

INCREASING VICTIM SATISFACTION WITH TRADITIONAL CRIMINAL  
JUSTICE SYSTEMS: LESSONS LEARNED FROM  
RESTORATIVE JUSTICE

by

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A THESIS

Presented to the Conflict and Dispute Resolution Program  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Master of Science

June 2016

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Title: Increasing Victim Satisfaction with Traditional Criminal Justice Systems: Lessons Learned from Restorative Justice

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Degree awarded June 2016

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## THESIS ABSTRACT

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June 2016

Title: Increasing Victim Satisfaction in Traditional Criminal Justice Systems: Lessons Learned from Restorative Justice

In this paper, I argue that we can identify policies that can increase victim satisfaction with traditional criminal justice systems through analyzing factors that increase victim satisfaction with restorative justice process. First, this paper defines key terms, including “restorative justice,” “traditional criminal justice systems” and “victim.” Next, it analyzes the current literature and identifies why increasing victim satisfaction in traditional criminal justice systems is important. Third, it looks at the state of victim satisfaction with traditional criminal justice systems, and identifies factors that contribute to low satisfaction. Fourth, this paper analyzes the literature examining restorative justice and victim satisfaction, and identifies key factors within restorative justice processes that improve victim satisfaction. Finally, having identified the problems with the traditional criminal justice system and the best practices within restorative justice systems, I propose a number of process changes for traditional criminal justice systems that could increase victim satisfaction.

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## ACKNOWLEDGMENTS

This thesis was no small task, and I want to express my deep appreciation for everyone who helped me complete it.

First, I would like to thank Professors Thomas Lininger and Nathaline Frener for their assistance through this entire process. Their input was invaluable to the completion of this paper.

Second, I would like to thank my father. Even though he found this paper “unbearably dry,” he read multiple drafts to ensure no commas or apostrophes were harmed during the making of this thesis.

Third, and most importantly, I would like to thank my wife, Michele, who tolerated me for months while I was glued to my keyboard. Without her love and devotion, I would not be where I am today.

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## CHAPTER I

### INTRODUCTION

Victim satisfaction with the traditional criminal justice systems is low. Victims of violent and non-violent crimes often find themselves re-traumatized by a system that they believe was created to help them. Research demonstrates that the same factors that diminish victim satisfaction with the criminal justice system are correlated with negative mental health outcomes—such as post-traumatic stress disorder—in crime victims.

In terms of victim experience, restorative justice systems starkly contrast traditional criminal justice systems. While no research exists comparing the mental health impacts of restorative justice to traditional criminal justice, restorative justice practices are routinely found to result in higher victim satisfaction than traditional criminal justice practices.<sup>1</sup>

A large concern for restorative justice is the potential inequity suffered by an offender if a victim refuses to participate in a restorative justice process.<sup>2</sup> However, no focus is placed on what happens to a victim when an offender refuses to participate in a restorative justice process. When victims refuse to participate in restorative processes, offenders are often offered a sentence reduction to help remediate their lost opportunity. In contrast, when an offender refuses to participate, victims are left to work in a system that offers them less procedural justice, less emotional restoration, a lower chance at restitution, and ultimately, less satisfaction with their experience. Consequently, it is

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<sup>1</sup> Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23.2 J. OF TRAUMATIC STRESS 182, 186 (2010).

<sup>2</sup> See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 37-38 (2003).

imperative that people in charge of traditional criminal justice systems look at ways these systems can be improved, in order to assist the innocent parties who may be suffering due to nothing more than an offender's choice to plead "Not Guilty."

In this paper, I argue that we can identify policies that increase victim satisfaction with traditional criminal justice systems through analyzing factors that increase victim satisfaction with restorative justice process. First, this paper defines key terms, including "restorative justice," "traditional criminal justice systems" and "victim." Next, this paper analyzes the current literature and identifies why increasing victim satisfaction in traditional criminal justice systems is important. Third, this paper looks at the state of victim satisfaction with traditional criminal justice systems, and identifies factors that contribute to low satisfaction. Fourth, this paper analyzes the literature examining restorative justice and victim satisfaction, and identifies key factors within restorative justice processes that improve victim satisfaction. Finally, having identified the problems with the traditional criminal justice system and the best practices within restorative justice systems, I propose a number of process changes for traditional criminal justice systems that could increase victim satisfaction. These include increasing access to victim advocates, increasing victims' rights training for law enforcement personnel, providing victims with counsel, increasing victim involvement at sentencing, increasing victims' access to psychological counseling, incentivizing offender apologies with sentence reductions, allowing for more creative restitution at sentencing, and improving processes for returning property to victims.

## CHAPTER II

### DEFINITIONS

Before delving into victim satisfaction with both restorative justice and traditional criminal justice systems, some terms must be defined. The definitions of “restorative justice,” “traditional criminal justice systems” and “victim” will lay a critical foundation for understanding the arguments levied in this work.

#### **Restorative Justice**

The term “restorative justice” is admittedly broad. The most general definition of restorative justice refers to a criminal justice process that results in “the restoration of victims, offenders, and community.”<sup>3</sup> Restorative justice “encourages a shift towards less formal responses to crime that emphasize the role of citizens, community groups and other institutions of civil society.”<sup>4</sup> For the purposes of this paper, restorative justice refers to all programs generally believed to fall under the “restorative justice” umbrella by including direct participation by victims and offenders and a focus on reparation and reconciliation.<sup>5</sup> This includes victim-offender reconciliation programs that happen after sentencing, victim-offender mediation programs that happen either face-to-face or by shuttle mediation, and family group conferences made popular in New Zealand, among others.

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<sup>3</sup> Heather Strang, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE*, 2 (2006) [hereinafter Strang, *REPAIR OR REVENGE*].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 45.

## Traditional Criminal Justice Systems

The term “traditional criminal justice systems” is notably misleading for a number of reasons. First, researchers recognize that restorative justice systems actually predated many adversarial systems of justice, and thus, are more “traditional” than adversarial systems.<sup>6</sup> Second, drawing a dichotomy between restorative justice and traditional criminal justice systems is difficult, because many if not all of these systems include some sort of restorative justice measures related to victim compensation and restitution.<sup>7</sup> Regardless, articulating this delineation is important.

In this paper, the term “traditional criminal justice systems” refers to the adversarial forms of criminal justice—namely trials—that are the primary form of resolving criminal offenses in Western societies. In these systems, the state has the “responsibility for the investigation, prosecution, and disposition of a criminal [offense].”<sup>8</sup> These processes are notably different from restorative justice programs because, though they may include restorative policies (providing victims restitution, for example), victims are largely excluded from any meaningful role in the prosecution of crimes committed against them.<sup>9</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

## Victim

The term “victim” is defined as a person “who has experienced harm as a result of an offense; it is invariably a term of moral approbation suggesting undeserved suffering.”<sup>10</sup> Researchers commonly use the word “victim” to refer to people who have suffered physical loss due to a crime.<sup>11</sup> However, the term “victim” for the purposes of this paper can also apply to people who suffer an emotional loss as a result of a crime. For instance, researchers often categorize family members of people who were murdered as “victims” when analyzing victim satisfaction.<sup>12</sup>

To fully understand the term “victim,” understanding the history of victims’ participation in criminal justice systems is important. Victims were initially not disenfranchised by criminal justice systems. Early criminal justice systems were predominately restorative in nature.<sup>13</sup> For example, “[i]n Saxon England, an offender

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<sup>10</sup> *Id.* at 2.

<sup>11</sup> See, e.g., Jac Armstrong, *Factors Contributing to Victim’s Satisfaction with Restorative Justice Practice: A Qualitative Examination*, 10.2 BRITISH J. OF COMMUNITY JUST. 39, 41 (2012) (studying offender-victim mediation processes where victims were either assaulted by or had property stolen or damaged by the offender).

<sup>12</sup> See, e.g., Sarah Goodrum, *Bridging the Gap Between Prosecutors’ Cases and Victims’ Biographies in the Criminal Justice System Through Shared Emotions*, 38 L. & Soc. Inquiry 257, 263 (2013) (analyzing the satisfaction of family members of murder victims with traditional criminal justice processes).

<sup>13</sup> Strang, REPAIR OR REVENGE *supra* note 3, at 3.

could buy back the peace he had broken by payment to the victim or his family according to a detailed schedule of injury payments.”<sup>14</sup>

However, as monarchies became more powerful in the late-twelfth century, the state became a more important actor in criminal prosecutions.<sup>15</sup> Victims’ interests were replaced by the interests of the state, and private settlement of criminal disputes was no longer permitted.<sup>16</sup> The state replaced victims as both a party to the litigation as well as the recipient of restitution payments by the offender.<sup>17</sup> By the 1800s, the victim “had become just another witness.”<sup>18</sup>

The systemic disenfranchisement of victims in traditional criminal justice systems remained basically unchanged until the 1970s.<sup>19</sup> Reforms in the form of victims rights movements began to restore victims place in criminal justice.<sup>20</sup> Restorative justice programs, which had fallen out of favor, began to spring up.<sup>21</sup> However, even following

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<sup>14</sup> *Id.* (internal quotation omitted).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 29-32 (commenting on the rise of the Victims’ Rights Movement in the United States).

<sup>21</sup> *Id.* at 45 (“Although the concept of ‘restorative justice’ has a lineage encompassing many indigenous as well as pre-industrial Western justice traditions, the term became widely used on in the 1990s”).

these reforms, victims still play a relatively minor role in criminal justice procedures.<sup>22</sup>

This paper makes its arguments under the backdrop of systems in which victims remain disenfranchised by the traditional criminal justice system.

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<sup>22</sup> Ian Edwards, *Am Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44.6 BRITISH J. OF CRIMINOLOGY 967, 978 (2004) (noting that the victim as a witness is merely an “information-provider” whose usefulness is determined by other people, rather than the victim).



## CHAPTER III

### THE IMPORTANCE OF THE VICTIM EXPERIENCE

Increasing victim satisfaction with traditional criminal justice systems is more than a noble goal. It is imperative given the system's current realities. Not only are traditional criminal justice systems failing to serve the people they purport to help—namely, victims—these systems are actually further victimizing them. Rather than helping overcome the physical and psychological harm they have suffered, the criminal justice system aggravates victims' injuries. Without an improved criminal justice system, society will continue to seek “justice” for the community while simultaneously harming and re-victimizing the people who were harmed by the criminal behavior.

Further, improving victim satisfaction within the criminal justice system is important because it has the potential to reduce crime. Victimization—especially violent victimization—and offending later in life are strongly connected. By failing to address fully the harm experienced by an individual, criminal justice systems are missing key opportunities for interventions that could keep victims from becoming offenders later in life.

Finally, specifically improving victim satisfaction with criminal justice systems is important in and of itself. Improving victim satisfaction not only increases the quality of justice provided by criminal justice systems, but it also improves those systems' ability to function effectively.

Because the criminal justice system currently exacerbates harm experienced by victims, because better focus on victims has the potential to reduce crime, and because

improving victim satisfaction increases justice, society should focus on improving victim satisfaction within traditional criminal justice systems.

### **Secondary Victimization**

Traditional criminal justice systems not only fail to help remedy the harm caused to victims by the original crime, but they also exacerbate victims' psychological and physical harms. This exacerbation of harm is often referred to as secondary victimization.

Formally defined, secondary victimization refers to harms suffered by victims after they were initially harmed by a criminal offender.<sup>23</sup> In contrast, primary victimization is “the negative consequences of the situation that [initially] victimized [the person].”<sup>24</sup>

The legal system's secondary victimization of individuals is well documented. One study of a traditional criminal justice system in Spain found that “criminal proceeding[s'] consequences on [a] victim do not allow for a useful intervention and a satisfactory management of the crime generated trauma.”<sup>25</sup> The study discovered a substantial positive correlation between contact with the court and feelings of fear, anxiety, sadness, shame and abandonment.<sup>26</sup> Researchers concluded that a victim's contact with the criminal justice system caused secondary victimization.<sup>27</sup>

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<sup>23</sup> Isabel Correia, Jorge Vala & Patricia Aguiar, *The Effects of Belief in a Just World and Victim's Innocence on Secondary Victimization, Judgments of Justice and Deservingness*, 14.3 SOCIAL JUSTICE RESEARCH 327, 328 (2002).

<sup>24</sup> *Id.*

<sup>25</sup> J. Tamarit, C. Villacampa & G. Filella, *Secondary Victimization and Victim Assistance*, 18 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST., 281, 296 (2010).

<sup>26</sup> *Id.* at 293.

The Spanish study is not unique in its findings. In another study, which examined secondary victimization of rape victims caused by contact with community services, researchers found that 52% of the subjects they interviewed indicated that the legal system was hurtful.<sup>28</sup> This contrasted sharply with the victims' perceptions of the other care they received. For instance, one-third of the victims rated their contact with the next most damaging system—the medical system—as hurtful.<sup>29</sup> Further, the victims overwhelmingly rated their contacts with mental health professionals, rape crisis centers and religious communities as healing, rather than hurtful.<sup>30</sup>

A third study, specifically analyzing secondary victimization caused by traditional criminal justice systems, researchers found that 67% of participants reported perceived secondary victimization from their interactions with the criminal justice system.<sup>31</sup> The study found that contact with the criminal justice system had negative effects on both victims' trust in the legal system and faith in a just world.<sup>32</sup> The study also indicated that the victim's perception of subjective procedural fairness and satisfaction with the

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<sup>27</sup> *Id.* at 295.

<sup>28</sup> Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefl & Holly E. Barnes, *Preventing the "Second Rape:" Rape Survivors' Experiences with Community Service Providers*, 16.12 J. OF INTERPERSONAL VIOLENCE 1239, 1250 (2001).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15.4 SOCIAL JUSTICE RESEARCH 313, 319 (2002).

<sup>32</sup> *Id.* at 321.

outcome of their case were strong indicators of whether or not the victim felt secondarily victimized.<sup>33</sup>

The harm caused to victims by the criminal justice system is in no way minimal. Secondary victimization by the legal system does not only take the form of negative attitudes towards the legal system, less faith in a just world, and negative emotions experienced by victims. Even though people—including law enforcement—may suggest to victims that reporting a crime may be psychologically beneficial to a crime victim, studies have shown this belief to be mistaken.<sup>34</sup>

First, we must recognize that the psychological harm suffered by victims as a result of their primary victimization—especially violent crime—cannot be overstated. Numerous studies have connected violent crime with post-traumatic stress disorder (PTSD), depression, substance abuse, panic disorder, anxiety disorders, agoraphobia, social phobia, obsessive compulsive disorder, and suicide.<sup>35</sup> Consequently, disaggregating the psychological harm suffered by victims as a result of their primary victimization and secondary victimization is difficult if not impossible. However, there is no question that secondary harm can exacerbate the primary psychological harm suffered by victims.

In a review of the studies conducted on secondary victimization caused by contact with the criminal justice system, Judith Herman concludes that while “[i]nvolvement in legal proceedings constitutes a significant emotional stress for even the

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 323.

<sup>35</sup> Parsons, *supra* note 1, at 182.

most robust citizen,” involvement in the criminal justice system by victims of violent crime “may compound [their] original injury.”<sup>36</sup> Herman remarks that, “if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.”<sup>37</sup>

Herman is not alone in her conclusions. In Campbell’s study of rape victims, researchers found a significant correlation between secondary victimization caused by “negative community contacts” and poorer health outcomes.<sup>38</sup> The study revealed that “victims who rated their contact with the legal system as hurtful exhibited higher psychological and physical health distress.”<sup>39</sup> This was especially true of defendants whose cases were not prosecuted.<sup>40</sup>

Another study demonstrates also supports Herman’s conclusions. Researchers provided questionnaires to 415 mental health professionals in the state of Illinois.<sup>41</sup> The respondents were asked to draw upon their collective experiences working with victims of sexual assault and rate whether various community interventions were psychologically

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<sup>36</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16.2 J. OF TRAUMATIC STRESS 159, 159 (April 2003).

<sup>37</sup> *Id.*

<sup>38</sup> Campbell, *supra* note 15, at 1253.

<sup>39</sup> *Id.* at 1252.

<sup>40</sup> *Id.*

<sup>41</sup> Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14.3 VIOLENCE & VICTIMS 261, 262 (1999).

helpful or harmful to their clients.<sup>42</sup> The survey results were an indictment of the traditional criminal justice system’s treatment of rape survivors. Eighty-one percent of the mental health professionals surveyed agreed that “contact with the legal system is psychologically detrimental to rape survivors.”<sup>43</sup>

Given the realities of the traditional criminal justice system, the phenomenon of secondary victimization should not be a surprise. The interests of victims and the interests of the traditional criminal justice system are often diametrically opposed.<sup>44</sup> A “crime victim” is a person “who has experienced harm as a result of an offense; it is invariably a term of moral approbation suggesting undeserved suffering.”<sup>45</sup> Even though the harm suffered by a victim instigates a criminal prosecution, the traditional criminal justice system is organized to resolve disputes between the state and the defendant, rather than between the victim and the defendant.<sup>46</sup> Consequently, the victim exists only as an object of the offense—not as a party to the dispute. In the best-case scenario, this arrangement ignores the victim’s needs and desires. In the worst case, the system aggravates harm suffered by victims.

In a review of studies on the psychological trauma suffered by victims who interact with the criminal justice system, Judith Herman illustrates a number of ways in which the criminal justice system is set up to harm, rather than support, victims:

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<sup>42</sup> *Id.* at 264.

<sup>43</sup> *Id.* at 267.

<sup>44</sup> Herman, *supra* note 36, at 159.

<sup>45</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 44.

<sup>46</sup> Herman, *supra* note 36, at 159.

Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.<sup>47</sup>

Given the realities of the system, it may be impossible to eliminate secondary victimization from the criminal justice system. However, given the large psychological consequences that it carries for victims, the system should work to minimize the harm that it causes. Unless it does that, the criminal justice system is not truly just.

### **The Victim-to-Prison Pipeline**

The secondary victimization caused by the criminal justice system is not the only reason that increasing victim satisfaction is important. Improving victim treatment within the traditional criminal justice system may also result in a reduction of crime.

Commonly victims and offenders are seen as two distinct communities.<sup>48</sup> However, victims and offenders often come from the same demographic pool.<sup>49</sup>

The relationship between victimization and offending has been studied extensively because of the close demographic relationship of the two communities. In an early examination of the phenomena, researchers found that, “Victimization is highly

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<sup>47</sup> *Id.* at 159-60.

<sup>48</sup> Lawrence Sherman & Heather Strang, *RESTORATIVE JUSTICE: THE EVIDENCE*, 12 (2007).

<sup>49</sup> Michael R. Gottfredson, *On the Etiology of Criminal Victimization*, 72.2 J. OF CRIM. L. AND CRIMINOLOGY, 714, 726 (1981).

related to self-reported, violent offenses.”<sup>50</sup> The study found that more than two-thirds of the participants who reported being a victim of serious violence also reported having committed an act of serious violence.<sup>51</sup> In contrast, “less than a third of the non-victims reported committing a serious violent offense.”<sup>52</sup>

These early findings are consistent with more recent studies. For example, the Department of Justice examined 5,003 juveniles over two years to identify connections between violent victimization and violent offending.<sup>53</sup> The evidence collected demonstrated a clear connection between violent victimization and committing future violent offenses.<sup>54</sup>

Researchers found that “violent victimization is an important risk factor for subsequent violent offending.”<sup>55</sup> The study showed that “[t]he percentage of year 1 victims who committed a violent offense in year 2 (52 percent) was significantly higher than the percentage of year 1 non-victims who committed a violent offense in year 2 (17 percent).”<sup>56</sup> Further, the study found that “the effect of violent victimization on offending

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<sup>50</sup> Simon I. Singer, *Victims of Serious Violence and Their Criminal Behavior: Subculture Theory and Beyond*, 1.1 VICTIMS AND VIOLENCE 61, 64 (1986).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Jennifer Shaffer & Barry R. Ruback, *Violent Victimization as a Risk Factor for Violent Offending among Juveniles*, JUV. JUST. BULL., December 2002 at 1.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.*



appears to be stronger within years than across years,” meaning that the likelihood of victims becoming offenders in the same year of victimization is even higher than the already high likelihood of them offending the year after their initial victimization.<sup>57</sup>

A third study, examining a population whose abuse and neglect as children had been documented and substantiated by the court system in the Midwest, found that, “Early childhood victimization demonstrably increases the risk of violent offending through the [victim’s] life span.”<sup>58</sup> Even though other factors, such as race and sex, were strong predictors of future criminal behavior, victimization served as a strong predictor among those demographics.<sup>59</sup>

More recently, studies have also discovered that a significant number of sexual abusers have suffered previous physical and sexual abuse.<sup>60</sup> In fact, research indicates that between “15% to 70% of adult sex offenders report histories of past sexual abuse and 40% to 80% of adolescent sex offenders report experiences of past abuse.”<sup>61</sup>

The strong correlation between victimization and future criminal activity is not coincidental. Research has shown that the reason for the strong correlation can be traced to the poor coping strategies victims use to handle the victimization.

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<sup>57</sup> *Id.* at 8.

<sup>58</sup> Beverly Rivera & Cathy Spatz Widom, *Childhood Victimization and Violent Offending*, 5.1 VIOLENCE & VICTIMS 19, 30 (1990).

<sup>59</sup> *Id.*

<sup>60</sup> Tony Ward & Gill Moreton, *Moral Repair with Offenders: Ethical Issues Arising from Victimization Experiences*, 20.3 SEXUAL ABUSE: A J. OF RES. & TREATMENT 305, 307 (Sept. 2008).

<sup>61</sup> *Id.* (citing D. Simons, *Childhood Victimization of Sexual Abusers: Making Sense of the Findings*, ATSA FORUM, 2006, at 1).

For example, in a study of twenty female offenders, researchers found a strong correlation between previous violent victimization and future criminal offending based on the victim's chosen methods for coping with the trauma of victimization.<sup>62</sup> The study concluded that violent victimization of women was a "strong force" in their criminalization because "the survival strategies selected by (or which are the only options available to) some women are the beginning of a process of transition from victim to offender."<sup>63</sup> These problematic survival strategies included running away from home as juveniles, substance abuse, and becoming prostitutes or committing minor property crimes as a way to support oneself.<sup>64</sup>

Coping as a cause of the future criminalization of victims is also confirmed by studies that examine the relationship of victimization and substance abuse. Victimization—especially violent victimization—greatly increases a person's risk of substance abuse. In a study of over 4,000 adolescents, aged 12 to 17, participants who had previously suffered either physical or sexual abuse had an "increased risk of past-

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<sup>62</sup> Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion into Street Crime.*, 4.1 WOMEN & CRIM. JUST. 63, 85 (1992).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

year alcohol abuse/dependence by a factor of about two.”<sup>65</sup> The same study found similar results for the use of both marijuana and hard-drugs.<sup>66</sup>

A similar study of women age 18-34 found that 80% of women who had sought treatment for substance abuse had been either physically or sexually victimized during their lifetimes.<sup>67</sup> The number was so significant that the researchers suggested that all substance abuse programs should provide trauma screening in order to best serve their patients.<sup>68</sup>

Other studies have shown that substance abuse is associated with childhood maltreatment as well as adult abuse. For example, a study of inmates found that 57.4% of female inmates experience victimization as children, while 75.2% of the female inmates surveyed reported they had been victimized as adults.<sup>69</sup> Researchers identified a strong correlation between illicit substance use and victimization.<sup>70</sup> This led the

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<sup>65</sup> Dean G. Kilpatrick, Ron Acierno, Benjamin Saunders, Heidi S. Resnick, Connie L. Best & Paula P. Schnurr, *Risk Factors for Adolescent Substance Abuse and Dependence Data from a National Sample*, 68.1 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 19, 29 (Feb. 2000).

<sup>66</sup> *Id.*

<sup>67</sup> Bonnie S. Dansky, Michael E. Saladin, Kathleen T. Brady, Dean G. Kilpatrick & Heidi S. Resnick, *Prevalence of Victimization and Posttraumatic Stress Disorder among Women with Substance Use Disorders: Comparison of Telephone and In-Person Assessment Samples*, 30.9 INTERNATIONAL J. OF THE ADDICTIONS 1079, 1092 (1995).

<sup>68</sup> *Id.* at 1093-94.

<sup>69</sup> Dorothy S. McClellan, David Farabee & Ben M. Crouch, *Early Victimization, Drug Use, and Criminality: A Comparison of Male and Female Prisoners*, 24.4 CRIM. JUST. & Behavior 455, 463-64 (1997).

<sup>70</sup> *Id.* at 468.

researchers to identify a pattern of increased victimization and substance abuse, especially in female populations.<sup>71</sup> The researchers noted that the data demonstrates that “[s]elf-medication to relieve the pains of victimization and depression lead to drug dependence and almost inevitably to arrest, incarceration, and punishment.”<sup>72</sup>

It is possible that armed with proper coping strategies to help handle the trauma caused by victimization, victims would be less likely to become criminals. This service is not being provided by current, traditional criminal justice systems. As previously discussed, victims are re-victimized—rather than helped—by the criminal justice systems that they turn to to seek safety. If these systems were to focus more on helping victims and achieving higher victim satisfaction, it is possible that victims could be armed with strategies that could keep them from later becoming criminals. Absent intervention, research clearly demonstrates that the victim-to-prison pipeline is a problem. Unless traditional criminal justice systems are improved, victims will continue to turn to substance use and abuse and other criminal behaviors to ease the trauma that they have experienced at the hands of others.

### **The Importance of Victim Satisfaction**

Victims’ experiences are important to more than their mental health and potential to become offenders in the future. Lack of victim satisfaction with traditional criminal justice systems also presents problems for the perception of and administration of justice within those systems. Criminal justice systems that fail to satisfy victims are unjust by

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<sup>71</sup> *Id.* at 472.

<sup>72</sup> *Id.*

standards our society has established. And criminal justice systems with low victim satisfaction also likely have problems administering justice.

First, if victims are not satisfied with the criminal justice process that most people believe was established to protect them, can we say that that system is truly just? As discussed previously, criminal justice systems were initially established exclusively for the purpose of redressing harms victims suffer.<sup>73</sup> As history has progressed, victims have found themselves increasingly disenfranchised by criminal justice systems.<sup>74</sup> However, society has recently recognized that the continued marginalization of victims in criminal justice systems is an absurd perversion of those criminal justice processes. Since the 1970s, every state in the United States has passed some form of victims' rights legislation.<sup>75</sup>

As will be discussed in length below, victim disenfranchisement is a key indicator of victim satisfaction with criminal justice systems.<sup>76</sup> Thus, criminal justice systems with low levels of victim satisfaction are also likely to have high levels of victim disenfranchisement. As demonstrated by the recent proliferation of victims' rights

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<sup>73</sup> Strang, REPAIR OR REVENGE *supra* note 3, at 3 (noting that in Saxon England, criminal cases were exclusively brought by victims against offenders).

<sup>74</sup> See, e.g., *id.* at 4-6 (discussing the evolution of the role of victims in traditional criminal justice processes).

<sup>75</sup> Michael E. Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims' Rights*, 64.4 CATHOLIC U. L. REV. 909, 909 (2015).

<sup>76</sup> See, e.g., Malini Laxminarayan, Robert Porter & Lorena Sosa, *Victim Satisfaction with Criminal Justice: A Systemic Review*, 8.2 VICTIMS & OFFENDERS 119, 131 (2013) (noting four studies that found a significant relationship between victim satisfaction and victim voice, as well as a fifth study that found a mixed relationship between the two factors).

legislation, victim inclusion in criminal justice systems is essential to our perception of those systems as just. Criminal justice systems with low levels of victim satisfaction are likely not truly just by the standards of our society has established. These systems disenfranchise victims—the same people most citizens believe criminal justice systems were created to protect.

Victim satisfaction is also importance to the administration of justice. Currently, victims' major role in traditional criminal justice systems is “information providers.”<sup>77</sup> Complaints by victims are essential to initiating the criminal justice system. Further, victims as witnesses also provide the information necessary for prosecutors to convict offenders. Many of our laws could not be effectively enforced without the participation of victims in the system. However, victims who are unsatisfied with criminal justice processes are not likely to participate in those processes.<sup>78</sup> As a result, criminal justice processes with low victim satisfaction suffer.<sup>79</sup>

Increasing victim satisfaction with criminal justice systems could have a three-fold effect. First, it could improve the mental health outcomes of victims who participate in those systems. Second, it could help reduce crime. Finally, improving victim

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<sup>77</sup> Edwards, *supra* note 22, at 978.

<sup>78</sup> Jo-Anne Wemmers & Katie Cyr, *What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation*, 2.2 APPLIED PSYCHOL. IN CRIM. J. 102, 124 (2006) (noting a number of studies that demonstrate that “victims who have previously had negative experiences with the justice system are less likely to report future criminal acts to the police”).

<sup>79</sup> *Id.* at 104 (“Victimization surveys show that most crimes go unreported with only a minority of victims actually reporting criminal acts to the police”).

satisfaction with traditional criminal justice systems also would increase those systems ability to be both just and effectively serve justice.

## CHAPTER IV

### VICTIM SATISFACTION WITH TRADITIONAL CRIMINAL JUSTICE SYSTEMS

Having recognized that achieving higher victim satisfaction is important to maintain a just criminal justice system, help reduce crime, and help those systems both be just and administer justice, it is now important to identify the factors contributing to low victim satisfaction with traditional criminal justice systems and the steps already taken to improve victim satisfaction. Only through fully understanding how victim dissatisfaction is exacerbated in traditional criminal justice systems, and what policies have and have not helped, can we identify where and how criminal justice systems can be improved by implementing the lessons learned from restorative justice.

#### **Factors Decreasing Victim Satisfaction with Traditional Criminal Justice Systems**

Victim satisfaction has long been a problem of traditional criminal justice systems. The most basic explanation for this problem has to do with the organization of criminal prosecutions. As previously discussed, criminal prosecutions resolve a dispute between a state and an offender, excluding victims. Victims and states have different interests in resolving criminal disputes.<sup>80</sup> Victims seek repair of the harmed they suffered, be it material or emotional.<sup>81</sup> States are interested in effectuating a consistent, predictable and equitable response to crimes.<sup>82</sup> This divergence of interests likely means there will never be complete victim satisfaction with traditional criminal justice systems. However, research has identified a number of other factors that contribute to low victim

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<sup>80</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 5.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*



satisfaction which may illuminate how victims' experiences within the system can be improved.

Research demonstrates that there are three major factors contributing to poor victim satisfaction with the criminal justice system. They are: (1) a perceived lack of procedural justice for victims; (2) a lack of emotional restoration for victims; and (3) a lack of material reparations for victims. Only through understanding how the traditional criminal justice system has failed victims in these areas can we identify potential improvements to traditional criminal justice processes.

#### Lack of Procedural Justice

A victim's perception of criminal justice processes as procedurally just has been identified by studies of both traditional criminal justice systems and restorative justice process as inextricably tied to victim satisfaction with criminal justice systems. In fact, studies have found that procedural justice is so intertwined with victims' criminal justice experiences that it affects their mental health. For example, one of the leading researchers on the mental health of victims noted that, with regard to criminal justice processes, "victim inclusion, choice, and empowerment may be the best predictors of mental health outcomes."<sup>83</sup> In another study, researchers concluded that "subjective procedural justice" was a strong indicator of secondary victimization in traditional criminal justice systems.<sup>84</sup>

Victims' perceptions of procedural justice are multifaceted. However, research has found that traditional criminal justice systems fail to be procedurally just in three ways that also negatively impact victim satisfaction. They are: (1) failure to keep victims

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<sup>83</sup> Herman, *supra* note 36, at 163.

<sup>84</sup> Orth, *supra* note 18, at 321.

informed about the process and adequately prepare them; (2) failure to adequately include victims within the process; and (3) failure for the end result of the process to be perceived as fair or just.

*Lack of Preparation for the Process*

One of the major failings of traditional criminal justice systems as they relate to victim satisfaction is the failure of the court system to keep victims adequately informed about their processes, and prepare them adequately to participate in those process. This issue is interrelated with the perceived procedural justice of the system. If victims are not informed about how a system works and do not have the tools to adequately participate in the system when given the chance, how can the system be perceived as just from their point of view?

Numerous studies have found a correlation between victims being poorly prepared and informed about the system and their satisfaction with traditional criminal justice processes. For example, in a study of victim satisfaction with traditional criminal justice systems and restorative justice processes in Australia, researchers found that victims who participated in court proceedings reported being incredibly under-informed about their case and criminal justice processes generally.<sup>85</sup> In this study, victims were asked whether they were informed “in good time” about when their cases were going to

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<sup>85</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 119.

be handled.<sup>86</sup> Seventy-nine percent of victims whose cases were being handled by a traditional criminal justice process reported that they were not informed “in good time.”<sup>87</sup>

Further, the study found that even when victims were actively tracking their own cases, their requests for information from police and prosecutorial offices were often met with cold responses.<sup>88</sup> Law enforcement personnel often told victims “it was premature to talk to [them] because the cases had not been dealt with so they could not make intelligent comment on how they felt.”<sup>89</sup> Unsurprisingly—based on this research—the study concluded that lack of communication “was the single greatest cause for dissatisfaction from victims whose cases were dealt with in court.”<sup>90</sup>

Failure to inform and prepare victims inadequately is not exclusive to traditional criminal justice systems in Australia. Undertaking a systemic review of 22 studies regarding victim satisfaction with traditional criminal justice systems, researchers found that “informational justice” had a significant relationship with victim satisfaction.<sup>91</sup> “Informational justice” referred to “the extent to which individuals[were] provided with explanations about the procedure, informed of the progress and facts of their case, and

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Laxminarayan, *supra* note 76, at 131.

referred to available sources of support.”<sup>92</sup> Evidence considered indicative of “informational justice” included reported victims “[a]ttend[ing] proceedings,” being “recontact[ed] about [the] status [of their] investigation,” being “kept informed,” being given “information on progress or outcome,” being “given contact name[s],” being given reasons for the direction of the case, “receiving information booklet[s],” being “referred to services,” having the “warrant process explained,” being “told about action steps,” and being “informed [of] developments.”<sup>93</sup>

In this review of victim satisfaction literature, researchers found that of the 22 studies, ten specifically examined “informational justice.”<sup>94</sup> Of those ten studies, five found a significant relationship between “informational justice” and victim satisfaction, and two found a mixed relationship.<sup>95</sup> Only three of the studies found no relationship between victim satisfaction and relational justice; however, those studies specifically looked only at victims who were provided with informational booklets, or those who choose to attend proceedings.<sup>96</sup> Consequently, the weight of the literature seems to demonstrate that when law enforcement officers and prosecutors fail to properly inform and prepare victims, victim satisfaction with traditional criminal justice systems suffers.

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<sup>92</sup> *Id.* at 122.

<sup>93</sup> *Id.* at 131.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

### *Lack of Involvement in the Process*

Another component affecting victims' perceptions of procedurally justice is their ability to participate within that system. Not surprisingly, given the fact that traditional criminal justice systems resolve a dispute between the "State" and the "defendant," victims are often excluded from participation within traditional criminal justice processes. Victims are not really participants as much as they are information providers.<sup>97</sup> In this role, victim participation in the system is "inextricably determined by others' needs for . . . information."<sup>98</sup> Unsurprisingly, victims' lack of standing as participants is a major source of their dissatisfaction with traditional criminal justice processes.

A recent review of the literature demonstrates that victims having a voice in criminal proceedings is key to their satisfaction with the process.<sup>99</sup> Eight of the 22 studies that researchers reviewed analyzed the relationship between voice and victim satisfaction with traditional criminal justice processes.<sup>100</sup> Researchers noted that four of the studies found a significant relationship between victims' ability to participate within the process and their satisfaction with the process, and one of the eight studies found a mixed relationship between victim participation and satisfaction.<sup>101</sup>

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<sup>97</sup> Edwards, *supra* note 22, at 978.

<sup>98</sup> *Id.*

<sup>99</sup> Laxminarayan, *supra* note 76, at 131.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Researchers also noted the importance of the quality of the opportunities to participate offered to victims.<sup>102</sup> Participation through acting as civil plaintiffs or subsidiary prosecutors, or making statements at sentencing was more likely to result in higher victim satisfaction than participation through victim impact statements or acting as private prosecutors.<sup>103</sup> Consequently, these studies suggest that the often poor quality opportunities that traditional criminal justice systems give victims to participate correlate with their dissatisfaction with these systems.

Other studies have also found that the lack of *quality* voice given to victims plays a role in victim dissatisfaction. In an analysis of victim participation as it relates to victim satisfaction, researchers sought to discover whether or not filling out victim impact statements increased victim satisfaction.<sup>104</sup> Researchers discovered that there was no correlation between victims participating through victim impact statements and victim satisfaction.<sup>105</sup> In fact, the researcher speculated that, in the case of some individual victims, their satisfaction with the process was decreased because it mistakenly raised their hopes.<sup>106</sup> This lead researchers to conclude that part of traditional criminal justice systems' problem with victim participation is not just that it fails to provide opportunities

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<sup>102</sup> *Id.* at 129.

<sup>103</sup> *Id.*

<sup>104</sup> Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9.3 JUST. Q. 393, 410 (1992).

<sup>105</sup> *Id.* at 400.

<sup>106</sup> *Id.* at 410.

for victims, but that those opportunities are not of high quality.<sup>107</sup> The researchers suggest that, in the future, opportunities for victims should be “conducted in a more ceremonial fashion” so that justice can be “*seen* to be done.”<sup>108</sup>

Recent research illustrates the lack of satisfaction that victims feel due to their inability to participate in a different light. Multiple studies have found that victims often find themselves frustrated with the fact that they cannot hire or select the prosecutor for their case.<sup>109</sup> One researcher noted that victim participants in her study made statements such as, “I didn’t have a choice [in the prosecutor for my son’s murder case]. It wasn’t like going out and hiring an attorney. And I just wanted to see and hear [the prosecutor] for myself,” and, “[T]he defendant gets to pick his own attorney, why aren’t the victims allowed to do that?”<sup>110</sup> This frustration suggests that, as found in other studies, victim disenfranchisement through lack of participation is a major contributor to poor victim satisfaction.

Each of these studies illustrates what seems to be common sense. Victim satisfaction with traditional criminal justice systems is lower because of a lack of quality victim participation. To improve victim satisfaction with traditional criminal justice systems, victim involvement with these processes needs to increase.

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (emphasis in original).

<sup>109</sup> Goodrum, *supra* note 12, at 279.

<sup>110</sup> *Id.* (alterations in original).

### *Lack of Fairness in the Process*

A third aspect of procedural justice strongly tied to victim satisfaction is the victim's perception of the process as fair. Research has clearly indicated that if victims view the outcome of their case as unfair, then they are often—unsurprisingly—less satisfied with the system.

For example, in a study of victim satisfaction with the criminal justice system in Ohio in the 1980s, researchers found a significant correlation between victims' perception that offenders' sentences were fair with their satisfaction or dissatisfaction with the criminal justice process as a whole.<sup>111</sup> This study found that the lack of fairness perceived was exacerbated when victims attempted to participate in the process through providing victim impact statements, because those victims often felt the system treated them unfairly by ignoring the harm they experienced, even though they expected it would be taken into consideration.<sup>112</sup> Consequently, victims often felt dissatisfied with the process and the final sentence.<sup>113</sup> This study is not unique.

In another study of 278 adult victims, researchers found that victim satisfaction with a traditional criminal justice system was more tied to their perception of the process as fair to them, than the actual outcome of the case.<sup>114</sup> Victims wanted to be consulted during the process, treated fairly and given restitution, but the outcome of the case—even

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<sup>111</sup> Erez, *supra* note 104, at 404-05.

<sup>112</sup> *Id.* at 410.

<sup>113</sup> *Id.*

<sup>114</sup> Joanna Shapland, *Victims, the Criminal Justice System and Compensation*, 23.2 BRIT. J. OF CRIMINOLOGY 131, 135 (1984).



if the offender was not caught—was unimportant to their satisfaction.<sup>115</sup> Consequently, the need to treat victims fair is an important factor guiding their satisfaction with the system. Further, these studies suggest that victim satisfaction with traditional criminal justice processes can be improved by increase victims’ perceptions of the process as fair.

#### Lack of Emotional Restoration

Unsurprisingly, given the data about secondary victimization and the court system discussed above, one of the main factors contributing to poor victim satisfaction is the lack of emotional restoration the system provides for victims. Studies show that exposure to traditional criminal justice systems often contribute to the negative emotional state of victims.

For example, one study found that over half of victims of violence whose cases were handled through the court system reported they would harm harm their victimizers if given the chance, following the conclusion of their case.<sup>116</sup> Another study reported that victims’ increased contact with the court positively correlated to feelings of fear, anxiety, sadness, shame and abandonment.<sup>117</sup> Unsurprisingly, when victims are left feeling negative emotions such as vengeance, fear, anxiety and shame, they also tend to be dissatisfied with the process that, even if it did not cause those emotions, failed to resolve

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<sup>115</sup> *Id.*

<sup>116</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 198.

<sup>117</sup> Tamarit, *supra* note 25, at 292-93.

them.<sup>118</sup> Thus, a majority of studies suggest that victim satisfaction with traditional criminal justice systems is correlated with the emotional well-being of the victim.<sup>119</sup>

While a number of factors contribute to traditional criminal justice processes' poor emotional restoration, studies have identified a number of areas in particular where courts fall short. These areas include the system's inability to elicit apologies from offenders to victims, and its inability to enable victims to properly tell their story unencumbered by strict rules of evidence and procedure.

#### *Lack of Apology*

One aspect of emotional restoration that correlates highly to victim satisfaction, regardless of whether a victim's case is handled by traditional criminal justice or restorative justice processes, is an offender apology. Studies have indicated that "almost all victims, regardless of the [offense] they had suffered . . . believe[] that their offenders should . . . apologize[] to them."<sup>120</sup> In fact, some studies indicate that as many as 90% of victims would like an apology from their offender.<sup>121</sup> However, traditional criminal justice processes do a very poor job of eliciting apologies from offenders.

Recognizing that at least part of this problem can be attributed to the Fifth Amendment right not to incriminate oneself, the failure to elicit apologies from offenders

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<sup>118</sup> See, e.g., Strang, REPAIR OR REVENGE, *supra* note 3, at 133.

<sup>119</sup> Maarten Kunst, Lieke Popelier & Ellen Varekamp, *Victim Satisfaction with the Criminal Justice System and Emotional Recovery: A Systematic and Critical Review of the Literature*, 16.3 TRAUMA, VIOLENCE, & ABUSE 336, 355 (2015).

<sup>120</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 198.

<sup>121</sup> Sherman, *supra* note 48, at 63.

means the system fails to meet a major interest of victims; one that is positively associated with their emotional well-being. Consequently, it is not surprising that studies have found a correlation between the lack of offender apologies in traditional criminal justice systems as correlated to high rates of victim dissatisfaction.

In a study comparing traditional criminal justice and restorative justice processes in Australia, researchers found that restorative justice systems were *four times* more likely than court systems to elicit offender apologies.<sup>122</sup> This study also found that victim satisfaction with traditional criminal justice system was significantly lower than victim satisfaction with restorative justice programs.<sup>123</sup> Though all of the difference cannot be attributed to the lack of apologies, the researchers concluded that following up with apologies is important to victim satisfaction in any system.<sup>124</sup> Consequently, the low rate of apologies in the traditional criminal justice system likely was a factor contributing to low victim satisfaction.

In a similar study of victim satisfaction with restorative justice programs in Great Britain, researchers also found lower rates of victim apology in courts corresponding with lower rates of victim satisfaction with the process.<sup>125</sup> The study found that in burglary

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<sup>122</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 198.

<sup>123</sup> *Id.* at 133.

<sup>124</sup> *Id.* at 152.

<sup>125</sup> Heather Strang, Lawrence W. Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel, RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMIC REVIEW, 38 (2013) [hereinafter Strang, RESTORATIVE JUSTICE CONFERENCING].

cases handled in the court, only 7% of victims received an apology.<sup>126</sup> Further, in robbery cases, only 14% of victims received an apology.<sup>127</sup> Tellingly, fully 60% of these victims reported being satisfied with the criminal justice process.<sup>128</sup> In comparison, 72% of victims reported being satisfied with restorative justice processes where between 96% and 100% of victims—depending on the original offense—received an apology.<sup>129</sup>

Given the correlation between low apology rates and low victim satisfaction, policies that increase offender apologies are likely to improve victim satisfaction with a system. These studies demonstrate that traditional criminal justice processes are notably poor at eliciting apologies. Consequently, part of the reason for low victim satisfaction with traditional criminal justice practices may be the lack of offender-to-victim apologies.

#### *Lack of Story Telling*

Victims' emotional restoration and, thus, satisfaction with the criminal justice system is also hurt by the system's failure to allow victims to tell their story—and have their stories listened to—unencumbered by evidentiary standards and other legal constraints.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 41.

<sup>129</sup> *Id.* at 38, 41.

The leading study on emotional restoration as it relates to victim satisfaction with traditional criminal justice process found that “a compassionate connection with the prosecutor prove[s] an important element of victims’ satisfaction with the system.”<sup>130</sup> Every victim interviewed by the researchers indicated a desire for a “close personal relationship with the prosecutor handling their . . . case.”<sup>131</sup> Victims want this relationship because it allowed them to openly share their stories and feelings about the case.<sup>132</sup> The study found that victims who were not able to cultivate this type of relationship felt dissatisfied and disconnected from the process.<sup>133</sup>

Interestingly, the study found that victim satisfaction in the traditional criminal justice system examined was higher because these relationships were developed with a majority of the victims surveyed.<sup>134</sup> However, the researcher also noted that this particular finding is at odds with every other study done on the subject, which find that sympathetic relationships between prosecutors and victims are rare.<sup>135</sup> The divergence between this study and others may be because this study surveyed only families of murder victims.<sup>136</sup> Consequently, the sympathetic relationships that allow victims to story

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<sup>130</sup> Goodrum, *supra* note 12, at 275.

<sup>131</sup> *Id.* at 282.

<sup>132</sup> *Id.* at 282-83.

<sup>133</sup> *Id.* at 271.

<sup>134</sup> *Id.* at 272.

<sup>135</sup> *Id.*

<sup>136</sup> *See id.* at 263-64.

tell and express emotions are likely not as common as this study posits, and thus, victim satisfaction with many traditional criminal justice systems suffers.

This research demonstrates that the lack of the ability for victims to story tell in traditional criminal justice systems undermines their satisfaction with those systems. Often, the only time that victims can express their emotions in traditional criminal justice systems is when they are talking to sympathetic law enforcement personnel in informal settings. Problematically, though law enforcement personnel in murder cases are likely to be sympathetic to victims, most other law enforcement personnel are not. Consequently, one of the few emotional outlets available to victims is often denied. As a result, their emotional restoration and satisfaction with the process suffer.

#### **Attempts to Improve Victim Satisfaction**

In order to understand better what policies can be effective in the future, we must understand what programs have already been undertaken to improve victim satisfaction. In the United States, the predominant response to poor victim satisfaction with traditional criminal justice systems over the last 40 years has been victims' rights legislation.<sup>137</sup> In fact, every state has passed a statutory or constitutional provision giving victims the right to receive notice and to participate in criminal proceedings involving their offender in some way.<sup>138</sup>

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<sup>137</sup> Solimine, *supra* note 75, at 909.

<sup>138</sup> *Id.*

One of the preeminent examples of this type of legislation is the Crime Victims' Rights Act (CVRA), passed by the United States federal government. The CVRA, codified at 18 U.S.C. § 3771 (2014), was passed by Congress in 2004.<sup>139</sup>

The CVRA includes a number of rights meant to increase victim participation within their cases.<sup>140</sup> These include: “[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;”<sup>141</sup> “[t]he right not to be excluded from any . . . public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;”<sup>142</sup> “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;”<sup>143</sup> “[t]he reasonable right to confer with the attorney for the Government in the case;”<sup>144</sup> “[t]he right to proceedings free from unreasonable delay;”<sup>145</sup> “[t]he right to

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<sup>139</sup> See Mary Margare Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26.2 YALE L. & POL'Y REV. 431, 444 (2007).

<sup>140</sup> See § 3771.

<sup>141</sup> § 3771(a)(2).

<sup>142</sup> § 3771(a)(3).

<sup>143</sup> § 3771(a)(4).

<sup>144</sup> § 3771(a)(5).

<sup>145</sup> § 3771(a)(7).

be treated with fairness and with respect for the victim’s dignity and privacy;”<sup>146</sup> “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement;”<sup>147</sup> and, the right to be informed of all of their rights.<sup>148</sup>

The CVRA also attempts to address the emotional restoration and material reparation of victims as well. Congress choose to give victims both “[t]he right to be reasonably protected by the accused,”<sup>149</sup> as well as “[t]he right to full and timely restitution as provided in the law.”<sup>150</sup>

Victims can enforce their rights under the CVRA by filing a mandamus petition with the court.<sup>151</sup> If a court finds a victim’s rights have been violated, the victim is entitled to remedies that include having the court reopen sentencing.<sup>152</sup>

The effectiveness of the various forms of victims’ rights legislation has differed depending upon its quality. It is important to note that generally, laws that give victims more opportunities to participate increase victim satisfaction.<sup>153</sup> Quality engagement with criminal justice systems offers emotional support to victims by giving them “greater

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<sup>146</sup> § 3771(a)(8).

<sup>147</sup> § 3771(a)(9).

<sup>148</sup> § 3771(a)(10).

<sup>149</sup> § 3771(a)(1).

<sup>150</sup> § 3771(a)(6).

<sup>151</sup> § 3771(d)(3).

<sup>152</sup> § 3771(d)(5).

<sup>153</sup> Herman, *supra* note 36, at 160-61.



safety and protection for themselves,” enhancing their sense of power to protect others, “detering the offender from repeating his crimes,” providing them with “public acknowledgment of their suffering” and “restitution for the harm done to them.”<sup>154</sup> Not all new laws have provided victims with quality opportunities to participate, however.

For example, victim impact statements, one of the more common ways traditional criminal justice systems have adapted to increase victim participation, are notoriously ineffective at increasing victim satisfaction.<sup>155</sup> Research shows that filling out victim impact statements alone, is not a noteworthy experience for victims.<sup>156</sup> In fact, one study showed that while 32% of victim’s surveyed reported not filling out a victim impact statement, half of those victims had actually completed one.<sup>157</sup> This means that merely giving victims the opportunity to produce impact statements does not solve the problem of low victim satisfaction.

Access to victim advocates, on the other hand, has been proven to increase victims’ perception of a system as procedurally just, and therefore, their satisfaction with that system.<sup>158</sup> Researchers conducted a two-year study to determine whether victims’ perception of a traditional criminal justice system as procedurally just was affected by

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<sup>154</sup> *Id.*

<sup>155</sup> Laxminarayan, *supra* note 76, at 129.

<sup>156</sup> Erez, *supra* note 104, at 400.

<sup>157</sup> *Id.*

<sup>158</sup> Ben Bradford, *Voice Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System*, 11.4 CRIMINOLOGY & CRIM. J. 345, 362 (2011).

increased contact with state provided victim advocates.<sup>159</sup> The study found that contact with victim advocates increased victims' overall satisfaction how their case was handled, perceptions of the criminal justice system as procedurally just, and levels of confidence with the criminal justice system.<sup>160</sup>

This research demonstrates that victims' rights legislation may already provide some answers as far as increasing victim satisfaction. However, it also demonstrates that some interventions are not of high enough quality (such as victim impact statements) to actually affect victim satisfaction. Consequently, any policies that are meant to improve victim satisfaction must provide real means for victims to participate and feel heard in order to be effective.

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<sup>159</sup> *Id.* at 347.

<sup>160</sup> *Id.* at 362.

## CHAPTER V

### VICTIM SATISFACTION WITH RESTORATIVE JUSTICE

Compared to traditional criminal justice systems, restorative justice processes generally have significantly higher levels of victim satisfaction. Studies demonstrate that victims who have their cases handled by the court are significantly less likely to feel satisfied with the process than those who participate in restorative justice processes. For example, a review of four comprehensive studies on restorative justice processes in Australia found that 46% of victims who had their cases handled in court reported being satisfied with the process.<sup>161</sup> In comparison, the studies found that 60% of victims whose cases were handled using restorative justice processes were satisfied with the process.<sup>162</sup> Another study examining victim satisfaction with a restorative justice program for juvenile offenders in Great Britain found that while 79% of victims whose cases went to court were satisfied with the process, a staggering 96% of victims who participated in restorative justice conferences were satisfied with their process.<sup>163</sup>

Interestingly, studies examining victim satisfaction with restorative justice programs indicate that the same factors contributing to low victim satisfaction with traditional criminal justice systems—procedural justice, emotional restoration and material reparations—are the factors contributing to higher levels of victim satisfaction with restorative justice. Consequently, it is important to delve into factors that contribute to the high levels of victim satisfaction that restorative justice processes enjoy.

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<sup>161</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 133.

<sup>162</sup> *Id.*

<sup>163</sup> Sherman, *supra* note 48, at 63.

## Procedural Justice

Whereas, the perceived lack of procedural justice in traditional criminal justice systems contributes to low levels of victim satisfaction; the perceived high levels of procedural justice provided by restorative justice processes contributes to high levels of victim satisfaction with restorative justice. Studies regarding victim satisfaction with restorative justice universally identify procedural justice as one of the most important—if not the most important—factors influencing victims’ high levels of satisfaction with restorative justice processes.

### Prepared for the Process

One aspect of the perceived improved procedural justice by victims in restorative justice processes is the amount of preparation received before entering victim-defendant mediations.

Studies have consistently shown that the extent of preparation received by victims before the beginning of a restorative justice process is important to its success.<sup>164</sup> Preparation generally “educate[s] participants regarding the process and alleviate[s] their concerns, fears and misconceptions” about the process.<sup>165</sup> Not surprisingly, in a study of 60 victims who participated in restorative justice processes in Great Britain, researchers found that participants felt that the amount of preparation they received before

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<sup>164</sup> Armstrong, *supra* note 11, at 44.

<sup>165</sup> *Id.*

participating improved their satisfaction with the process.<sup>166</sup> Researchers note that when interviewed, victims made statements such as, “*I felt really prepared for the meeting . . . and that helped a lot because I knew what would happen and what I needed to do when I was in there.*”<sup>167</sup> These statements tended to reflect a greater satisfaction with the process, based upon their understanding and ability to participate.

Other studies have recognized that generally, more preparation and understanding of restorative justice practices often increase victim satisfaction as well. In the above mentioned examination of four different studies of victim satisfaction in restorative justice programs in Australia, researchers recognized that “insufficient preparation of victims . . . regarding their role in the conference, their expectations about the outcome and their rights in terms of requesting reparation can have serious negative consequences for victims.”<sup>168</sup> While the studies indicated that 79% of victims whose cases were handled using restorative justice process reported being given “some” or “a lot” of information about their cases,<sup>169</sup> and that 60% of victims reported being satisfied with the process,<sup>170</sup> the studies also demonstrated that the victims least satisfied with the process were also the least prepared for their conferences.<sup>171</sup> Consequently, the study demonstrated that high levels of victim satisfaction with restorative justice are strongly

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<sup>166</sup> *Id.* at 44-45.

<sup>167</sup> *Id.* (emphasis in original).

<sup>168</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 150.

<sup>169</sup> *Id.* at 119.

<sup>170</sup> *Id.* at 133.

<sup>171</sup> *Id.* at 150.

correlated to the amount of preparation and information about their cases victims receive as a part of the process.

Based upon the findings of these studies, improving the information about the process that victims receive as well as improving the preparation that they receive to participate within that system will improve their perception of the process as procedurally just. Consequently, victims' satisfaction with that process will also increase.

#### Involved in the Process

Another aspect of perceived procedural justice in restorative processes that has been identified as increasing victim satisfaction is victim involvement in the process. This finding is not surprising, given—as was discussed above—one of the biggest causes of decreased victim satisfaction with traditional criminal justice practices is victims' lack of involvement with the process.

In the same 2012 study of British victims participating in restorative justice processes discussed previously, researchers found that 32 of their 60 respondents “identified their own role within the restorative process as a significant fact in their perceptions of satisfaction.”<sup>172</sup> Participants appreciated that the restorative justice process “allowed them to feel in control, well informed and empowered as a relevant party when decisions were being made regarding their case.”<sup>173</sup> The study noted that participants still felt increased satisfaction with the process even when, though they were capable of

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<sup>172</sup> Armstrong, *supra* note 11, at 45.

<sup>173</sup> *Id.*

stating their needs, they were told that there was nothing that could be done to meet them.<sup>174</sup>

In a study of victim satisfaction with restorative justice practices in Australia, researchers similarly found that the ability of victims to participate within the conferencing process was important to victims' satisfaction with the process.<sup>175</sup> When asked what factors contributed to their decision to participate within a restorative justice process, 63% of respondents noted the ability to "have a say" was the most important factor guiding their decision to participate.<sup>176</sup>

These studies are in no way unique. In a more recent evaluation of victim satisfaction with restorative justice, researchers found that victim "voice" was strongly correlated with higher rates of victim satisfaction.<sup>177</sup> The study defined "voice" as "the opportunity to be involved, express one's concerns and be heard."<sup>178</sup> The victims interviewed all indicated that they felt in control of the process.<sup>179</sup> Victims all indicated satisfaction with their ability to make decisions throughout the process including: (1) whether or not to participate in a restorative process; (2) what topics should be

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<sup>174</sup> *Id.* at 46.

<sup>175</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 122.

<sup>176</sup> *Id.*

<sup>177</sup> Tinneke Van Camp & Jo-Anne Wemmers, *Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice*, 19.2 INT'L REV. OF VICTIMOLOGY 117, 124 (2013).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

addressed by the process; and (3) what form should the process take (shuttle mediation or face-to-face conferences).<sup>180</sup> Researchers found that victims not only felt more satisfied with the process based upon their ability to participate and exercise voice, but that victims also felt more empowered and safe based upon their high level of participation with the process.<sup>181</sup>

None of these results should be surprising, however, because every study that has found high rates of victim satisfaction with restorative justice processes has also found similarly high rates of victims reporting that “their opinion has been considered,” that they “felt involved,” or had felt involved in the process.<sup>182</sup> Consequently, based on these studies findings, improving victim participation within a criminal proceeding clearly has the potential to increase victim satisfaction with the process.

#### Perceived the Process as Fair

A third factor that the literature has recognized as important to victim satisfaction with restorative justice that relates closely to procedural justice is perceived fairness of the restorative justice process to both the victim and the offender.

In a study of victim satisfaction with four juvenile victim-offender mediation programs in the United States (located in Albuquerque, Minneapolis, Oakland and Austin), researchers found that satisfaction with the mediator, the fairness of the restitution agreement and the opportunity to meet the offender accounted for 42% of the

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Sherman, *supra* note 48, at 62-65.



variance in victim satisfaction with mediation.<sup>183</sup> The study also found that satisfaction with the mediator and the perceived fairness of the restitution agreement both strongly contributed to victims' satisfaction with the process, even though researchers also discovered that whether a victim was made financially whole was not a significant factor in victims' satisfaction with the process.<sup>184</sup> The finding that both satisfaction with the mediator and the fairness of the resolution was tied to victim satisfaction, while actually receiving material reparations was not, suggests that perception of the process as fair is connected to victim satisfaction.

Other studies support this conclusion. Analyzing victim satisfaction of Canadian and Belgian victims who participated in restorative justice processes, researchers found that trust in the mediator and perceived respect for the victim were tied to victim satisfaction.<sup>185</sup> Researchers noted that receiving respect from the mediator was so connected with satisfaction with the process that respondents felt that it was an implied reason for satisfaction.<sup>186</sup> Further, researchers noted that respondents indicated that trust in the mediator was so important to satisfaction with the process that a victim's trust in

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<sup>183</sup> William Bradshaw & Mark S. Umbreit, *Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue*, 49 JUV. & FAM. CT. J. 17, 21 (1998).

<sup>184</sup> *Id.* at 22.

<sup>185</sup> Van Camp, *supra* note 177, at 125.

<sup>186</sup> *Id.*

the mediator could increase victim satisfaction despite other substantial factors such as working with an offender who seemed insincere.<sup>187</sup>

In contrast, studies have also shown that victims had low satisfaction with restorative justice processes that appeared to lack fairness. In the often-cited study of restorative justice practices in Australia, researchers discovered that victims were most dissatisfied when victims did not perceive the process as fair.<sup>188</sup> Researchers noted that when victims felt dissatisfied when they perceived the facilitator as poorly trained and not neutral, they felt bullied into the process, and when their views were ignored.<sup>189</sup>

Consequently, based upon this research, whether or not a process is perceived as fair is likely tied to whether or not victims perceive the process as procedurally just. Consequently, if a process can improve victims' perception of it as fair, victim satisfaction with the process will likely be improved.

### **Emotional Restoration**

Emotional restoration is another important feature of restorative justice processes that contributes to high victim satisfaction. Studies have consistently found that restorative justice processes result in higher levels of emotional restoration than traditional criminal justice processes. For example, a series of four studies in Australia found that “three times as many court-assigned property victims and five times as many of the violence victims believed that the offender would repeat the [offense] on them,

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<sup>187</sup> *Id.*

<sup>188</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 151-52.

<sup>189</sup> *Id.*

compared with their [restorative justice] assigned counterparts.”<sup>190</sup> Further, these studies noted that victims that participated in the restorative justice processes “reported that their feelings of fear, anger, and anxiety fell markedly after the conference while feelings of sympathy and security rose.”<sup>191</sup>

Examining the research illuminates three key ways in which restorative justice processes enable emotional restoration of victims: (1) providing them an opportunity to interact with their offender; (2) enabling them to share their story and emotions; and (3) facilitating offender-to-victim apologies. Studies demonstrate that each of these factors contribute both to victims’ emotional restoration and overall satisfaction with restorative justice processes. Thus, if other systems implement policies that are informed by these factors, those systems likely will see increased victim satisfaction.

#### Interaction with the Offender

A surprising source of emotional restoration for victims participating in restorative justice processes is the opportunity that those processes give victims to interact with defendants. Given the fact that a victim had to, by definition, be harmed by the defendant in order to participate within a restorative justice process, one would think that interacting with the defendant could easily lead to victims’ re-traumatization and secondary victimization. Further, research indicates that secondary victimization from interaction with the defendant is one of the—if not the largest—risks of restorative

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<sup>190</sup> *Id.* at 198.

<sup>191</sup> *Id.*

justice.<sup>192</sup> However, research also demonstrates that often, effective restorative justice processes improve victim satisfaction in part because of the opportunity they offer victims to interact with offenders and better understand their actions.

For example, in the study of British victims participating in restorative justice processes, more than half of the interviewed victims indicated that the opportunity to interact with the defendant was important.<sup>193</sup> Interviewees indicated that seeing the offender and understanding how and why the offender committed the crime contributed to the interviewees' emotional well-being.<sup>194</sup> Victim-interviewees noted it was "*important to hear how it happened and that we weren't being picked for any reason*" and that having "*the chance to see them [offender] and realize they're just some kid*" was "*probably the best part of the process.*"<sup>195</sup>

The study indicated that victims universally found the ability to talk to the offender important, regardless of whether they received material reparations for physical harms suffered.<sup>196</sup> Victims stated that this was because "*seeing [the offender] for who they really are, understanding their problems and getting some reassurance that it won't happen again and that you can move on and forget about it*" was worth participating in

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<sup>192</sup> Strang, REPAIR OR REVENGE, *supra* note 2 at 153-54.

<sup>193</sup> Armstrong, *supra* note 11, at 46.

<sup>194</sup> *Id.* at 46

<sup>195</sup> *Id.* at 46-47 (emphasis in original) (alterations in original).

<sup>196</sup> *Id.* at 49.

the process independent of whether or not they were compensated for the physical harm they suffered.<sup>197</sup>

The importance of the opportunity that restorative justice processes give victims to interact with offenders has also been reflected in studies of restorative justice programs in the United States. In a study of victim satisfaction with four American restorative justice programs, researchers found that the ability to interact with the offender was one of the top three factors victims reported influencing victim satisfaction.<sup>198</sup> Researchers concluded that interpersonal interaction between the offender and victim was likely important because it reflected the interpersonal nature of the crime that was committed.<sup>199</sup>

Interacting with offenders is an important source of emotional restoration for many victims. Consequently, any policy that increases opportunities for victims to interact with offenders likely will have a positive effect on victim satisfaction with a criminal justice system.

#### Story Telling

Beyond the ability to interact with defendants, the ability for victims to tell their stories unencumbered has also been identified as an important factor in improving victim satisfaction with restorative justice processes.

In the aforementioned studies of Australian victims, researchers asked victims why they chose to participate in the restorative justice process, rather than resolve their

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<sup>197</sup> *Id.* (emphasis in original) (some alterations in original).

<sup>198</sup> Bradshaw, *supra* note 183, at 21.

<sup>199</sup> *Id.*

case in court.<sup>200</sup> Fifty-six percent of respondents told researchers that they participated primarily because the process allowed them to express their feelings about the harm that they suffered.<sup>201</sup>

This is consistent with other research. In a study of Canadian and Belgian victims, 21 of 34 interviewees indicated that they choose to participate in restorative justice programs because “they wanted the offenders to hear directly from them how the crime had impacted their life.”<sup>202</sup> Sixteen of the respondents also indicated they appreciated the opportunity the process allowed to “express their emotions towards the offender.”<sup>203</sup> Unsurprisingly, respondents to the study also indicated satisfaction with the process, partially because the “chance to voice emotions such as sadness and anger, but also forgiveness, was . . . liberating and invigorating.”<sup>204</sup>

In contrast, studies have also discovered that restorative justice practices have lower victim satisfaction when a victim’s ability to story tell is hampered. Researchers in one study looked closely at cases where victims indicated they were dissatisfied with restorative justice processes.<sup>205</sup> One of the researchers’ major conclusions was that processes tend to fail from the perspective of the victim where there is excessive focus on

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<sup>200</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 122.

<sup>201</sup> *Id.*

<sup>202</sup> Van Camp, *supra* note 177, at 125.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 141-150.

the offender.<sup>206</sup> Importantly, the study concluded that facilitators need to give sufficient attention to the victim's perspectives in order for victims to feel satisfied with the process.<sup>207</sup>

These studies indicate that the ability for victims to tell their story is important for emotional restoration. Thus, any policies that increase opportunity for unencumbered story telling could have a positive effect on victim satisfaction with a criminal justice system.

### Apology

As was discussed when analyzing factors contributing to poor victim satisfaction with traditional criminal justice processes above, offender apologies are recognized as an important factor contributing to both the emotional restoration of victims and their overall satisfaction with the process. However, while part of the reason for poor victim satisfaction in traditional criminal justice processes was due in part to the poor job those systems do at facilitating apologies, part of the reason for high victim satisfaction with restorative justice practices is due to the high-rate of offender-to-victim apologies those processes facilitate.

For example, one study found that restorative justice programs in Australia were four times more likely to result in an apology than were traditional criminal justice practices.<sup>208</sup> More importantly, when researchers analyzed victim satisfaction with

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<sup>206</sup> *Id.* at 152.

<sup>207</sup> *Id.*

<sup>208</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 198.

restorative justice practices, they discovered that one of the major reasons for victim dissatisfaction was a lack of an offender apology. Researchers pulled out seven cases where victim dissatisfaction was highest to analyzing the shortcomings of those conferences.<sup>209</sup> Of those seven cases, three failed to result in apologies or full admissions of guilt.<sup>210</sup> Further, in two of these cases, the lack of apology was recognized as a significant factor by the victims themselves for their dissatisfaction with the process.<sup>211</sup> Those victims also reported continued feelings of anger and distrust resulting from their victimization.<sup>212</sup> As a result, researchers recommended that facilitators follow-up after restorative justice conferences to “rigorously . . . monitor compliance by offenders [with agreements], [and] particularly with letters of apology” in order to help ensure victim satisfaction with the process.<sup>213</sup>

Similarly, a study of victim satisfaction with restorative justice processes involving burglaries and robberies in Great Britain also demonstrated that offender apologies are correlated with higher victim satisfaction in restorative justice proceedings.<sup>214</sup> As has been discussed, 96% of burglary victims and 100% of robbery victims who participated in restorative justice processes received apologies from

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<sup>209</sup> *Id.* at 141-150.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 152.

<sup>214</sup> Strang, RESTORATIVE JUSTICE CONFERENCING, *supra* note 125, at 38, 41.



offenders.<sup>215</sup> The study also found that 72% of victims were satisfied with the restorative justice process.<sup>216</sup> In comparison, only 7% of burglary victims and 14% of robbery victims whose case was handled in the traditional criminal justice system received an apology.<sup>217</sup> Only 60% of those victims reported being satisfied with the process.<sup>218</sup> Just as this correlation suggests that victim satisfaction with traditional criminal justice systems is lower because of the lack of apologies, it also suggests that restorative justice processes' ability to elicit apologies improves victim satisfaction.

These studies demonstrate that apologies are important to victims. The ability of restorative justice systems to facilitate apologies correlates positively with higher levels of victim satisfaction. Consequently, any policies that increase the rate of offender apologies may also increase victim satisfaction with that system.

### **Material Reparations**

The ability of a system to provide victims with material reparations is also important to victims' satisfaction with that system. However, studies demonstrate that receiving material reparations is not of primary importance to victims.<sup>219</sup> This is a good thing, because even in restorative justice systems, victims do not receive as much

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<sup>215</sup> *Id.* at 38.

<sup>216</sup> *Id.* at 41.

<sup>217</sup> *Id.* at 38.

<sup>218</sup> *Id.* at 41.

<sup>219</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 91-92.

restitution as they desire.<sup>220</sup> That being noted, receiving material reparations is important to victims, and part of the attractiveness of the restorative justice system to victims is that it provides for material reparation when the traditional criminal justice system does not. It predominately does this through offering creative forms of restitution.

In the previously cited study of victims who participated in restorative justice programs in Great Britain, victims identified the final outcome of the process as an important factor influencing their satisfaction with the process.<sup>221</sup> One of the major goals recognized by the victims surveyed was to have stolen property returned to them or directly replaced.<sup>222</sup> The surveyed victims recognized that they would have had a much more difficult time having their stolen property returned under a more traditional criminal justice process.<sup>223</sup>

Other studies have found that the creative ways that restorative justice processes can materially repair victims increased their satisfaction. For example, victim participants in a study of victim satisfaction with restorative justice processes in Australia expressed appreciation for the fact that, even if offenders could not pay back victims monetarily, restorative justice processes allowed them to be compensated in other ways.<sup>224</sup> The study found that while victims in traditional criminal justice systems and restorative justice

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<sup>220</sup> *Id.* at 94.

<sup>221</sup> Armstrong, *supra* note 11, at 48-49.

<sup>222</sup> *Id.* at 49.

<sup>223</sup> *Id.*

<sup>224</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 92.

processes both received similar monetary awards, victims of restorative justice were more likely to receive non-monetary forms of compensation.<sup>225</sup> Non-monetary compensation included the offender working for the victim or performing some form of community service, such as volunteering for the Salvation Army.<sup>226</sup>

It is important to note that this study found that neither victims whose cases were handled in the traditional criminal justice system or victims who participated in restorative justice processes reported receiving as much material reparation as they would have liked.<sup>227</sup> However, the study also found that the fact that non-monetary solutions were more common in restorative justice processes indicated that more restorative justice victims were satisfied with their final rewards.<sup>228</sup>

In sum, any policy that increases the amount of restitution victims receive, be it monetary or non-monetary, also increases victim satisfaction with that system. Therefore, traditional criminal justice processes should implement those types of policies.

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 94.

<sup>228</sup> *Id.*

## CHAPTER VI

### PROPOSED SOLUTIONS FOR TRADITIONAL CRIMINAL JUSTICE SYSTEMS

At this point, we have examined how victim satisfaction is a major problem for traditional criminal justice systems. Not only does the low rate of victim satisfaction exacerbate the harms victims suffer, but by failing to reduce this further victimization, our society is losing a chance to help reduce crime by intervening before a person becomes a victim.

We have also analyzed studies that identified a number of factors that contribute to low victim satisfaction with traditional criminal justice system. As a result, we have identified areas, such as perceived procedural justice and emotional restoration, where the traditional criminal process needs to improve in order to increase victim satisfaction.

Finally, we have identified the factors that contribute to high victim satisfaction with restorative justice processes. Hence, we can now recognize that restorative justice processes are succeeding in many of the same areas where the traditional criminal justice system is failing.

We will now explore which policies can be implemented in the traditional criminal justice system that could improve victim satisfaction. Comparing the areas where victim satisfaction with traditional criminal justice systems has been hurt and victim satisfaction with restorative justice systems has been increased—namely procedural justice and emotional restoration—illuminates a number of policy changes, both large and small, that could improve victim satisfaction in traditional criminal justice systems. Further, understanding where restorative justice practices have succeeded in

providing victims material reparations provides further guidance for potential policies traditional criminal justice systems can implement to increase victim satisfaction.

### **Procedural Justice**

One of the major areas in which the traditional criminal justice systems can improve victim satisfaction is by improving victims' perceptions of the system as procedurally just. As we have previously examined, studies on victim satisfaction with both the traditional criminal justice systems and restorative justice systems demonstrate that victims' perceptions of a process as procedural just and victims' satisfaction with that process are inextricably tied.

Further, as discussed earlier, victims commonly perceive traditional criminal justice systems as procedurally unjust. This contributes to poor victim satisfaction with those systems. In contrast, research demonstrates that victims tend to view restorative justice programs as procedurally just. This contributes to high victim satisfaction with restorative justice processes. Consequently, traditional criminal justice systems could improve victim satisfaction by implementing policies focused on factors that the restorative justice literature identifies as important to victims' perceptions of procedural justice.

As we previously discussed, there are three different areas that the restorative justice literature has identified as contributing to victims' perceptions of procedural justice. They are: (1) increasing the amount of information and preparation that victims receive prior to having their case handled in the system; (2) increasing the quality opportunities for victims to participate in the handling of their cases; and (3) increasing

the perceived fairness of restitution systems. I propose that implementation of a number of new processes could improve the criminal justice system in all three of these areas.

### Increase Access to Victim Advocates

One way to improve victims' perceptions of traditional criminal justice systems as procedurally just—and consequently, their satisfaction with those systems—is to increase access to victim advocates. Improving access to victim advocates can improve procedural justice for victims in two of the three ways identified by restorative justice literature: increasing the amount of information and preparation they receive concerning their cases and increasing the quality of their participation in those systems.

Increased access to victim advocates increases both the information victims receive about their cases as well as victims' preparation for participating in court. According to the National Center for Victims of Crime, victim advocates “are professionals trained to support victims of crime.”<sup>229</sup> Their jobs include “[p]roviding information on victimization,” “[p]roviding information on the criminal justice process,” “[n]otifying victims of inmates' release or escape,” and “go[ing] to court with victims,” as well as many other duties.<sup>230</sup> Since victim advocates' jobs include informing victims about their cases and providing victims with information about the criminal justice process—much like a mediator in a restorative justice process would inform and counsel victims—increasing victim access to victim advocates would clearly make traditional

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<sup>229</sup> *What is a Victim Advocate?*, NATIONAL CENTER FOR VICTIMS OF CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/what-is-a-victim-advocate-> (last visited Mar. 30, 2016).

<sup>230</sup> *Id.*

criminal justice systems more procedurally just. Consequently, victim satisfaction would be improved.

Increasing victim access to victim advocates would also increase help victims' perceptions of procedural justice in traditional criminal justice systems by increasing victims' belief they are participating within the system. Victim advocates' jobs also include “[p]roviding information on victims' legal rights and protections,” “[h]elping victims with victim compensation applications” and “[h]elping victims submit comments to courts and parole boards.”<sup>231</sup> Because victim advocates already help victims participate in traditional criminal justice systems—like mediators assist victims participating in restorative justice process—increasing victims' access to victim advocates would clearly increase the quality of, if not the extent of, victims' participation. This increase in the quality of participation for victims would likely lead to an increase in victims' perceptions of traditional criminal justice systems as procedurally just as well as increased satisfaction with those systems.

Increased access to victim advocates is also likely to increase victim satisfaction with traditional criminal justice systems in a way unrelated to procedural justice. As was discussed earlier, when victims share their stories and emotions, and feel listened to, their emotional restoration is increased.<sup>232</sup> As a result, victim satisfaction is often improved.

In the traditional criminal justice setting, most victims get the opportunity to engage in story telling only when they enter into relationships with criminal justice

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<sup>231</sup> *Id.*

<sup>232</sup> *See, e.g.,* Goodrum, *supra* note 12, at 275, 282-83; Strang, REPAIR OR REVENGE, *supra* note 3, at 122.

personnel.<sup>233</sup> Law enforcement officers and prosecutors may not always be perfectly suited to fill this role. However, victim advocates are.

Beyond their procedural functions, a key function of victim advocates is to “[p]rovid[e] emotional support to victims.”<sup>234</sup> Increasing victim access to victim advocates can allow these professionals to more fully assume the role of an emotional support system and better develop relationships that allow victims to tell their stories, express their feelings and feel heard. This could significantly increase the emotional restoration that traditional criminal justice systems provide, and consequently, increase victim satisfaction with those systems.

Unsurprisingly, the conclusion that increasing victims’ access to state-funded victim advocates increases victim satisfaction is not limited to the restorative justice victim satisfaction literature. Studies on modern victims’ rights reform universally conclude that increased access to victim advocates increases victim satisfaction.<sup>235</sup> For example, a study of victim satisfaction as it relates to contact with victims services personnel in Great Britain found increased contact with victims services equated to increased satisfaction with how their cases were handled, an increased perception of the process as procedurally fair, and increased trust with the system.<sup>236</sup>

Increasing victims’ access to victim advocates is a potentially powerful tool to increase victim satisfaction with traditional criminal justice systems. Increasing the

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<sup>233</sup> Goodrum, *supra* note 12, at 275, 282-83.

<sup>234</sup> *What is a Victim Advocate?*, *supra* note 229.

<sup>235</sup> *See, e.g.*, Bradford, *supra* note 158, at 362.

<sup>236</sup> *Id.*



amount of funding provided to victim advocate programs could allow victim advocates to serve a role similar to that of mediators in restorative justice proceedings, but provided in the traditional criminal justice setting. Consequently, based upon restorative justice outcomes as well as related literature, victim satisfaction with traditional criminal justice systems would be increased.

#### Increase Victims' Rights Training for Law Enforcement Personnel

Another way to improve victim satisfaction with traditional criminal justice systems is to provide victims' rights training for law enforcement personnel. This training offers a number of potential benefits informed by the research on victim satisfaction with restorative justice programs.

Training law enforcement officials how to work better with victims will increase victim satisfaction with traditional criminal justice systems by providing victims better information about their case and preparation for participating in the cases' disposition. When criminal justice systems do not have victim advocates, or their victim advocate programs are underfunded, victims' primary source of information is either law enforcement or prosecutorial offices.<sup>237</sup> Even when a system has victim advocates, law enforcement officers and prosecutors are often the primary contact for victims within traditional criminal justice systems. Consequently, effective law enforcement officers and prosecutors can greatly increase victim satisfaction with criminal justice systems by

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<sup>237</sup> See, e.g., Strang, REPAIR OR REVENGE, *supra* note 3, at 119.

increasing the information and preparation that they convey to victims.<sup>238</sup> For example, one study indicated that regardless of the outcome of a police investigation, victim satisfaction with the system was increased when police officers contacted victims after the initial victimizing incidents.<sup>239</sup>

Increasing training for law enforcement officers and prosecutors on how to work with victims may also improve those victims' perception of themselves as participants within the system. As was discussed previously, victim satisfaction with traditional criminal justice systems is hurt by the fact that victims do not feel like participants.<sup>240</sup> Increasing victims' rights training for law enforcement personnel—and especially for prosecutors—victims may begin to feel more like participants.

Many victims' rights statutes contain a conferral right similar to the one espoused in 18 U.S.C. § 3771(a)(5). Section 3771(a)(5) states that victims have “[t]he reasonable right to confer with the attorney for the Government in their case.” This right is “‘intended to be expansive,’ applying to ‘any critical stage or disposition of the case.’”<sup>241</sup> This means victims have the right to speak with the prosecutor during plea negotiations and before the prosecutor makes a sentencing decision, for example. However, courts

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<sup>238</sup> See Tim Coupe & Max Griffiths, *The Influence of Police Actions on Victim Satisfaction in Burglary Investigations*, 27 INT’L J. OF THE SOCIOLOGY OF L. 413, 423 (1999).

<sup>239</sup> *Id.*

<sup>240</sup> See, e.g., Erez, *supra* note 104, at 410.

<sup>241</sup> *United States v. BP Products N. Am. Inc.*, No. CRIM. H-07-434, 2008 WL 501321, at \*11 (S.D. Tex. Feb. 21, 2008) (quoting 150 Cong. Rec. S4260, 24268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl)).

have recognized that the right confer does not extend so far as to limit prosecutorial discretion.<sup>242</sup>

The right to confer is not taken as seriously by prosecutors as many victims would like. For example, when arguing against the issuance of a writ of mandamus to a victim in a 2008 case, the government argued that victims' right to confer did not attach prior to offender being formally charged.<sup>243</sup> The court disagreed, holding that these victims' right to confer had attached prior to the government filing charges.<sup>244</sup> Fortunately, these victims had legal counsel who recognized that the victims could challenge their exclusion from pre-indictment plea bargains.<sup>245</sup> If victims are not represented, they may not properly understand their rights and lose their opportunity to participate in relevant parts of the process.

Providing prosecutors with victims' rights training can better impress on them the importance of the right to confer. Further, training can inform them of other important information, such as when the right to confer actually attaches. Victims' ability to participate in the disposition of their cases will likely be enhanced. As a result, their perception of the criminal justice system as procedurally just will improve, as will their satisfaction with the system.

Increasing victims' right training for law enforcement personnel offers a number of procedural benefits for victims that are suggested by the restorative justice literature

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<sup>242</sup> *Id.*

<sup>243</sup> *In re Dean*, 527 F. 3d 391, 394 (5th Cir. 2008).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 392-93.

discussed above. It may improve the information victims receive about their cases, as well as the preparation they receive for court. Further, it may also improve their opportunity to participate in the system. Increased victims' rights training for law enforcement personnel will likely cause victims to perceive traditional criminal justice systems as procedurally just. Thus, victims are more likely to be satisfied with those systems. States should provide increased victims' rights training for all law enforcement personnel.

#### Provide Legal Counsel

Like the other solutions proposed above, providing victims with court-appointed legal counsel has the potential to increase victim satisfaction with traditional criminal justice systems by increasing victims' perception of those systems as procedurally just. Just as restorative justice processes provide victims with mediators who help inform and prepare them for the process, giving victims legal counsel provides them with a support system that can inform and guide them as they participate in traditional criminal justice systems.

Providing victims with counsel may also improve victims' perception of themselves as participants within the traditional criminal justice systems. As was previously noted, studies on victim satisfaction with traditional criminal justice practices recognize that part of the reason that victims feel disenfranchised by the traditional criminal justice systems is that they lack legal representation in the system.<sup>246</sup> Legal counsel can inform victims of their rights, and then enable victims to assert those same rights.

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<sup>246</sup> Goodrum, *supra* note 12, at 279.

Third, providing victims with legal counsel may also increase victims' perceptions of the outcome of the proceedings as fair. As was noted when we discussed perceived fairness in both the restorative justice and traditional criminal justice contexts, victims view systems as less fair when they feel their voices are ignored during the process.<sup>247</sup> Providing victims with legal representation will decrease the likelihood that victims voices are ignored. Consequently, victims' perception of the processes and outcomes as fair is likely to increase, along with their satisfaction with those processes.

Finally, beyond increasing victim satisfaction, there is also evidence that providing victims with legal counsel can potentially reduce the secondary victimization caused by traditional criminal justice systems. As one study succinctly concludes:

[S]econdary victimization can be reduced by offering victims more legal . . . counseling during the criminal proceedings. Legal counseling issues address information about the course of the proceedings, about the victim's rights throughout the proceedings, about support available in case of threats by the perpetrator, and about confusing legal language.<sup>248</sup>

Consequently, providing victims with state-funded legal counsel has benefits that extend past increasing victim satisfaction.

In conclusion, though providing victims with state-funded legal counsel may be expensive, its potential benefits to victim satisfaction with traditional criminal justice systems are great. Not only can it help provide victims with an improved perception of the procedural justice of these systems, but it will also reduce potential secondary victimization.

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<sup>247</sup> Erez, *supra* note 104, at 410; Strang, REPAIR OR REVENGE, *supra* note 3, at 151-52.

<sup>248</sup> Orth, *supra* note 18, at 324.

### Increase Victim Involvement at Sentencing

A final policy informed by both the victim satisfaction literature on traditional criminal justice systems and on restorative justice systems is increasing victims' ability to participate at sentencing. Increasing victims' ability to participate at sentencing can improve victims' perceptions of traditional criminal justice systems in two key ways. First, it increases victims' ability to participate in their cases. Second, it will increase victims' perception of the process and the resolution as fair.

Victims' ability to participate in all proceedings relating to the offense that victimized them—as is discussed extensively above—is important to victims' perception of a criminal justice system as procedurally just, and their satisfaction with that process. Increasing victims' ability to participate at sentencing clearly gives victims an increased opportunity to participate in their case. Victim participation at sentencing could provide victims in traditional criminal justice systems opportunities that are similar to those victims receive in restorative justice conferences. These include the ability to share their stories and provide input on appropriate punishments and restitution agreements.

Victim satisfaction with any criminal justice system is also often associated with the perceived fairness of the process and final resolution of the agreement.<sup>249</sup> Part of the perceived fairness of the final resolution in a restorative justice process often comes from the victim's ability to participate during the sentencing portion of the proceeding. Providing increased opportunities for participation in sentencing could increase victims' buy-in to the process, perception that they have a voice in the process, perception that the final resolution of their case was fair, and finally, their satisfaction with that process.

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<sup>249</sup> See, e.g., Erez, *supra* note 104, at 404-05; Bradshaw, *supra* note 183, at 22.

It is important to note, however, that whatever form this increased participation comes in, it must also be of high quality. As researchers who discovered the lack of positive effect that merely filling out victim impact statements had on victim satisfaction noted:

If the purpose of [allowing victims to give input at sentencing] is to provide the psychological gratification of being heard, this procedure should be conducted in a more ceremonial fashion so that the victims remember it clearly as the occasion on which they voiced their feelings, concerns, and wishes. If victims are to receive an opportunity to be heard, they should feel and experience it as such. In this case, "justice must also be seen to be done."<sup>250</sup>

This means that any form “increased participation” at sentencing takes, it must be substantial. It should, at a minimum include allowing victims to deliver their statement in the way they choose, openly and ceremoniously—much like is allowed in United States federal courts.<sup>251</sup> It should further include allowing victims to comment on what they believe an appropriate sentence and what restitution should be—as is done in restorative justice systems. And, finally, the ability to participate could potentially include giving victims the right to require sentencing judges give a full explanation of why they may have differed with victims on their final sentence, much like a mediator in a restorative justice proceeding would comment on their inability to compel certain resolutions.

This solution, while giving the victim an increased opportunity to participate, also likely does not violate defendants’ due process rights. Though some argue that victim

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<sup>250</sup> Erez, *supra* note 104, at 410.

<sup>251</sup> *See* 18 U.S.C. § 3771(a)(4).

participation at sentencing begins to degrade due process,<sup>252</sup> victim participation through victim impact statements is already widely used within the United States and internationally, and encounters little resistance from defense counsel who are best placed to “make a judgment as to whether a particular victim right is appropriate or consistent with principles of fundamental justice and are more likely than politicians to be sensitive to any threat to the due process rights of defendants.”<sup>253</sup> Consequently, it seems unlikely that an increase in victim participation at sentencing beyond mere victim impact statements would result in a violation of defendants’ rights to due process.

In conclusion, increasing victim involvement at sentencing can increase victim satisfaction with traditional criminal justice systems in two ways. First, it increases victims’ ability to participate in their own cases. Second, it increases victims’ perception of the system and final resolution as fair. Both of these factors increase victims’ perception of the system as procedurally just, and their satisfaction with the system will improve as a result. It is unlikely these policies will infringe on defendants’ due process rights. Consequently, traditional criminal justice systems should begin to increase victim involvement at sentencing.

### **Emotional Restoration**

A second major area in which traditional criminal justice systems can improve victim satisfaction is providing victims with increased emotional restoration. As was discussed in previous sections, literature on both traditional criminal justice systems and

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<sup>252</sup> See Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIM. & J. 347, 379 (2009).

<sup>253</sup> *Id.* at 381.



restorative justice processes identifies emotional restoration as an important factor contributing to victim satisfaction.

Specifically, studies examining victim satisfaction with restorative justice have identified three factors that contribute to emotional restoration and thus, victim satisfaction: (1) the ability for victims to interact with the offender; (2) the ability of victims to share their story and emotions and feel heard; and (3) the ability for victims to receive apologies from offenders. By contrast, as this paper has previously discussed, traditional criminal justice systems often fail to provide victims with emotional restoration because of the restrictions these systems place on story-telling and emotion sharing, as well as the low rate of offender-to-victim apologies.

Restorative justice systems provide some opportunities for emotional restoration that cannot be replicated by traditional criminal justice systems. For example, traditional criminal justice systems cannot provide victims the same opportunity to interact with the offenders as restorative justice systems. The positive interactions that characterize successful restorative processes are made possible due to the voluntary nature of those processes.<sup>254</sup> To attempt to force the offender to interact with the victim could result in serious emotional trauma to the victim.<sup>255</sup>

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<sup>254</sup> Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85.2 PRISON J. 127, 128 (2005) (“the main elements of the restorative process involve voluntariness, truth telling, and a face-to-face encounter”).

<sup>255</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 56-57 (noting that poorly conducted restorative justice conferences often result in re-traumatization of the victim because of the “threatening” nature of the offender).

However, there are still other ways that traditional criminal justice systems can assist victims' emotional restoration. Increasing opportunities for victims to share their stories and emotions with empathetic listeners, as well as increasing the rate of offender apologies traditional criminal justice systems provide are both possible, and would improve victims' emotional restoration and satisfaction with the system. Below, I suggest a number of ways these goals can be achieved.

### Increase Psychological Counseling

The most obvious way to provide victims with more emotional restoration in traditional criminal justice processes is by providing victims increased access to psychological counselling. As noted by the literature on restorative justice, story-telling is important to providing victims with emotional restoration. Traditional criminal justice systems do a poor job of providing victims with the ability to share their stories and feelings unencumbered by evidentiary rules and other legal constraints. However, just because victims cannot tell their stories in court does not mean that the system cannot provide victims with other opportunities to heal through sharing their emotions. Providing victims with increased access to psychological counseling can give victims an opportunity to tell their stories and convey their emotions to another person in a productive way—similar to the opportunity restorative justice processes provides victims.

Further, providing victims emotional restoration may not be the only way in which psychological counseling can improve victim satisfaction with traditional criminal justice processes. Researchers have also noted that psychological counseling may offer minor procedural justice benefits similar to the benefits restorative justice processes provides. For example, researchers have noted that “[p]sychological counseling can help

victims to prepare for, and go through with [a] trial, and then cope with their experience in the criminal proceedings.”<sup>256</sup> Thus, increasing victim access to psychological counseling may also increase victim satisfaction with traditional criminal justice systems by increasing their perception of those systems as procedurally just.

Traditional criminal justice systems should increase victim access to psychological counseling. It provides victims emotional restoration and increases their perception of criminal justice systems as procedurally just. Both of these factors are important to victim satisfaction.

#### Increase Victims’ Rights Training for Law Enforcement Personnel

As was discussed above, increasing victims’ rights training for criminal justice personnel provides a number of potential procedural justice advantages that restorative justice literature has identified as improving victim satisfaction. What is less obvious is the potential increase in emotional restoration that increased law enforcement training provides.

Restorative justice and traditional criminal justice literature recognizes the importance of sharing stories and emotions in increasing victims’ satisfaction with criminal justice processes. While traditional criminal justice systems may not offer victims the ability to tell their stories in court unencumbered by legal constraints or the opportunity to connect emotionally with their offenders, they can offer victims the ability to share their stories and connect with law enforcement personnel outside of formal adjudicative settings.

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<sup>256</sup> Orth, *supra* note 18, at 324.

In a study discussed above, a researcher found that sympathetic emotional relationships between victims and prosecutors were positively correlated with victim satisfaction.<sup>257</sup> Victims reported this relationship was important to their satisfaction because it gave them the opportunity to tell their stories, express their emotions, and feel heard.<sup>258</sup> The research showed that well-trained law enforcement personnel can potentially serve as the audience for the story telling identified as important to victim satisfaction with restorative justice, without infringing the legal rights of offenders.

The conclusion that well-trained law enforcement personnel can assist with victims' emotional restoration is supported by other studies as well. Researchers have recognized "a correlation between those victims who gave a positive evaluation of the police attention and those who answered that they felt less abandonment."<sup>259</sup> Consequently, researchers concluded, "a more accurate police intervention increases the victim's sense of security."<sup>260</sup>

In conclusion, traditional criminal justice systems should improve law enforcement personnel on how to work with victims. Not only do well-trained law enforcement personnel increase victims' perceptions of procedural justice, but they may also contribute to victims' emotional restoration.

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<sup>257</sup> Goodrum, *supra* note 12, at 275.

<sup>258</sup> *Id.* at 282-283.

<sup>259</sup> Tamarit, *supra* note 25, at 295.

<sup>260</sup> *Id.*

## Incentivize Apologies at Sentencing

Studies on victim satisfaction with both traditional criminal justice systems and restorative justice processes illustrate the power of offender apologies. Not only does an apology help provide the victim with emotional restoration, but it can also improve a victim's perception of a criminal justice process as satisfying and just.

As was discussed above, the prevalence of offender apologies in restorative justice processes is instrumental to the high rates of victim satisfaction those processes. In comparison, offender apologies are far less common in traditional criminal justice systems, and consequently, victim satisfaction with those systems suffers. Therefore, victim satisfaction with traditional criminal justice systems could clearly benefit from policies that increase formal offender-to-victim apologies.<sup>261</sup> One simple policy change in particular—offering sentence reductions in exchange for formal offender-to-victim apologies—may meet this goal with a minimal cost to the government and society.

Traditional criminal justice systems already offer sentence reductions for post-offense behavior that indicates offenders are accepting responsibility for their actions. For example, in the federal system, defendants can seek up to a three-level reduction to their base offense level for “Acceptance of Responsibility.”<sup>262</sup> Defendants qualify for this reduction if they: “truthfully admit[] the conduct comprising the offense(s) of the conviction, and truthfully admit[] or [do] not falsely deny[] any additional relevant

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<sup>261</sup> It is important to note at this point that any policy that purports to increase offender-to-victim apologies must be careful not to run afoul of a defendant's Fifth Amendment right to not to be “compelled in any criminal case to be a witness against [oneself].”

<sup>262</sup> United States Sentencing Guidelines (U.S.S.G.) § 3E1.1 (“If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels”).

conduct for which the defendant is accountable;” “voluntary terminat[e] or withdraw[] from criminal conduct or associations;” “voluntary[ily] pay[] . . . restitution prior to adjudication of guilt;” “voluntary[ily] surrender to authorities promptly after commission of the offense;” “voluntary[ily] assist[] . . . authorities in the recovery of the fruits and instrumentalities of the offense;” “voluntary[ily] resign[] from the office or position held during the commission of the offense;” undertake “poste-offense rehabilitative efforts;” or timely accept responsibility for their actions.<sup>263</sup> Creating a new sentence reduction for making a formal apology to their victims—behavior similar to the other actions on this list—would come at little to no cost to the government overseeing the traditional criminal justice system, while also potentially increasing victim satisfaction with the system by incentivizing offenders to apologize for their actions.

There are a number of potential objections to incentivizing offender apologies. These include: (1) incentivizing offender-to-victim apologies may run afoul of offenders’ rights against self-incrimination; and (2) incentivizing apologies may make those apologies disingenuous. However, for the reasons discussed below, these arguments lack merit or have no bearing on the effectiveness of the policy of increasing victim apologies.

First, incentivizing formal offender-to-victim apologies also does not run afoul of offenders’ right against self-incrimination. Courts have recognized that U.S.S.G. § 3E1.1, which incentivizes behavior similar to offender-to-victim apologies, does not violate the Fifth Amendment of the United States Constitution.<sup>264</sup> For example, in *Rogers*, the

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<sup>263</sup> U.S.S.G. § 3E1.1 app. n.1(A).

<sup>264</sup> See, e.g., *United States v. Rogers*, 921 F.2d 975, 983 (10th Cir. 1990).

defendant argued that the § 3E1.1 presented defendants with the choice to either risk increasing their sentence by admitting prior criminal conduct to the court, or forgo a potential sentence reduction.<sup>265</sup> Recognizing that denial of a § 3E1.1 reduction “does not constitute a penalty or enhancement of sentence,” the court held, “U.S.S.G. § 3E1.1 neither ‘compelled’ Rogers to incriminate himself nor, if he had chosen silence, would the denial of a reduction under that section have constituted a penalty in violation of Rogers’ Fifth Amendment rights.”<sup>266</sup>

Similarly, offering a sentence reduction in exchange for a formal offender-to-victim apology would also not violate a defendant’s right against self-incrimination. Like “Acceptance of Responsibility” under § 3E1.1, offender-to-victim apologies offer defendants the choice to either admit their criminal conduct to the court, or forgo a potential sentence reduction. Like reductions under § 3E1.1, sentence reductions for apologies would not be penalties or enhancements to offenders’ sentences. Forcing defendants to make this choice is not the same as *compelling* defendants to testify against themselves.

Second, though incentivizing offender apologies may make those apologies seem disingenuous, that argument has no bearing on the effectiveness of this policy for increasing victim satisfaction. Apologies that happen at sentencing are much more likely to be viewed as insincere than apologies that are elicited through restorative justice

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<sup>265</sup> *Id.* at 982.

<sup>266</sup> *Id.* at 982-93.

conferences.<sup>267</sup> The disparity between the perception of the sincerity of the apology may differ for a number of reasons, including whether or not it appears the defendant was apologizing to seek a lower sentence. Further, courts will not likely be able or willing to police the sincerity of apologies when granting sentence reductions. However, this does not mean that apologies should not be incentivized.

As noted previously, research demonstrates that offenders who participate in traditional criminal justice systems apologize at an abysmal rate.<sup>268</sup> Researcher postulate that the reason for this is many offenders are not given the opportunity to apologize in traditional criminal justice systems.<sup>269</sup> By incentivizing offender apologies, two functions are served. First, the rate of offender apologies in traditional criminal justice system is increased. Given the horrible rate at which victims receive apologies, and the strong correlation between apologies and victim satisfaction discussed above, this can only serve to increase victim satisfaction with the system, regardless of the apologies' sincerity.

Second, incentivizing offender apologies also provides a formalized, routine opportunity for defendants to apologize to offenders. This formalization of offender apologies as part of the process means will remind courts to both give offenders the opportunity to apologize and notify interested victims of the offenders' apologies. This

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<sup>267</sup> Strang, RESTORATIVE JUSTICE CONFERENCING, *supra* note 125, at 38-40 (noting two studies that found disparities between victims' perceptions of an apology as sincere in restorative justice processes versus at sentencing).

<sup>268</sup> *Id.* at 38 (noting offenders apologized in between 7%-19% of cases at court in comparison to between 72%-100% of the time in restorative justice cases).

<sup>269</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 116-17 ("It is worth noting that possibly many offenders who go before the court experience genuine remorse for their behavior;" however, in one case where the offender wanted to apologize, "neither the police nor the court conveyed to [the victim] that the offender wanted to apologize").



avoids the problem noted by researchers like Strang, where offenders wanted to apologize and victims want apologies, but the apology never happened because of the failures of the system.<sup>270</sup>

Apologies are powerful. Studies demonstrate that increasing apologies in criminal justice systems helps victims' emotional restoration and increases their satisfaction with the system. Incentivizing defendants to apologize by potentially reducing their sentences offers a cheap way for governments to increase offender-to-victim apologies in traditional criminal justice systems without violating defendants' rights. Consequently, governments should start incentivizing offender-to-victim apologies in order to increase victim satisfaction with traditional criminal justice systems.

### **Material Reparations**

A third way in which traditional criminal justice systems can potentially increase victim satisfaction is through providing victims with better material reparations. As was previously discussed, receiving material reparations is the least important of the three factors that contribute to victims' satisfaction with restorative justice systems.<sup>271</sup> However, that does not mean that improving the way that traditional criminal justice systems provide victims with material reparations cannot be improved.

Studies that have compared the monetary restitution victims receive in restorative justice and traditional criminal justice systems tend to show that victims receive similar

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<sup>270</sup> *See id.*

<sup>271</sup> *See Strang, REPAIR OR REVENGE, supra note 3, at 91-92.*

awards in both systems.<sup>272</sup> However, these studies also demonstrate that victims are often more satisfied with the reparations they receive in restorative justice programs, because they often receive reparations in other forms.<sup>273</sup> As a result, any policies that increase non-monetary material reparations in traditional criminal justice systems are also likely to increase victim satisfaction. There are at least two ways that traditional criminal justice systems can do this: improving systems for property return and allowing for more creative forms of restitution to be ordered at sentencing.

#### Improve Systems for Returning Property to Victims

Literature on victim satisfaction with restorative justice has noted that victims are often more satisfied with the material outcomes of the process than they are with court-imposed restitution orders because they are more likely to get stolen property returned to them or replaced.<sup>274</sup>

Currently, in many traditional criminal justice systems, having physical property returned to victims can be an incredibly difficult and complicated process. For example, the process of returning victims their property in the United States Federal System is so complicated that the chapter covering the process in the Department of Justice's *Asset Forfeiture Policy Manual* devoted to returning victims their property is nine pages long, and likely could only be properly understood by a lawyer.<sup>275</sup>

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<sup>272</sup> *Id.* at 92.

<sup>273</sup> *Id.*

<sup>274</sup> Armstrong, *supra* note 11, at 49.

<sup>275</sup> See U.S. Dep't of J., ASSET FORFEITURE POLICY MANUAL, at 163-72 (March 22, 2014).

Given the findings of the restorative justice literature and the complicated nature of property return in traditional criminal justice systems, any policy that improves victims' ability to have their stolen property returned is likely to increase victim satisfaction and should be implemented.

#### Allow for Creative Forms of Restitution at Sentencing

Another change many traditional criminal justice systems should make in order to improve victim satisfaction is to allow for victims to receive more creative forms of restitution.

As was previously discussed, though victims who participated in restorative justice processes often do not receive more money than victims whose cases are handled in more adversarial systems, they do receive more non-monetary reparations.<sup>276</sup> For example, offenders who participated in restorative processes in Australia often worked for victims or a community service organization designated by the victim, in lieu of restitution.<sup>277</sup> This serves a stark contrast to traditional criminal justice systems, where even when victims are compensated for the harm they suffered, they often only receive a check from the government, months after the case was completed.<sup>278</sup>

Based upon this research, any policy that allows courts to order more creative forms of restitution such as ordering the defendant to work for the victim or the victim's charity of choice, increases victim satisfaction. These creative restitution orders may both seem more personal to the victim (feeling more like an apology), and increase the number

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<sup>276</sup> Strang, REPAIR OR REVENGE, *supra* note 3, at 92.

<sup>277</sup> *Id.*

<sup>278</sup> *See id.* at 94.

of restitution orders victims receive. Offenders who can not afford to pay back victims, may still be able to work for them or volunteer somewhere. Consequently, the material reparations victims receive would increase, along with their satisfaction with traditional criminal justice systems.

## CHAPTER VII

### CONCLUSION

Traditional criminal justice systems clearly have a victim problem. These processes are designed to exclude victims and are often perceived as lacking procedural justice by victims. Further, they often fail to provide victims with adequate opportunities for emotional restoration. As a result, victims are left unsatisfied and at risk of further traumatization; often without the coping skills necessary to stay out of prison. Traditional criminal justice systems should not remain unaltered.

This paper demonstrates that restorative justice processes can do more than restore relationships between the victims and offenders. Restorative justice can also help restore the relationship between problematic traditional criminal justice systems and victims.

First, restorative justice literature insists that increasing victim's perceptions of systems as procedurally just is important. To do this, these systems must keep victims adequately informed of their case's progress, prepare them for participation in the process, provide quality opportunities for victims to participate, and have both outcomes and procedures that are perceived as fair. Traditional criminal justice systems can meet each of these goals through implementing policies that increase access to victim advocates, increase victims' rights training for law enforcement personnel, provides victims with legal counsel, and increases victim involvement at sentencing. These policies, if implemented, have the potential to dramatically alter the procedural justice that victims receive, and their satisfaction with traditional criminal justice systems.

Second, restorative justice literature also demonstrates that quality criminal justice systems need to provide victims with emotional restoration. Providing victims with the ability to tell their stories, feel heard and to hear the offender apologize all contribute to victims' emotional well-being. As discussed above, traditional criminal justice systems can help emotionally restore victims through incentivizing offender apologies at sentencing with potential sentence reductions, increasing training for law enforcement personnel on how to work with victims, and providing victims with more court-funded psychological counseling.

Third, restorative justice literature demonstrates that providing victims with material reparations can help the relationship between traditional criminal justice systems and victims. Implementing policies that make it easier for victims to receive non-monetary reparations, such as the return of their property or work in lieu of payment from offenders, would increase victim satisfaction with the system.

But what needs to be done from here? Future research should focus on a number of areas. While this paper proposes new policies to increase victim satisfaction, these policies are not tested. Research should focus on proving the effectiveness of the policies suggested by this paper in the real world. Second, this paper also assumes that all crime victims are the same, and makes suggestions based on data formed by the group as a whole. Future research should examine which factors influence victim satisfaction based upon various demographic characteristics of the victim pool. What satisfies a bank robbery victim may not necessarily be the same thing that satisfies a victim of rape. Understanding these disparities could lead to more nuanced policies targeting improved victim satisfaction.

In the meantime, the research seems conclusive that restorative justice processes can provide better outcomes for both offenders and victims who choose to participate in them. Increasing the proliferation of these programs is important to giving victims, offenders and their communities more control over how justice is distributed.

Resolving criminal disputes is no easy task. No one system is perfect. Every offense, offender, victim and community is different. Nonetheless, we must continue to refine these systems.

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