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VICTIM OFFENDER SETTLEMENTS, GENERAL DETERRENCE, AND SOCIAL WELFARE

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JEREMY D. ANDERSEN*

<u>Abstract</u>

Two relatively new systems – Victim Offender Mediation programs and compromise statutes – are currently experiencing a period of relative growth as states try to grapple with various problems facing the criminal justice system. The feature that distinguishes both of these programs, and thus the feature that requires the most justification, is that they place the victim at the center of the sentencing procedure.

This paper seeks to fill a gap in the discussion surrounding these new systems. Advocates of these programs focus almost exclusively on certain alleged benefits of the programs, such as increased victim satisfaction and cost savings. However, no analyst has truly attempted to balance, in an overall sense, the likelihood these benefits actually are realized against the likelihood social welfare is being reduced through other unintended consequences – for instance, the fact that letting the victim set the level of punishment is likely to result in a sanction level that is less than optimal, thereby harming social welfare.

Because few actual studies have been done to determine the actual effect of these programs, the paper takes a more generalized approach. It first describes the key aspects of each program, then attempts to determine whether each key variable makes it more or less likely that the programs' claimed benefits will in fact outweigh their likely consequences.

J.D., Harvard Law School, 2003. Special thanks to Professor Steven Shavell, without whose help and guidance this paper would not have been possible.

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By Jeremy D. Andersen *

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I. INTRODUCTION: EVALUTING THE EFFECT OF VICTIM PARTICIPATION IN THE SETTING OF CRIMINAL SANCTIONS

Two relatively new systems—Victim Offender Mediation ("VOM") programs and compromise statutes—are currently experiencing a period of relative growth as states try to grapple with various problems facing the criminal justice system. This paper seeks to seriously question the justifications typically given for these programs.

The feature that distinguishes both of these programs, and thus the feature that requires the most justification, is that they place the victim at the center of the sentencing procedure. Typically, a victim's post-event interaction with an offender does not affect the level of the offender's punishment—that is, the victim of a car theft usually cannot dictate how long the offender has to stay in prison, or the size of the fine the offender has to pay. In certain situations to be

Another exception to this general rule is that victims seemingly have an effective "veto" over prosecution, in that they may decide not to report the crime or not to cooperate

^{1.} These programs go by many other names, such as "Victim Offender Reconciliation Programs" ("VORPs"). For consistency, "victim offender mediation," or "VOM" will be used throughout this paper to refer to any programs which fit the general description laid out in Part III, *infra*.

^{2.} See, e.g., Justin Miller, The Compromise of Criminal Cases, 1 S. CAL. L. REV. 1 (1927) ("In theory there should be no compromises of criminal cases."). One exception to this general rule is that victims often give "impact statements" in an effort to sway the judge one way or the other when sentencing. See, e.g., Ashley Dugger, Note, Victim Impact Evidence in Capial Sentencing: A History of Incompatibility, 23 Am. J. CRIM. L. 375 (1996) (outlining the historical justifications for using victim impact statements; arguing against using such statements for capital offenses); Katie Long, Note, Community Input at Sentencing: Victim's Right or Victim's Revenge?, 75 B.U. L. REV. 187 (1995) (discussing the propriety of allowing victim impact statements). In order to determine how big of an exception this practice truly is, it would be necessary to gauge how judges actually take such statements into account. See Edna Erez & Pamela Tontodonato, The Effect of Victim Participation in Sentencing on Sentence Outcome, 28 CRIMINOLOGY 451 (1990) (analyzing the effect victim impact statements had on felony crimes in one midwestern county); Anthony Walsh, Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases, 77 J. CRIM. L. & CRIMINOLOGY 1126 (1986) (studying the impact victim recommendations have on the actual sentences given out). However, such an analysis beyond the intended scope of this paper.

delineated below, however, these programs essentially allow the victim to do just that.

The standard justifications given for putting the victim in such an unusual position of power within the criminal justice system typically come from a larger "victims' rights" movement stressing retribution. As such, advocates of these programs typically emphasize the emotional benefits that accrue to victims through their increased participation in the criminal justice system. Further, advocates claim such programs help reduce recidivism, because the victim-offender interaction confronts offenders with the ramifications of their actions. Further, advocates claim such programs offer substantial cost savings over "traditional" types of punishment (such as incarceration).

with enforcement agencies. However, this is a practical power, not a legally vested one, and so does not truly fit into the analysis performed *infra*.

- 3. See generally ROBERT GRAEF, WHY RESTORATIVE JUSTICE? REPAIRING THE HARM CAUSED BY CRIME (2000); RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE (Heather Strang & John Braithwaite eds., 2000); Jennifer Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, 42 EMORY L.J. 1247, 1256 (1994) (noting that VOM programs are a product of victims' rights movements); MARK S. UMBREIT & ROBERT COATES, VICTIM OFFENDER MEDIATION: AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE U.S. 1 (1992) ("The development of victim offender mediation in recent years has occurred within the larger context of restorative justice theory . . . 'Restorative justice' emphasizes that crime is a violation of one person by another, rather than simply against the State.").
- 4. Although the victims' rights movement generally stresses retribution, and such notions do appear throughout criminal law sentencing, it is unclear why its use requires the reduction of criminal sanctions, as is seen in practice. One commentator summarizes:

Although the view of restitution as an alternative to incarceration is widely held, it is usually unclear whether the defendant in such a case is to be spared imprisonment because restitution mitigates culpability, or because incapacitation, deterrence, or desert regrettably have been balanced against rehabilitative hopes or concern for recovery by the victim. To some commentators, imprisonment appears to be simply overused, and a community disposition involving restitution constitutes a sufficiently severe penalty. Other commentators conclude that restitution can operate as an effective deterrent. Several writers view restitution as being an integral part of, if not synonymous with, retribution. To that extent, restitution can serve as a symbolic "pay[ment of one's] debt to society."

Alan T. Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. REV. 52, 126 (1982) (citations omitted).

5. For a survey of multiple studies done on satisfaction with the criminal process and overall feelings of fairness, *see* MARK. S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH 163-68, 397 (2001) [hereinafter "THE HANDBOOK"] (noting high levels of satisfaction, but cautioning that self-selection may be driving these results). For a similar assessment of studies done on the affect of VOM programs on recidivism, *see id.* at 170-71, and for a discussion on the costs of VOM programs, *see id.* at 173-74.

The inconsistencies seen in the studies surveyed *supra* indicate that the supposed benefits of retributive-justice based systems are by no means a certainty. For the purposes

What such proponents have failed to squarely and adequately address, however, is the programs' wider effects on general deterrence. As will be expounded upon below, this is a particularly troubling aspect of both programs. This is because victims seem illequipped to determine the optimal level of sanctions to be imposed on criminal offenders. For instance, the victim of a car theft is unlikely to be aware of the concept of optimal sanctions, let alone be able to apply it in any particular instance in order to achieve the proper level of general deterrence. Instead, the victim is likely to focus more narrowly on his or her own personal loss and emotional feelings. Such factors of course routinely—and properly—go into the setting of sanctions. However, other factors that also should be included—such as the rate and cost of enforcement—are likely well beyond the victim's visual horizon. Thus, as will be explained more below, the car theft victim, when empowered through such programs as VOM and compromise statutes, is likely to set criminal sanctions too low, resulting in under-deterrence.

As with all programs, the key question should be whether, overall, the costs outweigh the benefits. Here, this means determining whether the emotional and enforcement benefits outweigh the cost associated with the likely drop in the deterrent effect of the criminal justice system. Unfortunately, not many critics or proponents have tackled this overarching, yet pivotal, inquiry. This paper seeks to address this gap in the discussion, raising issues that little (if any) data exists to answer, but that need to be addressed before such programs are

of discussion, and because determining the actual presence of these benefits is beyond the scope of this paper, these benefits will be assumed to be genuine. However, this should obviously be taken into account when trying to do the balancing called for by the analysis described *infra*.

^{6.} The economic concepts of "general deterrence" and "optimal sanctions" will be explained briefly below in Part II.A, *infra*. Briefly, general deterrence is the functional term given to the ability of the punishment of one offender to deter other would-be offenders from committing the same or similar acts. Sanctions are said to be set optimally when the right number of people are deterred from committing the act.

^{7.} Why the rate of enforcement, which turns on such factors as how likely an offender is to be caught and prosecuted, ought to be a pivotal factor in sentencing is explained in Part.II.A, *infra*.

^{8.} See Part II.B, infra.

^{9.} See Brown, supra note 3, at 1252 n.16 (noting that "little empirical work" has been done to consequences of VOM programs, and criticizing those studies that have been done). But see THE HANDBOOK, supra note 5, at 375 (summarizing the findings of forty empirical studies). Note, however, that most of the studies contained in THE HANDBOOK have little, if anything, to say in terms of general deterrence.

allowed to grow beyond their current limited bounds.¹⁰

In order to give some background, Part II.A briefly introduces the economic concepts of optimal deterrence, optimal sanctions, and social welfare. Part II.B applies these principles to justify the majority rule that bars a victim's post-event interactions with the offender from affecting the offender's criminal liability. Part III describes briefly the current state of VOM programs before analyzing how the key characteristics of these systems may affect the program's overall impact on deterrence and social welfare. Part IV commences a similar undertaking for compromise statutes. Part V summarizes the questions raised in this paper.

II. JUSTIFYING THE GENERAL RULE BARRING VICTIMS FROM SETTLING CRIMINAL LIABILITY

A. A Brief Discussion of Optimal Sanctions and Social Welfare 11

Generally, society has an interest in preventing those activities which cause an overall net utility loss. ¹² The first step in figuring out *how* to prevent socially undesirable acts is to assume that people are rational actors. ¹³ This means that people will undertake an activity

^{10.} Indeed, the answers may even lead to the elimination of the programs even within their current limited bounds.

^{11.} This section is admittedly a gross over-simplification of many economic theories. The intricacies behind the theories presented here can be incredibly complex, and are widely debated. However, this section is meant only to be a general introduction to some basic economic concepts to aid the reader in understanding the analysis *infra*. As such debates and complexities are well beyond the scope of this paper, they are for the most part omitted.

The concepts here are very general, but the discussion here is a summary of concepts covered in the forthcoming textbook, STEVEN SHAVELL, PRINCIPLES OF LAW & ECONOMICS (unpublished, on file with author).

^{12.} The core economic concept of "utility" seeks to measure a person's overall wellbeing or happiness. Although such an amorphous concept could never really be measured, for analytical purposes unitless, fictional numbers are often used. By applying some social welfare function to compare the resulting worlds under different legal regimes, the economist can determine which regime would lead to the best overall result. See generally Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L. REV. 961, 966-99 (2001) (explaining the general concepts of utility and the choice of a social welfare function). For simplicity, this paper speaks of a pure utilitarianism social welfare function, where the goal is merely to achieve the highest total summation of utilities. However, analysis under any of the numerous other social welfare functions would raise the same questions discussed infra.

^{13.} See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (5th ed. 1998) ("An increase in . . . the severity of the punishment . . . will raise the price of crime and therefore reduce its incidence."). But see John Braithwaite & Heather Strang, Connecting

only if they expect to derive more benefit form the activity than they expect the activity to cost. Because it is the expected gains (and losses) driving decisions, analysis proceeds by discounting gains (and losses) by their relative probabilities. Thus, if society is to discourage activities that cause a net social welfare loss, it can impose a cost on the would-be-actor. Of course, deciding the size of this cost is pivotal.

One might begin by setting the sanction for an activity at the level of the social harm it is expected to cause. By imposing a cost equal to the harm, no person whose engagement would cause a net social loss would rationally decide to do so. This is only true, however, if the actor knows that such costs will be imposed every time the activity is undertaken. However, for many (indeed, most all) activities, this is not true—numerous criminal and civil violations go unpunished. The rational actor will take this into account by discounting the sanction to

Philosophy and Practice, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, supra note 3, at 211 (arguing for restorative justice when the actor is virtuous, deterrence when the actor is rational, and incapacitation when the actor is incompetent); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1545 (1998) (noting the fallacies of the "rational actor" assumption).

- 14. "Gain" and "cost" here are in terms of utility, not necessarily in terms of money.
- 15. For example, an activity that is 10% likely to result in a utility gain of 100 and 90% likely to result in a utility gain of 10 is said to have an expected benefit of only 19 (10%x100 + 90%x10 = 19). Thus, the rational actor will undertake the activity only if the expected cost of undertaking the activity, which is calculated similarly to the example above, is less than 19.
- 16. Utility being an overarching concept without units, this "cost" can be anything—jail time, monetary sanctions, or anything that brings about a drop in the actor's utility in the appropriate amount. Because of this, "sanctions" are referred to in this paper in the general sense of anything that brings about a drop in the offender's utility, without regard to how they are actually extracted.
- 17. For example, assume that the act of fishing in a particular lake will always cause harm to the lake totaling 40. A, only moderate fisherman, expects to gain only 10 from fishing in that lake; B, an avid fisherman, expects to gain 100 from fishing in the same lake. Thus, overall social welfare is reduced by 30 (10-40=-30) if A fishes in the lake, but will be increased by 60 (100-40=60) if B fishes in the lake. Thus, the problem becomes setting up a system where A will not want to fish in the lake, but B will. This selective deterrence can achieved by imposing a cost of 40 on the activity: A will not be willing to "pay" 40 to "gain" 10, but B will gladly pay 40 to gain 100.

The size of the imposed cost is critical, as error in either direction would cause a drop in overall social welfare. On one hand, if the cost is set too low, there will be under-deterrence—that is, other people who are more like *A* will fish in the lake even though they do not realize gains of more than 40. On the other hand, if the cost is too high, there will be over-deterrence—that is, other people who are more like *B* and would really enjoy fishing in the lake will not, even though doing so would increase social welfare.

In the criminal context, some commentators try to discard the utility gain of the offender. In the context of this paper, discarding the utility of the offender will only lower the point as to *when* sanctions should be imposed, not the *level* of the resulting sanctions. Thus, the debate about illicit utility and its result would have no impact on the questions and conclusions raised in this paper.

be received by the probability of getting caught. To counteract this, sanctions need to be inflated above expected harm to account for less-than-perfect enforcement. This level of sanctions is referred to as "optimal sanctions" and is what the criminal system should strive for in its sentencing scheme. The sentencing scheme.

B. Application: Victims are Likely to Settle for Less Than the Optimal Sanction, Harming Overall Deterrence

As discussed above, given less than perfect enforcement, sanctions need to be inflated beyond expected harm in order to maximize social welfare. The benefit of this inflation accrues to society as a whole, as it is saved the net utility loss that would have occurred had the socially undesirable activities taken place. A single victim of a crime, however, does not see the benefits of overall deterrence as flowing entirely to his or herself, so is unlikely to take it fully into account should he or she be empowered to set the level of criminal sanctions.

For example, suppose the harm from a theft is 100,²² and the chances of catching the offender is only 10%. Thus, the optimal sanction is 1000. In a system where the victim could set the total (criminal and civil) level of sanctions, however, the victim will only see his loss as being 100, so will likely be willing to settle for anything more than that, counting the rest as gain. Unless the victim

^{18.} See SHAVELL, PRINCIPLES OF LAW & ECONOMICS, supra note 11, at ch. 21 (discussing inflation of sanctions). Continuing from the example above, if people who are engaged in the activity are caught only 10% of the time but the sanction is still only 40, A will see the expected cost of the activity as only being 4 (10% x 40=4), but will still see a benefit of 10. Therefore, A will rationally engage in the activity despite the fact that social welfare will be lowered (as the activity is still causing actual harm of 40).

^{19.} In the example above, a sanction of 400, discounted by the fact that it will be imposed only 10% of the time, will result in optimal deterrence, as both A and B will see an expected cost of 40.

^{20.} In reality, other considerations may push the "optimal" sanction up or down from this derived level. For instance, society may not want to fully inflate the sanction, because the cost of enforcement may outweigh the benefit of increased deterrence. SHAVELL, PRINCIPLES OF LAW & ECONOMICS, *supra* note 11, at ch.20. Or, in order to preserve an overall system which provides marginal deterrence, the sanction for one particular crime might need to be reduced. *Id.* at ch. 22. Again, such considerations are well beyond the scope of this paper.

^{21. &}quot;Socially undesirable" here again tied to a net loss in total social welfare.

^{22.} Note that this harm of 100 is more than the value of the item stolen—it includes all disutility flowing from the theft, including the victim's emotional harm, inconvenience in replacing the item, etc.

forces the offender to pay the full 1000 (the odds of which happening is discussed below), the crime will be under-deterred, and society as a whole will suffer.

If there is the threat of state-imposed sanctions standing behind a victim's negotiations, why would a victim *not* seek to extract the full optimal sanction? If victims were fully informed, that is, if they knew the criminal sanction that would be otherwise imposed were 1000, they seem unlikely to settle for much less than that (as they would know that the offender would be willing to pay up to that amount). However, this does not seem realistic, and it seems that victims will overall tend to settle for less than the optimal sanction. This is because victims (as opposed to judges) seem relatively unlikely to understand optimal sanctions and general deterrence. Further, if the victim were to push for the optimal sanction of 1000, the victim might fear the offender, being indifferent between settling with the victim and accepting traditional punishment, might opt for the traditional punishment, leaving the victim with no monetary recompense.

Further, a background assumption working above is that the victim was directly benefiting from the sanction. If the sanction involves the transfer of fungible goods to the victim, this seems to hold. However, it is clear that offenders often do not have the ability to fully pay the optimal sanction strictly through monetary means. In such a situation, the optimal sanction must be extracted through other forms of punishment, such as incarceration. How this would effect the victim-offender bargain depends on whether victims view such punishments as gain to themselves. On one hand, victims might not have a "taste" for imposing strict sanctions whose benefits do not flow directly to them. That is to say, victims might feel guilty about imposing strict jail time after they feel that they have already been personally compensated. Such victims are unlikely to impose sanctions above actual harm, thus resulting in sub-optimal sanctions. On the other hand, victims might feel vindicated by seeing their offenders get their

^{23.} This assumes, as is the case with the programs discussed *infra*, that the offender has the option of settling with the victim or accepting a more traditional judge-imposed sentence.

^{24.} See generally Mark S. Umbreit, Mediation of Victim Offender Conflict, 1988 J. DISP. RESOL. 85, 99-101 (1988) (discussing prevalence of three different typologies of victims that participate in VOM programs—"The Healer"; "The Fixer"; and "The Avenger"—and discussing how each type tended to set levels of punishment).

^{25.} See GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, & DEBATES 23 (2002) ("Proponents of restorative justice argue . . . that [a victim's satisfaction with seeing an offender punished] often turns quickly into anxiety and guilt.").

"just desserts," even to the point of seeking revenge. 26 Such victims would be willing to push sanctions above his actual harm, perhaps even beyond optimal sanctions. 27

Given all of these contradictory factors, it cannot be said for certain where, in relation to optimal sanctions, victim-negotiated settlements will end up. However, this paper assumes that in most cases, victims will settle for less than the optimal sanction. Such an assumption seems justified given the strength of the assumption that victims are unlikely to be very well equipped (in comparison to judges) to determine optimal sanction levels, given the near universal prevalence barring victims from settling away criminal liability, and given that victims will be unlikely to fully count as "gain" to themselves non-monetary punishments.

III. VICTIM OFFENDER MEDIATION PROGRAMS

One exception to the general rule that victims do not participate in setting the sanctions of their offenders is the use of Victim Offender Mediation (VOM) programs.²⁹ Such programs involve the offender meeting with the victim in a highly controlled environment in hopes of reaching a mediation agreement setting some sort of recompense to the victim.³⁰

^{26.} See id. ("It is usually conceded that victims derive some satisfaction from seeing punitive justice done to those who have wronged them.").

^{27.} In such a case, the question is whether satisfaction of the victim's need for revenge is greater than the social welfare loss from over-deterrence of the underlying activity.

^{28.} See also THE HANDBOOK, supra note 5, at 31, 174 (instructing mediators to brainstorm with victims about their "losses" from the crime in an effort to work towards "restitution" and to inform them of public funds available to help with "reimbursing" their losses; noting that "restitution" of some sort was part of the vast majority of VOM agreements); Umbreit, Mediation of Victim Offender Conflict, supra note 24, at 99-101 (noting that "The Healer" type of victim was the most common of those that participate in VOM programs, whereas "The Avenger" was the least prevalent); Brown, supra note 3, at 1250, 1254 (criticizing VOM programs for "stressing forgiveness"; noting that shift from private enforcement of crime to state enforcement occurred only after aim became deterrence, rather than compensation—thus implying that deterrence is hindered by private enforcement techniques); Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 HARV. L. REV. 931, 941 (1984) ("If the offense is not repugnant or if the damage is disproportionately greater than the defendant's culpability, the court may order less than full compensation.").

^{29.} Currently, there are over 1319 VOM programs in the world, with 302 in the United States alone. The HANDBOOK, *supra* note 5, at xlv. *See also* UNITED STATES DEPARTMENT OF JUSTICE, DIRECTORY OF VICTIM OFFENDER MEDIATION PROGRAMS IN THE U.S. (2000).

^{30.} For an overview of VOM programs, see generally THE HANDBOOK, supra note 5.

Although reaching a mediation agreement is the tangible result and aim of VOM meetings, proponents stress that the key benefits of VOM programs accrue through the discussions themselves. On one side of the table, victims are said to be more satisfied with the criminal justice system because of their direct participation in the process, and they report relief through being able to confront the offender, as they are able to get such questions as "why me?" answered. On the other side of the table, proponents claim that offenders, because they are forced to confront their victims, realize the significance of their actions and begin to feel guilty for their actions. Because of such emotional benefits, proponents claim VOM programs offer the benefit of increased individual deterrence.

It is usually conceded that victims derive some satisfaction from seeing punitive justice done to those who have wronged them. Proponents of restorative justice argue, however, that this satisfaction often turns quickly into anxiety and guilt. . . . It is claimed that . . . victims who go through the [restorative justice] process tend to derive and express much more satisfaction and are more likely to feel that they have experienced *real* justice, than victims whose cases are dealt with in the conventional punitive way.

Id. at 23 (emphasis in original); GRAEF, *supra* note 3, at 30 (analyzing the emotional benefits victims receive through their participation in mediation); MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE & MEDIATION 21-23 (1994) (reporting that victims have high levels of satisfaction with the mediation process).

- 33. See Albert Eglash, Creative Resitution: A Broader Meaning for an Old Term, 48 J. CRIM. L. CRIMINOLOGY & POLICE SCIENCE 619, 622 (1958) (arguing that psychological benefits accrue to defendants who are forced to give restitution to their victims); Stephen Schafer, Restitution to Victims of Crime—An Old Correctional Aim Modernized, 50 MINN. L. REV. 243, 250 (1965) (arguing that restitution may be a correctional instrument through which the defendant can feel and understand his social responsibility and alleviate guilt feelings).
- 34. See THE HANDBOOK, supra note 5, at 190 ("Eighteen percent of the youth in mediation committed a new offense within a year, compared to twenty-seven percent of those in a matched comparison group. This finding of reduced recidivism was statistically significant."); Alan Morris & Warren Young, Reforming Criminal Justice: The Potential of Restorative Justice, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, supra note 3:

Regression analysis . . . suggest[s] that those offenders who apologized to victims were three times less likely to be reconvicted four years later than those who had not apologized and that those offenders who participated in conferences with victims were more than four times less likely to be reconvicted four years later than those where no victims had been present.

Id. at 19. Of course, such studies only speak to individual deterrence, and thus have no relation to the system's effect on general deterrence.

^{31.} Umbreit, *Mediation of Victim Offender Conflict, supra* note 24, at 95, 98 (finding that "[t]here is increasing evidence that emotional and informational needs of crime victims often surpass simply the need for compensation"; noting that victims who participated in negotiations did not even list "compensation" as their first, second, or even third reason for feeling satisfied with the program, instead focusing on the emotional benefits of the meeting itself).

^{32.} See JOHNSTONE, supa note 25:

Finally, proponents claim that the use of such programs will result in a reduction of enforcement and court costs.

Even though these goals are universal to VOM programs, the way in which proponents seek to achieve them is by no means standard. Indeed, it is impossible to explain the workings of 'the standard' VOM program beyond the generic description above; ³⁶ thus, it is impossible to draw any blanket conclusions as to their impact on general deterrence and social welfare. However, by analyzing each individual variable, one can get an idea of the overall impact of such systems. The key aspects of VOM programs, as they relate to deterrence and social welfare, are: (A) the scope, type, and extent of sanction; (B) the types of crimes handled by the program; (C) the time of referral into the program; and (D) the discretionary powers of the offender, the victim, and the court.

As discussed in Part II.B *supra*, generally it seems that letting victims set sanctions will result in under-deterrence, and thus a loss in social welfare. Throughout each analysis set out below, this will be taken as a given, and from there the analysis will proceed to analyze how each key aspect of VOM programs as currently seen affect this background assumption. For each section, they key question is whether each variable makes it more or less likely that the program will result in a decrease in general deterrence, and whether each variable makes it more or less likely that the program's claimed benefits will be able to outweigh the decrease in social welfare caused by any drop in general deterrence. Only by answering this over-arching question can one intelligently analyze the effect VOM programs have on social welfare.

^{35.} See JOHNSTONE, supra note 25, at 24; THE HANDBOOK, supra note 5, at 174 ("The potential cost savings of VOM programs when they are employed as true alternatives rather than as showcase add-ons are significant."). See generally Mark S. Umbreit, COST OF MEDIATION VERSUS COURT DISPOSITION: FEASIBILITY STUDY (1993) (outlining how an empirical study into the relative costs could be completed).

^{36.} See Brown, supra note 3, at 1262 ("Most VOM programs involve face-to-face meetings between crime victims and offenders in the presence of trained mediators. Beyond this basic description, VOM programs defy generalization.") (citations omitted); Markus Dubber, The Victim in America, 3 BUFF. CRIM. L. REV. 3, 22 (1999) ("Victim-offender mediation . . . will result in dismissal. The alternative disposition of facially criminal cases occurs rarely and unsystematically, even in minor cases.").

A. Scope, Type, and Extent of Sanctions³⁷

As mentioned above, the tangible result of a victim-offender mediation is an agreement setting terms describing actions the offender must take to successfully complete the program. Such agreements primarily entail payments to the victim, often in the amount of the harm caused, but other options and mixes are available. Theoretically, such payments and sanctions could equal the optimal sanction, and thus overall deterrence would not be hurt, but society would still gain from the emotional benefits claimed by VOM advocates.

Realistically, however, even if victims were allowed to negotiate any amount regardless of their actual harm, or even if the court enables the victim to order non-monetary sanctions, it seems likely that they will settle for less than optimal amount, as they are unlikely to take into account the social welfare benefits of optimal deterrence, and are unlikely to fully count as gain to themselves any non-monetary sanctions. Finally, it has been charged that the programs as currently administered stress forgiveness on the part of victims, pushing the resulting sanction even lower. Thus, it seems that VOM programs, standing alone, are likely to set sanctions lower than the

^{37.} It is important to note that oftentimes *judges* impose other types of sanctions on top of (or in tandem with) whatever sanctions victims impose through the VOM program. However, in order to facilitate analysis, this section seeks to analyze the scope of sanctions imposed solely by VOM programs in isolation. The effect that the stacking on of other sanctions has on the conclusions drawn herein is addressed in Part III.C, *infra*.

^{38.} See UMBREIT, VICTIM MEETS OFFENDER, supra note 32, at 62 (studying what mix of monetary payment, personal service, and community service terms were used in actual mediation agreements); THE HANDBOOK, supra note 5, at 42-43 (noting availability of different punishment options). As discussed in the latter part of Part II.B, when non-monetary sanctions are available to be demanded by the victim, it seems even less likely that the victim will demand the optimal sanction. This is because the victim seems even more unlikely (as compared to a judge) to understand the relative levels of disutility associated with such punishments, and, unlike monetary sanctions, the victim is less likely to see the imposition of prison time as accruing gain directly to him or herself. See also Umbreit, Mediation of Victim Offender Conflict, supra note 24, at 100-01 (noting that the "The Avenger" victim type was observed least frequently of all victims that participated in VOM programs).

^{39.} See Anne Newton, Alternatives to Imprisonment: Day Fines, Community Service Orders, and Restitution, 8 CRIME & DELINQUENCY LITERATURE 109, 124 (1976) ("Restitution need not be only in the form of money. The ingredients of restitution are limitless. . . . For example, a lawyer could be sentenced to perfom free services for indigent defendants, or a doctor to provide free medical services to the needy.").

^{40.} See generally supra Part II.B.

^{41.} Brown, *supra* note 3, at 1249-50 ("VOM disserves the interests of victims by stressing forgiveness and reconciliation before victims have the vindication of a public finding that the offender is guilty.").

optimal amount, harming general deterrence.

Pushing against this conclusion, however, is the fact that the meeting *itself* can be seen as a sanction, in that forcing the offender to discuss his or her crime with the victim may cause some understandably uncomfortable feelings for the offender. The question then becomes whether the reduction of the more traditional sanctions is counterbalanced by the offender's disutility in having to meet with the victim. However, it should be noted that systems *in their current form* may not be able to rely on this factor for general (as opposed to individual) deterrence because there is lack of overall awareness of such programs.

B. Type of Crimes Mediated

Although there is no universal description of the type of crimes that VOM programs can handle, three generalizations can be fairly made which will simplify this analysis: (1) the majority of programs handle a large portion of property crimes; (2) the majority of programs focus on more "lightweight" crimes, usually misdemeanors; and (3)

^{42.} See, e.g., Morris & Young, supra note 34, at 22 (responding to criticisms of restorative justice by claiming that "being confronted by one's victim in a restorative conference is no 'soft option'"); Brown, supra note 3, at 1298-99 ("VOM might be reconciled with deterrence goals by arguing that the cost of the crime to the offender is increased when he or she must face the victim and hear about the consequences of the crime. This might cause the offender to internalize some of the consequences."); Dubber, supra note 36, at 28 ("In shaming the offender, victims also contribute to the offender's punishment in the short term and, perhaps, to her rehabilitation and reintegration in the long term."); Schafer, supra note 33, at 250 (arguing that restitution may be a correctional instrument through which the defendant can feel and understand his social responsibility).

^{43.} See Brown, supra note 3, at 1298-99 ("To have general deterrent effect... the costs associated with facing the victim would have to be publicized more, so that potential criminals would know the fate that might await them if their contemplated crime is detected."). That is to say, many people as general knowledge might know approximately the length of a prison sentence or a fine accompanying an act, but in their current rare form, few may be counting on having to face the victim as part of the overall sanction.

^{44.} THE HANDBOOK, *supra* note 5, at 255 ("Both restorative justice in general and victim offender mediation specifically continue to be identified a primarily, if not exclusively, addressing nonviolent property crimes and *perhaps* even minor assaults.") (emphasis added); MARK S. UMBREIT & JEAN GREENWOOD, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS 7 (2000) (noting that three of the top four crimes most frequently referred to mediators are property crimes—vandalism, theft, and burglary); MARK S. UMBREIT, CRIME & RECONCILIATION: CREATIVE OPTIONS FOR VICTIMS AND OFFENDERS 100 (1985) ("VORP deals mainly, but not exclusively, with property cases.").

^{45.} THE HANDBOOK, *supra* note 5, at 174-75 (noting that a 1996-1997 survey indicated that two-thirds of cases referred to VOM programs during were misdemeanors; noting that data "support[s] the notion that VOM is typically used as a 'front-end' diversionary

many programs handle primarily juvenile and/or first-time offenders.

1. Property Crimes

Although recently VOM programs have begun to branch out into more areas, they traditionally have been associated with property crimes, and this still makes up a majority of the cases that VOM programs. From a deterrence standpoint, this seems particularly problematic. As discussed in Part II.A *supra*, the lower the probability that an offender will be caught, the greater the sanction must be inflated beyond expected harm in order to achieve optimal deterrence. Property cases, such as theft, vandalism, and destruction of private property, seem like they would be harder to enforce than other types of crimes, for there are often no witnesses, victims seem more unlikely to know the offender, and less police resources are devoted to resolving them in comparison to crimes against the person. Assuming this to be true, then this use of VOM programs seems particularly troublesome in terms of general welfare, as the size of under-deterrence loss is likely to be very large as compared to other types of crimes which may not need such high sanction-inflations.

Cutting against this, however, is the fact that it may that property crime offenders are more likely to be repeat offenders than offenders of other types of crimes. If this is the true, and if it is true (as

option, reserved primarily for 'lightweight' cases").

^{46.} See, e.g., UMBREIT & GREENWOOD, supra note 44, at 5 (finding that, of survey respondents, 91 percent of programs reported working with juvenile offenders, while only 57 percent reported working with adults).

^{47.} See, THE HANDBOOK, supra note 5, at 35-36 (indicating that a case's suitability usually depends on, among other things, "no more than two or three prior convictions").

^{48.} See supra note 44 (noting prevalence of property cases in VOM programs).

^{49.} See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 10-11 (2001), available at http://www.fbi.gov/ucr/01cius.htm (last visited Nov. 13, 2002) (stating that property crimes made up 87.7 percent of crimes reported to law enforcement agencies, with only 32.4 percent of the value stolen being recovered),. These numbers might overstate the actual numbers, because not all property crimes are reported to police. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1994, at 83-91 & tbls.91-100 (1997) (listing statistics of un-reported crimes).

^{50.} See, e.g., BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES, available at http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm (last visited Nov. 13, 2002) (finding that the rearrest rate for property offenders went up from 68.1% in 1983 to 73.8% in 1994, whereas rearrest rate for violent offenders remained stable, with a 61.7% rate in 1994); CONNECTICUT GENERAL ASSEMBLY, LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE, RECIDIVISM IN CONNECTICUT ch.2 (2001), available at http://www.cga.state.ct.us/pri/2001ricreportchap2.htm (last visited Nov. 13, 2002) ("Many researchers found offenders who commit property crimes such as burglary and larceny have the highest rates of recidivism and reoffend in less time than other types

proponents claim) that VOM programs offer better individual deterrence than traditional sanctions, then it could be the case that the increase in *individual* deterrence here is particularly helpful, and thus justifies (and offsets, from a social welfare perspective) the drop-off in *general* deterrence.

2. Minor Offenses and Misdemeanors

Again, although VOM programs recently are beginning to branch out, traditionally VOM programs have been limited to minor offenses, such as misdemeanors. In terms of program's overall effect on social welfare, it is unclear which way this characteristic pushes. On one hand, the social harm in under-deterring offenses increases with the seriousness of the crime. On the other hand, it also seems likely that the program's benefits—cost savings, increased individual deterrence, and emotional benefits—may also rise with the seriousness of the crime. Thus, this limitation's overall effect on VOM's impact on social welfare is ambiguous.

In the context of *very* small offenses, however, a clearer picture can be drawn. Here, it may be that VOM programs are actually *aiding* general deterrence. This is because VOM programs (because of their claimed low cost)⁵³ may be accepting and dealing with cases which

of criminals."); WEST VIRGINIA DIVISION OF CORRECTIONS, 1999 RECIDIVISM STUDY 2 (1999), available at http://www.state.wv.us/wvdoc/recstudy.pdf (last visited Nov. 13, 2002) ("Property Crimes made up 64% of the total original crimes for those recidivists released in 1994 and 51% of those released in 1995.").

^{51.} See supra notes 33-34 and accompany text (discussing claimed benefits of increased individual deterrence flowing from forcing the offender to face his or her victim)

^{52.} See supra note 45. Perhaps the reason behind this observed limitation in scope may simply be that these programs are relatively new, and that jurisdictions are simply unwilling to experiment with "serious" crimes. This is evidenced by the fact that the programs now are beginning to branch out into more serious offenses. See UMBREIT, VICTIM MEETS OFFENDER, supra note 32, at 159 (considering whether programs are taking strictly minor cases just to get acceptance; criticizing them for caving in too often rather than stretching to establish selves as legitimate option); THE HANDBOOK, supra note 5, at 120, 255-90 (noting that VOM programs are noticing a trend in referrals toward a "higher level of crime"; assessing use in crimes of severe violence). Even practitioners, however, are questioning whether their training enables them to adequetly handle the progressively more serious cases that are coming before them. UMBREIT & GREENWOOD, supra note 44, at 16.

^{53.} See THE HANDBOOK, supra note 5, at 169 ("Many VOM programs are nominally established to divert youthful offenders into less costly, less time-consuming, and, according to some observers, less severe options."); id. at 173-74 (noting difficulties in comparing costs, but claiming that "[t]he potential cost savings of VOM programs when they are employed as true alternatives rather than as showcase add-ons are significant").

otherwise would not receive any prosecutorial attention.⁵⁴ If this is true, then in this instance VOM programs represent a "widening of the net" of offenses that receive any enforcement effort. Thus, in the context of very small offenses, VOM programs may be actually increasing deterrence by increasing enforcement efforts, even if the resulting sanctions are less than optimal.⁵⁵

3. Juveniles and/or First-Time Offenders

Another recurring theme in the cases seen referred to VOM programs is that the typical case involves either first-time offenders or juvenile delinquents. If it is true that first-time offenders are more likely to be individually deterred than repeat offenders, then this limitation may make sense. That is to say, limiting the use of VOM

While not yet as precise in predicting future recidivism as might be preferred, recent social science literature suggests that recidivists ought to be targeted [for harsher sentences] and that first-time offenders may merit punishment that is less severe than those already hardened to the realities of the criminal justice system. Those social science findings have been echoed by political leaders seeking to focus law enforcement efforts on the most hardened and dangerous offenders."

^{54.} See id. at 169-70 (discussing studies into actual diversion rates). It should be noted that proponents of VOM programs seem to think this net-widening effect is actually a bad thing. See id. (noting that some "expressed concern" about the "unintended" consequence of widening the net, in that it would result in giving some people more serious sanctions than if VOM programs did not exist); JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 149-50 (2002) (discussing net-widening effect of VOM programs).

^{55.} This is of course because *some* sanction (the VOM program) is a better deterrent than *no* sanction (if the case would have been dropped in the absence of the VOM program).

^{56.} See supra notes 46-47 (discussing prevalence of juvenile offenders and first-time offenders in VOM referrals).

^{57.} See, e.g., Williams v. New York, 337 U.S. 241, 248 (1949) ("Today's philosophy of individualized sentences makes sharp distinctions . . . between first and repeated offenders."); ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 2 (1989) (indicating that prisoners with extensive prior records are far more likely to recidivate than first-time offenders); T. Markus Funk & Daniel D. Polsby, Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons, 52 WASH. U. J. URB. & CONTEMP. L. 161, 181 (1997) ("If this juvenile is in fact a first-time offender, and the judge knows it, the judge will in all likelihood impose a relatively lenient sentence because the offender has not yet evidenced a lack of rehabilitative potential."); Joan Petersilia & Susan Turner, Criminology: An Evaluation of Intensive Probation In California, 82 J. CRIM. L. & CRIMINOLOGY 610, 612 (1991) ("Most of the programs limit participation to property offenders with insubstantial criminal records, which undoubtedly helps explain the low recidivism rates."); CONNECTICUT GENERAL ASSEMBLY, supra note 51, at ch.2 ("Offenders with multiple prior arrests and convictions, especially if concentrated in a short time span, are frequently rearrested."); Michael Edmund O'Neil, Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System, 42 B.C. L. Rev. 291 (2002):

programs to those who are more likely to be individually deterred makes it more likely that that increase in social welfare caused by this aspect of the VOM program would outweigh the social welfare lost caused by an overall drop in general deterrence.

C. Time of Referral and Effect on Criminal Liability

Another key variable among VOM programs that likely has an effect on the program's impact on social welfare is the point at which VOM programs come into play. Five main points in the criminal process have been identified for the use of VOM programs: (1) prior even to criminal reporting ("community use"); (2) pre-prosecution; (3) after conviction but before sentence; (4) during sentencing (where VOM may be used in tandem with other forms of sanctions); and (5) as part of a probation program.

1. Pre-Reporting

In some instances, schools, churches, and communities set up VOM programs that are used completely outside the criminal setting. For example, a school fight could result in mediation, rather than referral to the police. Such use of the programs likely represents a widening of the net of offenses that get any sanction, and this affect may offset any negative impact on general deterrence caused by their use of less-than-optimal sanctions.

2. Pre-Prosecution

Here, offenders often are sent to VOM programs in lieu of traditional prosecution. Upon successful completion of the program, the prosecutor agrees not to press criminal charges. As above, if this truly represents an expansion of cases that at least receive some attention, then again VOM programs might actually be aiding

^{58.} See GRAEF, supra note 3, at 50 (discussing community use of VOM programs).

^{59.} Id.

^{60.} See supra notes 53-55 and accompanying text (discussing the net-widening effect of VOM programs and its potential to aid general deterrence). But see Braithwaite, supra note 54, at 149-50 (2002) (noting danger that, if programs acquiesce in getting only those cases the police do not want to bother doing anything with, that restorative justice and mediation will never gain respectability).

^{61.} GRAEF, *supra* note 3, at 50-51. This option is used particularly where the offender is a first-time offender, or a juvenile. *Id.*

deterrence by increasing enforcement efforts. ⁶² However, it seems unlikely that *none* of the cases referred to VOM programs would have been prosecuted. The question thus becomes whether the effect of the increased number of cases dealt with offsets the fact that some cases would have received higher sanctions if not for the program's existence.

3. Post-Conviction, But Before Sentencing

Sometimes, offenders have been adjudicated (whether by a trial or plea-bargaining) as being guilty, but the judge offers the offender the option of entering a VOM program *instead of* facing "traditional" sentencing. Given the unknown "traditional" sentence, and given that usually judges seem to drastically reduce sentences when using VOM programs, it seems that the "choice" offered the offender is particularly coercive. If this is true, then the offender (striving to successfully complete the VOM program) seems particularly likely to feign repentance and fake his or her way through the mediation program. Thus, the individual deterrence gains caused by the "remorse" offered by the system may in fact be illusory in this instance, and may indeed serve to further offend the victim. In such

^{62.} See supra notes 53-55 and accompanying text (discussing the net-widening effect of VOM programs and its potential to aid general deterrence).

^{63.} MARTIN WRIGHT, JUSTICE FOR VICTIMS & OFFENDERS 114 (2d ed. 1996) (finding sample average sentence for offenders referred to mediation was 38 days, versus 212 for those who were not); see also id. at 183 ("[V]ictims may feel a burden of decision because if they refuse to participate or to reach agreement, they may bear some responsibility for a heavier sentence imposed on the offender.") (emphasis added).

^{64.} See; Brown, supra note 3, at 1253, 1265 (noting that the coupling of the mediation and criminal justice systems creates an "unacceptably coercive context" for the parties' decision to take part; noting that VOM programs can "exploit the offender's fear of state coercion" by scheduling mediation when the offender's uncertainty is at its maximum); Umbreit, Mediation of Victim Offender Conflict, supra note 24, at 89-90 (1988) (noting that, despite the rhetoric of offender volition, practice suggests "rather significant" state coercion is exercised; noting research which suggests that offenders do not view the program as voluntary).

^{65.} GRAEF, *supra* note 3, at 50-51 ("Although used often, critics argue that [using the program at this point] invites false remorse on tactical grounds, and puts pressure on the victim to accept it.").

^{66.} See The Handbook, supra note 5, at 27 (noting the importance of volition on part of offender, for "[t]he offender's attitude or insincerity may constitute an additional offense in the eyes of the victim"); Umbreit, Victim Meets Offender, supra note 32, at 99 (noting that some victims complain about the offender's attitude during the mediation, leaving them less satisfied with the program). But see Kathleen Daly, Revisiting the Relationship between Retributive & Restorative Justice, in Restorative Justice: Philosophy to Practice, supra note 3, at 48 (questioning whether, given the symbolic importance of apology to victim, whether such gesture should be coerced ("if only gently") from the offender).

an instance, there would seem to leave (comparatively) little to offset the loss in social welfare caused by the problem of under-deterrence.

Importantly, however, the completion of the mediation is not conclusively the end to the story—often judges retain discretion to impose additional sanctions, even incarceration. This theoretically enables the judge to reap the benefits of VOM programs while still maintaining optional sanctions. In such a situation, how the court actually exercises its direction is determinative of the program's effect on social welfare. An analysis of how this discretion is being carried out occurs in Part III.C.4, *infra*.

4. During Sentencing

Another time when VOM programs come into play in the criminal justice system is during the sentencing of the offender. In such circumstances, judges often use VOM in tandem with other more traditional forms of punishment. Theoretically, if judges are able to accurately measure the amount of "punishment" such programs entail, then there is no reason VOM programs used in this way should *ever* hurt deterrence—the trade-off in sanctions would be one of kind, and not of level.

For instance, assume the sanction needed for optimal deterrence is 1000. Further assume that the expected mediation agreement will provide that the offender will pay the victim \$100, and assume this correlates to a utility loss to the offender of 100. Finally, assume that the very act of going through the VOM program (because the offender is forced to face his victim and have conversations with him, etc.) will cause a utility loss to the offender of 200. In such an instance, the judge, in an effort to keep optimal deterrence, could add on top of the VOM program whatever "traditional" forms of punishment one assumes is worth the remaining 700 units of disutility required to get to optimal deterrence. In such an ideal world, the victim would presumably still get the satisfaction of being part of the justice system, the victim would still get the emotional benefits of confronting the offender, the system overall would get the claimed benefit of increased individual deterrence . . . all the while still

^{67.} See WRIGHT, supra note 63, at 114 (finding that sample data showed that those cases referred to mediation eventually received custodial sentences at the same rate as those not being referred to mediation, but that the length of the sentence was reduced dramatically).

maintaining the optimal sanction of 1000 needed for optimal deterrence. Thus, social welfare might be actually be increased in this instance.

One such instance where the court seemed to be attempting to do this proper balancing occurred in a fascinating New Zealand case, *The Queen of Clotworthy 1998*. There, a trial court imposed a sentence for a mugging that was grounded mostly on its approval of a successful mediation program. Over the objection of the victim (who thought imprisonment to be a "waste of time"), the mediator, and (not surprisingly) the offender, the court of appeals reversed, stating that "[t]he public interest in consistency, integrity of the criminal justice system *and deterrence of others* are factors of major importance." After considering the successful completion of the program, the nature of the case in general, and the factors mentioned above, the court of appeals sentenced the defendant to three years in jail.

However, one questions whether most judges really do perform this balancing in order to achieve optimal sanctions, or if instead they are overly focusing on the individual deterrence factors involved in VOM programs. For instance, the offender in the Clotworthy case had multiple charges levied against him after he mugged a passer-by, slashed the victim in the face, and stabbed the victim in the chest. Although the victim survived a collapsed lung, he required blood transfusions and was in intensive care for several days. In response to this event, the trial court gave the defendant a two-year suspended sentence upon completion of the program, and was ordered to do twohundred hours of community service. Other instances of similar severe reductions in sentences are strewn throughout the restorative justice literature: one case saw an offender have his sentence reduced from twenty years in prison to a single year, plus five years of probation and participation in a VOM program, and another involved an offender being sentenced to thirty days in prison upon

^{68.} Charles Barton, *Empowerment and Retribution in Criminal Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, *supra* note 3, at 58-59 (emphasis added).

^{69.} Sir Anthony Mason, *Restorative Justice: Courts and Civil Society, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, supra* note 3, at 4-6. This was in contrast to the District Court's sentence of a *suspended* two-year sentence.

^{70.} *Id.* As discussed *supra*, in contrast to this two-year *suspended* sentence (which essentially meant no jailtime), the appellate court instituted a three-year sentence, which was a reduction from the usual sentence of four to six years. *Id.*

^{71.} UMBREIT, CRIME & RECONCILIATION, supra note 44, at 21-33.

completion of a VOM program, while another judge sentenced his accomplice to ten years in prison.

Such dramatic reductions in sentences raise serious doubts as to whether courts are truly working with optimal sanctions in mind, and if instead they are overly-focusing on individual deterrence and "victims' rights." However, it may very well be that such cases are outliers, held up by the advocates of restorative justice to show how special circumstances of the particular offender or victim were ignored by the traditional criminal system. If this is true, then other trial courts might indeed be doing a proper balancing. For instance, one sample found that the courts imposed custodial sentences just as often when the offender had participated in VOM than when he or she had not. 13 However, the average length of the sentence imposed on mediated offenders was 38 days, versus 212 days for non-mediated offenders. 4 This supports the notion that not all courts are completely handing over the sentencing to VOM programs, but it still does not answer the question of whether the reduction in the package of sanctions is justified by the mediation programs' claimed benefits.

In sum, the coupling of VOM programs with "traditional" sanctions theoretically allows judges to get the claimed benefits of VOM programs without sacrificing general deterrence. This would be true if judges truly are only reducing traditional sentences in measure with the disutility caused by the programs themselves, or to the point where social harm in under-deterring the offense is outweighed by the program's social benefits. The existence of severe cases indicates that some judge are over-emphasizing the benefits of VOM programs, but such instances likely represent outliers, as for many courts the reduction is not nearly as striking. The key question which both advocates and critics have failed to address, however, is whether the reductions that are actually taking place in practice are justified by the mediation's claimed benefits.

5. Probation

Another use of VOM programs occurs in tandem with probation

^{72.} Id. at 104.

^{73.} WRIGHT, supra note 63, at 114.

^{74.} Id

programs. If one assumes that the original sanctions doled out by the court were optimally set, then it could be that this use of VOM programs may result in over-deterrence. That is to say, if, as advocates argue, forcing an offender to go through the program really does equate to a severe sanction, then adding on a VOM program to an already-optimal sanction would result in over-deterrence. In such a case, the question simply changes terms—namely, it must be answered whether the social loss due to *over*-deterrence is outweighed by the social gain caused by cost savings, increased individual deterrence, and victim satisfaction. On the other hand, if the original sanction was sub-optimally set, then it is likely that such programs are fully aiding social welfare by adding at least some punishment while at the same time providing the other virtues.

D. Court, Offender, and Victim Discretion

1. Offender Co-Operation and State Coercion

No offenders are ever technically forced into VOM programs. This is a requirement of necessity, as an unwilling offender seems likely to be hostile to the victim, destroying the possibility of any of the benefits underlying the programs.

However, it is widely recognized that the system as currently administered involves a good deal of state coercion on the offender. This coercion may work to undercut the benefits offered by VOM

^{75.} Indeed, some have tied the use of restitution as part of criminal law with probation law. Harland, *supra* note 4, at 57 ("[T]he systematic rise of restitutive sanctions in the United States may be linked to the appearance of suspended sentence and probation laws")

^{76.} See Morris & Young, supra note 34, at 22 (responding to criticisms of restorative justice by claiming that "being confronted by one's victim in a restorative conference is no 'soft option'").

^{77.} But see WRIGHT, supra note 63, at 125 (noting that some commentators have argued that, when used as an "add-on", society may be reaping the program's advantages without harming anything "too much").

^{78.} Indeed, this may be the best area to use VOM programs—namely, when the original sanction was sub-optimal due to other factors (prison crowding, etc.). In such a case, where it is VOM or unconditional release, society might as well attempt to reap the benefits of VOM programs, even if such programs only marginally aid general deterrence.

^{79.} See supra notes 63-67 and accompanying text (noting coercive force of state pushing offenders into such programs, and resulting danger of false remorse and emotional damage to victim). But see Daly, supra note 66, at 48 (questioning whether, given the symbolic importance of apology to victim, whether such gesture should be coerced ("if only gently") from the offender).

programs, making it harder to justify their adverse affect on deterrence. First, offenders may make fake showings of repentance and remorse in order to get a stamp of approval from the program. If this is true, then the proclaimed benefit of increased individual deterrence caused by the evocation of such feelings may be an illusion. Second, offenders may enter the program, but only participate half-heartedly. Not only does this present the danger that the offender may not be truly individually deterred, but it also may mean the victims are left unsatisfied with the whole process—or, even worse, may regret ever attending the meeting. Thus, the more coercion the state puts on offenders (through overly lopsided penalty options, or the like), the more the proclaimed benefits of VOM programs seem to be at risk—making it less likely that the benefits sought can outweigh the drop in social welfare resulting from the decrease in general deterrence.

2. Victim Co-Operation

As with offenders, victim cooperation is a practical requirement.⁸⁴ Forcing a victim who does not want to participate into a program obviously raises the possibility that one of the virtues of the program—namely, an increase in victim satisfaction—will be absent.⁸⁵

3. Court Discretion

No matter when a case is referred to a VOM program, there always

^{81.} Id.

^{82.} Id.

^{83.} Id.

^{84.} The fact that VOM programs are conducted through a court-controlled mediator makes the chance of coerced involvement or settlement extremely unlikely. This may be one advantage that VOM programs have over compromise statues. To the extent that the possibility of coerced settlement is possible, the analysis would be similar to the done for compromise status. *See infra* notes 140-41 and accompanying text (discussing problem of coerced settlement in the compromise statute context); *see also* WRIGHT, *supra* note 63, at 183 ("[V]ictims may feel a burden of decision because if they refuse to participate or to reach agreement, they may bear some responsibility for a heavier sentence imposed on the offender.").

^{85.} Although beyond the scope of this paper, one might question whether hinging an offender's sentence on the willingness to participate hurts another goal most see for any criminal system—predictability and consistency. Indeed, the fact victims get to set penalties at all has been criticized as going against these goals. *But see* Mason, *supra* note 69, at 21 (responding to such criticisms by pointing to fact that current system does not even meet these goals).

stands some government agent whose final approval is required before the program is deemed successful. Such a power of final approval is a key check on VOM programs, as it enables the official (whoever it may be) to ensure that the program did operate as intended, that the agreement reached was truly fair, that the victim was truly satisfied with the results and was not coerced into settlement, and that the offender participated in good faith (in an attempt to assure the "true remorse" that is claimed to lead to increased individual deterrence). Without such a check, the likelihood that the benefits claimed would actually materialize would seemingly decrease, as nobody would be ensuring the overall integrity of the process. Thus, this aspect of VOM programs increases the probability that the use of VOM programs are aiding social welfare.

E. Summary of VOM Programs

Overall, it is important to focus debate on the key question of whether the social welfare gains from the VOM program outweigh the social welfare losses such programs cause through their reduction in general deterrence. The number of variables seen among VOM programs makes it difficult to draw any blanket conclusions, but it is possible to analyze how each key characteristic is likely to affect where this balancing ends up. First, the core of many programs property crimes—seems like a specifically problematic place to use VOM programs, given the low probability of apprehending such offenders. Second, the effect of limiting the use of VOM programs to minor crimes is ambiguous, but it should be noted that for extremely small crimes that might not otherwise get punished at all, VOM programs may be actually aiding deterrence. Third, the timing of the use of the program seems pivotal. Using VOM programs before prosecution may aid enforcement efforts and thus may actually increase deterrence. On the other end, using VOM programs as just a piece in a list of sanctions given during sentencing gives the judge the opportunity to capitalize on the benefits of VOM programs while not

^{86.} That is to say, for those cases where the prosecutor has decided not to file but instead to refer the case to a VOM program, the prosecutor still maintains the power to file charges if the results are not to his or her satisfaction. Similarly, judges maintain the ability to review VOM agreements, and have the power to modify the sentence based on the results. Finally, probation officers have the ability to deem when VOM completion is "successful" whether or not an agreement is made.

^{87.} Of course, how courts are exercising their discretion in practice is a key question which advocates and critics have yet to address. *See generally supra* Part III.C.4.

sacrificing deterrence. Whether or not judges are capitalizing on this opportunity by doing the proper balancing test is unclear.

The discretion of all parties helps to increase the likelihood that the claimed benefits of mediation are actually realized. Victims' voluntary participation is required because forcing unwilling victims into something they resist would make it unlikely they will reap any of the emotional benefits promised. Offender cooperation is required because false portrayals of guilt and remorse both further insult the victim and make individual deterrence more unlikely. Finally, the discretion vested in the courts at least empowers them to ensure that the benefits claimed by advocates really do materialize—thus making it more likely that the program's social welfare gains (caused by the victim's emotional gains and the increase in individual deterrence) outweigh the social welfare losses (caused by the overall reduction in general deterrence). As with sentencing discretion, however, such empowerment only matters if courts are properly focused on the question of whether the resulting drop in general deterrence is outweighed by the program's proclaimed benefits.

IV. COMPROMISE STATUTES

The use of compromise statutes 88 creates a similar exception to the

88. See Alaska Stat. §§ 12.45.120 to 12.45.140 (Michie 2001); Ariz. Rev. Stat. Ann. § 13-3981 (West 2001); Cal. Penal Code §§ 1377 to 1379 (West 2001); Idaho Code §§ 19-3401, 19-3403 (Michie 2001); Mass. Ann. Laws. ch. 276, § 55 (Law. Coop. 2001); Miss. Code. Ann. §§ 99-15-51, 99-15-52, 19-15-53 (2001); Nev. Rev. Stat. Ann. §§ 178.564 to 178.568 (Michie 2001); N.Y. Code Crim. Proc. § 170.40 (Consol. 2001); N.D. Cent. Code §§ 29-01-16 to 29-01-19 (2001); Okla. Stat. it. 22, §§ 1291-94 (2001); Or. Rev. Stat. §§ 135.703 to 135.705 (2001); Pa. Stat. Ann. it. 42, § 314 (West 1993); Wash. Rev. Code §§ 10.22.010 to 10.22.020 (1991); see also 21 Am. Jur. 2D Criminal § 475 (2002):

There are exceptions to the general rule that condonation or compromise between the offender and the victim is no defense to a criminal prosecution [S]tatutes or rules may specifically authorize a compromise of both the criminal and civil liability arising out of certain conduct.

Id.; Jeffrey F. Ghent, Annotation, Construction and Effect of Statute Authorizing Dismissal of Criminal Action Upon Settlement of Civil Liability Growing Out of Act Charged, 42 A.L.R. 3D 315, 318 (1972):

An exception to [the principle that victims cannot settle away criminal liability] exists, however, where a statute specifically authorizes a compromise of the criminal, as well as the civil, liability arising out of certain conduct If there is a compromise involving civil liability arising from a criminal act, and if there is included in the compromise some promise or agreement, express or implied, that the prosecution of the criminal case will be suppressed, abandoned, or hindered, the compromise is generally considered illegal and contrary to public policy, except to the extent that a statute may specifically authorize it.

general rule that victims should not have a large role in setting punishment levels. These programs allow a court, in its discretion, to dismiss the charges against an offender if the offender produces evidence that the victim of the underlying crime has received satisfaction for his or her injury. As above, the core of the analysis should be whether such statutes cause a net increase or decrease in social welfare, taking into account the statute's effect on general deterrence. Part A analyzes the ways in which the statutes may effect social welfare, concluding that: (1) as with VOM programs, compromise statutes are likely to result in a sub-optimal level of sanctions; and (2) the only realistic benefit the use of such statutes has is that they save enforcement and court costs. Part B considers the key characteristics of compromise statutes that may determine which of these effects dominates, and thus whether the statutes' overall effect is to add to or detract from social welfare. Part C summarizes the conclusions and outstanding questions brought out by this analysis.

Id. Such statutes are periodically upheld against charges that they violate the state's separation of powers doctrine. *See* Arizona v. Larson, 764 P.2d 749 (Ariz. Ct. App. 1988); Alaska v. Nelles, 713 P.2d 806, 809-10 (Ct. App. Ala. 1986).

89. See, e.g., People v. Moulton, 182 Cal. Rptr. 761, 766 (Cal. App. Dep't Super. Ct. 1982) ("In most instances, the civil and the criminal law operate independently of one another so that resolution of a victim's civil rights and remedies has no effect upon criminal prosecution. Indeed, it is generally considered to be a criminal offense to condition settlement of a civil claim upon nonprosecution of a criminal action."); Miller, supra note 2, at 1 ("In theory there should be no compromises of criminal cases."); 21 AM. JUR. 2D Criminal § 474 ("Because a crime is by definition a public wrong . . . it is ordinarily no defense that a person injured by the crime condoned the offense."); Ghent, supra note 88, at 318 ("A particular act charged may be the basis for both criminal and civil liability, and although a compromise and settlement may be binding between the parties as to civil liability, it will ordinarily have no effect upon a party's criminal liability."); 22 C.J.S. Criminal Law, § 41 at 132 (1961) ("[A] crime is a wrong directly or indirectly affecting the public, the fact that a person who was injured by the commission of a crime has condoned the offense or made a settlement with accused or with some third person in his behalf does not relieve accused or bar a prosecution by the state, except where there is statutory authority therefor Settlements under statutory authority must be made in the manner directed by the statutes."). For articles relating to victim impact statements, see supra note 2.

90. See, e.g., ARIZ. REV. STAT. ANN. § 13-3981(C) (West 2001) (requiring the party injured to appear before the court and acknowledge that he or she has received satisfaction for the injury); 21 AM. JUR. 2D Criminal § 474 (2002) ("[Compromise statutes require] the injured party's acknowledgement of receipt of satisfaction for the injury."); Ghent, supra note 88, at 319 ("A final requirement for dismissal under compromise statutes, which has often been a subject of litigation, is that the injured party acknowledge receipt of satisfaction for the injury."). The meaning given to "satisfaction" is discussed infra.

A. Potential Costs and Benefits of Compromise Statutes

1. Compromise Statutes and Under-Deterrence

Under the statutes, the victim must receive "satisfaction." Although nothing specifically binds victims to only receiving money or property, a review of the case law reveals that such payments are overwhelmingly the normal avenues of compromise. This is because, unlike in the VOM program setting, victims cannot use the court system to monitor and enforce terms as jail time, work programs, or participation in community service projects. As such, this analysis will assume the settlements to consist of purely monetary payments.

As to what level such monetary payments are set at, courts seem to alternate between two ways of defining and applying the statutory requirement that the victim receive "satisfaction": (1) whatever it takes to get the victim to agree to dismissal of the criminal charge; or (2) whatever the victim could have gotten in a civil suit. On one hand, it is clear that the victim's assent is not a necessary requirement to dismissal, which may exclude the first interpretation. Such logic is supported by *Oregon v. Johnsen*, where the court upheld the compromise of a shoplifting charge. State law gave a storeowner a

^{91.} See note 90, supra (noting universal requirement of victim's acknowledgement of satisfaction).

^{92.} See People v. Stephen, 227 Cal. Rptr. 380, 388 (Cal. App. Dep't Super. Ct. 1986) ("[T]he civil compromise statute does not in fact condition the approval of a compromise on the commencement of a civil action or on the resolution of such action in any particular fashion . . . Nor does the statute specify . . . what the nature or form of such 'satisfaction' [should] be."); Newton, supra note 39, at 124 ("Restitution need not be only in the form of money. The ingredients of restitution are limitless. . . . For example, a lawyer could be sentenced to perfom free services for indigent defendants, or a doctor to provide free medical services to the needy.").

^{93.} See State v. Boretz, 706 P.2d 559 (Or. Ct. App. 1985) (finding that court did not have jurisdiction to enforce compromise settlement terms through contempt charges). Compare note 38, supra (noting range of punishment options for victims to use in VOM programs).

^{94.} See, e.g., State v. Dummond, 530 P.2d 32 (Or. 1974) (holding that compromise statute gave trial court discretion to dismiss charges if the injured party acknowledges in writing that he or she received satisfaction, whether or not that party or the state consents to the dismissal); 21 AM. JUR. 2D Criminal § 474 (2002) (noting that compromise statutes typically require court (but, conspicuously, not victim) consent). But see Dubber, supra note 36, at 29 (noting the "celebrated" case of State v. Roberts, 894 P.2d 1340 (Wash. 1995), where a Native American tribe allowed the victim to determine how long offending youths were to remained isolated on remote islands; quoting trial court judge in same case as saying "nothing is over until the victim feels like he is fully compensated for his loss and says so").

^{95. 962} P.2d 689 (Or. 1998).

civil action for the face value of the item stolen, plus a civil penalty between \$100 and \$250. Reasoning that the receipt of the statutory fines abolished all claims the store owner could have under state law, the court found that the receipt was evidence of satisfaction, despite the fact there was no indication from the victim that he consented to compromise or felt that he had received "satisfaction". Thus, *Johnsen* may be read to indicate that "satisfaction" is merely what the victim could have gotten in a civil suit.

However, Johnsen might be seen as an oddity, in that the maximum civil recovery was clearly defined and met. In other contexts, however, judges will not have such clear guidance as to what constitutes "satisfaction," and so may likely defer to the victim. Thus, the court in *People v. Stephen* rejected the idea that the court had to find that the victim received the maximum possible in order to dismiss charges under the compromise statute." Instead, the court noted that "[w]here the victim voluntarily accepts recompense from the defendant, the court may infer that the victim considered the proffered reparation to be 'satisfactory.'" Similarly, in State v. Martindale, the appellate court overturned the compromise of an assault charge. In Martindale, the victim seemed to verbally agree to settlement, but after consulting his attorney, decided to hold out for more money. 102 The trial court found the original terms "fair" and so accepted compromise, saying that the "victim should not be able to use the criminal justice system to obtain more money than he had agreed to." The appellate court overturned, because the victim had never given written notice of satisfaction, as required under the statute. However, the appellate court went further than simply finding the statutory requirement of proof in writing not met, commenting that:

The court is not to be a party to the negotiations between defendant and victim and cannot intervene in the case until the victim gives

^{96.} OR. REV. STAT. § 30.875 (2002).

^{97.} Johnsen, 962 P.2d at 689.

^{98. 227} Cal. Rptr. 380 (Cal. App. Dep't Super. Ct. 1986).

^{99.} *Id.* at 389 (noting that the court's inquiry should focus only on "ensur[ing] that the victim has in fact received recompense from the defendant, *albeit not necessarily the maximum possible therefor* [sic]).

^{100.} Id.

^{101. 569} P.2d 659 (Or. Ct. App. 1977).

^{102.} Id. at 660.

^{103.} Id.

written acknowledgement of satisfaction. It is not an appropriate role and constitutes abuse of discretion for a trial court to attempt to direct the terms of compromise or to dismiss a case because the court believes the injured party is seeking too much.

As illustrated in *Stephen* and *Martindale*, then, despite the clear rule indicating that the victim's consent is not necessary for dismissal, as a practical matter "satisfactory" may indeed mean whatever is necessary in order to get the victim to accept the payment.

Given that victims thus seem to have broad control over the setting of the terms of a compromise, it must be determined at what level victims will likely set sanctions. As concluded in Part II.B, *supra*, it is assumed that victims will tend to set this amount below optimal sanctions. There is nothing apparent with the compromise statute setting that would change this background assumption.

Is this drop below optimal monetary sanctions terms made up for through non-monetary sanctions? Like VOM programs, these statutes give victims and offenders an incentive to interact. VOM program advocates claim that such interaction itself is a punishment because such direct confrontation forces offenders to realize the consequences of his or her actions. However, it seems that compromise statutes are less likely to be able to claim these additional non-monetary

^{104.} Id. at 661.

^{105.} This logic seems to work on both sides of the theoretical maximum, in that it indicates that a settlement for *less* than some theoretical maximum recovery in a civil suit and a settlement for more than the same theoretical maximum will both satisfy a compromise statute. However, when a victim receives more than what he could have gotten under the civil law, questions of coercion and legitimacy may come into play, and the repeated criticism of allowing the rich to buy their way out of jail may be particularly cogent. See generally State v. Garoutte, 388 P.2d 809, 811 (Ariz. 1964) (criticizing statutes for allowing the rich to buy their way out of criminal prosecution).

^{106.} See supra notes 31-34 and accompanying text (discussing the claimed emotional benefits of participation in VOM programs); see also United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977) (upholding use of restitution under Federal Youth Corrections Act, noting that "the youth will have learned the first lesson that society—in its effort to rehabilitate all offenders—tries to teach: society, whenever it can, will not allow crime to pay"); Eglash, supra note 33, at 622 (arguing that psychological benefits accrue to defendants who are forced to give restitution to their victims); Schafer, supra note 33, at 250 (arguing that restitution may be correctional instrument through which the defendant can feel and understand his social responsibility and alleviate guilt feelings).

As will be expounded upon in Part IV.A.2.c, *infra*, the same arguments laid out here as to why the offender is less likely to experience a significant amount of non-monetary disutility due to his or her interaction with the victim also apply to the claimed benefits of VOM programs that relate to the victim. That is to say, victims are relatively less likely to experience the claimed emotional benefits of VOM programs because they are less likely to be able to confront and discuss the events in a structured manner.

sanctions. This is because compromise statutes do not seem to foster the same *quality* of interaction, which seems key to the benefits behind the VOM programs. This is because it seems more likely the compromise statute negotiations will be between lawyers, more likely that the discussion will be focused entirely on negotiating price and less on letting the victim talk through his or her feelings with the offender, and less likely that the discussion will be conducted with the emotional needs of both parties in mind (which is the job of the mediator in VOM programs). Further, the relative lack of punishment options available to victims in this context makes creative solutions a practical impossibility. Thus, in comparison to VOM programs, compromise statutes seem less likely to be able to claim that the interaction fostered by the incentive to settle can be equated to a sanction in the general deterrence sense.

To summarize, compromise statutes are likely to result in pure property settlements. The amount of such settlement is likely to be below optimal level, given less than perfect enforcement, as victims are unlikely to take general deterrence into account. As compared to VOM programs, it is less likely that any non-monetary punishment will be realized simply by forcing the offender to undergo the compromise process, due to the lack of structured interaction. Overall, then, general deterrence, and thus social welfare, is likely to be harmed by the use of compromise statutes, as sanctions will be set at a sub-optimal level.

2. Potential Societal Benefits and Enforcement Efficiency

It is of course necessary to determine whether there are any virtues in the statutes which may offset the welfare loss caused by the drop in general deterrence. A good starting point for determining what such benefits might be is to analyze how legislatures, courts, and commentators have justified the creation and application of

^{107.} For instance, one court has even upheld the use of a clerk-signed receipt for statutory damages to fulfill the "satisfaction" requirement. Oregon v. Johnsen, 945 P.2d 1064 (Ct. App. Ore. 1997). It is hard to see how such interactions will produce the range of emotional benefits claimed by VOM programs, which specifically structure interactions with that goal in mind.

^{108.} See supra notes 91-93 and accompanying text (noting the background assumption and actual practice of pure property transfers under compromise statutes, in contrast to the punishment options available to the VOM participant); State v. Boretz, 706 P.2d 559 (Or. Ct. App. 1985) (finding that court did not have jurisdiction to enforce compromise settlement terms through contempt charges).

compromise statutes. Four basic justifications are currently seen: (a) certain events are essentially private in nature, and thus justice is better served by resolving it in the private sphere; (b) the statute empowers courts to act as a check against police and prosecutorial power; (c) compromising aids social welfare by increasing individual deterrence and by aiding victims; and (d) the statute saves enforcement costs by taking care of both civil and criminal actions at one time relatively early in the process.

a. "Truly Private Events"

The legislature that passed the original compromise statute—the one that forms the basis for all of today's modern statutes —explained their new creation:

There are many cases, which are technically public offenses, but which are in reality rather of a private than a public nature, and where the public interests are better promoted by checking than by encouraging criminal prosecutions.

Unfortunately, this 'truly private events' language gives little or no guidance or justification for the use and application of compromise statutes, nor does it tell us what public interests are supposed to be promoted. The fact the harm of an act is centralized in one person does not change the fact that overall social welfare would be raised by preventing the harm from happening in the first place by capitalizing on the general deterrent effect of inflating sanctions beyond actual harm. Thus, this reasoning, which a surprising number of courts have simply recited without reflection, cannot alone justify the use of compromise statutes.

b. Court Discretion as a Political Check Against Police and Prosecutorial Discretion

A more recent justification for compromise statutes is that it "operates as a check and balance against the much greater

^{109.} See, e.g., People v. Moulton, 182 Cal. Rptr. 761, 765 (Cal. App. Dep't Super. Ct. 1982) (quoting and adopting comments of New York legislature); Alaska v. Nelles, 713 P.2d. 806, 807-08 (Alaska Ct. App. 1986) ("It appears that Alaska's civil compromise statutes derived from the same source as most other similar statutes, a 1813 New York statute."); Moulton, 182 Cal. Rptr. at 765 ("All the statutes authorizing civil compromise of criminal actions trace their origins to a New York statute...").

^{110.} See Moulton, 182 Cal. Rptr. at 765 (quoting and adopting comments of New York legislature); see also State v. Garoutte, 388 P.2d 809, 811 (Ariz. 1964).

discretionary power of the police to decide when to arrest and of the prosecutor when to prosecute." ¹¹¹ If courts are actually using their power to curb prosecutorial abuses, then, the statute's invocation may actually aid social welfare. However, no court found has truly defined when the prosecutorial discretion has been abused, and no court found has based a dismissal on a finding of abuse. Instead, courts that espouse this language fall back on the 'truly a private wrong' language when actually applying the statute to the case before them. ¹¹² The only difference here is that courts following this additional logic may (for better or worse) increase the overall impact the use of compromise statutes may have, as they typically expand the applicability of the compromise statute in order to empower themselves to curb more "abuses." ¹¹³ As discussed above, the 'truly a private wrong' logic contains no apparent social welfare justification. Thus, again, one must look elsewhere in order to justify the use of compromise statutes.

c. Increased Individual Deterrence and Victim Satisfaction

As seen in the VOM context, a movement stressing victims' rights and rehabilitation focus has argued that certain benefits accrue through the process of forcing interaction and direct payment from offender to victim. Although such benefits as increased individual deterrence could potentially flow from the use of compromise statutes, it seems relatively unlikely such benefits will actually be realized, due to the impersonal procedures surrounding compromise statutes. For the same reasons, it seems similarly unlikely that compromise statutes will increase victim satisfaction. Indeed, as victim consent is not required, courts may even dismiss criminal

^{111.} Washington v. Britton, 925 P.2d 1295, 1296 (Wash. Ct. App. 1996). See also Washington v. Roxbury, 629 P.2d 1341 (Wash. Ct. App. 1981); J. Cross Creason, Review of Selected 1997 California Legislation: Eliminating the Use of Civil Compromise Statutes in Cases of Domestic Violence, Elder Abuse, and Child Abuse, 29 McGeorge L. Rev. 641, 642 (1998) (noting that "civil compromise checks the great discretionary power of the police and the prosecutor . . .").

^{112.} See Britton, 925 P.2d at 1295.

^{113.} See id. at 1296 ("[The policy of preventing prosecutorial abuses] is best served by a broad reading of the compromise statute.").

^{114.} See supra notes 4, 33-34 and accompanying text (discussing the potential rehabilitative benefits of retribution-based systems).

^{115.} See supra notes 107-08 and accompanying text (concluding that the interaction fostered by compromise statutes is less likely to be akin to a "sanction" as compared to that fostered by VOM programs).

charges over the express objection of the victim. This reasoning is supported by the fact that few courts have stressed such benefits while applying compromise statutes, and by the fact that victims' rights advocates have focused efforts in areas other than compromise statutes. Thus, it is unlikely that compromise statutes can be justified in this way.

d. Increased Efficiency by Quickly Eliminating Two Simple Cases

A final justification given for compromise statutes is that they save on enforcement costs. Not only does dismissal by the court save the state the cost of punishing the offender, but the concurrent settlement of the civil liability further saves the state resources by allowing one court to quickly take care of two actions relatively early in the process. This argument definitely seem plausible, and, unlike the other justifications, may explain how courts could apply compromise statutes to individual cases without harming social welfare overall. Thus, the question becomes whether the particular context and application of the compromise statute are likely to make the drop in general deterrence larger or smaller, and whether the context makes

^{116.} See, e.g., State v. Dummond, 530 P.2d 32 (Or. 1974) (holding that compromise statute gave trial court discretion to dismiss charges if the injured party acknowledges in writing that he or she received satisfaction, whether or not that party or the state consents to the dismissal).

^{117.} A similar, but distinct argument seen in the VOM context is that proponents argue that the us of VOM programs may represent a widening of the net of the crimes that received some punishment, and in this way the programs could actually aid general deterrence. See supra notes 53-55 and accompanying text (discussing the net-widening effect of VOM programs and its potential to aid general deterrence). This is unlikely to apply to compromise statutes. This is because compromise statutes kick in only after the prosecutor has decided to formally file charges, indicating his or her desire to go ahead with the case. Further, unlike VOM programs, it is the offender's decision to seek an agreement that activates the statute, not a prosecutor. It seems unlikely that a prosecutor would file charges on a case that it would not otherwise pursue on the mere chance that an offender and a court will decide to apply a compromise statute.

^{118.} See People v. Tischman, 35 Cal. App. 4th 174, 177 (Ct. App. Cal. 1995) ("[C]ivil compromise serves the public need for the efficient administration of justice by resolving relatively minor disputes by eliminating two proceedings—the criminal prosecution of the defendant and the victim's civil suit for financial compensation."); Harland, supra note 4, at 120 ("Rather than being based upon any profound reconsideration of the fundamental purposes of civil versus criminal courts or tort-crime differences, the current swing towards restitutive responsibilities appears inescapably grounded on considerations of practicality and convenience.").

^{119.} Of course, one questions whether courts are actually making such determinations in practice. If not, then courts may be over-applying the statutes and thus lowering social welfare. The tone and rationale courts are actually using when deciding when to apply the statute is discussed in Part IV.B.3, *infra*.

it more or less likely that the savings in enforcement costs makes up for the social welfare losses caused by the drop in general deterrence.

B. Key Characteristics Effecting the Cost/Benefit Balance

1. Overall Scope

a. Limited to Minor Crimes or Misdemeanors.

Like VOM programs, most (but not all) compromise statutes limit themselves to minor crimes—defining the line either between felonies and misdemeanors, or between those punishable by jail and those that are not. ¹²⁰ It is not intuitively obvious which (if any) direction this pushes the social welfare calculation. Compromising more serious offenses would save more enforcement costs (especially if the alternative criminal sanction involved incarceration). At the same time, however, it is clear that under-deterring more serious offenses will adversely affect social welfare more than under-deterring minor offenses. Thus, it cannot be said whether this limitation makes it more or less likely that the statutes are helping social welfare.

b. Underlying Event Must Naturally Give Rise to a Civil Suit

The scope of crimes amenable to compromise is further limited by the fact that the victim must have otherwise have a civil action against the offender for the underlying event. This requirement seems to be a practical necessity. If offenders could settle with victims who had no other way of getting paid, or settle with a single victim a crime that in fact injured many, victims would be willing to settle for way below

^{120.} See, e.g., ALASKA STAT. § 12.45.120 (2001) (limiting ability to compromise charges to misdemeanors); see also Ghent, supra note 88:

A typical compromise statute also limits its authorization of dismissals to prosecutions for minor offenses. Thus, under one kind of compromise statute, the propriety of dismissal has depended on whether the particular offense was a misdemeanor, while under another kind, it has depended on whether the particular offense was punishable by fine and imprisonment.

Id. at 318-19.

^{121.} Some states have codified this requirement. See, e.g., ARIZ. REV. STAT. ANN. § 13-3981(A)(3) (West 2001) (allowing compromise "[w]hen a defendant is accused of a misdemeanor or petty offense for which the person injured by the act constituting the offense has a remedy by a civil action . . ."). Realizing its necessity, however, no court has found the absence of such explicit language to bar application of this requirement. See also infra notes 148-56 and accompanying text (discussing how courts exercise their discretion in this area).

actual harm (for something is better than nothing), let alone optimal sanctions. Thus, this requirement serves to serves to limit the loss in welfare caused by any problems of under-deterrence by ensuring that the victim has an incentive to bargain for *at least* actual harm. Further, it helps to ensure that the cost-savings are actually realized, because, if the victim could not bring suit on his or her own, the state is not saving any costs by taking care of any potential civil suit through the criminal process.

2. Common Statutory Exceptions From Compromisability

In addition to the general scope limitations discussed above, most statutes contain four basic limitations excluding certain offenses from compramisability: (a) offenses committed with an "intent to commit a felony"; (b) "rioutous" offenses; (c) offenses where the victim or offender is a peace officer; and (d) intra-household offenses.

a. Offense Committed With an "Intent to Commit a Felony"

Crimes committed with "an intent to commit a felony" are usually exempted from compromise. This limitation simply reinforces the statutes' general limitation to misdemeanors or minor crimes—that is, just because an offense was stopped early in the process before it became serious does not mean that the offender is any less dangerous than a similar criminal who happened to avoid being caught until later in the criminal process. However, as expounded upon above, the net effect of limiting the application to minor crimes pushes social welfare is not intuitively obvious.

Unlike the general limitation to minor crimes, however, this "intent" limitation includes an additional consideration: it has been emphasized in appellate decisions that it is the duty of the court, and not the prosecutor, to determine, based on all the facts and circumstances, whether this restriction applies. By expanding the

^{122.} One court has commented that "The reason [for the statutory exemptions] is clear: each of these exceptions renders the offense more public than private in nature, an thus, the rationale behind allowing civil compromises no longer exists". People v. Stephen, 227 Cal. Rptr. 380, 383 (Cal. App. Dep't Super. Ct. 1986).

^{123.} See, e.g., ALASKA STAT. § 12.45.120(3) (2001) (barring compromise of offenses made "with an intent to commit a felony"); ARIZ. REV. STAT. ANN. § 13-3981(A)(3) (West 2001) (same).

^{124.} See supra Part IV.B.1.a.

^{125.} See People v. Moulton, 182 Cal. Rptr 761, 765 (Cal. App. Dep't Super. Ct. 1982)

job of the trial court, this requirement expands the costs, thus making it less likely that the cost savings offsets the loss of social welfare caused by under-deterrence. On the other hand, empowering courts to make such an inquiry may give them more opportunity, either explicitly or implicitly, to refuse compromises that would detract from social welfare.

b. "Riotous" Offenses

"Riotous" offenses are another common statutory exception from compromisability. Such offenses put numerous parties in danger (and thus the expected harm may be high), even though no single person may actually bear this harm. Because all parties bear a share of the expected harm, there does not seem to be any single person in an adequate position to bargain with the offender. Any single 'victim' will be unlikely to take into account the full expected harm borne by all of the 'victims,' and so will be particularly unlikely to push for sanctions equal to expected harm.

This exception does not seem to affect the enforcement cost savings effect of the use of compromise statutes.

c. Offender or Victim is a Peace Officer or a Judge

All statutes exempt an offense from compromise when either the victim or the offender is an officer or a judge, and when the offense is committed during the execution of their duties. Given that the general reason given for compromise statutes is that the state has little interest in certain types of crimes, this limitation makes sense, as the

(overturning acceptance of compromise agreement where trial judge refused to go into facts of case, instead relying solely on fact that crime charged was a misdemeanor).

^{126.} See infra notes 149-56 and accompanying text (questioning whether courts are using various legal doctrines as a guise to refusing dismissal when they are truly concerned with general deterrence).

^{127.} See, e.g., ALASKA STAT. § 12.45.120(2) (2001) (limiting compromisability to charges not involving rioutous offenses); see also supra note 88 (listing numerous current compromise statutes).

^{128.} For example, a person in a crowd that is incited to a riot by an offender is put in danger, but so is everyone else in the area.

^{129.} In this sense, the "riotous offense" restriction seems to be a specific legislative application of the court-created doctrine restriction to cases where the offense by its very nature creates a single civil cause of action.

^{130.} See, e.g., ALASKA STAT. §§ 12.45.120(1) (2001) (barring compromise of charges "by or upon a peace officer, judge, or magistrate while in the execution of the duties of that office"); see also supra note 88 (listing numerous current compromise statutes). The statutes vary in their actual definition, but they all seemed aimed at the same general theme of exempting those actors who are in the government business of enforcing the law.

state obviously has an interest in how its employees are conducting their business.

However, regardless of the reason actually given for this exception, this limitation's main effect seems to be on the negotiating process. That is to say, when one side is an officer ¹³¹ that was acting in the line of duty, it seems safe to assume that the officer will have the upper hand in negotiations. ¹³² This limitation might either aid or harm general deterrence, depending on which side of the crime the officer is on.

When the officer is the victim, it would seem that he or she would be able to get more out of a citizen offender, using his or her superior bargaining position. That is to say, the resulting settlement will likely be higher than it would if the dispute were between two regular citizens. Thus, this exception seems to be barring from compromise cases that would settle for higher than the "normal" compromise statute case. From this viewpoint, the exception does not make sense, as it is barring settlements that seem less likely to present problems of under-deterrence than the "normal" compromise statue case. However, perhaps allowing police officers as victims to use their superior bargaining position in such a way would violate people's sense of "fairness." In the sense that this violation would decrease people's utilities, then, this limitation would be socially justified if the drop caused by people feeling bad about cops getting bigger settlements would be bigger than the drop caused by the harm to general deterrence.

When the officer is the offender, the victim may again perceive that

^{131.} For simplicity, this section will refer to "officers." However, the same analysis applies if the actor is a judge, for both seem to have similar upper hands both in knowledge and position—not to mention the obvious sympathy from other "insiders" that many assume exists. Whether these differences in treatment really do exist is not the question—it is the *perception* that they do that will affect negotiations.

^{132.} Justifying the limitation based on the effect on the negotiating process makes sense, but it is unclear why the statutes only bar compromise when the officer was acting while on-duty. That is to say, perceptions of sympathy and imbalance may play a role when an officer is involved in something outside of his duty—for instance, a simple car accident. However, it seems that the imbalance in power is particularly salient when the officer was acting on the job, as it seems more likely that those trying the case will have an interest in the outcome.

^{133.} Again, this is not only because of superior knowledge of the system, but because the generally assumed notion that crimes against cops get prosecuted more vigorously. And, again, it is not whether such is true in fact, but it is the perception of such that will affect the negotiating process.

the officer is in a superior bargaining position. ¹³⁴ In this instance, the victim may settle for less than he or she would have in a "normal" case. Thus, this exception seems to be barring from settlement cases that would settle for less than the "normal" compromise case. From this viewpoint, it seems that this exception is barring settlements that are more likely to present particularly large dangers of underdeterrence, and so is protecting social welfare.

This exception does not seem to affect the enforcement cost savings effect of the use of compromise statutes.

d. Intra-Household Offenses

Some (but not all) states do not allow crimes that occur between members of the same household to be compromised, while others focus more narrowly by barring compromise of domestic abuse cases. Much like the exception for crimes involving officers, the main influence on social welfare may be its affect on the bargaining process. For instance, in the domestic abuse instance, "abusers may take advantage of the reconciliation pattern that follows a battering incident." Similarly, the victim may compromise out of fear of further abuse. Thus, there are valid reasons to question the validity of the compromise, and therefore the resulting settlement may be considerably below even actual harm.

^{134.} Here, the victim might fear that a cop might be good in front of a jury, or that a judge might be favorable to a fellow official.

^{135.} See, e.g., ARIZ. REV. STAT. ANN. § 13-3981 (2001) (giving prosecutorial discretion for crimes of domestic abuse); CAL. PENAL CODE § 1377(e) (West 2001) (barring compromise of offenses "by or upon any family or household member"). But see MASS. ANN. LAWS. ch. 276, § 55 (Law. Co-op. 2001); Alaska v. Nelles, 713 P.2d 806, 810 (Alaska 1998) (refusing to create judicial exception to statute for domestic abuse, but noting that in certain cases it might be abuse of discretion for trial court to accept such compromises). Note that after Nelles, Alaska later amended its statute to exclude abuse cases between various relatives and household members. ALASKA STAT. § 12.45.120(5) (2001) (barring compromise of crimes between various relatives and household members);

^{136.} As indicated *infra*, the domestic abuse exclusion seems to be supported on a social welfare standpoint. However, it may be that the passing of the exclusion is merely part of a larger political movement to "crack down" on domestic abuse. *See generally* Pickard v. Alaska, 965 P.2d 755, 761 (upholding relatively long sentence for domestic abuser, pointing to passage of compromise statute exception as evidence of the legislature's intent to "crack down" on a "serious societal problem"). This movement to add the exception, and the language surrounding it, may indicate that both legislatures and courts understand that compromise statutes hurt general deterrence.

^{137.} Creason, *supra* note 111, at 647.

^{138.} See Nelles, 713 P.2d at 810 ("[T]he state has a valid concern: that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur.").

The above arguments apply in a strict sense only to abuse cases. Even when there is no fear of abuse, however, the bargaining process seems likely to be deformed in the intra-household context. First, as with abuse, victims may feel more willing to forgive a friend than a stranger, thus leading to collusive settlements. Second, even if the amount is set perfectly, it seems likely that members of the same household share resources. If this is true, then no matter how high the compromise amount is set, the offender might not be truly "feeling" the adverse affect of having to "pay" the victim. Thus, even outside the abuse context, excepting intra-household offenses helps to limit the statute's detrimental effect on deterrence by preventing compromise in situations where sanctions may fall even farther below optimal levels than they fall in "normal" compromise cases.

This exception does not seem to affect the enforcement cost savings effect of the use of compromise statutes.

3. Court Discretion

A key aspect that has been working throughout this analysis is that compromise turns on court approval. The effect this power has on deterrence and social welfare overall depends on the reasons courts give for non-recognition of a compromised settlement otherwise within the reach of the relevant statute.

Court discretion aids social welfare in that it gives a defense mechanism in the system for coercive or threat-induced settlements from affecting criminal liability. Undoubtedly, this is a requirement

^{139.} In some instances, this is made explicit in the statute itself. See, e.g., IDAHO CODE 19-3403 (2001) (requiring leave of prosecutor and court). In others, this aspect has come through judicial interpretation. Nelles, 713 P.2d at 810 (finding that the accused has no right to compromise, nor is prosecutorial approval required; rather, the decision rests in the sole discretion of the court).

^{140.} See, e.g., People v. Stephen, 227 Cal. Rptr. 380, 389 (Cal. App. Dep't Super. Ct. 1986) (focusing court's inquiry into whether victim had in fact received recompense, and whether the settlement was voluntary); People v. Moulton, 182 Cal. Rptr. 761 (Cal. App. Dep't Super. Ct. 1982):

Instances in which the victim has been subjected to coercion to dismiss charges are not without precedent. In *John Gilmore's Case*, it developed that after defendant's employer had agreed to settle the victims' civil claims, 'that the defendant had threatened these women, that if they persisted in the prosecution, he would do them greater injury.' . . . By requiring personal presence of the victim or in lieu thereof other trustworthy evidence, the section affords the court the opportunity to assure itself that . . . settlement [was] voluntary.

Id. at 768 (citations omitted).

of necessity, lest the statutes sanction, and even encourage, further victimization.

However, if courts are exercising their discretion *solely* to determine whether the agreement truly represents an arm's length transaction, then it seems the effect on deterrence will be minimal. This is because judges will merely be approving agreements that—as discussed above—likely only represent sanctions set at actual harm. This helps deterrence in that judges will at least be able to stop agreements that fall below this level, but also harms deterrence in that any approval of any sanction less than the optimal amount will result in under-deterrence. Further, courts would seemingly not even be considering whether the drop in deterrence is justified by the cost savings.

It is unlikely, however, that judges are using their discretion *solely* to oversee the negotiating process. Rather, it seems that judges are likely to look the underlying situation to determine if the offender and crime are appropriate for settlement. Of course, "appropriate for settlement" likely means different things to different judges. Unfortunately, especially given the relatively thin published case law, it is impossible to know what is driving every judge in every compromise case. However, a few general patterns can be seen in the case law which may reveal the system's overall mental process.

One window into how courts view the compromise statutes is how they have applied the requirement that victim must have a civil claim. From this general requirement, courts have developed a relatively robust doctrine that allows the crime to be compromised only when the crime, "by its very nature," *always* gives rise to a civil remedy in favor of *only* a discrete number of victims. The creation and application of this doctrine is exemplified by how courts have grappled with traffic violations, and, particularly, with hit-and-run

^{141.} See, e.g., State v. Hunter, 14 La. Ann. 71, 72 (La. 1859) ("[P]roduction of a written compromise of an assault and battery by the bully, and the terror of the neighborhood, might be an aggravation of the public injury . . .").

^{142.} See, e.g., Williams v. Superior Court, 512 P.2d 45 (Ariz. Ct. App. 1973) (finding disturbing the peace not to be amenable to compromise because crime by very nature does not give rise to civil liability); State v. Van Hoomissen, 866 P.2d 521, 522 (Or. Ct. App. 1994) ("[T]he crime of public indecency is committed against the public at large, not against the person who incidently witnessed the act, and [thus is not subject to civil compromise.]").

^{143.} See Schaefer III v. Fenton, 449 P.2d 939 (Ariz. 1969) (disallowing compromise of charge of operating aircraft under the influence of alcohol to affect criminal liability because act was a crime regardless of if struck the victim); Williams v. Tucson, 502 P.2d

violations.

In *Hensel v. Alaska*, the court held that the crime of leaving the scene of an accident could not be compromised. The court reasoned that the person struck was not directly injured by the other party's failure to stop and exchange the required information, but rather it was the state's regulatory scheme that suffered the damage. A California court reached the exact opposite conclusion in *People v. Tischman*. In *Tischman*, the court disagreed with the intent behind the hit-and-run statute, finding that "the purpose of the misdemeanor hit-and-run statute is not to deter running for running's sake, but to ensure that parties involved in automobile accidents stop and exchange information so that the injured party can be compensated. As the statute was intended to benefit a single person, then, the court allowed the charge to be compromised away.

It is not the exact result in this area that is relevant here, it is the analysis the courts undertook. These two courts looked to who was suffering the harm—society or a particular person. This at least shows that courts are in some sense concerned with protecting society's overall interest as it relates to being the direct victim of the crime. Unfortunately, however, only one court found seemed to take the next step to protect society's *indirect* interest it has in deterring crime in general. In *State v. Williams*, the court refused to find that the defendant had a *right* to have his crime compromised. In doing so, the court indicated that the compromise statute must be read in tandem with the overall purpose of the criminal law, noting that:

^{543 (}Ariz. Ct. App. 1972) (finding failure to yield not subject to compromise because could commit crime without giving rise to civil liability); Seattle v. Stokes, 712 P.2d 853 (Wash. Ct. App. 1986) (noting that the trial court could have refused compromise motion altogether, as reckless driving does not always give rise to civil liability; noting that "[w]e do not believe that the Legislature intended to rest this important matter of public policy upon the happenstance that in any particular case a private citizen might or might not suffer personal injury or property damage") (citing People v. O'Rear, 220 Cal. App. 2d Supp. 927, 931 (1963)). Compare with State v. Garoutte, 388 P.2d 809 (Ariz. 1964) (allowing compromise of misdemeanor manslaughter caused by automobile accident because no criminal reckless driving was alleged, therefore, no crime would have existed if offender had not struck and killed the victim).

^{144. 585} P.2d 878 (Alaska 1978).

^{145.} Id. at 880.

^{146. 35} Cal. App. 4th 174 (1995).

^{147.} Id. at 177.

^{148.} Id.

^{149. 14} La. Ann. 71 (La. 1859).

^{150.} Id.

[The criminal law] is enacted for the purpose of redressing the injury done to the State by the disturbance of the public peace and the disquiet which is inspired among good citizens by wrongful acts, and to deter others from like offenses by the public example which is made of the offender, as well as sometimes to place it out of his power, for a time at least, to renew his attacks against the public peace.

It is not surprising that a court understands that general deterrence plays a part in the criminal law. What is surprising, however, is that since *Williams*, there has been a reluctance to blatantly refuse to compromise a case solely because of society's "indirect" injury due to the drop in general deterrence caused by the compromise.

It is unclear what to read from this silence regarding deterrence and social welfare. On one hand, it could be that many other courts simply do not think of general deterrence, somehow comforted by the 'truly a private wrong' language discussed (and dismissed) above. 152 Indeed, one court, after earlier espousing the familiar language, has explicitly said that the "public's abstract interest in the prosecution of crimes" cannot prevent "the civil compromise of misdemeanors that can do nothing more than cause actual injury to a particular person or persons." On the other hand, it is unlikely that so many judges are simply ignoring the importance of general deterrence. Instead, it could be that courts fear that blatantly refusing to compromise a case in one instance just because of its detrimental effect on general deterrence would lead to refusing compromise in most all instances, thus going against the wishes of the legislature. Thus, it could be that courts are well aware of the problems, but they are simply using other doctrines to carry out their goals for fear of having the judicial exception swallow the legislative rule. For instance, the court in Oregon v. Dumond¹⁵⁴ included in dicta long explanations of the problems of compromising crimes before saying that "nevertheless" (that is, despite the sound deterrence-based criticisms), the Oregon statutes had vested the trial court with discretion to dismiss the

^{151.} Id. at 72 (emphasis added).

^{152.} See Part IV.A.2.a, supra.

^{153.} Oregon v. Dugger, 698 P.2d 491, 493 (Or. Ct. App. 1985) (finding that charge of public indecency was not an offense that could be compromised). *See also* Washington v. Perdang, 684 P.2d 781, 783 (Wash. Ct. App. 1984) (overturning trial court's refusal to compromise because court did not explicitly make findings looking into the defendant's "personal circumstances").

^{154. 526} P.2d 459 (Or. Ct. App. 1947).

case. Perhaps as an indication of what other courts might be doing, the *Dumond* court overturned the compromise anyway, using another doctrinal tool instead of basing itself directly on the deterrence argument.

Overall, then, vesting discretion in the court is necessary to ensure that any settlement was in fact voluntary, and in this way discretion clearly aids social welfare. Beyond that, however, whether social welfare is in practice actually helped by the discretionary use is unclear. Theoretically, this discretion makes it a possibility that only those instances where the beneficial cost savings outweighs the detrimental drop in general deterrence. Unfortunately, however, it is not clear if that is really what is driving courts. First, no court has blatantly performed such a balance. Second, the courts' treatment of society's interest in maintaining optimal deterrence is inconsistent. On one hand, it is unlikely that all courts are doing such a balancing test, as the language of many limits the relevant societal interest to direct harms. On the other hand, severe criticism of the deterrence problem preceding a refusal supposedly based on other grounds may indicate that courts are using other tools to aid deterrence, rather than indirectly vetoing the legislature's decision.

C. Compromise Statute Summary

Compromise statutes reflect a departure from the general rule that victims do not have a say in an offender's criminal liability. It is possible that the statutes likely sole benefit (savings in enforcement costs) really does outweigh its cost (the resulting drop in general deterrence). Several characteristics were examined to determine how their presence likely affected the cost/benefit balance.

It is unclear how limiting the compromise statutes to misdemeanors affects the balance, as compromising major offenses would increase the loss of social welfare caused by the drop in general deterrence, but at the same time it would save more enforcement costs. Not allowing riotous offenses, domestic cases, or cases that involve officers all seem to be aimed at ensuring the integrity of the bargaining process. In that this helps keep settlements from falling even further below

^{155.} Id. at 461-62.

^{156.} *Id.* at 462-63. *See also* State v. Garoutte, 388 P.2d 809, 811 (Ariz. 1964) (criticizing statutes for allowing the rich to buy their way out of criminal prosecution, but nevertheless upholding it).

optimal than one would normally expect a victim to bargain for, these limitations seem to be keeping compromise statutes out of areas where they may be particularly likely to harm social welfare.

The granting of broad discretion to trial courts in this area gives them the final say as to whether these statutes help or hurt social welfare. If courts are actually trying to weigh the cost savings against the drop in deterrence, then the statutes may be justified. However, no court has explicitly undertaken this inquiry. This could be because courts have bought into the 'truly private harm' language and simply are not thinking about general deterrence. Or, it could be that the courts are in fact crafting and using other doctrines to ensure the statute is used correctly, and using other doctrines to ensure the legislature for enacting them in the first place. Which of these alternatives (or, more likely, what mix of these alternatives) is true likely determines whether compromise statutes are socially justifiable. However, no critic or proponent has focused on this pivotal inquiry.

V. SUMMARY

Both VOM programs and compromise statutes represent a departure from the traditional criminal justice model, in that they allow victims to have a say in the setting of sanction levels. The current debate around these programs seems overly focused on the conclusionary remark that the state's interest in certain areas are low, or it overly emphasizes the benefits supposedly flowing from these programs. What is missing from this debate, however, is an overarching assessment the *net* effect these programs have on social welfare.

Generally, it seems likely that these programs result in an initial drop in social welfare, as they likely result in sanctions below optimal levels. However, key characteristics of each program not only affect the size of this loss, but also the likelihood that the under-deterrence loss is outweighed by gains in other areas. Proponents and critics of both programs should therefore focus their efforts on determining the result of this "welfare gains versus welfare losses" balancing. Hopefully, this paper was helpful in raising some key questions, and perhaps pointing the direction to some key answers, in this relatively new movement in criminal law.