com/c/Office-of-the-District-Attorney-18th-Judicial-District/Job/Victim-Witness-Specialist/-in-Englewood,CO?jid=0ab968010b83fd2c> [https://perma.cc/QJ23-MZGJ].

151. *Id.*

152. Sliva & Lambert, *supra* note 49, at 86 (stating that Vermont has over twice as many laws referencing restorative justice than the next highest states, Montana and Texas); *Reparative Probation*, HARV. KENNEDY SCH., <https://www.innovations.harvard.edu/reparative-probation> [https://perma.cc/DLF7-95HG] (last visited Oct. 14, 2020); *Court Diversion*, VT. CT. DIVERSION, <http://vtcourtdiversion.org/court-diversion> [https://perma.cc/37CK-U789] (last visited June 30, 2020).

153. Christopher Gernon, *Vermont’s Criminal Justice System: Restorative Justice*, MIDDLEBURY CAMPUS (Mar. 14, 2018), <https://middleburycampus.com/38029/local/vermonts-criminal-justice-system-restorative-justice> [https://perma.cc/Z5ZH-8GWS] (reporting on the Circle of Support and Accountability, a reentry program “available following their served prison time” to individuals convicted of crimes and deemed high-risk).

154. VT. STAT. ANN. tit. 13, § 5304 (2015).

155. *Id.* § 5321(a)(2).

156. As an example, a template for victim impact statements in juvenile adjudications advises victims to describe “the impact that this incident has had on you as the victim, including any physical injuries, emotional impact, and physical damage.” *Victim Impact Statement and Request Form*, VT. JUDICIARY, <https://www.vermontjudiciary.org/sites/default/files/documents/Form%20112.pdf> [https://perma.cc/T949-AJTN] (last visited July 5, 2020).

157. *Vermont Victim Assistance Program*, VT. CTR. FOR CRIME VICTIM SERVS, <http://www.ccvv.vermont.gov/support-for-victims/victim-assistance-program> [https://perma.cc/VWH4-NMW4] (last visited July 6, 2020) (stating that “the [Victim Assistance Program] serves every county in Vermont with twenty-seven State’s Attorneys victim advocates devoted to serving crime victims’ needs”).

restorative justice before advising victims to “call your local law enforcement agency” to find out more.<sup>158</sup>

Texas, a state more well known for executions than enlightened sentencing policy, is an unlikely restorative justice vanguard.<sup>159</sup> In 2001, the state enacted legislation providing for victim-offender mediation.<sup>160</sup> In contrast to other mediation programs past or present, the program extends to individuals convicted of violent crimes—those whose conduct “caused bodily injury or death to victims.”<sup>161</sup> Notably, the process requires the victim, the offender, and a volunteer mediator to undergo at least one hundred hours of training before the first meeting.<sup>162</sup> The mediations are then coordinated by three fulltime Texas Department of Criminal Justice staff working with the mediators.<sup>163</sup> In 2005, an evaluation reported “all available barometers indicate that [the program] has been a success.”<sup>164</sup> Surveys revealed that 97 percent of the participants in 187 mediations were satisfied with the process and some 80 percent reported “major life changes as a result.”<sup>165</sup> The evaluation also highlighted the therapeutic value of the mediations, observing that “victims’ families did not excuse the crime[s], but were able to ease their feelings of anger and vengeance.”<sup>166</sup> Additionally, offenders gained self-esteem through “a sense that they were able to provide some measure of compensation to the victim” and accrued fewer disciplinary violations after participating in the program.<sup>167</sup>

Despite the unqualified success of the Texas program, the onus remains on victims to independently seek out mediation.<sup>168</sup> A victim has the right to “request” mediation, but the Texas Department of Criminal Justice has no affirmative obligation to inform victims of the program or outline its

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158. *Vermont Criminal Justice Process—Adults*, ESSEX VT., <https://essex.org/336/Vermont-Criminal-Justice-Process—Adult> [<https://perma.cc/KFQ9-74ZW>] (last visited July 5, 2020).

159. See Sliva & Lambert, *supra* note 49, at 86.

160. MARC LEVIN, TEX. PUB. POL’Y FOUND., RESTORATIVE JUSTICE IN PRACTICE: PAST, PRESENT, AND FUTURE 5, 12–13 (2005).

161. TEX. CODE CRIM. PROC. ANN. art. 56.13(1) (West 2001); see also LEVIN, *supra* note 160, at 13 (noting that the requests for mediation “have come primarily from victims of violent crime”).

162. See LEVIN, *supra* note 160, at 13 (“Preparation is central to the program.”); Sliva & Lambert, *supra* note 49, at 86.

163. LEVIN, *supra* note 160, at 13.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. See TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2015).

contours.<sup>169</sup> The program's origins, as recounted in a Texas Public Policy Foundation report, bear this out:

Three women who were victims of violent crime are largely responsible for [the program]: Cathy Phillips, Raven Kazen and Ellen Halbert. When Phillips asked for a meeting with her daughter's killer in 1990, officials denied the request, but Phillips saw a television program on victim-offender mediation. She then contacted Ellen Halbert, herself a victim of violent crime who then served on the Texas Board of Criminal Justice, and [Texas Department of Criminal Justice] Victim Services Division Director Raven Kazen, who continues to serve in that position today. The Victim Offender Mediation/Dialogue program resulted from their joint efforts . . .

<sup>170</sup>

Like other states, the Texas victim impact statement template fails to reference reconciliation, instead encouraging victims to “explain your feelings such as loss, frustration, fear, [and] anger, as well as any physical or monetary damages due to the crime.”<sup>171</sup> A brochure produced by the Texas Department of Corrections, titled “It’s Your Voice,” highlights the importance of victim impact statements to prosecutions.<sup>172</sup> In essence, the Texas victim-offender mediation language is, as in other jurisdictions, largely additive to a retribution-focused law crafted in the wake of the Reagan-era Task Force.<sup>173</sup>

At least one state, Montana, appears to be trending away from restorative justice after auspicious beginnings. In 2001, the state created the Montana Office of Restorative Justice, “intended to . . . encourage community and victim participation in the criminal justice process” by “promoting and supporting practices, policies, and programs that focus on repairing the harm of crime.”<sup>174</sup> Among other initiatives, the law funded educational programs, technical assistance to law enforcement and court officers, victim counseling, mediation training, and “a repository for resources and information to

169. *Id.* arts. 56.03(c), 56.04(a) (explaining that, in Texas, as in most other states, Victim Assistance Coordinators are employed by prosecutors' offices).

170. LEVIN, *supra* note 160, at 12 (footnote omitted).

171. *Victim Impact Statement Packet*, TEX. DEP'T CRIM. JUST. (Sept. 2019), [https://www.tdcj.texas.gov/documents/Victim\\_Impact\\_Statement\\_Packet\\_English.pdf](https://www.tdcj.texas.gov/documents/Victim_Impact_Statement_Packet_English.pdf) [<https://perma.cc/UK26-8E8T>].

172. VICTIM SERVS. DIV., TEX. DEP'T OF CRIM. JUST., VICTIM IMPACT STATEMENT BROCHURE (2019), [https://www.tdcj.texas.gov/documents/Its\\_Your\\_Voice.pdf](https://www.tdcj.texas.gov/documents/Its_Your_Voice.pdf) [<https://perma.cc/G8FY-YDGQ>].

173. The Texas Crime Victim Clearinghouse's official report to the 71st Legislature provides a broader look at the history of the Texas Victim's Rights Law. *See* TEX. CRIME VICTIM CLEARINGHOUSE, CRIME VICTIM IMPACT (1989).

174. MONT. CODE ANN. § 2-15-2013(3)(a)–(b) (2001).

coordinate expertise in restorative justice.”<sup>175</sup> Last year, the legislature amended the law and moved the state’s restorative justice programs to the Montana Board of Crime Control.<sup>176</sup> The amended language positions restorative justice as a budget-minded alternative to the “extremely high cost” of “incarcerating offenders.”<sup>177</sup> Under the new law, restorative justice “means criminal justice practices that . . . hold offenders directly accountable to the people and communities they have harmed.”<sup>178</sup> The law does not provide any specific initiatives but authorizes the Board of Crime Control to pursue federal funding for “the purposes of this section.”<sup>179</sup>

When calculated in legislative years, the Model Penal Code’s guidance on victim-offender reconciliation is in its infancy. Still, the early indicators of its integration into victims’ rights laws are not promising. Opportunities for victim-offender reconciliation are mostly abstractions in—if not altogether absent from—state codes.<sup>180</sup> Further, in both substance and procedure, the laws remain anchored in the language of retribution. More problematically, the advisory nature of the Code’s legislative guidance, its consignment to an appendix, and its emphasis on “experimental” use fall well short of a clarion call for reform. The final revisions reflect a necessary compromise of divergent views of victims’ roles in the sentencing process.<sup>181</sup> The section’s circumspect tone, however diplomatic, is not evidence that victim-offender reconciliation is novel, untested, or legally tenuous—the presentencing equivalent of an investigational drug. Rather, its principles and objectives strengthen the law and policy at the core of the victims’ rights movement.

#### IV. A LEGAL AND POLICY FRAMEWORK FOR VICTIM-OFFENDER RECONCILIATION

Victim-offender reconciliation aligns with *Payne*, the Supreme Court case upholding the admissibility of victim impact statements at sentencing.<sup>182</sup>

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175. *Id.* § 2-15-13(4)(a)–(d).

176. MONT. CODE ANN. § 44-7-301 (2019).

177. *Id.*

178. *Id.* § 44-7-302(2).

179. *Id.* § 44-7-302(4)(a).

180. I have catalogued state-by-state information for four categories: (1) availability of victim-offender reconciliation, (2) whether victim outreach is conducted by the prosecutor, (3) whether victim advocates are employed by the prosecutor, and (4) whether neutral facilitators are utilized for victim-offender reconciliation. I have this information on file and it is available on request.

181. MPC: SENT’G, Proposed Final Draft, *supra* note 119, at xxiii.

182. *Tennessee v. Payne*, 501 U.S. 808, 826–27 (1991).

The Court's rationale hinged on the admissibility of victim impact statements in the name of relevance and fair play.<sup>183</sup> Chief Justice Rehnquist opined that just as the defendant's background and character is generally relevant at sentencing so, too, is "evidence about the victim and about the impact of the murder on the victim's family."<sup>184</sup> Invoking Justice Cardozo, Rehnquist concluded that the "concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."<sup>185</sup> Justice O'Connor endorsed Rehnquist's application of an evidentiary threshold to determine the admissibility of victim impact statements.<sup>186</sup> In a separate concurrence, Justice Souter expressed concerns over equity, writing that "sentencing without . . . evidence of victim impact may be seen as a significantly imbalanced process."<sup>187</sup> Dissenting, Justice Stevens rejected the proposition that a criminal prosecution requires an equal balance between the state and the defendant.<sup>188</sup> The criminal justice system, he observed, is designed to protect the criminal defendant from "the State's overreaching," as reflected by its burden of proof beyond a reasonable doubt and rules of evidence limiting the use of certain evidence at trial.<sup>189</sup>

*Payne's* low evidentiary threshold to admit victim impact evidence coupled with its expansive view of fairness easily accommodates reconciliation-oriented statements. First, like retributive statements, expressions of forgiveness may be evaluated against a relevance standard and—if admitted—should be treated by states no "differently than other kinds of relevant evidence."<sup>190</sup> Secondly, if equity demands a balance between evidence presented by both "the accused and accuser," the same principal guides equal accommodation of accusers pursuing reconciliation over retribution.<sup>191</sup> To encourage access for one victim versus another "narrow[s]" the "concept of fairness" that *Payne* seeks to broaden.<sup>192</sup> Finally, in recognition of the Stevens dissent, opportunities for victim-offender reconciliation protect against prosecutorial overreaching by inviting a

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183. *Id.*

184. *Id.* at 827.

185. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

186. *See id.* at 831 (O'Connor, J., concurring) ("Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence.").

187. *Id.* at 839 (Souter, J., concurring).

188. *Id.* at 860 (Stevens, J., dissenting).

189. *Id.*

190. *Id.* at 827 (Souter, J., concurring).

191. *Id.* at 839.

192. *Id.* at 827.

multitude of views and voices, not just those enlisted to buttress the State's penal interests.<sup>193</sup> As currently constructed, the impediments to reconciliation in victims' rights laws undermine rather than advance *Payne's* rationale. An enhanced victims' rights model freed of those obstacles, however, will enliven the Court's ambitious goal to "keep the balance true."<sup>194</sup>

Moreover, victim-offender reconciliation advances legislative trends toward criminal justice reform. In 2018, Congress passed the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act—"the most substantial criminal justice legislation reform in a generation."<sup>195</sup> The law's evolution is noteworthy, especially in an age of partisan rancor. In 2015, Iowa Senator Chuck Grassley, a Republican and "longtime hardliner on criminal justice policy," and Democrat Senator Richard Durbin of Illinois cosponsored the Sentencing Reform and Corrections Act (SRCA).<sup>196</sup> The legislation signaled a marked philosophical shift away from costly and retribution-focused crime control, chiefly among Reagan acolytes.<sup>197</sup> The impetus for change varied across party lines with budgetary concerns, interests in personal liberty, and consideration of "the moral and spiritual dimensions" of mass incarceration all cited as bases for reform.<sup>198</sup> Nonetheless, the turnabout generated bipartisan support for a new

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193. *See id.* at 860 (Stevens, J., dissenting).

194. *Id.* at 827. In the same vein, while the *Payne* majority did not discuss due process in the context of mitigation, the Court noted that a defendant may raise a due process challenge if victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 809. It follows that the statutory availability of victim-offender reconciliation responds to due process concerns and, in practice, may benefit prosecutorial interests by establishing that a defendant had an avenue for pursuing reconciliation.

195. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act or the FIRST STEP Act, S. 2795, 115th Cong. (2018); Tim Lau, *Historic Criminal Justice Legislation Signed Into Law*, BRENNAN CTR. FOR JUST. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law> [<https://perma.cc/9YJW-HQUH>].

196. S. 2123 (114<sup>th</sup>): *Sentencing Reform and Corrections Act of 2015*, GOVTRACK (Nov. 5, 2015), <https://www.govtrack.us/congress/bills/114/s2123/summary> [<https://perma.cc/RF4T-ALY5>]; *Sentencing Reform and Corrections Act of 2015*, S. 2123, 114th Cong. (2015).

197. *Agency Perspective: Hearing on Over-Criminalization Task Force of 2014 Before the Subcomm. on Over-Criminalization of the H. Comm. on the Judiciary*, 113th Cong. 65 (2014) (statement of David E. Patton, Exec. Dir., Fed. Defenders of N.Y.) [hereinafter Patton Statement], <https://www.nacd.org/getattachment/4003006d-4aa4-4ee9-b298-1ba73d0e3a55/patton-testimony.pdf> [<https://perma.cc/8THK-6DCH>]; Bill Keller, *Prison Revolt*, NEW YORKER (June 22, 2015), <https://www.newyorker.com/magazine/2015/06/29/prison-revolt> [<https://perma.cc/QP2A-HA53>].

198. Patton Statement, *supra* note 197, at 1 ("Conservatives denounce the unnecessary and unwise fiscal costs, the assault on personal liberty, and the harshness of a system that

approach to sentencing. While the legislation only addressed federal inmates, pundits predicted its passage would “provide a momentum boost for reform advocates and spur states to look at similar legislation.”<sup>199</sup> Despite broad support, the bill stalled in the U.S. Senate after facing opposition from a group led by then-Senator Jeff Sessions.<sup>200</sup>

The FIRST STEP Act originated in early 2018 as the Prison Reform and Redemption Act, a bill that provided measures to improve federal prison conditions but did little to address policies that contribute to mass incarceration.<sup>201</sup> In November 2018, a bipartisan Senate coalition brokered a “breakthrough” compromise to integrate key provisions from the SRCA into the new bill.<sup>202</sup> Among other reforms imported from the SRCA, the amended legislation shortened mandatory minimum sentences for nonviolent drug offenses, eased a rule imposing a life sentence for three or more convictions, and expanded the so-called “safety-valve” to give judges more discretion to deviate from mandatory minimums when sentencing for nonviolent drug offenses.<sup>203</sup> The revamped bill also expanded job training, bolstered early release programs, and took additional measures designed to reduce recidivism rates.<sup>204</sup> On December 17, 2018, the FIRST STEP Act received “overwhelming approval” from the Senate.<sup>205</sup> President Donald Trump signed the bill into law three days later, touting it as “legislation that will reduce crime while giving our fellow citizens a chance at redemption.”<sup>206</sup>

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has become unmoored from foundational religious principles such as redemption and mercy.”); *see also* Keller, *supra* note 197 (reporting that Patrick Nolan, a former Republican congressman who served twenty-five months in prison for racketeering, says “human dignity” is the driving force for change after witnessing the lack of emphasis on inmate education, job training, and other rehabilitative programs).

199. S. 2123 (114<sup>th</sup>): *Sentencing Reform and Corrections Act of 2015*, *supra* note 196.

200. Lau, *supra* note 195. The bill failed despite cosponsorship by Senators John Cornyn (R-TX), Sheldon Whitehouse (D-R.I.), Mike Lee (R-Utah), Charles Schumer (D-N.Y.), Lindsey Graham (R-S.C.), Patrick Leahy (D-Vt.), Cory Booker (D-N.J.) and Tim Scott (R-S.C.). *See Statement of Paulette Brown, President, American Bar Association Re: The Senate’s Introduction of the Sentencing Reform and Corrections Act*, ABA (Oct. 1, 2015), <https://www.americanbar.org/news/abanews/aba-news-archives/2015/10/statement-of-paulette-brown-president-american-bar-association> [<https://perma.cc/X2P7-4NN3>].

201. *See id.*

202. Grawert & Lau, *supra* note 51.

203. *See* Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. §§ 101–07 (2015).

204. *See* Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES, Dec. 15, 2018, at A1.

205. *Id.*

206. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, WHITE HOUSE FACT SHEETS (Apr. 1, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act> [<https://perma.cc/QJ7K-2TW6>].

In terms of sentencing reform, the FIRST STEP Act is just that—an encouraging but modest incursion into the prison-industrial bulwark. The law fell short of more ambitious benchmarks in the SRCA aimed at mass incarceration and systemic sentencing disparities.<sup>207</sup> Still, when passed, the law was widely viewed as an historic moment that “shifted the debate in a way that could set the stage for additional changes.”<sup>208</sup> At its core, the FIRST STEP Act is intended to lower prison populations by promoting sentencing proportionality and reducing recidivism.<sup>209</sup> Opportunities for victim-offender reconciliation serve both ends. Notably, the Act endeavors to reduce recidivism using an evidence-based approach—through activities that have “been shown through empirical evidence to reduce recidivism or is based on research indicating that it is likely to be effective in reducing recidivism.”<sup>210</sup> The Act’s list of activities with empirical support includes “victim impact classes or other restorative justice programs.”<sup>211</sup> In terms of sentencing proportionality, victim-offender reconciliation can implicate a sentencing court’s evaluation of the “entire package of legal sanctions that a criminal defendant will face,” including punishment, postrelease supervision, and restitution.<sup>212</sup>

Victim-offender reconciliation also squares with sentencing reform at the state level. Like federal prison sentences, state sentences are excessively long.<sup>213</sup> Worse still, longer prison sentences often increase recidivism rates and have negligible effects on public safety.<sup>214</sup> Victim-offender reconciliation can have

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207. See Fandos, *supra* note 204.

208. *Id.*

209. See Patti Saris, *The First Step Act Is A Major Step For Sentencing Reform*, LAW360 (Apr. 28, 2019), <https://www.law360.com/articles/1153056/the-first-step-act-is-a-major-step-for-sentencing-reform> [<https://perma.cc/MP62-JLB3>].

210. NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 n.2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45558> [<https://perma.cc/2F2V-4VJ4>].

211. *Id.*

212. Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, 48 CRIM. & JUST. 255, 273 (2019) (stating that a proportionality analysis under the Model Penal Code “must be applied” to all facets of a criminal sentence, including collateral consequences).

213. JAMES AUSTIN, LAUREN-BROOKE EISEN, JAMES CULLEN & JONATHAN FRANK, BRENNAN CTR. FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 17 (2016), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf) [<https://perma.cc/8P2L-PKYX>].

214. See LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE 14 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal%20Justice%20Agenda.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal%20Justice%20Agenda.pdf) [<https://perma.cc/GP3Z-RQVW>].

salutary effects on state sentencing proportionality, too—especially with respect to serious crimes that make up almost 60 percent of the prison population.<sup>215</sup>

Looking forward, the nonpartisan Brennan Center for Justice encourages states to pass laws “that reward prosecutors’ offices [when they] reduce crime and incarceration together.”<sup>216</sup> Codifying standards around alternatives to incarceration reflect “the changing perspective of the role of a prosecutor” and can reward prosecutors who “prioritize seeking rehabilitation over simply seeking convictions.”<sup>217</sup> To that end, opportunities for victim-offender reconciliation facilitate appropriate offender-specific alternatives, including probation, community service, counseling, or treatment. Further, alternative sanctions hold offenders accountable while more effectively reducing recidivism, even in cases involving felony offenses.<sup>218</sup> The bond forged during victim-offender reconciliation intensifies accountability, as the sentence is a manifestation of the victim’s expressions of mercy.<sup>219</sup>

A case involving a brutal jail assault exemplifies this dynamic: On July 5, 2005, Jim Loftis, a sheriff’s deputy at a jail in rural Tennessee, participated in an attack on a detained person, Ricky Beaty.<sup>220</sup> The previous evening, police arrested Beaty for a domestic assault.<sup>221</sup> A jail lieutenant knew Beaty’s alleged victim and sought revenge.<sup>222</sup> He ordered Loftis to enlist two fellow detained persons to beat Beaty.<sup>223</sup> Loftis followed the directive.<sup>224</sup> Loftis then watched with other deputies as Beaty was taken to a common area where the two detained persons converged on him from behind.<sup>225</sup> The detained persons repeatedly struck Beaty in the head, causing injuries.<sup>226</sup> As medics attended

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215. *Id.* (including the following serious crimes: aggravated assault, murder, nonviolent weapons offenses, robbery, serious burglary, and serious drug trafficking).

216. *Id.* at 4; *see id.* at 25 (citing a successful 2009 Illinois program to provide some counties with additional dollars if they sent 25 percent fewer probationers to prison).

217. *Id.* at 26.

218. *Cf. id.* at 12.

219. ZEHR, *supra* note 55, at 16 (noting that individuals convicted of crimes need accountability that encourages empathy and responsibility).

220. Sentencing Memorandum at 5, *United States v. Loftis*, No. 2:05-0007 (M.D. Tenn. Feb. 12, 2007) (on file with author) [hereinafter *Loftis Sentencing Memorandum*].

221. *Id.* at 5–6.

222. *Id.* at 6.

223. *Id.*

224. *Id.*

225. *Id.* at 6–7.

226. *Id.* at 7.

to Beaty, the deputies rewarded his attackers with cake and coffee in the employee break room.<sup>227</sup>

Following his arrest, Loftis expressed remorse for his role in the attack.<sup>228</sup> He pleaded guilty and faced a prison sentence of up to twenty years.<sup>229</sup> Weeks before his sentencing, Loftis, through his defense counsel, arranged for a meeting with Beaty.<sup>230</sup> Beaty accepted, and the communications that followed resulted in a remarkable encounter at Loftis's sentencing hearing. At the hearing, Loftis—not the prosecution—called Beaty as a witness.<sup>231</sup> Beaty testified that Loftis offered a “very sincere” apology to him after the two met.<sup>232</sup> Beaty later learned that Loftis was a single father raising three sons.<sup>233</sup> Asked if Loftis should go to prison, Beaty replied:

If I had my way about it, I would ask the judge to give Mr. Loftis probation until his youngest son turns 18. Give a man a chance to raise his children. I know what this has done to mine, the two youngest ones, [over] the past 24 months. And I was there for them, their mother was there for them. The Court may think it's wrong of me to ask that Mr. Loftis only receive probation, but that's how my heart feels. I've got to live with my conscience.<sup>234</sup>

Despite the prosecutor's request for a sentence of imprisonment, the court imposed three years of supervised release.<sup>235</sup> Loftis successfully completed the term.<sup>236</sup>

Beyond legislative reforms, the Loftis case embodies the baseline public policy objectives of the victims' rights movement. When Loftis addressed the

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227. *Id.*

228. *Id.* at 5.

229. Transcript of Proceedings at 18, *United States v. Loftis*, No. 2:05-00007 (M.D. Tenn. May 14, 2007) [hereinafter *Loftis Transcript of Proceedings*].

230. Loftis Sentencing Memorandum, *supra* note 220, at 10.

231. Loftis Transcript of Proceedings, *supra* note 229, at 17.

232. *Id.*

233. *Id.*

234. *Id.* at 19; see also Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 136 (2005) (concluding that victims and offenders who participate in restorative justice programs are more satisfied with their case outcomes than those whose cases are adjudicated through traditional criminal justice practices).

235. Loftis Transcript of Proceedings, *supra* note 229, at 28. Loftis was briefly jailed after his arrest. Thus, the sentence he received was, in technical terms, supervised release. The main difference between probation and supervised release is that probation is served instead of incarceration, while supervised release is served after release from incarceration. For both supervised release and probation, the client will be supervised by a probation officer.

236. See Criminal Docket, *United States v. Loftis*, No. 2:05-00007 (M.D. Tenn.).

court before his sentence was imposed, he cited Beaty's empathy as central to his appreciation of the crime's impact on both families and his desire "to the best of my ability, to make this right."<sup>237</sup> From the counterperspective, the reconciliation empowered Beaty—himself accused in a different assault—to reveal compassion and humanity.<sup>238</sup> Finally, in justifying the sentence against Loftis, the court made clear that Beaty's forgiveness was instructive.<sup>239</sup>

In large part, the policy justifications for reconciliation-oriented victim impact statements match or exceed those directed toward statements in retribution. First, despite critiques of restorative practices as impractical or ineffective, their value has been studied more rigorously "than almost any other criminal-justice intervention."<sup>240</sup> An oft-cited refrain of the victims' rights movement embraces the "healing" power of impact statements.<sup>241</sup> The parlance of the movement also invokes "closure," as if the victim impact statement functions as an epilogue to the crime.<sup>242</sup> Still, the notions of "healing" and "closure" ostensibly made real through victim impact statements oversimplify the complex, arduous, and individualized process of recovery.<sup>243</sup> Inasmuch as Mary Zvolanek's statement served as a defining moment in the victims' rights movement, her reaction to the Supreme Court's favorable ruling in *Payne*—"as the years go by, it just gets harder to deal with"—undercuts one of the movement's core precepts.<sup>244</sup> As Linda Mills, the Executive Director of the NYU Center on Violence and Recovery, argues, "the societal goals of punishment and accountability and the individual desire for healing are not mutually exclusive."<sup>245</sup> The *sine qua non* of the relationship, however, is not retribution. To the contrary, victims who pursue reconciliation "feel a significant reduction in fear and a significant increase in

237. Loftis Transcript of Proceedings, *supra* note 229, at 30; *see also* Giannini, *supra* note 50, at 444 (discussing goals of victim impact statements).

238. *See* Giannini, *supra* note 50, at 444.

239. *See id.*; Loftis Transcript of Proceedings, *supra* note 229, at 31–32.

240. Lawrence W. Sherman & Heather Strang, *Restorative Justice as Evidence-Based Sentencing*, in *THE OXFORD HANDBOOK OF SENTENCING & CORRECTIONS* 22, 23 (Joan Petersila & Kevin Reitz eds., 2012) (opining that "[m]ost criticisms of [restorative justice] are moral rather than causal, despite morally driven efforts to portray [it] as 'impractical' for causal reasons").

241. *See* Cassell, *supra* note 99, at 621.

242. *See* U.S. ATTY'S OFF.: MIDDLE DIST. OF PA., VICTIM IMPACT STATEMENTS: KNOW YOUR RIGHTS (2012), <https://www.justice.gov/sites/default/files/usao-mdpa/legacy/2012/01/17/Impact%20Statements%20restitution.pdf> [<https://perma.cc/6VZW-B9UU>].

243. *See* Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 *HASTINGS L.J.* 457, 462 (2006).

244. *High Court Ruling Comforts Family Torn By 2 Murders*, *supra* note 81.

245. Mills, *supra* note 243, at 458.

their sense of security.”<sup>246</sup> Moreover, as personified by Beaty’s revelatory testimony at Loftis’s sentencing hearing, “restoration in the justice process . . . has the potential to reduce the propensity of victims to become victimizers.”<sup>247</sup> Most critically, from their origins, victim impact statements were envisioned as a means to help victims regain autonomy and restore “a sense of self.”<sup>248</sup> Of course, victim-offender reconciliation invariably runs counter to prosecutorial aims and, perhaps, to the retributory interest of the “public at large.”<sup>249</sup> In this light, statements steeped in mercy evince the ultimate act of agency.<sup>250</sup>

## V. A PROPOSAL TO RESHAPE STATE VICTIMS’ RIGHTS LAWS

Victims’ rights laws emerged from a movement less motivated by access to justice than by “an addiction to mass incarceration.”<sup>251</sup> Then, as now, “[t]he consensual process of restorative justice . . . stands in sharp contrast to the current adversarial proceedings of our federal and state criminal justice systems.”<sup>252</sup> Therefore, ensuring meaningful access to and protection under the laws for all victims requires more than merely adding reconciliation-oriented language to existing statutes. Rather, a shift toward a restorative model requires a “dramatic change” from structures and processes that embolden only those victims seeking retributive justice and toward a more inclusive approach for all affected communities.<sup>253</sup> At a minimum, state legislatures must undertake five essential steps to change laws governing victim impact statements:

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246. *Id.* at 463.

247. *Id.* at 459.

248. MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS 338 (2006).

249. See Bruce A. Green & Lara Bazelon, *Restorative Justice From Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2299–300 (2020).

250. See *id.* at 2300 (“One of the principal advantages of restorative justice is that, when victims voluntarily choose it, it better serves victims’ interests by respecting their agency.”).

251. Lau, *supra* note 195.

252. Mills, *supra* note 243, at 463.

253. See Carol A. Brook, *Telling Their Stories: Whose Lives Would Restorative Justice Restore?*, in RESTORATIVE JUSTICE IN PRACTICE, *supra* note 57, at 103, 115 (calling for a “dramatic change of course” from mass incarceration policies towards community-based interventions like restorative justice, which give offenders and victims the opportunity to speak honestly to each other and to be heard).

## 1. Employ independent victim advocates through the court system, not the prosecutor's office.

The fundamental objectives of prosecutors with respect to punishment, under our current system, are diametric to the goals of victim-offender reconciliation.<sup>254</sup> This is “particularly true in cases of violent crime, which has traditionally called for a carceral response.”<sup>255</sup> Thus, it stands to reason that channeling victims through prosecutors’ offices is a fool’s errand for restorative justice purposes. Probation and pretrial services officers, the ones who collect data about individuals convicted of crimes, are court-employed.<sup>256</sup> The officers prepare reports that the court relies on to make informed release decisions and “choose fair sentences.”<sup>257</sup> Victim advocates should also be employed by the courts. After all, even in the image and likeness of the 1982 Task Force, victim impact statements are intended to achieve fairness.<sup>258</sup> Fairness is a task for the courts, not the prosecutor’s office.

## 2. Establish training programs for victim advocates in restorative justice processes.

Training in restorative justice is paramount for victim advocates, especially those who remain under the prosecutorial umbrella. At a baseline, advocates must be trained in essential restorative justice theory, values, and models.<sup>259</sup> Also, advocates should gain an understanding of the ways in which

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254. See Green & Bazelon, *supra* note 249, at 2299 (“Whether or not punishment involves incarceration, it is assumed to achieve objectives that restorative justice processes are not intended to achieve.”).

255. *Id.*; see also KATHERINE BECKETT & MARTINA KARTMAN, UNIV. OF WASH., VIOLENCE, MASS INCARCERATION AND RESTORATIVE JUSTICE: PROMISING POSSIBILITIES 1 (2016), [https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative\\_Justice\\_Report\\_Beckett\\_Kartman\\_2016.pdf](https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative_Justice_Report_Beckett_Kartman_2016.pdf) [<https://perma.cc/W6NF-4AWW>] (observing the “unfortunate” exclusion of restorative justice interventions in most cases involving violent crime, as interventions “can both reduce violence and facilitate victim healing from violent trauma”).

256. *Probation and Pretrial Officers and Officer Assistants*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> [<https://perma.cc/769K-6TBF>] (last visited Sept. 18, 2020) (stating that “[o]fficers investigate defendants and offenders for the court by gathering and verifying information about them”).

257. *Id.*

258. See HERRINGTON ET AL., *supra* note 84.

259. A powerful starting point is Howard Zehr’s *Little Book of Restorative Justice*, in which Zehr frames restorative justice objectives and outcomes around three fundamental principles: “harms and needs,” “obligations (to put right),” and “engagement (of stakeholders).” ZEHR, *supra* note 55, at 21–23.

trauma informs the behaviors of offenders as well as victims.<sup>260</sup> Perhaps most critically, advocates should develop appreciation of the mutual healing that emerges through expressions of responsibility, remorse, and forgiveness.<sup>261</sup>

Further, while most victim advocates receive training to assist victims in navigating the criminal justice system, advocates should also be trained on the collateral consequences of imprisonment on individuals convicted of crimes and their families—especially any children.<sup>262</sup> The information serves at least two valuable ends. First, the effects of pre- or postsentencing incarceration on people can present unique challengers to the victim-offender reconciliation process.<sup>263</sup> In addition, an understanding of families on both sides of the crime can assist an advocate to decide whether reconciliation is a

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260. See *id.* at 18 (“Crime represents damaged relationships: damaged relationships are both a cause and an effect of crime.” (emphasis omitted)); see also BECKETT & KARTMAN, *supra* note 255, at 1 (“[P]eople who are convicted of violent crimes have often been a victim of violence.” (citations omitted)).

261. See ZEHR, *supra* note 55, at 18–19. A solemn example of this dynamic in action in a recent sentencing involves the murder of an unarmed Black man, Botham Jean, in Dallas by a police officer who entered the wrong apartment. See David K. Li, *Botham Jean’s Brother Honored for Embrace of Dallas Officer Convicted in the Killing*, NBC NEWS (Dec. 3, 2019), <https://www.nbcnews.com/news/us-news/botham-jean-s-brother-honored-embrace-dallas-officer-convicted-killing-n1094801> [<https://perma.cc/ZB5C-LUH2>].

262. The federal government’s own studies document that the impact of a parent’s incarceration on children has both short- and longterm consequences. ROSS D. PARKE & K. ALISON CLARKE-STEWART, U.S. DEP’T OF HEALTH & HUM. SERVS., EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN 4–6 (2001), <https://aspe.hhs.gov/system/files/pdf/74981/parke%26stewart.pdf> [<https://perma.cc/U57Y-VAYP>]. Before their parent’s imprisonment, children are often anxious and fearful. *Id.* at 4. Parents bestowed with the responsibility of explaining a pending imprisonment to a child also suffer from stress that invariably affects familial relationships. *Id.* at 6. After a parent’s incarceration, over 50 percent of school-age children “exhibit school-related problems and problems with peer relationships.” *Id.* Problems include poor grades, instances of aggression, and unruly classroom behavior. *Id.* A smaller percentage of younger school-age children exhibit transient school phobias and are unwilling to attend school for weeks after a parent’s incarceration. *Id.*

263. As one example, the Insight Prison Project, a program started at San Quentin State Prison in 1997, which now provides services at twenty-one state prisons, offers a Victim Offender Education Group (VOEG), an intensive year-long program for incarcerated people designed to understand and take responsibility for the impact of the crime(s) they have committed. The class culminates with incarcerated people meeting with victims “for a healing dialogue.” For an in-depth look at the VOEG, see *Victim Offender Education Group (VOEG)*, INSIGHT PRISON PROJECT, <http://www.insightprisonproject.org/victim-offender-education-group-voeg.html> [<https://perma.cc/XK93-A75B>] (last visited Aug. 27, 2020).

viable strategy and, if so, how best to work with stakeholders to maximize its chance for success.<sup>264</sup>

Finally, advocates must be trained in crosscultural competency as a tool to challenge false assumptions about offenders and victims that “grow out of [their] own cultural blinders.”<sup>265</sup> Naturally, a victim-centered approach to advocacy limits the ability of advocates to explore the background or basis for the offender’s actions.<sup>266</sup> Rather than falling back on stereotypes, cultural competency exalts “the importance of searching for alternative explanations” for an individual’s actions.<sup>267</sup> Along similar lines, victim advocates must have an understanding of structural, institutional, and individual racism that pervades the criminal justice system.<sup>268</sup> A restorative justice approach that ignores the race-based biases that have contributed to mass incarceration is untenable.

### 3. Enlist a panel of trained and neutral mediators to facilitate victim-offender reconciliation.

Most every jurisdiction maintains a list of criminal defense lawyers who are appointed to represent indigent defendants when the public defender is unable or unavailable to do so.<sup>269</sup> A similar panel should exist for mediators. Mediators may include social workers, counselors, or volunteers who have an established track record of community investment. Through a process led by court-employed victim advocates, prospective mediators must be screened for traits essential to productive victim-offender dialogue, including honesty, empathy, openness, accountability, integrity, and conversance in restorative justice principles.<sup>270</sup> Further, each jurisdiction should have a certification

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264. See ZEHR, *supra* note 55, at 22–23 (noting that restorative justice promotes participation of family members and “[t]hese ‘stakeholders’ need to be given information about each other and to be involved in deciding what justice in [the] case requires”).

265. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 88 (2001). Although Susan Bryant’s guidance is directed at lawyers, the same principles hold true for victim advocates. See *id.*

266. See *id.* (listing questions that should be asked, such as, “Why I am judging this [person] negatively? Is it because we have different values, experiences or opportunities?”).

267. *Id.* at 93.

268. INSIGHT PRISON PROJECT, <http://www.insightprisonproject.org/> [https://perma.cc/Y2BA-MVHS] (last visited Oct. 14, 2020) (noting that the victim-offender reconciliation process must recognize “the enormous impact of race and class in the justice system”).

269. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [https://perma.cc/QGL7-Q73J].

270. See ZEHR, *supra* note 55, at 52 (facilitator traits include those “that emphasize respect, the value of each participant, integrity, [and] the importance of speaking ‘from the heart’”).

process for mediators that encompasses both an initial training and continuing education requirements.<sup>271</sup> Training may be specialized for certain crimes, such as those involving domestic offenses and sexual assault.<sup>272</sup> Finally, especially in the introductory phases, courts should empanel advisory committees to gather data about the use and effectiveness of—and obstacles to—victim-offender reconciliation.

#### 4. Impose prohibitions on victim sentencing recommendations.

While victims may have useful information about a defendant's history or culpability, proportionality demands prohibitions on victim sentencing recommendations.<sup>273</sup> The danger of recommendations is threefold. First, a victim's belief that an offender should be punished to the fullest extent of the law is often "untethered" from the foundational purposes of sentencing and rooted only in the victim's personal preference.<sup>274</sup> As the Model Penal Code revisions state plainly, raw punitiveness disguised as victim empowerment makes for a "lawless and ungovernable" sentencing structure.<sup>275</sup> Further, in most cases, victims often do not have useful information with respect to an offender's rehabilitation.<sup>276</sup> Finally, the highly emotional nature of victim impact statements risks that undue weight will be afforded a victim's sentencing request at the expense of other relevant sentencing considerations.

Mark Gibbs's case is telling. There, the court was obligated to resentence Mark to life imprisonment only upon concluding that Mark was incapable of rehabilitation.<sup>277</sup> Still, much of the court's presentence factual findings were rooted in the retributive victim impact statements by Richie Gibbs's family, none of which referenced Mark's post-offense rehabilitation.<sup>278</sup> In turn, the court put little, if any, stock into the appropriate sentencing framework under

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271. See MPC: SENT'G, Proposed Final Draft, *supra* note 119, § 6.14 reporter's note (emphasizing "the importance of using well-trained facilitators . . . who will assist court in their gatekeeping function to ensure that only appropriate cases are referred for victim-offender conferencing and that such conferences are carried out in a manner that safeguards the interests of all involved").

272. See *id.* (noting that legislatures have discretion "to develop local training standards for those wishing to facilitate victim-offender conferences").

273. *Id.* app. B, Reporter's Memorandum.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

278. Gibbs Sentencing Transcript Two, *supra* note 19, at 109 (commenting that, based on the victim impact statements given by Richie Gibbs's family, "it sounds as though at one time there was, what I would refer to as, just a great big, wonderful country family").

*Miller*.<sup>279</sup> Prior to resentencing Mark to life in prison, the court summarily concluded that Mark’s childhood crimes demonstrated “irretrievable depravity, whatever that definition is.”<sup>280</sup>

**5. Amend statutory language about a victim’s right to provide a statement in mitigation, including a definition of restorative justice and an explanation of the value of reconciliation-oriented statements to the goals of punishment.**

As a final—and, perhaps, self-evident—point, state statutory language must be amended to place opportunities for victim-offender reconciliation on equal footing with retributive processes. As a representative example, the Illinois Victims’ Rights Act highlights the right of crime victims to be treated with “fairness and respect for their dignity” before immediately enumerating the rights “to communicate with the prosecution,” “to be reasonably protected from the accused,” and the “right to [victim] safety” when determining conditions of post-arrest release.<sup>281</sup> In effect, the statutory language functions as a kind of retribution-directed roadmap for victims. Instead, if victims’ rights laws truly prize “dignity,” a statement of restorative alternatives must comprise more than a mere statutory afterthought—to the extent that a law accommodates it at all. Again, Mark Gibbs’s case offers insight. Far from dignified, Betty Gibbs’s family members were debased in their victimhood. Express statutory language elevating the right to, and value of, restorative justice processes will reduce the chance that future victims in Illinois and elsewhere are treated similarly.

### CONCLUSION

Since the 1982 Presidential Task Force Report on Victims of Crime, the U.S. has spent \$260 billion per year on criminal justice, with negligible returns.<sup>282</sup> Fruitless dollars aside, the toll extracted by the era of mass

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279. *Miller*, 567 U.S. at 479–80.

280. Gibbs Sentencing Transcript Two, *supra* note 19, at 137.

281. 725 ILL. COMP. STAT. 120/4(a)(1), (3), (7), (7.5) (2020).

282. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? (2015), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf) [<https://perma.cc/95KB-4QX3>]; see also Marc Santora, *City’s Annual Cost Per Inmate is \$168,000*, N.Y. TIMES (Aug. 23, 2013), <https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is->

incarceration is incalculable.<sup>283</sup> Punitive crime control and mass incarceration has fractured families, disenfranchised millions of individuals convicted of crimes, and entrenched social inequality.<sup>284</sup> As sentencing laws have played a central role in escalating prison populations, criminal justice reform hinges on changing outdated sentencing policies and practices. Overhauling victims' rights laws to include meaningful opportunities for victim-offender reconciliation is a critical component of the course correction. While the Model Penal Code's recommendations for victim-offender conferencing offer a promising starting point, its legislative guidance stops short of implementing lasting change. Rather, a radical rethinking of victims' rights laws is due. The changes I propose are integral to a decarceration movement emerging "not solely from the wreckage of past policies but also from new attitudes" about just and equitable crime control.<sup>285</sup> Criminal justice trends aside, legislating real opportunities for victim-offender reconciliation will honor all crime victims, especially those who resist exploitation by the prosecutor in pursuit of hard-won mercy for the condemned.

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nearly-168000-study-says.html [https://perma.cc/2V6B-GCLX] (citing a Vera Institute study of forty states with an aggregate cost of \$39 billion to house inmates at an average taxpayer cost of \$31,286 per inmate).

283. See BROOK, *supra* note 253, at 115; ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 1, 17–18 (2014) ("Since the 1980s, the War on Crime and War on Drugs have taken millions of Black young men out of school, work, and family life, sent them to jails and prisons, and returned them to society with felony convictions.").

284. GOFFMAN, *supra* note 283, at 17–18.

285. Nicholas Kristof, *We Interrupt This Gloom to Offer . . . Hope*, N.Y. TIMES (July 16, 2020), [https://www.nytimes.com/2020/07/16/opinion/sunday/coronavirus-blm-america-hope.html?te=1&nl=nicholas-kristof&emc=edit\\_nk\\_20200725](https://www.nytimes.com/2020/07/16/opinion/sunday/coronavirus-blm-america-hope.html?te=1&nl=nicholas-kristof&emc=edit_nk_20200725) [https://perma.cc/9L3B-YCKR].