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Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice

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Prosecuting Violence: A Colloquy on Race, Community, and Justice

*751 PROSECUTING VIOLENCE: A COLLOQUY ON RACE, COMMUNITY, AND JUSTICE

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Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice

A recent innovation in criminal justice, the restorative justice movement has serious implications for the relationship among crime, race, and communities. Restorative justice, which sprang up in the mid-1970s as a reaction to the perceived excesses of harsh retribution, features an active role for the victims of crime, required community service or some other form of restitution for offenders, and face-to-face mediation in which victims and offenders confront each other in an effort to understand each other's common humanity.

This article questions whether restorative justice can deliver on its promises. Drawing on social science evidence, the author shows that the informal setting in which victim-offender mediation takes place is apt to compound existing relations of inequality. It also forfeits procedural rights and shrinks the public dimension of disputing. The article compares restorative justice to the traditional criminal justice system, finding that they both suffer grave deficiencies in their ability to dispense fair, humane treatment. Accordingly, it urges that defense attorneys and policymakers enter into a dialectic process that pits the two systems of justice, formal and informal, against each other in competition for clients and community support. In the meantime, defense attorneys should help defendants find and exploit opportunities for fair, individualized treatment that may be found in each system.

***753** Introduction

The relationship among race, crime, and community is complex and multiform. Although every crime is a violation of community, [FN1] community concerns acquire special significance with interracial and interclass crimes where offenses can easily be seen as injuries one of you inflicted against one of us. [FN2] Enforcement of crime may also take on an interclass or intergenerational dimension, such as when police enforce anticruising ordinances against teenage drivers or antigraffiti laws against inner-city youth. [FN3] Nonenforcement can also raise class and community concerns as well, such as when the black community charges the police with lax enforcement of street crime because of subconscious racism and devaluation of black life. [FN4]

The prosecution and defense of crime may take on an implicit or explicit community dimension as well. Consider, for example, a defense attorney who advances a cultural defense that, if successful, will mitigate his or her client's punishment but only at the cost of stigmatizing the defendant's group as subcultural, violent, or bizarre. [FN5] In these cases, the community issue is what one of us (the defendant) is doing to the rest of us (the community). [FN6] Finally, sexual violence cases demonstrate how the manner of prosecuting a case may affect the community. When a victim of sexual assault is forced to recount her sexual history on the stand, all women receive a warning not to complain of mistreatment at the hands of men. [FN7]

This essay addresses a recent dynamic movement that seeks to address the effects of crime on community. Restorative justice, which began in the mid-1970s as a reaction to perceived excesses of incarceration, as well as ***754** inattention to the concerns of victims, offers a new paradigm for structuring the relationship among crime, offenders, and communities. [FN8] Featuring new ways of conceptualizing crime, along with innovative mechanisms for dealing with it, restorative justice constitutes a radically new approach to criminal justice.

Part I reviews the origins and ideology of restorative justice, including what it hopes to accomplish and its purported advantages over the current system. Parts II and III then critique the movement, first offering an internal assessment that evaluates the new approach on its own terms, followed by an external critique that examines it in light of broader values. Part IV reviews some of the deficiencies in our current system, particularly for disadvantaged, minority, and young offenders. Part V offers suggestions for strengthening community bonds while dealing fairly and consistently with those who have breached them.

I. The Restorative Justice Movement and Victim-Offender Mediation

In ancient times, crime was dealt with on an interpersonal level, with restitution or even private resources, rather than official punishment, the main remedy. [FN9] The state played little part. For example, the Code of Hammurabi provided that individuals who had injured or taken from others must make amends, in service or in kind. [FN10] Other early systems, such as the Torah and Sumerian Code, [FN11] required that offenders make their victims whole, as ***755** did Roman law. [FN12] Then, in the eleventh century, William the Conqueror expanded the king's authority by declaring certain offenses crimes or “breaches of the king's peace,” redressed only by action of the king's courts. [FN13] Accordingly, private vengeance was forbidden, fines were paid directly to the state, rather than to the victim, and punishment, rather than restitution or making amends, became the main sanction for antisocial behavior. [FN14] This approach, with the state wielding monopoly power over the prosecution and punishment of crime, has reigned unchallenged until recently.

A.Restorative Justice

Many proponents of restorative justice believe that our current approach to criminal justice should be reexamined and that we should try to recapture many of the values of the earlier, pre-Norman approach. Specifically, restorative justice advocates argue that incarceration offers little in the way of rehabilitative opportunities for offenders. Many emerge from prison more hardened and angry than when they entered, setting up a cycle of recidivism that serves neither them nor society. [FN15] Moreover, although the victims' rights movement has begun to clamor for restitution as a part of court-ordered sentencing, [FN16] relatively few victims receive compensation for their injuries, and fewer still receive anything resembling an apology from the perpetrator. [FN17]

The movement's proponents argue that the traditional criminal justice system does a second disservice to victims, by forcing them to relive their ordeal at trial. [FN18] Because the American criminal justice system conceptualizes crime as a wrong against the state, it uses the victim for her testimony, while offering little, if anything, in the way of counseling services or support.***756** [FN19] For the same reason, district attorneys rarely consult with the victim at key times during the course of the trial, so that he experiences a lack of control as key events take place without his input. [FN20]

In response to these perceived shortcomings, proponents of the Restorative Justice Movement believe that those affected most by crime should play an active role in its resolution. The movement intends to redefine crime as an offense against an individual, providing a forum for the victim to participate in the resolution and restitution of that crime. [FN21] This is achieved through programs in which the victim, offender, and community play an active role.

B.Victim-Offender Mediation: Restorative Justice in Action

Of the numerous programs bearing restorative justice roots, Victim-Offender Mediation (VOM) is the most well established. [FN22] Although VOM takes slightly varying forms, [FN23] all share the same basic structure. Most receive referrals from the traditional justice system, are predicated on an admission of guilt, and, if successful, are conducted in lieu of a conventional trial. [FN24] The VOM process generally consists of four phases: Intake, Preparation for Mediation, Mediation, and Follow-up. [FN25] During intake, a pre-***757** screening occurs. Here, the mediator, who is either a trained community volunteer or a staff person, [FN26] accepts the victim and offender into the VOM process if both parties express a readiness to negotiate and show no overt hostility toward each other. [FN27] In the Preparation for Mediation stage, the mediator talks with the victim and the offender individually and schedules the first meeting. If the mediator does not feel she has effectively established trust and rapport with each of the parties, the case is remanded to court. [FN28] In the Mediation stage itself, the parties are expected to tell their versions of the story, talk things over, come to understand each other's position, and agree upon an appropriate solution, usually a restitution agreement or work order. [FN29] If they cannot do so, the case is remanded to court. A final Follow-up stage monitors the offender's performance and cooperation with the work or restitution agreement, with the goal of assuring compliance. [FN30]

1.VOM success: far-reaching and still growing.

While the majority of VOM programs concentrate on first- and second-time juvenile offenders, [FN31] some include adult felons, including alleged killers, armed robbers, and rapists. [FN32] In a recent year, VOM dealt with 16,500 cases in the United States alone, while the number of programs in the United States and Canada approached 125. [FN33] Endorsed by the ABA, [FN34] the movement shows no sign of slowing. [FN35]

2.VOM's departure from today's criminal justice system.

Like other programs born of the Restorative Justice Movement, VOM seeks to cure perceived problems with the traditional criminal justice process. While an adversarial dynamic may create the appearance of greater justice, it also provides minimal emotional closure for the victim and little direct ***758** accountability by the offender to the victim. [FN36] On the other hand, VOM deals more openly with the direct human consequences of crime. Through a face-to-face meeting and discussion, the victim is able to receive information about the crime, express to the offender the impact his actions have had on her, and, it is

hoped, gain a sense of material and emotional restoration. [FN37] Similarly, the offender is forced to face the consequences of his actions and accept responsibility for them, while also playing a role in fashioning the remedies. [FN38] The offender's restitution should also lead to increased public confidence in the fairness of the system. [FN39] A further advantage for the offender is that VOM offers an alternative to the ravages of incarceration: Because successful mediation serves in lieu of a trial, a defendant who cooperates and performs the agreed service will escape confinement entirely.

In summary, proponents of VOM maintain that the program will empower the victim while reducing recidivism among offenders. [FN40] It offers the hope that victims and offenders may come to recognize each other's common humanity and that offenders will be able to take their place in the wider community as valued citizens. Through restitution, the victim will gain back what was lost. Accordingly, VOM proponents advocate the program as "a challenging new vision of how communities can respond to crime and victimization. . . . deeply rooted in . . . the collective western heritage . . . of remorse, forgiveness, and reconciliation." [FN41]

II. Can Restorative Justice Deliver on its Promises? An Internal Critique

Critics of the Restorative Justice Movement and VOM voice two concerns: (1) they charge that restorative justice does not deliver what we expect from a system of criminal justice, and (2) they contend that the movement ***759** may render a disservice to victims, offenders, or society at large. The following two sections discuss these two sets of criticisms in turn. [FN42]

A. Can Restorative Justice Deliver What We Expect from a System of Criminal Justice?

Among the elements that society may reasonably expect from a criminal justice system are consistency, equality of bargaining power, due process, punishment, state control, and widespread applicability.

1. Consistency.

Consider first the problem of inconsistent results. The traditional criminal justice system aims at uniformity, employing a system of graded offenses and sentencing guidelines designed to assure that like cases are treated alike. [FN43] Although far from perfect in realizing this goal, the system at least holds consistency up as an ideal and includes measures designed to bring it about. [FN44] Moreover, judges, prosecutors, and defense attorneys are repeat players who tend to see cases in categorical terms (e.g., a car accident: pedestrian versus driver) rather than in terms of ascribed qualities of the participants (e.g., black driver, white pedestrian). [FN45] However, VOM lacks both an obvious "metric" (e.g., what is the appropriate number of hours of community service for a shoplifting offense? [FN46]) and the repeat-player quality of formal adjudication. [FN47] The mediator may have seen many cases similar to the one at hand, but the victim and the offender will most likely be in their ***760** situation for the first time. [FN48] Without any prior experience, different victims and offenders may decide similar cases differently, leading to inconsistency in punishment.

2. Inequality of bargaining power.

VOM gives great power to the victim, and mediators and judges reinforce that power, placing defendants in an almost powerless position. For example, the mediator frequently advises the offender that he will be referred back to the court system for trial if he and the victim cannot reach a restitution agreement. [FN49] The mediator may also tell the offender that the judge will take his lack of cooperation into account at the time of sentencing. This leaves the victim with the power to price the crime based on her subjective reaction, while at the same time confronting the offender with a harsh choice: cooperate or go to jail. [FN50]

3. Waiver of constitutional rights.

Related to the above-mentioned coercive quality of mediation is the issue of waiver of constitutional rights. [FN51] Enacted during a period when the "king's peace" view of crime and criminal justice prevailed, rather than during the earlier

period when private restitution served as chief remedy, [FN52] our Constitution and Bill of Rights guarantee the criminally accused certain rights, including the right to confront witnesses, to be represented by counsel, and to avoid self-incrimination. [FN53] Fearing abuse by the powerful state, the Framers incorporated these protections against overzealous prosecution and police practices. [FN54] However, because VOM pressures offenders to accept informal resolution of the charges against them and to waive representation by a lawyer, trial by jury, and the right to appeal, it would seem to stand on constitutionally questionable ground. [FN55] Moreover, mediation takes place early in the criminal process, at a time when the offender may be unaware***761** of the evidence against him, or the range of defenses available. [FN56] Furthermore, social science evidence compiled by VOM's defenders is one-sided, adulatory, and lacking basic elements of scholarly rigor--such as blind studies, controls for variables, and randomization--that one would wish in connection with a widespread social experiment. [FN57] In the current state of research, neither offenders nor their advisors can predict what mediation will really be like. [FN58] Thus, a defendant may be unable to waive his rights "knowingly and intelligently" as required by the Constitution. [FN59]

4. Punishment.

Our society has further expectations of any system of criminal adjudication. These include the traditional goals of criminal punishment-- deterrence, rehabilitation, increased societal safety, and retribution. [FN60] Mediation may accomplish some of these objectives in individual cases, but only incidentally and as a byproduct of its principal objectives of compensating the victim and avoiding incarceration for the offender. [FN61] During mediation, if an offender is willing to apologize and make restitution, he is released immediately into society with little check on whether he is fully rehabilitated. [FN62] Accordingly, society's need for retribution or vengeance remains unsatisfied. This is not surprising: Most restorative justice theorists consider retribution an illegitimate relic of a more barbaric age. [FN63]

5. State control.

Another troubling aspect of VOM is that it may upset social expectations by casting a wider net of state control than we expect. One way this may happen is that minor cases that ordinarily would have been dismissed or treated summarily in the traditional system receive full-blown treatment under VOM. [FN64] Indeed, one study showed that VOM increased incarceration ***762** because many offenders who would not have received jail time entered into a restitution agreement, but then failed to carry it out. These offenders were then referred back to court, where they were sentenced for failure to complete their restitution bargain. [FN65]

6. VOM's limited applicability.

Finally, mediation cannot be applied, without radical modification, to victimless crimes, such as drug offenses or crimes of attempt, or to offenses against the state or a corporation. [FN66] In these cases, no ordinary victim is available to meet with the perpetrator and discuss restitution, nor has the perpetrator victimized a specific individual or community who could be made whole.

B. Disservice Toward Particular Groups

Defenders of restorative justice and VOM frequently assert that this type of informal justice is beneficial to society, offenders, and victims. What they neglect to mention, however, is that informal justice may also have a number of downsides for both victims and offenders.

1. Victims.

Mediation may disserve victims by pressuring them to forgive offenders before they are psychologically ready to do so. [FN67] Mediators, who typically want both parties to put aside their anger and distrust, may intimate that victims are being obstructionist or emotionally immature if they refuse to do so. Such victims may in fact harbor perfectly understandable anger and resentment over the crime. [FN68] A victim who already blames herself may magnify that self-blame; this risk is most

severe if the offender is an acquaintance or intimate partner of the victim. [FN69] Furthermore, VOM casts the victim in the role of sentencer, holding the power of judgment over the offender. Not only does this lead to a lack of proportionality and consistency, [FN70] but it may also place an unwelcome burden on the victim who will end up determining the ***763** fate of an often young and malleable offender. Not every victim will welcome this responsibility. [FN71] In pressuring the victim to "forgive and move on" and handing him the power of sentencer, VOM may end up compounding the injury received from the crime itself.

2. Offenders.

At the same time, VOM may disserve offenders, who lose procedural guarantees of regularity and fair treatment. [FN72] Offenders are urged to be forthcoming and admit what they did, yet often what they say is admissible against them in court if the case is returned. [FN73] Finally, as mentioned earlier, mediation may not meet social expectations for a system of criminal justice: It dismisses retribution, a valid social impulse; abjures incapacitation, even for serious offenses; offers little in the way of deterrence (a forty-five minute session is not unpleasant enough); and reduces recidivism little, if at all, perhaps because offenders' basic attitudes are unchanged, and the compulsory nature of the mediation induces only superficial expressions of shame and regret. [FN74]

III. External Critique: Larger, Systemic Problems with Restorative Justice and Victim-Offender Mediation

As we have seen, restorative justice, in some respects, falls short of achieving its professed goals, or, indeed, those that any system of criminal justice, even narrowly understood, should be expected to accomplish. This section examines restorative justice in light of broader political and social values, such as its ability to spark needed social change, moral reflection, or altered relationships between offender and victim communities. As will be seen, restorative justice raises troubling issues when viewed through this lens as well.

A. Restoration of the Status Quo Ante

One difficulty with restorative justice inheres in the concept itself. Restorative justice, like tort law, attempts to restore the parties to the status quo ante--the position they would have been in had the crime not occurred--through restitution and payment. [FN75] But if that status quo is marked by radical ***764** inequality and abysmal living conditions for the offender, returning the parties to their original positions will do little to spark social change. The mediation agreement ordinarily requires payment from the offender to the victim, when in many cases it will be the offender who needs a better education, increased job training, and an improved living environment. Offenders rarely are assigned work that will benefit them or lead to new job opportunities; rather, they end up performing menial services for the victim, such as cutting his grass, painting his porch, or making simple repairs. [FN76] When the offender performs services for the community, they typically take the form of unskilled labor, such as clearing brush, picking up trash in city parks, or painting over graffiti. [FN77]

A key component of VOM consists of shaming the offender--making him feel the full force of the wrongfulness of his action, thus causing him to experience remorse. [FN78] Yet, this adjustment is all one-way: No advocate of VOM, to my knowledge, suggests that the middle-class mediator, the victim, or society at large should feel shame or remorse over the conditions that led to the offender's predicament. Of course, many offenders will be antisocial individuals who deserve little solicitude, while many victims will have well-developed social consciences and empathize with the plight of the urban poor. But nothing in restorative justice or VOM encourages this kind of analysis or understanding. [FN79] In most cases, a vengeful victim and a middle-class mediator will gang up on a young, minority offender, exact the expected apology, and negotiate an agreement to pay back what she has taken from the victim by deducting portions of her earnings from her minimum-wage job. Little social transformation is likely to arise from transactions of this sort.

***765** B. Unlikelihood of Sparking Moral Reflection and Development

By the same token, it seems unlikely that VOM will produce the desired internal, moral changes in the offender. [FN80] In

theory, bringing the offender to the table to confront the victim face-to-face will enable him to realize the cost of his actions in human terms and to resolve to lead a better life. [FN81] Some offenders may, indeed, have a crisis of conscience upon meeting the person she has victimized. But a forty-five minute meeting is unlikely to have a lasting effect if the offender is released to her neighborhood and teenage peer group immediately afterwards. [FN82] If the offender-victim encounter is brief and perfunctory, and the ensuing punishment demeaning or menial, young offenders will learn to factor the cost of restitution into their practical calculus the next time they are tempted to commit a crime and to parrot what is expected of them when caught. Most offenders are at an early stage of Kohlberg's moral development, seeing right and wrong in pragmatic terms--the action is right if you can get away with it, wrong if you are caught and punished. [FN83] A short encounter with a victim is unlikely to advance them to a higher stage. Reports of young offenders show that most have little self-esteem, [FN84] yet both the mediation and the ensuing work an offender performs for the victim or his community come perilously close to degradation rituals. Rarely, if ever, is the offender ordered to do something that will benefit him. For all these reasons, VOM is apt to do little to make an offender a better person; indeed, in a few studies, recidivism increased, compared to a similar group subject to the ordinary criminal justice system. [FN85]

C. Inequality of Treatment of Offenders and Victims

Mediation treats the victim respectfully, according him the status of an end-in-himself, while the offender is treated as a thing to be managed, shamed, and conditioned. [FN86] Most surveys of VOM programs ask the victim if he felt better afterwards. By contrast, offenders are merely asked whether ***766** they completed their work order and whether they recidivated. [FN87] Offenders sense this and play along with what is desired, while the victim and middle-class mediator participate in a paroxysm of righteousness. In such a setting, the offender is apt to grow even more cynical than before and learn what to say the next time to please the mediator, pacify the victim, and receive the lightest restitution agreement possible.

The offender's cynicism may not just be an intuition; it may be grounded in reality: Informal dispute resolution is even more likely to place him at a disadvantage than formal adjudication. In court, a panoply of procedural devices serve as a brake against state power and overzealous prosecution. [FN88] Each defendant is assigned a lawyer, who has a prescribed time and place for speaking. [FN89] The state bears a heavy burden of proof. [FN90] Moreover, visible features of the American Creed, such as the flag, the robes, and the judge sitting on high, remind all present that principles, such as fairness, equal treatment, and every person receiving his day in court, are to govern, rather than the much less noble values we often act upon during moments of informality. [FN91] In less formal settings, the same individuals who will behave with fairness during occasions of state will feel much freer to tell an ethnic joke or deny a person of color or a woman a job opportunity. [FN92] This “fairness and formality” thesis, solidly grounded in social science understandings of the dynamics of prejudice, [FN93] counsels against using VOM for offenders who are ***767** young, black, Latino, or otherwise different from the white, middle-class norm many Americans implicitly embrace. [FN94]

D. Racial and Social Inequality

The prime architects of the VOM movement seem to believe that mediators can balance, or counter, inequalities among the parties. [FN95] However, their own writing about race is replete with stereotypes. [FN96] Rather than ***768** breaking down the barriers and preconceptions that parties bring to the table, mediation is apt to compound preexisting power and status differentials even more systematically and seriously than formal, in-court resolution. [FN97] VOM sets up a relatively coercive encounter in many cases between an inarticulate, uneducated, socially alienated youth with few social skills and a hurt, vengeful victim. This encounter is mediated by a middle-class, moralistic mediator who shares little background or sympathy with the offender, but has everything in common with the victim. To label this encounter a negotiation seems a misnomer, for it is replete with overt social coercion.

E. Prompting Recognition of Common Humanity

Nothing is wrong with requiring persons who have harmed others without justification to make restitution. But forcing a needy person who has stolen a loaf of bread to do so is regressive, unless accompanied by measures aimed at easing his poverty.

[FN98] In VOM, all the onus is placed on the offender to change; the victim is required only to come to the bargaining table, discuss how the crime has affected him, negotiate a restitution agreement, and accept an apology. Why not require victims to take a bus tour of the offender's neighborhood and learn something about the circumstances in which he lives? In traditional adjudication, judges, prosecutors, defense attorneys, and jurors will all be privy to this information and be able to consider it when charging and sentencing, but with mediation, the mediator and the victim often will not. Mediation aims at emotional closure, [FN99] but without a reciprocal exchange of information, any closure is apt to occur only on the most superficial level. If the objective of VOM is to have both sides recognize their common humanity, measures of this sort ought to be considered. Why not even encourage the victim, in appropriate cases, to perform service to the offender or his or her community as a condition of receiving restitution (for example, by serving as a mentor or big brother/sister to a youth like the offender)?***769** Countless studies of mediated crime adopt the feelings of the victim as the principal measure of success or failure--the better the victim feels afterwards, the more successful the mediation. [FN100] Yet, sometimes in a successful mediation, the victim should feel worse, or at least realize that matters are not as simple as she might have thought.

F. Which Community is to be Restored?

In a similar vein, VOM will frequently lead to a restitution agreement that includes service to "the community." [FN101] Indeed, one of the principal advantages of VOM is said to be its ability to repair the breach that the offender's crime has opened between himself and that same community. [FN102] Yet proponents of restorative justice rarely focus on the precise nature of that community. In a diverse, multicultural society, many collectivities may vie for that status. To which does the offender owe restitution? If, for example, the offender is to rake leaves, should he be required to do it in a park near where the victim lives? In a large municipal park serving the entire city? In one in his own neighborhood? Descriptions of successful mediation abound with stories of offenders made to perform services to victims' churches, for example. [FN103] Apart from obvious issues of separation of church and state, such privatized, particularized service is troublingly reminiscent of peonage and prison labor gangs.

G. Erasing the Public Dimension of Criminal Prosecution

Moreover, such particularized mediation atomizes disputes, so that patterns, such as police abuse or the overcharging of black men, do not stand out readily. It forfeits what Owen Fiss and others call the public dimension of adjudication. [FN104] Mediation pays scant attention to the public interests in ***770** criminal punishment, particularly retribution. [FN105] It also lacks the symbolic element of a public trial, trying instead to compensate by formalized talking among private participants. The criminal justice system, of course, is a principal means by which society reiterates its deepest values; loss of that opportunity is cause for concern.

The timing of VOM's advent is also curious: It first appeared when the United States' demographic composition was beginning to shift rapidly in the direction of a majority nonwhite population. [FN106] Juries were beginning to contain, for the first time, substantial numbers of nonwhite members, and at least one scholar of color would soon encourage black jurors to acquit young black men, who are, in their view more useful to the community free than behind bars. [FN107] Could it be that VOM arose, consciously or not, in response to the threat of jury nullification?

H. Treating Conflict as Pathology

Perhaps the above concerns can be captured in the notion of conflict as pathology. [FN108] Like many forms of mediation, VOM treats conflict as aberrational, and the absence of it as the desired state. [FN109] Yet, in a society like ours, tension among groups may be normal, and not a sign of social pathology. [FN110] With a history of slavery, conquest, and racist immigration laws, the United States today exhibits the largest gap between the wealthy and the poor of any Western industrialized society. [FN111] Until recently, Southern states segregated school children by race [FN112] and criminalized marriage between whites and blacks. [FN113] Surely, in such a society, one would expect the have-nots to attempt to change their social position (by legal or illegal means), and the ***771** haves to resist these attempts. Conflict is a logical and expected result. [FN114] One also would expect the majority group to use the criminal law, at least in part, as a control device--a means of keeping tabs on any

behavior of subordinate groups that threatens or irritates, such as loud music, congregating on sidewalks, writing graffiti on freeway overpasses, and shoplifting. [FN115] Insofar as restorative justice aims at smoothing over the rough edges of social competition and adjusting subaltern people to their roles, it is profoundly conservative. While restoration and healing are emotionally powerful objectives, it is hard to deny that they can have a repressive dimension as well.

IV. "But Consider the Alternative": The Criminal Justice System

Before rejecting restorative justice and VOM for the reasons mentioned in Parts II and III of this essay, it behooves us, as its advocates urge, to consider the alternative--the conventional criminal justice system. For if informal adjudication of offenders is imperfect, the traditional system may be even worse. And when one does examine the traditional system, one discovers that it is far from the safe haven that formal settings generally provide for the disempowered. Instead, as a result of a slow evolution, our criminal justice system has emerged as perhaps the most inegalitarian and racist structure in society. Our prisons are largely black and brown. [FN116] Indigent defendants are assigned a lawyer from the underfinanced public defender's office and encouraged to plead guilty to a lesser offense in return for a shorter sentence, even if they are innocent or have valid defenses to the charges against them. [FN117] Minority defendants receive harsher sentences than middle-class whites charged with the same offense, while black men convicted of murdering whites receive the death penalty ten times more often than do whites who kill blacks. [FN118] Police focus on minority youth congregating on street corners; they stop black motorists and Latino-looking men at airports so regularly that the black community refers to the traffic stops as "DWBs" ***772** ("Driving While Black"). [FN119] Meanwhile, the war on drugs causes police to target minority communities, where drug transactions tend to be conspicuous, rather than in middle-class areas where use is more covert. [FN120] Black judges face recusal motions more often than their white counterparts often from white litigants concerned that the judge may rule against them because of their race. [FN121] Studies of the behavior of mock jurors show that baby-faced defendants are acquitted more often than less attractive ones against whom the evidence is exactly the same. [FN122]

The criminal justice system, then, may be the lone institution in American society where formal values and practices are worse--more racist, more inegalitarian--than the informal ones that most citizens share. As previously mentioned, the situation in this society is generally the opposite: Our formal values, the ones that constitute the American Creed, are exemplary--every person is equal, everyone deserves full respect as a moral agent, one person one vote--while informality harbors risks for women, blacks, and members of other outgroups. [FN123] In our criminal justice system, however, the opposite situation prevails. There alone, as in South Africa under the old regime, the formal values are implicitly or explicitly racist. Just as in South Africa, in former times, a black, such as a stranded motorist, might receive kind treatment from the occasional white traveler while the official police would pass him by, members of stigmatized groups today are apt to receive harsher treatment from U.S. police, judges, and juries than they might get, with luck, at a mediation table. As with Jews in Holland during the Third Reich, private kindness is at least possible; the official kind, unlikely. Despite the main drawbacks of privatized, decentralized, informal mediation, offenders will often be better off taking their chances within VOM than within the formal system.

***773** V. What, Then, To Do? A Dialogic Approach Based on Competition Between the Two Systems

Assuming they have a choice, blacks, Latinos, and others subject to prejudice should examine both systems carefully before opting for one or the other. In white-dominated regions, as Rodney Hero has recently pointed out, blacks are apt to receive poor formal treatment; [FN124] they may be better off taking their chances with VOM. Where, by contrast, the jury pool is racially mixed and the judge sympathetic, formal adjudication may be the better choice. While these pragmatic calculations are taking place, conscientious legislators and reform-minded lawyers should work to improve both systems.

A. Within the Formal Criminal Justice System

Within the formal system of courtroom justice, defense lawyers should serve as guides and native informants, helping defendants find and exploit any known niches of sympathy and fair treatment. Examples include regions where the jury pool is racially and economically mixed, where judges are trained to look behind police testimony and a record of prior convictions for

possible bias and overcharging. [FN125] Because the formal values have become corrupted by an overlay of discriminatory practices, participants must constantly remind everyone to follow the American Creed. Legislators and community groups should urge “superformality”--new layers of formality aimed at keeping the police, prosecutors, and other agents of official power honest. Examples include police and prosecutor review boards, laws requiring the police to keep statistics on traffic stops, and instructions aimed at encouraging members of the jury to consider whether race is affecting their judgment. [FN126] In short, progressive lawyers and community activists should bolster the in-court version of criminal justice by expanding any informal ***774** links to justice, while seeking to impose new levels of formal oversight on the rest of the system.

B. Within Alternative, Informal Justice

Reformers and critics need to call attention to the way mediation's informality can easily conceal race and class bias underneath an overlay of humanitarian concern. [FN127] Minority communities need to understand how this happens, so they can avoid its seductive appeal. Minorities should also lobby for structural improvements to VOM, such as more mediators of color, participation by defense attorneys, and studies that test some of VOM's overenthusiastic claims. Where VOM seems fairer than the formal justice system, defendants should “take the bait” and opt for it, while keeping alert for possible abuse and unfairness. The defense bar should attempt to counteract the powerfully conservative, status-quo-enforcing thrust of restorative justice by insisting that community and religious groups (its main sponsors) reform it. For example, minority groups could demand that work assignments benefit the offender and her community, rather than merely enhancing the middle-class or suburban communities where most victims live. Just as mediation now provides for a full airing of the victim's story, mediation should allow the offender's history be heard as well. If the offender is inarticulate, someone should be appointed to speak for him, so that those present become better informed of the social conditions that give rise to crime in a substantial sector of the population. Optimistically, this knowledge will inspire further social reform.

C. Short and Long-Term Strategies

In short, persons dissatisfied with both approaches to criminal justice should adopt a short-term and a long-term strategy. The short-term would consist of steering defendants to the system where they are likely to experience the fairest treatment. The long-term strategy would focus on forcing dialog and competition between the two systems, drawing comparisons between them, making criticism overt, and attempting to engraft the best features of each onto the other. This frank merging and borrowing should promote dialog between practitioners of conventional, courtroom justice and informal mediation--something that, except in a few locations, is not taking place now. Both systems should be made to compete with each other for resources, participants, and approval in the eyes of the various constituencies that make up the criminal law's public.

***775** This process, if carried out persistently and intelligently, can harness two principal theories for controlling prejudice--confrontation and social contact [FN128]--by challenging the conventional system and the emerging one, reminding each of its myths and values, and demanding that each equal or exceed the other in pursuit of the common goal of racial and social justice. Ultimately, no form of criminal justice, either of the traditional or the restorative variety, will work if the target community lacks a hand in designing and operating it. Blacks, Latinos, whites, middle-class, and blue-collar people must be permitted, indeed encouraged, to work together to counter exploitative arrangements that oppress them and render our society one of the most fearful and crime-ridden in the Western developed world.

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[FN1]. This is so because the community defines crime and punishes those whose actions violate these standards. On the role community condemnation plays in the criminal law, see Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 402-06 (1958).

[FN2]. See, e.g., Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America 81-101 (1997); Katheryn K. Russell, The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment,

and Other Macroaggressions 1-13 (1998).

[FN3]. See John Larrabee, Cities Wish Artists Would Find Another Canvas, USA Today, June 29, 1999, at 4A; Roesslein, These Motorists Are Cruising for Trouble, Milwaukee J. Sentinel, Sept. 8, 1998, at 14.

[FN4]. See Randall Kennedy, Race, Crime, and the Law 76-135 (1997) (arguing that non-enforcement of crime in black neighborhoods erodes quality of life). But see Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1771-72 (1992) (noting that some black communities rally behind certain offenders).

[FN5]. See, e.g., Peter Margulies, Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense, 51 Rutgers L. Rev. 45, 53-54 (1998) (pointing out that cultural defenses can stigmatize the defendant's community). See generally Leti Volpp, (Mis)Identifying Culture: Asian Women and the "Cultural Defense," 17 Harv. Women's L.J. 57 (1994).

[FN6]. See Margulies, supra note 5, at 46-47, 53-57.

[FN7]. See, e.g., Susan Estrich, Real Rape 51-53 (1987) (giving examples of victim humiliation at trial).

[FN8]. For excellent overviews of the new movement, see generally PACT Inst. of Justice & MCC Office of Criminal Justice, The VORP Book (Howard Zehr ed., 1983); Daniel Van Ness & Karen H. Strong, Restoring Justice (1997); Martin Wright, Justice for Victims and Offenders: A Restorative Response to Crime (2d ed. 1996); Mark S. Umbreit, The Development and Impact of Victim-Offender Mediation in the United States, 12 Mediation Q. 263 (1995); Daniel W. Van Ness, New Wine and Old Wineskins: Four Challenges of Restorative Justice, 4 Crim. L.F. 251 (1993); Henry J. Reske, Victim-Offender Mediation Catching On, A.B.A. J., Feb. 1995, at 14, 14; David Van Biema, Should All Be Forgiven?, Time, Apr. 5, 1999, at 55, 55; Howard Zehr, Restorative Justice: The Concept, Corrections Today, Dec. 1997, at 68.

For critiques and evaluations of the restorative justice movement or victim-offender mediation, see generally Restorative Justice on Trial (Heinz Messmer & Mans-Uwe Otto eds., 1992); Andrew Ashworth, Some Doubts About Restorative Justice, 4 Crim. L.F. 277 (1993); Jennifer Gerarda Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, 43 Emory L.J. 1247 (1994); Terenia Urban Guill, A Framework for Understanding and Using ADR, 71 Tul. L. Rev. 1313 (1997); Sheila D. Porter & David B. Ells, Mediation Meets the Criminal Justice System, 23 Colo. Law. 2521 (1994).

[FN9]. See, e.g., Van Ness & Strong, supra note 8, at 8; Van Ness, supra note 8, at 253-56; Brown, supra note 8, at 1254 (discussing blood feuds and private vengeance).

[FN10]. See, e.g., Van Ness & Strong, supra note 8, at 8-9.

[FN11]. See id.; see also Fred Gay & Thomas J. Quinn, Restorative Justice and Prosecution in the Twenty-First Century, The Prosecutor, Sept./Oct. 1996, at 16 (noting that the Sumerian method has roots in the 600 A.D. Laws of Ethelbert). On the Torah's preference for compensation of victims, see Steven Schafer, Compensation and Restitution to Victims of Crime (2d ed. 1970); Brown, supra note 8, at 1254 n.20; Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 933 n.18 (1984).

[FN12]. See Van Ness & Strong, supra note 8, at 8-9. Early Saxon justice had similar provisions. See Schafer, supra note 11, at 3-7; Brown, supra note 8, at 1254-55 n.22.

[FN13]. See, e.g., Van Ness & Strong, supra note 8, at 9-11; Van Ness, supra note 8, at 255-56.

[FN14]. See Van Ness & Strong, supra note 8, at 9-11; Wright, supra note 8, at 14 (noting that collecting fines and forfeits proved to be profitable); Van Ness, supra note 8, at 256.

[FN15]. See, e.g., Van Ness & Strong, supra note 8, at 43; Wright, supra note 8, at 11, 40; Van Ness, supra note 8 at 257-60.

[FN16]. On the victims' rights movement, which advocates restitution and a more participatory role at trial for victims of crime, see, e.g., National Victim Ctr., Chronology of the Victims' Rights Constitutional Amendment Movement (1991). For a critique of this movement, see Lynne N. Henderson, The Wrongs of Victim's Rights, 37 Stan. L. Rev. 937 (1985).

[FN17]. See Brown, supra note 8, at 1255-57 (describing the nascent victims' rights movement, which is attempting to address these perceived differences).

[FN18]. See National Inst. of Corrections, Dep't of Justice, Restorative Justice: What Works 3 (1996); Umbreit, supra note 8, at 263.

[FN19]. This limitation is inherent in the prosecutor's role--she prosecutes in the name of the state. Unlike a tort lawyer who sues on behalf of an assigned client and, of course, is under a professional obligation to consult with that client at critical stages, the victim of a crime is not the client of either the prosecutor or defense counsel and has no right, under conventional law or professional codes, to be consulted as to his wishes at critical stages. See Henderson, supra note 16, at 942-53 (describing recent changes affording victims a measure of participation rights).

[FN20]. See Brown, supra note 8, at 1256-57 (describing the beginnings of a movement to provide victims such input).

[FN21]. See Van Ness & Strong, supra note 8, at 43; Mark S. Umbreit & William Bradshaw, Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison, 61 Fed. Probation, Dec. 1997, at 33, 33. On the general movement to reincorporate the victim in our treatment of crime, see generally David W. Van Ness, Crime and Its Victims (1986).

[FN22]. See Gordon Bazemore & Curt Taylor Griffiths, Conference, Circles, Boards, and Mediations: The “New Wave” of Community Justice Decisionmaking, Fed. Probation, June 1997, at 25, 27; Zehr, supra note 8, at 268-70.

Other restorative justice programs include community policing, community corrections, and family conferencing circles. See Bazemore & Griffiths, supra; Russ Immarigeon & Kathleen Daly, Restorative Justice: Origins, Practices, Contexts, and Challenges; 8 ICCA J. on Community Corrections 13, 13-16, 26, 28-30, 35, 37-39 (1997). On various aspects of community corrections, see Roberta C. Cronin, National Inst. of Justice, Boot Camp for Adult and Juvenile Offenders, Overview and Update (1994) (describing boot camp punishment, youth leadership camps, and similar programs for offenders); National Inst. of Corrections, Striving for Safe, Secure and Just Communities (1996) (essays on approaches to community corrections that emphasize community and neighborhood participation and control).

[FN23]. See Brown, supra note 8, at 1264 (describing the different implementations of VOM).

[FN24]. See Mark S. Umbreit, Mediation of Victim Offender Conflict, 1988 J. Disp. Resol. 85, 88 (1988).

[FN25]. See id. at 87.

[FN26]. See Mark S. Umbreit & National Inst. of Corrections, Dep't of Justice, Victim Offender Mediation: Conflict Resolution and Restitution 9 (1985).

[FN27]. See id.

[FN28]. See Umbreit, supra note 24, at 88.

[FN29]. See id. at 90-91.

[FN30]. See id. at 92; Brown, supra note 8, at 1265-67.

[FN31]. See Umbreit, supra note 8, at 270; Mark S. Umbreit & Jean Greenwood, National Survey of Victim-Offender Mediation Programs in the United States, 16 Mediation Q. 235, 239 (1999).

[FN32]. See Mark S. Umbreit, PACT Inst. of Justice, Victim Offender Mediation with Violent Offenses 11-18 (1986); Wright, supra note 8, at 90, 159 (noting that VOM is beginning to be considered for cases of domestic violence and sexual assault); Brown, supra note 8, at 1262; Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, 25 J.L. & Soc'y 237, 245-53 (1998); Umbreit & Greenwood, supra note 31.

[FN33]. See Guill, supra note 8, at 1327.

[FN34]. See Reske, supra note 8.

[FN35]. See Mike Dooley, The NIC on Restorative Justice, Corrections Today, Dec. 1997, at 110.

[FN36]. See Umbreit, supra note 8, at 266.

[FN37]. See Van Biema, supra note 8, at 55-56; see also Hon. Robert Yazzie, "Hozho Nahasdlii"--We Are Now in Good Relations: Navajo Restorative Justice, 9 St. Thomas L. Rev. 117, 123-24 (1996) (discussing a traditional parallel system of restorative justice among the Navajo).

[FN38]. See Umbreit & National Inst. of Corrections, supra note 26, at 3; Guill, supra note 8, at 1327-28; Yazzie, supra note 37, at 123.

[FN39]. See Gordon Bazemore & Mark Umbreit, Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime, 41 Crime & Delinq. 296, 297-98, 302-03 (1995).

[FN40]. See William R. Nugent & Jeffrey B. Paddock, The Effect of Victim-Offender Mediation on Severity of Reoffense, 12 Mediation Q. 353, 363, 365 (1995).

[FN41]. Umbreit, supra note 8, at 275. But see Brown, supra note 8, at 1295 (arguing that this goal is unrealistic in a culturally diverse society and that VOM advocates hunger for a "simpler, more homogeneous time").

[FN42]. The term "internal critique" describes a critique or assessment that takes as its point of departure goals and values that its new movement professes, or that reasonably may be attributed to it.

[FN43]. See, e.g., A Symposium on Sentencing Reform in the States, 64 U. Colo. L. Rev. 645 (1993).

[FN44]. See, e.g., Leonard Orland & Kevin R. Reitz, Epilogue: A Gathering of State Sentencing Commissions, 64 U. Colo. L. Rev. 837, 844 (1993).

[FN45]. The "social contact hypothesis," a leading school of social science thought, holds that interacting with large numbers of people of different races diminishes prejudice, because the individual learns, through experience, that people of different races and ethnicities are similar to those of her own group--some good, some bad. For a summary of this theory and its leading contender, the "confrontation theory," see Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1385-87 (summarizing social science studies suggesting that a regime of firm rules and sanctions is best calculated to suppress racist impulses, even the unconscious kind).

[FN46]. On this lack of a readily available metric for compensatory justice, see Ashworth, supra note 8, at 280-85, 290-94 (noting that harms to "the community" are especially hard to quantify).

[FN47]. In mediation, the mediator may be somewhat of a repeat player (although not so much as a judge), but the victim and offender are likely to be first-time (or at least infrequent) participants. See Delgado et al., supra note 45, at 1365.

[FN48]. See note 45 supra and accompanying text.

[FN49]. See Brown, supra note 8, at 1267, 1269-70.

[FN50]. See note 46 supra and accompanying text; see also Brown, supra note 8, at 1249.

[FN51]. See notes 28-31, 48-50 supra and accompanying text.

[FN52]. See notes 9-14 supra and accompanying text.

[FN53]. See U.S. Const. amend. V, VI; see also Jerold H. Israel, Yale Kamisar & Wayne R. LaFave, Criminal Procedure and the Constitution 33-54 (1999) (discussing the way in which these rights were extended to all criminal defendants).

[FN54]. See Wayne R. Lafave & Jerold H. Israel, Criminal Procedure § 2.1 (2d ed. 1992).

[FN55]. See notes 28-31, 48-50 supra and accompanying text.

[FN56]. See Brown, supra note 8, at 1263-64.

[FN57]. See, e.g., Elmar Weitenkamp, Can Restitution Serve as a Reasonable Alternative to Imprisonment?, in Restorative Justice on Trial, supra note 8, at 84, 94.

[FN58]. See id.; see also Guill, supra note 8, at 1327-28 (arguing that the literature is dismissive of problems and objections).

[FN59]. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (holding that waiver of constitutional rights must be knowing and voluntary).

[FN60]. On these four classic goals of criminal punishment, see Joshua Dressler, Cases and Materials on Criminal Law 21-35 (1994).

[FN61]. See text accompanying notes 9-41 supra (discussing the objectives and ambitions of restorative justice).

[FN62]. See Robert Carl Schehr, From Restoration to Transformation: Victim Offender Mediation as Transformative Justice 19-21 (1999) (unpublished manuscript, on file with author).

[FN63]. See, e.g., Wright, supra note 8, at 133, 135; Van Ness, supra note 8, at 251-52, 258-59, 266.

[FN64]. See Weitenkamp, supra note 57, at 81-84.

[FN65]. See, e.g., id.

[FN66]. In these cases, either no victim exists, or the harm is so diffuse as to make restitution and compensatory justice impracticable. See Wright, supra note 8, at 147-48 (noting that where no individual victim exists, restitution might go to the community as a whole, or it may not be required if the victim does not want it); Ashworth, supra note 8, at 284.

[FN67]. See, Brown, supra note 8, at 1273-76.

[FN68]. See id. at 1266, 1273.

[FN69]. See id. at 1278-81.

[FN70]. See text accompanying notes 43-48 supra.

[FN71]. See Brown, supra note 8, at 1266-67.

[FN72]. See notes 54-55 supra and accompanying text; Brown, supra note 8, at 1284-86 (noting that VOM may be especially hard on minorities and the tongue-tied).

[FN73]. See Brown, supra note 8, at 1288-90 (noting the risk of self-incrimination).

[FN74]. See note 85 infra and accompanying text; see also Wright, supra note 8, at 27 (describing punishment as the "deliberate infliction of pain" and rehabilitative sanctions as constructive measures); Ashworth, supra note 8, at 283-86 (doubting whether society is prepared to forfeit retributive punishment in favor of a restorative justice approach).

[FN75]. Cf. Wright, supra note 8, at 124, 129 (acknowledging that restitution can be regressive, but noting that this is not a frequent concern); Schehr, supra note 62 (noting that restitution is arguably inherently conservative, since its goal is to restore parties to the situation that prevailed before their interaction took place).

[FN76]. On the range of work assignments, see Bazemore & Griffiths, supra note 22, at 28; Schehr, supra note 62, at 3-5, 21-22 (on menial work assignments, in general); Reginald A. Wilkinson, Community Justice in Ohio, Corrections Today, Dec. 1997, at 100-01.

[FN77]. See note 76 supra.

[FN78]. On shame as an ingredient in VOM and restorative justice, see generally Van Ness & Strong, supra note 8; Brown, supra note 8. On shame as a crime control strategy, see generally John Braithwaite, Crime, Shame, and Reintegration (1989). For critiques of the shaming approach, see generally Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880 (1991); Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholarship, 63 U. Colo. L. Rev. 521 (1992).

[FN79]. See generally Schehr, supra note 62.

[FN80]. On the hope that VOM will transform hardened criminals into thoughtful, law-abiding citizens, see Brown, supra note 8, at 1259-61.

[FN81]. See id. at 1259-60.

[FN82]. In other words, the reinforcing effect of the neighborhood and peer group is likely to be much more enduring and influential than that of mediation.

[FN83]. See James Q. Wilson & Richard J. Herrnstein, Crime and Human Nature 392-93 (1985); Bruce A. Arrigo & Robert C. Schehr, Restoring Justice for Juveniles: A Critical Analysis of Victim-Offender Mediation, 15 Justice Q. 629, 653 (1998).

[FN84]. See, e.g., Turning Society's Losers into Winners, an Interview with Dennis A. Challeen, 19 Judges J. 4, 5 (1980).

[FN85]. See P. R. Schneider, Restitution as an Alternative Disposition for Serious Juvenile Offenders (1982); Weitenkamp, supra note 57, at 84. But see Van Ness & Strong, supra note 8, at 10 (finding small, insignificant reductions in recidivism).

[FN86]. See notes 12-18, 36-40 supra and accompanying text.

[FN87]. See, e.g., Mark S. Umbreit, Victim Meets Offender: The Impact of Restorative Justice and Mediation (1994) (reporting studies of satisfaction in four juvenile courts that employed victim-offender mediation); Wright, supra note 8, at 129; William Bradshaw & Mark S. Umbreit, Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialog, Juv. & Fam. Ct. J., Summer 1998, at 17, 19, 21-24; Stella P. Hughes & Anne L. Schneider, Victim-Offender Mediation: Characteristics and Perceptions of Effectiveness, 35 Crime & Delinq. 217, 229 (1989) (finding victims satisfied and offenders unlikely to recidivate); Schehr, supra note 62; Mark S. Umbreit & Jean Greenwood, National Survey of Victim-Offender Mediation Programs in the United States, 16 Mediation Q. 235, 244-45 (1999) (asking survey victims about their feelings and degree of satisfaction and focusing on whether offenders completed the restitution agreement).

[FN88]. See notes 54-55 supra and accompanying text; Delgado et al., supra note 45, at 1367-75, 1402.

[FN89]. See Delgado et al., supra note 45, at 1402.

[FN90]. See e.g., Dressler, supra note 60, at 8-9 (discussing the burden of proof in criminal cases).

[FN91]. See Delgado et al., supra note 45, at 1383-84 (pointing out that at moments of intimacy and informality, individuals are more likely to tell a racist joke, favor friends in job searches, or disparage minorities or women).

[FN92]. See id. at 1383-85, 1388.

[FN93]. See id. at 1375-83, 1402-04 (discussing the social science foundation of the fairness-and-formality hypothesis).

[FN94]. See id. at 1387-89, 1402-04 (noting that deformalized adjudication exacerbates preexisting power differentials among the participants and increases the likelihood of a biased outcome).

[FN95]. See Umbreit, supra note 8, at 270 (expressing this faith).

[FN96]. For example, a leading proponent of VOM, addressing the problem of mediation when one of the parties is a minority group member, writes of African Americans that “understanding the cultural base from which the client is operating” is key. Mark S. Umbreit, National Inst. of Corrections Info. Ctr., Victim Offender Mediation in Urban/Multi-Cultural Settings 12 (1986). Citing other authorities, seemingly with approval, this author goes on to assert that this understanding includes that blacks are church-oriented, share “child care, food, money, and emotional support,” and affirm “a value system which embraces a sense of ‘we-ness.” ’ Id. at 13. Moreover, blacks supposedly exhibit an interpersonal style that is “‘animated, interpersonal and confrontational,” 'while whites are cool and impersonal. Id. Black talk is said to be “‘heated, loud, and generates affect.” ’ Id. Whites use argument to express anger; blacks, routinely, use argument when trying to persuade. See id. at 13-14. Blacks have no respect for authority--merely because something is published “or in some other way certified by experts in the field is not sufficient for many blacks to establish its authority.” Id. at 14 (citing authorities). Blacks are said to follow a value system in which it is permissible to interrupt, “rather than waiting for their turn,” and in which spontaneity of expression is

routine. Id. They do not understand rules regarding generalization, so that statements like "'white people are racists" 'are "not intended to be all inclusive." Id. at 15. "Within black culture, the applicable rule is 'If the shoe fits, wear it." ' Id.

Further generalizations about blacks related by the same author deal with eye contact, "hot" versus "cool" interactive style, use of titles and surnames, and boastfulness (tolerated and approved of in the black community). See id. at 16-17.

Latinos ("Hispanic people") do not come off much better. Latinos are supposedly deeply respectful of authority. "Whether the locus is nature, fate, age, God, or authority, it tends to be more external than internal," in contrast to Anglos who see themselves in charge of their fates. Id. at 6-7. Challenging a person's opinion is evidence of "disrespect," a major sin. Id. at 7. Hispanic people live in a "hierarcial [sic] world," in which respect and calling people by their last names are of utmost importance. Id. at 7-8. The culture is said to encourage dependency, so that the mediator or social worker must "be sure the individual understands you through use of language that is clear, concise, and simple. Second, be warm and personal ... (yet not) overly friendly, effusive...." Id. at 8.

For further stereotypes about minority communities, see Howard H. Irving, Michael Benjamin & Jose San-Pedro, Family Mediation and Cultural Diversity: Mediating with Latino Families, 16 Mediation Q. 325, 327-30 (1999), which includes the following wisdom about Latinos for fellow mediators:

- Group-oriented (family over all);
- Obsessed with machismo and honor;
- "Sensitive to insult or criticism;"
- Devoid of any sense of time urgency (time is flexible);
- "Emotions are close to the surface;"
- Prone to escalating conflict rapidly, and unable to let it go; and
- Susceptible, in the case of men, to "shame, which in turn promotes marital ... desertion ... and divorce."

Mediators are urged to cultivate patience, respect the existing hierarchy and macho practices, and be ready for a parade of "allusions, proverbs, folk tales, storytelling, humor, metaphor, and reframing." Id. at 332-33. Because of Latinos' concept of extended time, mediators also need to be ready for clients who miss appointments or show up late. See id. at 334; see also Cherise D. Hairston, African Americans in Mediation Literature: A Neglected Population, 16 Mediation Q. 357, 360-61 (1999) ("A review of mediation literature indicates minimal awareness of and sensitivity to historical, political, societal, and cultural influences.").

[FN97]. See Delgado et al., supra note 45, at 1388-89, 1402-03; text accompanying notes 116-123 infra.

[FN98]. Recall the famous line from Anatole France about how the law, in its majesty, forbids rich and poor alike from sleeping under bridges or stealing bread. See Dictionary of Quotations 363 (Bergen Evans ed., 1968).

[FN99]. See Brown, supra note 8, at 1263; Reske, supra note 8, at 14-15; Mark S. Umbreit, Restorative Justice through Mediation, J.L. & Soc. Work, Spring 1995, at 1, 2.

[FN100]. See Reske, supra note 8; Van Biema, supra note 8 (using feelings as a measure of success).

[FN101]. See, e.g., text accompanying note 77 supra; Bazemore & Griffiths, supra note 22, at 28. For critiques of the notion that, in a diverse society like ours, anything like a unitary community exists, see Massaro, supra note 78, at 1922-23; Sally Engle Merry, Defining "Success" in the Neighborhood Justice Movement, in Neighborhood Justice 172, 175-77 (Roman Iomasic & Malcolm M. Feeley eds., 1987); Daniel R. Ortiz, Categorical Community, 51 Stan. L. Rev. 769 (1999).

[FN102]. See note 77 supra and accompanying text; Bazemore & Griffiths, supra note 22, at 28.

[FN103]. See Bazemore & Griffiths, supra note 33, at 25 (describing a work assignment under which the offender was sent to work in a food bank sponsored by victim's church); see also Wright, supra note 8, at 151 (warning that restitution can be corrupted to serve private gain); Burt Galaway, Victim Participation in the Penal-Corrective Process, 10 Victimology: An Int'l J. 617, 624-25 (1985) (addressing the concern that restitution can be corrupted to serve private gain).

[FN104]. See Owen Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984). Mediation, as observed earlier, takes place in

private settings, and the results are rarely recorded or reported in a newspaper or anywhere else.

[FN105]. See notes 60-63 supra and accompanying text; Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808, 1809-10 (1986) (questioning whether mediation satisfies the public's demand for accountability); Ashworth, supra note 8, at 284 (also questioning whether mediation satisfies the public's demand for accountability).

[FN106]. In the late 1970s and early 1980s, when society was first becoming aware of the growth in minority populations.

[FN107]. See generally Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995). For a forerunner of the Butler thesis, see Austin, supra note 4, at 1771-72.

[FN108]. See Richard Delgado, Conflict as Pathology: An Essay for Trina Grillo, 81 Minn. L. Rev. 1391 (1997) (first coining the term).

[FN109]. See id. at 1397.

[FN110]. See id. at 1397, 1400-02.

[FN111]. See Tom Teepen, It's True: Rich Just Get Richer; Poor, Poorer, Milwaukee J. Sen-tinel, Sept. 7, 1999, at 10.

[FN112]. See Brown v. Board of Education, 347 U.S. 483 (1954).

[FN113]. See Loving v. Virginia, 388 U.S. 1 (1967).

[FN114]. See Delgado, supra note 108, at 1397-1402.

[FN115]. On the use of the criminal law to demonize and control minority groups of color, see Richard Delgado, Rodrigo's Eighth Chronicle: Black Crime, White Fears: On the Social Construction of Threat, 80 Va. L. Rev. 503 (1994).

[FN116]. See generally Marc Mauer, The Sentencing Project: Young Black Men and the Criminal Justice System: A Growing National Problem (1990) (discussing disproportionate number of black men in penal institutions).

[FN117]. On the difficult conditions under which most public defenders work, see James M. Doyle, "It's the Third World Down There!": The Colonialist Vocation and American Criminal Justice, 27 Harv. C.R.-C.L. L. Rev. 71 (1992).

[FN118]. On the racial gap in sentencing, see Mauer, supra note 116; Andrea Blum, Jail Time by the Book: Black Youths More Likely to Get Tough Sentences Than Whites, Study Shows, A.B.A. J., May 1999, at 18. On the death penalty, see David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty (1990) (examining the role of racial bias in the application of the death penalty).

[FN119]. See generally City of Chicago v. Morales, 527 U.S. 41 (1999) (striking down anti-gang ordinance that prohibited congregating on the streets as impermissibly vague). On "driving while black," see American Civil Liberties Union, Driving While Black: Racial Profiling on our Nation's Highways (1999); Michael A. Fletcher, Driven to Extremes: Black Men Take Steps to Avoid Police Stops, Wash. Post, Mar. 29, 1996, at A1; Kevin Johnson, ACLU Campaign Yields Race Bias Suit, USA Today, May 19, 1999, at 4A. On profiling of Latinos, see Julie Amparano, Waiting to Celebrate, A.B.A. J., July 1999, at 68, 69.

[FN120]. On the racial impact of the war on drugs, see Andrew N. Sacher, Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield, 19 Cardozo L. Rev. 1149 (1997).

[FN121]. See Sherril A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. Rev. 95, 114 (1997) (describing case in which defendants insisted that Judge Leon Higginbotham disqualify himself for this reason).

[FN122]. For a study of the role that baby-faced features and physical attractiveness play in determining length of sentence, see Michael G. Efran, The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task, 8 J. Res. Personality 45 (1979).

[FN123]. See Delgado et al., supra note 45, at 1367-75, 1383-85, 1402-03.

[FN124]. See Rodney Hero, Faces of Inequality: Social Diversity in American Politics 74-79 (1998) (examining the racial makeup of judges and juries in state courts).

[FN125]. See generally Doris Marie Provine, Too Many Black Men: The Sentencing Judge's Dilemma, 23 L. & Soc. Inquiry 823 (1998) (discussing the problems of avoiding disproportionate conviction and sentencing of African American males); Katheryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 80 B.C. L. Rev. 717, 728 (1999) (describing Judge Nancy Gerstner's refusal to sentence a black motorist to a long term under a "three-strikes" type statute, because of the way police target black motorists for zealous enforcement). On the need for skepticism over eyewitness identification in cross-racial settings, see John Gibeaut, "Yes, I'm Sure That's Him," A.B.A. J., Oct. 1999, at 26.

[FN126]. See Matt Ackerman, Special Jury Instructions Needed if Cross Racial ID Uncorroborated, N.J. L.J., Apr. 19, 1999, at 1, 1; Gibeaut, supra note 125 (noting that social scientists support the need for caution in cross-race situations); Cynthia Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn. L. Rev. 367, 482 (1996) (urging a "race switching" jury instruction aimed at requiring jurors to consider whether their verdict would be the same if the defendant and the victim were of different races).

[FN127]. See notes 88-95 supra and accompanying text.

[FN128]. See note 45 supra (explaining these two approaches).

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