Serve & Protect, Honor & Respect: Restoring the Victims and Rebuilding Police and Community Ties After Racially Charged Civilian-Police Incidents

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Introduction

“I don’t want the officer disciplined. I want a conversation.”1 Citizen Complainant - Portland, Oregon

The physical and psychological tremors of police misconduct have been a long-standing concern in the United States, particularly within African-American communities. The constant de-victimization and criminalization of Black people has fueled unconstitutional searches and seizures, false arrests, malicious prosecutions, and unjustified uses of lethal force across the nation. Consequently, these incidents have encouraged adverse mental health, inferiority complexes, broken families, fear, financial strain, and public ridicule in minority neighborhoods.2 The debilitating impact on affected African Americans has fostered skepticism of a police officer’s duty to “protect.” Thus, police-civilian relations are further strained, amplifying the belittlement of Black people and discontentment towards law enforcement.

Victim-offender mediation is a form of restorative justice that may be a stepping stone to remedying biases suffered by minority civilians at the hands of police officers. It would provide the face-to-face opportunity for police officers to recognize the detriments of their actions upon civilians while allowing the chance for the civilians to understand the motivations of their behaviors. As long as the subject officer admits to the offense, he or she is eligible to be a candidate for victim-offender mediation.4 The facilitative tone of this type of mediation can

promote healing for the purported victim, through an apology or at the very least, acknowledgement of wrongdoing. It can help assuage the misconceptions of both parties, determine a meaningful restitution or reparations the police officer would afford to the victim, provide closure to unanswered questions or emotional traumas, and stimulate respect between police officers and civilians, resulting in better policing.

This Note will illustrate why victim-offender mediation may be an attractive solution to help resolve racially-charged police misconduct incidents. Part I of this Note will examine the current climate of police misconduct cases and alternative dispute resolution processes in New York and Washington D.C. Part II will discuss the advantages and disadvantages of mandating pre-suit victim-offender mediation in police misconduct cases. Part III will identify opt-out provisions of victim-offender mediation and provide a conclusory overview of this Note and the future implications of victim-offender mediation in the criminal justice system.

Background

Historically, the connection between implicit, racial biases and disparate law enforcement practices have perpetuated distrust amongst minority communities. From the establishment of American society, racism has played a prevalent role in the consistent inequities that people of African descent have undergone. During the implementation of slavery in the 19th century, Black people were demoralized by the term “brute,” a bigoted connotation exacerbated by minstrel shows, Blackface, literature such as *Uncle Tom’s Cabin*, and films such as *Gone in the Wind*. Although these depictions were quieted after the Civil War and renewed faith was instilled

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within the Black community through the Reconstruction Amendments, racism still hindered opportunities for socioeconomic progression. Atrocities such as tarring-and-featherings, shootings, public whippings, and lynching were tactics used to uphold Jim Crow laws and Plessy’s “separate but equal” ideologies, while spewing political terrorism against Blacks. These violent measures were often executed by the Ku Klux Klan, a White supremacy group which incorporated members such as politicians, mayors, artists, and police officers.

As the 20th century proceeded into the 21st century, the conventional image of a Black man evolved from absurd buffoon to barbaric criminal. In 1915, the silent film Birth of a Nation, depicted Black men as “uncouth, intellectually inferior, and predators of White women.”

“Destroy This Mad Brute,” a famous 1917 World War I poster encouraging army enlistment, incorporated a gorilla-like beast capturing a distressed, White woman. The cover of Vogue’s 2008 “Shape Issue” magazine bore an uncanny resemblance to the poster, using Lebron James, an African-American athlete, to questionably recreate the frightening demeanor of the beastly cartoon while holding Gisele Bundchen, a Brazilian model.

Older discriminatory principles along with the media’s controversial representation of a “dangerous Black man” has contributed to countless, modern-day unjustified encounters with police officers. On April 12, 2018, two African-American men were arrested at a Philadelphia Starbucks after an employee called the police to report that they were “trespassing” because they

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8 Plessy v. Ferguson, 163 U.S. 537 (1896). The Court ruled that public accommodations that are segregated according to racial classifications do not violate the Equal Protection Clause of the Fourteenth Amendment as long as such accommodations are “separate but equal.”
12 Id.
did not order anything. Although the men were reportedly waiting for a business associate at Starbucks, a recognized meeting place, they were escorted out of the establishment by six police officers. Years prior, in 2012, a 32-year-old African American male was searched and arrested at gunpoint after being falsely accused of being a pedophile for simply relaxing in a Missouri park. When he objected to the officer’s vehicle search request, the officer charged him with eight violations of Ferguson’s municipal code. Consequently, the charges caused him to lose his long-standing job as a federal government contractor. Both incidents highlight the extremities of racial profiling in policing.

The fictitious infraction “Driving While Black” has garnered notoriety through Supreme Court decisions such as Whren v. United States and the African American community’s continual fear of humiliation or violence from law enforcement. Despite only encompassing 67% of Ferguson, Missouri’s population, African Americans have accounted for 85% of vehicle stops, 90% of citations, and 93% of arrests made by Ferguson Police Department officers from 2012 to 2014. Furthermore, the innumerable cases of police officers using excessive force resulting in serious impairment or fatality of unarmed African Americans without due process of law is deplorable. According to Kwadwo Frimpong, a senior research analyst in the Race, Prosperity, and Inclusion Initiative at the Brookings Institution, “Black

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16 Whren v. United States, 116 S. Ct. 1769 (1996). In this case, the court held that where police officers have probable cause that a traffic violation has occurred, the ensuing search and seizure of the offending vehicle is reasonable regardless of what other personal motivations the officers might have had for stopping the vehicle.  
17 See United States Department of Justice Civil Rights Division, supra note 14.
males are killed by police officers at three times their relative share of the national population, and are twice as likely to be killed by a police officer as a White male.”

The deaths of Walter Scott, Eric Garner, Michael Brown, Trayvon Martin, Amadou Diallo and Stephon Clark are a few of the countless symbols of systemic police violence and ongoing racial disparities within the criminal justice system.

Due to these varied occurrences of police misconduct, distrust of law enforcement has infiltrated affected communities. To evaluate residents’ views on procedural policing, the Urban Institute, in partnership with local organizations, has conducted in-person surveys and collected empirical data from six cities: Birmingham, Alabama; Fort Worth, Texas; Gary, Indiana; Minneapolis, Minnesota; Pittsburgh, Pennsylvania; and Stockton, California. The purpose of this research study was to evaluate the efforts of the National Initiative for Building Community Trust and Justice in alleviating the tension between police officers and communal members residing in the above-referenced, crime-ridden areas. Based on the 1,278 adults who completed the survey, only 27.8% believed that police almost always acted within accordance of the law when dealing with people while 26% believed that police make fair and impartial decisions in the cases they deal with. This survey showcased the blatant disapproval of policing tactics used in these cities and the need for reformation of police officers’ application of the law.

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19 Interview with Malcolm Anderson, a civil rights attorney who specializes in police misconduct cases in New York City (March 27, 2019).
21 Id. The National Initiative for Building Community Trust and Justice is aimed to mend relationships and increase confidence between minority communities and the criminal justice system. Through fostering blunt discussions between law enforcement and minority communities to promote racial conciliation, encouraging procedural justice by focusing on the public’s perspective of law enforcement interactions, and negating implicit bias, this initiative provides scholars and other every-day citizens with considerations of those relationships.
22 Id.
a. Victim Offender Mediation

Throughout the years, victim-offender mediation has demonstrated constant success in a myriad of cases such as property crimes, minor assaults, and juvenile delinquent activities. However, I believe it can make even more impactful changes as a pre-litigation tool in racially-charged police misconduct cases. Victim-offender mediation may provide reinvigorated hope to partially alleviate the turmoil of disturbed communities. The “dialogue-driven” rather than “settlement driven” environment of this type of mediation has proven to induce therapeutic feelings for the parties involved, thus, promoting restorative justice.\footnote{Mark S. Umbreit, ET AL., \textit{The Impact of Victim-Offender Mediation: Two Decades of Research}, US COURTS.GOV (December 2001), \url{https://www.uscourts.gov/sites/default/files/65_3_6_0.pdf}.} Restorative justice intertwines criminology and victimology to influence rehabilitation of the victim and decrease the possibility of recidivism by the perpetrator. In contrast to the punishment-driven nature of our judicial system, restorative justice focuses on the communication between the three, primary client groups: victims, offenders, and communal members.\footnote{Mark S. Umbreit & Jean Greenwood, \textit{National Survey of Victim-Offender Mediation Programs in the United States}, MEDIATE.COM (last visited April 1, 2019), \url{https://www.mediate.com/articles/vomsurvey.cfm#bio}.} As a result, victim-offender mediation has the ability to repair communities riddled with police misconduct by preventing further alienation of victims from the criminal justice system.\footnote{Mark S. Umbreit, \textit{Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment}, WESTERN CRIMINOLOGY REVIEW (June 1998), \url{http://www.westerncriminology.org/documents/WCR/v01n1/Umbreit/umbreit.html}.}

Undoubtedly, crime victims feel victimized twice: first, by the offending police officer and second, by the ignorance or dismissal of the criminal justice system with regard to their incident.\footnote{Id.} However, this form of alternative dispute resolution can provide victims with a “voice” to attain a sense of closure and eliminate historically-toxic labels of minority groups that
may influence an officer’s policing. Additionally, victim-offender mediation will allow both parties to create a plan to help redress the negative impact it has made on affected individuals.

Although victim sensitive, victim-offender mediation is the most prominent illustration of restorative justice, with recognition in eighteen countries along with the implementation of over 1,300 programs worldwide, victim participation was limited at first. However, the process gained momentum during the mid-1970s after the Supreme Court decision of *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972), which partially sparked the Modern Crime Victims’ Rights Movement. In *Linda R.S.*, the petitioner was an unmarried mother who attempted to sue and criminalize her child’s father, under Article 602 of the Texas Penal Code, for failure to pay child support. She sought to enjoin the local district attorney’s office from refraining to indict the child’s father because the statute only pertained to married parents. The Supreme Court held that “a crime victim cannot compel a criminal prosecution because ‘a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.’” This legal development highlighted the issue of victim exclusion within the criminal justice system and propelled social cognizance about victims’ rights. Since then, the Modern Crime Victims’ Rights Movement and other activist associations have inspired federal legislations that acknowledge victims’ rights and create objective functions for crime victims in related proceedings.

Nonetheless, the starting location of the restorative justice movement is attributed to Kitchener, Ontario in 1974. Here, two teenagers who participated in a vandalism spree after a

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27 See Umbreit, supra note 23.
30 Id.
31 See National Crime Victim Law Institute, supra note 28.
32 Id.
night of intoxication, were required to meet with and pay restitution to the twenty-two affected property owners.\textsuperscript{34} The “Kitchener Experiment” is stamped into legal history because “more than 100 restorative programs and projects across Canada, over 300 in the US, and more than 500 in Europe”\textsuperscript{35} were modelled after the sentence. The institutionalization of victim-offender mediation was further boosted after endorsements from the American Bar Association in 1994, the National Organization for Victim Assistance’s monograph sanctioning “restorative community justice” in 1995, and the U.S. Department of Justice in 1996.\textsuperscript{36}

By personalizing consequences, holding perpetrators accountable for their transgression, and facilitating an open discussion, victim-offender mediation programs have reported high success rates. Usually, eight or nine out of ten participants report being content with the process and with the ensuing agreement.\textsuperscript{37} The sharing of feelings between mediation participants has proved advantageous to their overall healing and closure. Per Mark Umbreit’s “Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice,” a burglary victim who participated in a victim-offender mediation program claimed that she wanted to “let the kid know he hurt me personally, not just the money...I felt raped.” According to another Umbreit study, a victim explained that “it was important to find out what happened, to hear his story, and why he did it and how.”\textsuperscript{38} In the same study, offenders mimicked the positive sentiments of the resolution process. One offender stated, “After meeting the victim I now realize that I hurt them a lot...to understand how the victim feels makes me different.”\textsuperscript{39}

\textsuperscript{34} John Smith, Restorative Justice: Righting the Relational Wrongs, ASSOCIATION FOR REFORMED POLITICAL ACTION (last visited April 2, 2019), \url{https://arpacanada.ca/wp-content/uploads/2016/03/Restorative-Justice-EN.pdf}.
\textsuperscript{35} Id.
\textsuperscript{36} See Umbreit, supra note 25.
\textsuperscript{37} See Umbreit, supra note 23.
\textsuperscript{38} Mark S. Umbreit & Robert B. Coates, Victim Offender Mediation: An Analysis of Programs in Four States of the U.S., NATIONAL CRIMINAL JUSTICE REFERENCE (May 24, 1993), \url{https://www.ncjrs.gov/pdffiles1/photocopy/140289NCJRS.pdf}.
\textsuperscript{39} Id.
Victim-offender mediation has also proven to decrease recidivism rates. Per Dr. Marilyn Armour, the director of the Institute for Restorative Justice and Restorative Dialogue at the University of Texas at Austin, a recent meta-analysis of 12,000 juveniles discovered a twenty-five percent reduction in recidivism after victim-offender mediation.40 Another meta-analysis, approved by the American Legal Exchange Council in 2011, revealed that 72% of 27 victim-offender mediation programs located in North America, reduced recidivism with a common decline at a 7% rate.41 Additionally, an Umbreit & Coates comparison group study of four U.S. victim-offender mediation programs exposed that 26.9 percent of non-participants of victim-offender mediation reoffended while 18.1 percent of victim-offender mediation participants reoffended.42

This restorative justice process has also encouraged the establishment of appropriate restitution in the agreements of participants. The face to face meeting prevents offenders from rationalizing the misconduct which then increases the cooperation of paying retribution. Compared to the national restitution collection rate of 20 to 30 percent, a Texas Public Policy Foundation report revealed that 89% of agreements derived from victim-offender mediation programs of juveniles and adults were accomplished.43 These statistics demonstrate that victim-offender mediation may be a lucrative and effective option when redressing the past harms of police misconduct and African-American communities.

I. The Existing Climate of Police Misconduct Cases and the Alternative Dispute Resolution Processes for Redressal in New York and Washington D.C.

40 See Armour, supra note 33.
42 Id.
43 Id.
In his empirical study *Justice Without Trial*, Jerome Skolnick, the former president of the American Society of Criminology, has stated that the predisposition to stereotype is an intrinsic factor in policing. Unlike the traditional complaint investigative measures, mediation is the only procedure that would provide a civilian-victim and the offending officer with direct contact to rectify ethnic divisions or suspicions.

a. **New York**

In December of 2006, I distinctly remember my father driving past a woman standing blocks away from my New York high school holding a poster with the number “1” in large font. Repeating these actions, she held posters representing the next consecutive number every day. After the fiftieth day, she was nowhere to be found. With research, I learned that each number that she held represented one of the fifty bullets that was fired at Sean Bell, an unarmed African American male who was killed the day before his wedding at a Queens nightclub on November 25, 2006. The police officers involved in his fatality were acquitted of all charges.

Indisputably, racially-charged police misconduct has plagued New York City for years. The racial disparities are evident regarding the criminalization statistics of minorities in New York. From false arrests, excessive force, unwarranted imprisonment, unjustified fatalities or blatant disrespect, African Americans are more susceptible to injustices when compared to other races.

Regarding the increase of police complaints to 4,487 in 2017, individuals who identified themselves as Black made up half of the alleged victims and 66% of the alleged victims were male. When a victim-civilian files a complaint against the New York Police Department

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44 See Walker, *supra* note 1.
asserting racial profiling, excessive force, abuse of authority, or offensive language, the complaint is initially examined by the Civilian Complaint Review Board. For the complaint to be processed by the NYPD, it must be substantiated, meaning validated by evidence. If the complaint is substantiated, the CCRB recommends particular levels of discipline for the offending officer which include charges such as loss of vacation days or termination, warnings, or retrainings.

Nonetheless, Peter L. Zimroth, a court-appointed monitor of the NYPD’s practices and policies regarding stop-and-frisk matters, reported that 792 of 1,722 profiling allegations against police officers spanning from 2017 to 2018 were not substantiated. Without a conclusive window into an officer’s mindset, discipline cannot be implemented. Although the CCRB suggests that allegations such as inappropriate use of force, abuse of authority, insolence, and offensive language may cover a police officer’s ethnically-charged motive, complainants tend not to receive the retribution they seek. In 2012, the CCRB asserted that 258 complaints against the NYPD were substantiated, the NYPD followed recommendations for only 25 of the cases. Officers received no discipline in 104 cases. Out of 175 cases where the CCRB recommended the most severe discipline, the NYPD only sought charges in 7. In 2015, 19 police officers had committed chokeholds (a prohibited restraint tactic) and 168 cases of force occurred. However,

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49 Id.
50 Id.
52 See Horan & Veltman, supra note 48.
53 Id.
54 Id.
not one officer was dismissed.\textsuperscript{55} These statistics express the ineffective aspects of CCRBs and why New York police-community relations have been consistently strained.

Nevertheless, the Mediation Unit at the CCRB has received better success with disputing parties. Before a CCRB investigation commences, mediation is offered as option if the case meets suitability requirements such as lack of physical injury or property damage from the incident, no criminal case pending from the incident, and a lawsuit has not been filed.\textsuperscript{56} While discipline will not be the outcome, the civilian and the officer can resolve their differing perspectives in front of a trained, independent mediator. The process remains voluntary and confidential for the officer and civilian. The possible outcomes of the mediation session include a successfully mediated verbal agreement, a successfully mediated signed agreement, sending the complaint back to the CCRB for further investigation, or withdrawal of the complaint.\textsuperscript{57} Regardless of the outcome, any information stemming from the mediation process cannot be used in ensuing judicial proceedings. In 2017, the Mediation Unit conducted 226 mediation sessions, resulting in 204 satisfactory resolutions, an approximate 90\% success rate, resulting in the closing of the remaining 22 complaints.\textsuperscript{58} This success rate supports the notion that victim-offender mediation may be the key to resolving the ethnic divide in police-civilian incidents.

b. Washington D.C.

Similar to New York, Washington D.C. has been riddled with racially-charged police misconduct incidents. According to Washington D.C.’s Office of Police Complaints, 89\% of

\textsuperscript{55} Helen Barthelemy, \textit{The Agency Designed to Protect Civilians From the Police Actually Protects Police From Civilians}, THENATION.COM (October 20, 2016), https://www.thenation.com/article/the-agency-designed-to-protect-civilians-from-the-police-actually-protects-police-from-civilians/.
\textsuperscript{58} See Civilian Complaint Review Board, \textit{infra} note 56.
reported uses of force involved Black civilians in 2017. This staggering statistic is exacerbated by countless minorities who have their police misconduct incidents publicized. During a public hearing in July 2018, Police Chief Peter Newsham referenced some of his officers’ policing tactics as “disturbing and inappropriate.” After watching cell-phone videos displaying the intrusive nature of a D.C. officer’s search of an African American male and of two D.C. officers conducting a warrantless, unannounced search of a fenced-in backyard of an African American family home, Chief Newsham admitted to feeling “very uncomfortable.” However, it may be just as uncomfortable to discover empirical data that conclude “8 out of 10 people who undergo a stop-and-frisk by D.C. police are Black, although African Americans make up less than half of Washington D.C.’s population.”

Unjustified deaths of African Americans at the hands of D.C. police officers have also sparked outrage and prolonged cynicism of the criminal justice system. In 2013, Miriam Carey, an unarmed African American dental hygienist, was shot in her car from behind while her infant was in the backseat after she made a U-turn at a White House checkpoint. After her vehicle chase ended from collision into security barriers, more shots were fired into the car, killing her. In contrast, Jessica Ford, an armed Caucasian woman who was arrested for previous attempts of illegal entry into the White House, used her vehicle to intentionally strike a White House security

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61 Id.
62 Id.
barrier in February 2018. No shots were fired during this incident. The blatant disparity in police treatment between Carey and Ford is one of the numerous examples of why police-citizen relations are debilitated in Washington D.C.

Furthermore, 75% of the 780 complaints received by the Office of Police Complaints in 2018 were filed by African Americans. Nonetheless, only 22 cases were sustained by the Complaint Examiner to have reasonable cause of misconduct occurrence and discipline eligibility. These statistics display the dire need for procedures that alleviate police-citizen tension and expend accountability on offending officers. However, most cases that are referred for mediation at the Office of Police Complaints have showcased favorable outcomes. Compared to 2016, which encompassed the mediation referral of 74 cases producing a 61% resolution rate, there was a 20% increase in the amount of resolved mediations last year. In 2018, 86 cases were referred to mediation which resulted in an 81% resolution rate. Additionally, 85% of complainants and 100% of police officers surveyed after a completed mediation session revealed how supportive the mediator was. After mediation, officers experienced a 12% attitude improvement towards communal members while community members experienced a 17% improvement towards police officers. A satisfied complainant stated, “It started as a yelling match and exchange of threats between the officer and me but after an hour ended on a very


66 Id.

67 Id.

68 Id.
conciliatory note…I am very pleased and recommend mediation as a substitute for traditional hearings/trials in which the end goal is punishment. “

To receive a better understanding of how impactful mediation was, I interviewed Rochelle Howard, Deputy Director of the Office of Police Complaints in Washington D.C. She stated that, “Mediation is the most direct tool to bettering the relationships between the police officers and the community members in a safe, neutral, nongovernmental space.” Howard also gave an example on how mediation could “clear the air” by stating, “When a police officer walks up to a car with his hand on his weapon, it is actually protocol…some complainants may feel that its racial profiling…mediation would provide an opportunity for the officer to explain that he was trained that way for twenty-two years and his behavior is nothing personal.” She also noted that, “Most of these community members see these officers everyday…when both parties can talk about the incident outside of a hostile and intense environment, relations can be improved.” This feedback highlights how effective police-civilian mediation can be in diminishing or erasing damaging stigmas both parties may have of each other.

II. Advantages & Disadvantages of Mandating Pre-Suit Victim-Offender Mediation in Police Misconduct Cases

As discussed above, mediation has proven successful in appeasing misconceptions that surface during police-civilian incidents while encouraging healing for the parties involved. Would victim-offender mediation be efficient if the process was mandated before the dispute could be filed in court? Mandatory mediation is described as a process in which parties are obligated to attend mediation in good faith, as a requirement to bringing their dispute to court. 

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70 Interview with Rochelle Howard, Deputy Director of the Office of Police Complaints in Washington D.C. (April 9, 2019).
Nonetheless, it leaves intact the voluntariness of the agreement. Usually, victim and offender participation is voluntary, while an offender’s participation is known to be influenced by outstanding factors such as the circumvention of more severe penalties. However, there are studies that show that parties who are compelled to engage in court mediation still benefited from the process although their involvement was not voluntary. Parties that may have further contact with each other after the conclusion of the lawsuit, such as neighbors, business associates, spouses, employers and employees require a dispute resolution process that causes as little damage as possible to the continuing relationship. Mandating victim-offender mediation would bring both parties together for a face-to-face discussion before the commencement of a civil rights lawsuit against the subject officer or an extensive internal investigation of a police complaint. Irrespective, there are advantages as well as disadvantages of doing so.

a. Advantages

The implementation of mandatory pre-suit victim-offender mediation generates a myriad of advantages. One advantage resides in the satisfactory, cost-effective and timely agenda of mediation when compared to the prolonged processes of litigation. Per the New York City Comptroller’s Office Bureau of Law and Adjustment, the 2017 Annual Claims Report stated that the cost of settled claims stemming from litigated police misconduct disputes in New York State courts totaled $160.6 million. According to the 2015 Census of State and Local Governments, the average annual cost estimate per problem officer include $109,729 for the Washington Metropolitan Police Department, $112,428 for the Philadelphia Police Department, and $116,279


for the San Jose Police Department. In twenty of the largest cities within the United States, the average annual litigation fees of police misconduct cases paid calculated to $127,541,734.75

As seen in City of Riverside v. Rivera, 477 U.S. 561 (1986), most claimants do not possess the financial means to engage in such extended litigation. In conjunction with the debilitating legal fees and resident taxes, the traditional judicial process moves lackadaisically. Most civil cases have a standard twelve-month case schedule, while more complex cases can prolong more than fifteen months.76 Furthermore, police officers implicated in misconduct cases rarely face discipline. Based on the “blue wall of silence” which protects the identity of offending officers, the “weighty” sincerity of an officer’s testimony in front of jurors, a prosecutor’s choice of “softer” tactics for police defendants, qualified immunity or absence of an in-depth investigation, University of Baltimore Law School Professor, David Jaros, stated that victims hardly receive the judicial outcome they seek. As a result, police-community ties are shattered. In contrast, victim-offender mediation normally lasts an hour or longer, with little to no fees attached to the process.77 Additionally, a multi-site study conducted by the Texas Justice Coalition revealed that “79% of victims who participated in victim-offender mediation programs were satisfied, compared with 57% of victims who went through the traditional court system.”78 Mandating pre-suit victim-offender mediation may decrease overloaded court dockets and litigation costs expended by city governments and claimants, while increasing resolution contentment.

Another advantage stems from the potential of mandatory mediation to generate a deeper level of understanding, bridge ethnic differences, and promote community values and relationships between police and civilians, especially in light of a heightened distrust of local law enforcement. Irrefutably, minorities have had more negative interactions with law enforcement when compared to other races. In 2013, more than half of police-initiated recorded stops in cities such as Philadelphia, New York, and Los Angeles, linked to confrontations with “young, largely male, brown or black residents.” Due to the racially-based experiences with crime control, minority residents in high-crime areas tend to begrudge police officers because of adverse law enforcement practices and apparent failure to safeguard them from harm.\(^\text{79}\) Since mediation is a non-adversarial dispute resolution process where victim-complainants and subject officers can meet face-to-face with a purpose of understanding both sides of a dispute, the resentment may be lessened. Traditional police misconduct complaint procedures do not institute the magic of direct communication, thus, provoking distrust and anger between the involved parties. Victim-offender mediation participants are able gain a more candid perspective about the transpired incident through the demeanors and facial expressions of the other party. This can promote genuine feelings of accountability and acknowledgement. For example, in an undisclosed city, an African-American complainant contended that an officer used a discriminatory slur while speaking to him.\(^\text{81}\) Allegedly, the complainant told the mediator that he wished the officer could judge his character based on seeing him in a Sunday church service.\(^\text{82}\) At the recommendation of the mediator, the officer and citizen decided to go for coffee after a


\(^{80}\) Id.


\(^{82}\) Id.
church service. This process allows officers to help redress the human consequences of the offense, reduce the probability of repeat crime, and rebuild their self-image as competent police within the community. Mandating victim-offender mediation in police misconduct cases could ease harbored feelings of cynicism of law enforcement and historic racial biases within policing.

Another advantage derives from the self-determination element of victim-offender mediation to empower participants. Based on the unpredictability of the court system and lack of unlimited resources, victim-complainants may feel that they are not “equal” to police officers. Victim-offender mediation may level the playing field because both parties determine a mutually-agreeable consensus. Whether the resolution involves victim restitution, cognitive skills development sessions, community work service, decision making programs, or victim empathy programs, all options promote restorative justice while satisfying the complainant and subject officer. The choice to accept or reject a proposal resides with both participants, rather than a court system’s judgment that typically encourages limitless autonomy of police officers. Mandating pre-suit victim-offender mediation may give complainants and subject officers a chance to reach a resolution that is satisfactory to them before relying on the volatility of jurors.

b. Disadvantages

Although there are advantages of mandating victim-offender mediation, there are certain disadvantages. Mandating victim-offender mediation in police misconduct cases may hinder the healing process by essentially forcing complainants to relive the harrowing experience without the confidence of negotiating power, further poisoning their psyche.

Certain researchers of familial disputes believe that agreements derived from mediation can only be impartial if the “parents engage in mediation voluntarily, with equal power and
equivalent competence to protect their essential interests and a similar investment in the
outcome.”\textsuperscript{84} The fairness of mediation becomes even more muddled in situations involving
domestic violence because the compromises are empty and there is no genuine reduction in the
prospect of future harm.\textsuperscript{85} Abusers may use mechanisms such as verbal interruptions, facial
intimidations, menacing gestures, and domination of discussions to instill fear and assert control
of their victims, resulting in the victims silencing their own desires to maintain safety.\textsuperscript{86} Since
the abuser has stripped the victim of dignity through physical and/or emotional abuse, the
bargaining power between the parties are explicitly imbalanced. Due to the possibility of
economic manipulation, increased assaults, sexual harassment, false imprisonment, verbal
attacks, self-esteem deterioration, and compromise of the victim’s children safety, the victim
may refrain from shedding light on his or her interests during the mediation session.

This unequal footing is comparable to minority civilians and subject officers in police
misconduct cases because of the induced resentment, anger, inferiority, and helplessness victims
experience after the incident. Similarly, to victims of domestic violence who suffer from the
psychological impact of Battered Woman Syndrome,\textsuperscript{87} many minority civilians who have
experienced police misconduct undergo mental anguish or racial trauma. Racial trauma is
defined as, “race-based traumatic stress…which may result from racial harassment, witnessing
racial violence, or experiencing institutional racism…which may result in experiencing
symptoms of depression, anxiety, low self-esteem, feelings of humiliation, poor concentration, or

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Melissa Dittman, \textit{Giving Battered Women a Voice}, AMERICAN PSYCHOLOGICAL ORGANIZATION (last visited
April 27, 2019), \url{https://www.apa.org/gradpsych/2004/06/battered}. Battered Woman Syndrome is a type of post-
traumatic stress disorder which alludes to specific behavioral patterns that form in victims of abusive relationships.
irritability." As a result, mandating victim-offender mediation in police misconduct cases in which the complainant believes the incident was racially-charged may hinder the healing process. If a complainant has felt that his or her civil rights were infringed upon by a police officer, being forced into a face-to-face interaction with the officer again can be compared to scraping an emotional scab about the incident. Based on information on police killings between 2013 and 2016 from the Mapping Police Violence Project and the U.S. Behavioral Risk Surveillance System of more than 103,000 African Americans, police killings of unarmed African-Americans are having a population-level impact on the mental health of Black Americans. The study revealed that these incidents may contribute to 55 million more poor mental health days every year among African Americans across the nation. Sadly, this means that the amount of African Americans who suffer from toxic mental health due to police slayings of unarmed Black victims is comparable to the mental health burden associated with diabetes, which estimates to be 75 million. Consequently, civilian complainants who are directly affected by the subject officer’s behavior may not be suitably prepared for dialogue because of his or her internal distrust of law enforcement. Due to an officer’s authority to impose fines, use force, engage in unsolicited questioning or physical restraint, coupled with the possibility that the complainant may encounter the subject officer in the future, mandatory victim-offender mediation may be an unhealthy way of resolving the conflict. The power imbalance along with

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90 *Id.*

91 *Id.*
the involuntary rehash of the incident may exacerbate the complainant’s feelings of feebleness and inadequacy, adding to their mental turmoil.

Mandating victim-offender mediation in police misconduct cases may prevent significant issues from being appropriately adjudged. Systemic harassment such as racial profiling may be best addressed through political action and use-of-force complaints may be best resolved through formal investigation and disciplinary actions. Christopher Cooper, professor of criminology at St. Xavier University in Chicago, stated that mediation of police complaints may help law enforcement avoid “departmental punishment and potential criminal prosecution” because once a complaint is deemed resolved by mediation it can no longer be investigated.92 Since media coverage from pending litigation outcomes bring awareness to detriments in community policing, it may influence change through legislation or criminal sanctions. While mediation is a confidential dispute resolution process and discipline is not the end goal, complainants may eventually feel that subject officers received a “slap on the wrist” for their alleged conduct.

Another disadvantage includes that mandating victim-offender mediation may inhibit “good-faith” participation of both parties and may be considered as coercive. The self-determination and autonomy aspect of mediation contributes to the success level of the session. However, mandating a complainant to mediate when he or she is not emotionally stable or open to meeting with the subject officer may aggravate any traumas resulting from the incident which can be considered “fruitless.” Forcing subject officers to mediate with complainants, regardless of admittance of wrongdoing, may bring about a tendency to disregard their perspectives, engage in “bad-faith” participation or half-hearted acknowledgement on the incident.

92 See Walker, supra note 1.
Another disadvantage is that the mediator may subconsciously become pro-complainant given the severity of the circumstances. This subconscious mentality may influence how the mediator facilitates the discussion and may make the subject officer question the neutrality of the mediator. Without neutrality, the officer may deflect blame which can hinder the healing process for the complainant. For example, if the complainant received apparent physical injuries from the incident and accused the officer of excessive force during the session, the mediator must refrain from using language that incriminates the officer. This can be difficult because the mediator must also ensure that he or she does not denounce the complainant’s feelings.


Since there are definite disadvantages to mandatory victim-offender mediation for police misconduct cases, opt-out provisions should be considered depending on the particular case.

Prior to the commencement of a victim-offender mediation session, there is a pre-mediation phase. Most victim-offender mediation programs undertake case referrals after an official admission of guilt, while other programs accept referred cases without a preceding admission of guilt as part of a delayed prosecution tactic or condition of probation. Subsequently, the mediator meets individually with the offender to listen to the offender’s story, provide clarity on the program and possible benefits, incite participation in the session, and evaluate their ability to do community service or pay restitution. Then, the mediator meets individually with the victim to listen their account of the incident, discuss the beneficial aspects of mediation, inspire their participation while reiterating that their choice to engage is completely

\[94\] Id.
voluntary.\textsuperscript{95} The mediator may also receive confidential letters from both parties that cite their interests and what they would like out of the session.

By this stage, the mediator may conclude that both parties in conjunction with the crime do not suit the mission of victim-offender mediation based on factors such as increased risk of re-victimization of the victim and vastly different perspectives on a restorative activity. If the mediation occurs and results in a resolution, then a follow-up phase may be implemented.\textsuperscript{96} The follow-up phase can include, “monthly phone contact with the victim to monitor fulfillment of the restitution agreement, working with the offender and probation officer to ensure compliance, and scheduling a follow-up joint conference with the victim and offender.”\textsuperscript{97}

However, due to the levels of severity within police misconduct cases, certain opt-out provisions and precautions should be implemented for victim-offender mediation. For example, victim-complainants that have alleged excessive force against subject officers should be able to opt-out of mandatory mediation to avoid resurfacing traumas. If they decide to proceed with mediation, they should be entitled to separate waiting areas from the subject officer, a choice in safety measures they would like to see, conference tables that provide barriers for immediate contact, and pronounced “Exit” signs leading out of the conference space. The face to face interaction with the offending officer may exacerbate feelings of anxiety. Complainants should be able to opt-out of mandatory mediation when they have a legitimate fear of re-victimization. If the complainant could gather explicit proof or at least two unrelated witnesses that can testify to the alleged threat by the officer, the complainant should be able to opt-out of mandatory victim-offender mediation. If they decide to proceed with mediation, complainants should be

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
entitled to differing arrival and dismissal times to diminish physical encounters with the subject officer outside of a “safe space.” It is also imperative that mediators that are assigned to racially-charged police-misconduct cases have diversity competence. Diversity competence is described as “the capacity for an individual to mediate effectively with diverse background, cultures, and life circumstances.” Civilians and subject officers are entitled to mediators who are diverse in their gender and race, while being equipped with related knowledge.

**Conclusion**

As stated above, minority communities have undergone severe detriments at the hands of law enforcement for years. Through varied studies, surveys, and analyses, it has been established that the criminal justice system rarely provides civilian-complainants with satisfactory retribution. However, the incorporation of victim-offender mediation may be the commencement of a progressive era to diminish the lasting, psychological effects of police misconduct on minority civilians. Unlike litigation, it has been proven that states across the nation such as New York and Washington D.C. have benefitted immensely from the absolute magic of face-to-face interaction that stems from mediation. Three requirements must be satisfied for a process to be restorative, “namely safety of the environment, respectful interaction, and the creation of positive energy.” Thus, certain opt-out provisions and limitations in victim-offender mediation are essential in making the resolution process a formidable option. Mediation has already proven to be predominantly fruitful to countless subject officers and civilian complainants in the United States. Therefore, I believe that victim-offender mediation is the blueprint for healing and re-configured thinking for all affected individuals in police misconduct cases.

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99 *See* Umbreit, *supra* note 93.