

Mediation as Practiced in Criminal Law:
The Present, the Pitfalls, and the Potential

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Mediation as a method of dispute resolution has acquired a promising track record in the context of civil conflicts. In 2004, more than two-thirds, or 63 of 94, of the federal district courts offered some form of mediation program.¹ Today mediation has become an essential, and sometimes even standard², part of many fields of law, particularly in family and employment law, and is spreading to other areas of law.³

This widespread acceptance and recognition of mediation as a viable or even preferred form of dispute resolution in the realm of civil law has not been duplicated in its criminal counterpart. In fact, the American Bar Association's Section of Dispute Resolution, the world's largest dispute resolution organization with over 19,000 members,⁴ has yet to create even a

¹ Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. Empirical Legal Stud. 843 (2004).

² Many courts now make divorce mediation mandatory. Dennis Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. Rev. 425, 430 (2003). In the employment law context, mediation is increasingly becoming a presumptive process for many employees due the use of mandatory mediation clauses in employment contracts. Jason Schatz, *Imposing Mandatory Mediation of Public Employment Disputes in New Jersey to Ameliorate an Impending Fiscal Crisis*, 57 Rutgers L. Rev. 1111, 1119 (2005), citing *ADR: At the Very Least, Something to Consider*, New York Employment Law Letter (O'Melveny & Myers, Dec. 1997).

³ One notable development is the introduction of mediation programs in foreclosure cases. In response to the foreclosure crisis, fourteen states launched foreclosure mediation programs in 2008 and 2009. Geoffrey Walsh, *State and Local Foreclosure Mediation Programs*, (2009), http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-Sept09.pdf. Similarly, also in response to the times, mediators have begun dealing in elder law (on issues such as inheritances and care-giving), as the baby boomers reach retirement age. Anne Tergesen, *Mediators Focus on Elder Issues*, Wall St. J., Mar. 14, 2010. http://online.wsj.com/article/SB126852452213961837.html?mod=WSJ_RetirementPlanning_MoreHeadlines#articleTabs%3Darticle; Anne Tergesen, *When Siblings Step Up*, Wall St. J., March 27, 2010, <http://online.wsj.com/article/SB10001424052748703503804575083992265508012.html>

⁴ American Bar Association, *Section of Dispute Resolution Homepage*, (2010), <http://www.abanet.org/dispute>.

committee on criminal law even though it was instrumental in introducing mediation to civil litigation.⁵ Nevertheless, the legal world's interest in mediation's potential role in the criminal justice system is definitely present, and rising. Mediation has been used in the criminal setting since the 1970s and today there are over 300 such programs in the US.⁶ In 2006, the ABA's Criminal Justice Section established the ADR and Restorative Justice Committee, and in 2008 the ABA Board of Governors awarded a grant to start Mediation in Criminal Matters Project, an ABA-wide effort to study and promote mediation in criminal law.⁷

This paper will examine the state of criminal mediation today. It will then explore the underlying premises and goals behind such mediations and analyze their efficacy and soundness in actual application. If such mediations seem to play a proper and constructive role in their current areas of practice, then it will consider other fields of criminal law to which mediation may expand.

Overview of the Current Use of Mediations in Criminal Law

The Mediation in Criminal Matters Project found and surveyed almost 120 mediation programs in criminal law across the country,⁸ with the vast majority identifying themselves as victim-offender mediation programs.⁹ In a victim-offender mediation, the victim and the

⁵ Jack Hanna, *Mediation in Criminal Matters*, 15 *Disp. Resol. Mag.* 4, 5 (2008).

⁶ Mark S. Umbreit, Robert Coates, Betty Vos. *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 *Conflict Resol. Q.* 279, 270-81 (2004).

⁷ Hanna, *supra* at 5.

⁸ Minnesota, Vermont, Wisconsin, Maine, New Mexico, Pennsylvania, and Montana make the most use of victim-offender mediation programs. Federal criminal courts make less use of these programs due to fixed sentencing laws. Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 *Annu. Rev. Law Soc. Sci.* 161, 168 (2007).

⁹ Hanna, *supra* at 5. Hanna writes that the vast majority of these programs identify themselves as "juvenile restorative justice or victim-offender programs," but the juvenile restorative justice programs practice what is commonly known in the field as victim-offender mediation. Indeed, the degree of dominance of victim-offender mediation as the model used in criminal law leads the Mediation in Criminal Matters Project to use interchangeably the terms "victim-offender mediation" and "mediation in criminal matters." Video Recording: American Bar

offender of the crime are brought together to meet face-to-face under the structured guidance of a mediator.¹⁰ Typically, when a case is referred to the program, the would-be mediator or a person from the program calls and subsequently meets with the victim and the offender separately in preparation for the mediation session.¹¹ The mediation may take place at any time during the course of the justice process, but almost all of them take place after court involvement.¹² According to a national survey conducted by the U.S. Department of Justice, about a third of the mediations take place prior to any formal finding of guilt, but over half take place after.¹³

That such a large proportion of mediations in criminal law take place after the adjudication or even the disposition of the case suggests that, in contrast to the mediations in the civil context, the primary objective isn't to reach a settlement for the parties. In fact, while most of these mediations "result in a signed restitution agreement... [its order in importance] is secondary."¹⁴ Indeed, the U.S. Department of Justice survey found that the mediators judged "facilitating a dialogue between the victim and offender" to be their most important task (28% of the respondents), followed by "making the parties feel comfortable and safe (24%)." "Assisting the parties in negotiating a restitution plan" came in as a relatively distant third (12%).¹⁵

Criminal mediation programs typically handle misdemeanors, and vandalism, minor assaults, theft, and burglary, in that order, make up the vast majority of the offenses referred to

Association, *Mediation in Criminal Matters*, (2008).
<http://vids.myspace.com/index.cfm?fuseaction=vids.individual&videoid=62259035>.

¹⁰ Umbreit, *supra* note 6, at 279.

¹¹ U.S. Department of Justice, Office of Justice Programs, National Survey of Victim-Offender Mediation Programs in the United States (NCJ 176350) 9 (2000),
http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf.

¹² *Id.* at 8.

¹³ *Id.* at 7.

¹⁴ Umbreit, *supra* note 6, at 280.

¹⁵ U.S. Department of Justice, *supra* note 11, at 10.

them.¹⁶ However, the U.S. Department of Justice survey remarked that “many programs reported a trend in referrals toward a ‘higher level of crime,’” some having mediated cases of severely violent crimes such as serious assault and homicide.¹⁷

The mediators are trained on average 31 hours, and undergo an apprenticeship period of mediating with an experienced co-mediator for on average of four cases.¹⁸ There is considerable uniformity among the programs on the format of the trainings. The trainings typically aim to make learning “interactive, participatory, and experiential” and make heavy use of role plays, videos, and modeling of skills. Issues and principles imparted in training are also quite uniform in the field, stressing concepts such as neutrality and diversity, and skill sets such as dealing with difficult people and emotions.¹⁹ The trainings the criminal mediators receive seem to conform to the trainings that most non-criminal mediators receive at large.²⁰

Restorative Justice: Rise of Victim-Offender Mediation

While the justifications for punishment stem from many theories,²¹ the rationale of retribution is the dominant and the “conventional” today.²² “A retributivist punishes because the offender “deserves it”²³ due to his being morally culpable (to the society at large).”²⁴ In other

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 19.

²⁰ In Professor [professor name redacted per competition rules]’s course on Mediation offered at [law school name redacted per competition rules], similar teaching techniques are used and similar issues are explored. This is also true for the [program name redacted per competition rules] at [law school name redacted per competition rules].

²¹ Sanford H. Kadish, Stephen J. Schulhofer, & Carol Steiker, *Criminal Law and Its Processes* 79 (8th ed. 2007).

²² Center for Justice and Reconciliation, Restorative Justice Online, *Distinguishing Restorative Justice*, <http://www.restorativejustice.org/university-classroom/04restorative%20justice%20theory/disting/>.

²³ Kadish, *supra* note 21, at 79, citing Kent Greenawalt, *Punishment*, 4 Encyclopedia of Crime and Justice 1336 (1st ed. 1983).

words, our present society punishes because it (believes it) is just to punish the person who has injured it by violating its morality.

Indeed, today crime is treated as violation against not the victim but the state, and accordingly the state and not the victim has the jurisdiction to address it. This is a continuation of the change that came with the Norman invasion of Britain in 12th century. Prior to it, Western law had viewed crime as conflict to be dealt with between the individual victim and the offender. It was only under William the Conqueror that crime began to be conceptualized as breach of king's peace.²⁵

Restorative justice, the model which victim-offender mediation subscribes to and practices,²⁶ is a reaction against this model of conventional retributive justice²⁷ and, in some ways, a return to the pre-Norman times.²⁸ Under the restorative justice model, Howard Zehr writes, "crime is a violation of people and relationships... Justice involves the victim, the offender, and the community."²⁹ In effect, advocates of restorative justice argue that traditional justice fails to adequately address the needs of the victim, the offender, and the community at large.

For the victims, that the offender has been punished by the state does not necessarily restore the losses they have suffered—it does not "answer their questions, relieve their fears, help

²⁴ Kadish, *supra* note 21, at 81, citing Michael S. Moore, *The Moral Worth of Retribution*, in F. Schoeman, ed., *Responsibility, Character and Emotions* 179 (1987).

²⁵ See Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, 46 Idaho B. J. 22, 22 (2003).

²⁶ Lawrence W. Sherman, Heather Strang, The Smith Institute, *Restorative Justice: The Evidence*, 8 (2007), http://www.smith-institute.org.uk/publications/restorative_justice_the-evidence.htm.

²⁷ Markus D. Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 Buff. Crim. L. Rev. 3, 6 (1999).

²⁸ Reimund, *supra* note 25, at 22.

²⁹ *Id.*, citing Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 178-179 (1990).

them make sense of their tragedy or heal their wounds.”³⁰ Similarly, the offenders gain little from retributive justice. Being punished prevents them from making direct reparations for the harm they’ve caused to the victims. Further, state proceedings that often shut out the victims may shield the offenders from truly understanding and accepting responsibility for the consequences of their actions.³¹ As for the community at large, retributive justice reduces its role in dealing with crime and may even fragment it. When the state has the exclusive jurisdiction over crime, the community – encompassing the (present and future) victims, offenders, and others affected – become removed from directly addressing what are, in actuality, conflicts within its own members. Furthermore, by trying, punishing, and removing (incapacitating) the offenders away from the victims, retributive justice segregates the community into sets of (present and future) victims and offenders.

Restorative justice is practiced through many avenues, including but not limited to court-ordered restitution or reparation payments, face-to-face conferencing (including the “circle” approach³²), and indirect communication by third parties.³³ Victim-offender mediation, however, is perhaps the best of these expressions of the model to study, as it is by far the most developed among them, with over 30 years of history and over 300 programs in the US and 700 internationally.³⁴

Procedural Concerns in Practical Application

³⁰ Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 Ohio St. J. on Disp. Resol. 185, 185-186 (2001), citing Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?*, <http://www.vorp.com/articles/crime.html>

³¹ *Id.* at 189.

³² Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 Wash. U. J. L. & Poly. 301, 310 (2007).

³³ Sherman, *supra* note 26, at 8.

³⁴ Shenk, *supra* note 30, at 192, 193, 217.

Since victim-offender mediation is born out of the desire to alleviate some of the perceived deficiencies of the traditional retributive model of justice, its method of operation necessarily differs from that of traditional adjudication. That calculated difference, however, in turn deprives victim-offender mediation of many of the benefits and safeguards of the traditional justice, giving rise to serious and necessary critiques.

Victim's Needs

If victim-offender mediation is undertaken as an alternative to (or even merely prior to) traditional adjudication, then the victim is given the power to shape the treatment that the offender receives. The victim, then, must make a choice between leaving the offender's punishment as it would be under adjudication, or lightening it—and if the latter, then by how much.

Victims who participate in victim-offender mediation commonly feel that the session “humanized” their experience of crime.³⁵ This is an expected consequence of actually meeting the offender— oftentimes the “reality is less frightening than assumption and speculation” of the victim.³⁶ Furthermore, offenders, of course, possess personalities distinct from the crimes they've committed, and often do present themselves in a way that seems pleasant and gentle,³⁷ further surprising the victim.

Not only that, the offender typically offers an explanation and/or an apology upon his/her turn to speak in mediation.³⁸ The apology may be a “tactical” one that has as its primary purpose

³⁵ *Id.* at 196, , citing Victim-Offender Reconciliation Program Information and Resource Center, *Victim-Offender Mediation Dialogue Programs*, www.vorp.com/articles/abaendors.html (last visited Oct. 12, 2001).

³⁶ Reimund, *supra* note 25, at 24.

³⁷ John Braithwaite, *Narrative and “Compulsory Compassion”*, 31 *Law & Soc. Inquiry* 425, 433 (2006).

³⁸ Marty Price, *Personalizing Crime*, *Disp. Res. Mag.* 8, 9 (2000).

the reduction of expected liability.³⁹ Nevertheless, the victim may feel assuaged by the words—after all, the apologist makes the apology with precisely the intention—or even actually believe that the offender is truly admitting fault and expressing genuine regret.⁴⁰ An apology, however, creates “forgiveness as a moral option for the offended.”⁴¹ The victim (and perhaps the offender) may then be naturally drawn to consider the following questions, articulated by Jennifer Gerarda Brown:

Having delivered a heartfelt apology, is the offender entitled in any way to expect a positive response from the other party? To what extent can an offender expect that a moral victim will accept the apology and even forgive? If such acceptance and forgiveness are not forthcoming, can the apologizing person somehow be converted into a victim of a new harmful event?⁴²

The victim’s compulsion to lighten the offender’s liabilities in response to his seeming humanity and an apology⁴³ may be heightened because of the presence of the mediator.

Offenders who hope to reduce criminal sentences may give the apology with the intention that the authority figure witnesses it.⁴⁴ In victim-offender mediation, the apology may be directed at

³⁹ Jennifer Gerarda Brown, *The Role of Apology in Negotiation*, 86 Marq. L. Rev. 665, 668 (2004).

⁴⁰ *Id.*, citing Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L. J. 1135, 1140 (2000), citing Nicholas Tavuchis, *Mea Culpa* 3 (1991)

⁴¹ *Id.* at 672, citing Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L. J. 1135, 1143 (2000).

⁴² *Id.* at 673.

⁴³ Presenting a greater cause for alarm is that this compulsion may partially be rooted in not just morality but also in biology. The term “norm of reciprocity,” a well-explored concept in social and evolutionary psychology, describes people’s tendency to respond to an action in kind. Thus, a person who receives a small gift from a salesperson may feel more compelled than he otherwise would’ve to purchase the salesperson’s products. See Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, Am. Soc. Rev. 25, 161-178 (1960) ; Bram P. Buunk & Wilmar B. Schaufeli, *Reciprocity in Interpersonal Relationships: An Evolutionary Perspective on its Importance for Health and Well-Being*, 10 Eur. Rev. Soc. Psychol. 259 (1999).

⁴⁴ Brown, *supra* note 39, at 667.

the mediator, who, even if lacking adjudicating authority and maintaining her neutrality, may cause the victim to reciprocate to the offender's conceding gesture by merely being present for the exchange and thus becoming a potential moral judge. The victim may, then, reluctantly make a concession, in effect becoming "re-victimized."

Even if the victim makes such a concession freely and wholeheartedly, however, the choice may ultimately unfairly disservice him. Man's desire to give his wrongdoer his "just desserts," stressed in retributive justice, is natural and perhaps universal.⁴⁵ Retributive justice, which most people are accustomed to, matches the magnitude of the punishment to the crime. By lightening that punishment, the victim may one day come to feel that his wound was also minimized and that justice wasn't done. This problem is exacerbated by the fact that most victim-to-offender mediations are single-session, with restitution agreements drawn up in the end, thus preventing the victim from engaging in prolonged, careful consideration about the choice before committing to it.⁴⁶

The current justice system takes the case out of the victim's hands once criminal complaints are filed—and one of the benefits of this practice may be that it shields the victim from having to make the choice of whether to forgive and how much. Victim-offender mediation, by presenting the victims with the choice, runs the danger of either pressuring them to forgive or encouraging premature forgiveness.

Offender's Needs

Victim-offender mediation creates serious potential due process violations for the offender. The offender, despite his constitutional rights, enters the justice process extremely

⁴⁵ Braithwaite, *supra* note 37, at 432.

⁴⁶ Shenk, *supra* note 30, at 195.

vulnerable to coercion and exploitation. Firstly, the mere existence of a prosecution's case can be often overwhelming for the offender. Not only is he often subjected to confinement if bail is not available to him, he must prepare for and make other procedural steps such as initial appearances, preliminary hearings, intake hearings, and information or grand jury trials.⁴⁷ Secondly and more importantly for the purpose of this paper, the offender (assuming he is found guilty) faces the state's punishment with all its negative consequences on his immediate and future life. If the offender believes it is unwise to dispute his guilt, his primary concern becomes the avoidance or at least the reduction of this punishment. This concern often conflicts with the assertion of his constitutional rights to the fullest and therefore renders him vulnerable to relinquishing them.

This concern, in fact, may even contaminate a basic tenet of mediation—the voluntariness of the participants. Participation in mediation is in theory voluntary, but mediation is an avenue through which the offender may attempt to reduce his punishment.⁴⁸ His participation, therefore, may not be wholly voluntary. His voluntariness becomes further dubious if a prosecutor or other authority figure makes the suggestion that he participates, because the offender then has reason to fear that his refusal may have an effect on *their* perception of him and his willingness to cooperate or to make amends.

This compromise of the offender's voluntariness is especially problematic because many victim-offender mediation programs make it a prerequisite to participation that the offender admits his offense. Indeed, in the US Department of Justice survey, fully 65% of the programs reported that offenders must admit to their guilt prior to participation.⁴⁹ This is not surprising,

⁴⁷ Kadish, *supra* note 21, at 11.

⁴⁸ Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 Emory L. J. 1247, 1283 (1994).

⁴⁹ U.S. Department of Justice, *supra* note 11, at 8.

given that victim-offender mediation follows the restorative justice model, which seeks to “restore” the harm done, which requires that the offender admit and take responsibility for his actions.⁵⁰ An offender will therefore need to trade in his due process right against self-incrimination in exchange for his participation. Even if he manages to take advantage of a program that does not require him to admit guilt pre-session, however, he may feel coerced to do so once in mediation. Victim-offender programs make it one of their goals to hold “the offender directly accountable for his or her behavior.”⁵¹

Similar due process concerns are also triggered by the place that mediation occupies in the justice system. Traditional justice system recognizes that the offender is, by the nature of his position, vulnerable to coercion and exploitation, and so establishes for him many safeguards. Mediation, however, is not traditional justice—it seeks to be its alternative or complement. This has placed mediation in the awkward position of operating on many of the same ideals and legal concepts that produces the safeguards of traditional justice, but simultaneously lacking the legitimacy and the historical and structural familiarity that enable their predictable application in traditional justice.

Mediation lacks the legitimacy of the adjudicative system in one sense—unlike the court system, it does not have a constitutional basis. Therefore, a due process right such as the right to counsel does not extend to mediation. While this may be understandable in the civil and out-of-court context, it becomes problematic in criminal mediations, because they often take place

⁵⁰ Ikpa, *supra* note 32, at 312.

⁵¹ Umbreit, *supra* note 6, at 279.

during the adjudicative process, and through the referral of the court.⁵² The offender in such a program is not yet finished with his dealings with justice—he can still make statements or actions that (cause mediation to fail and) bring the case to trial or even initiate a new charge.⁵³ Furthermore, the offender may even have a special need for a counsel in mediation. Unlike in the adjudicative setting in which the punishment, at least in theory, fits the crime and is constrained by law to be fair, in the mediation setting the offender must negotiate his own punishment. Despite these concerns, most mediation programs do not require nor provide the offender with an attorney.⁵⁴ and many do not clarify the role of the attorneys who do attend.⁵⁵ Of course, the mediator cannot serve as the offender's counsel. In other words, even though criminal mediation is structurally situated to carry the same problems that grant a defendant the constitutional right to competent counsel, because mediation is not a trial, the right does not extend to it.

Further weakening protections for the offenders is the reality that mediation as a field, let alone criminal mediation, is in its infancy relative to adjudication. As a result it has yet to develop a history of precedents and to become familiar to its ultimate decision-makers, who (adding a layer of complexity to the issue) are the adjudicators.⁵⁶ Therefore, courts have been widely divergent in their interpretations of the purpose and the desired processes of mediation.

⁵² The primary referral sources of victim-offender mediation programs are the members of the adjudicative system, namely probation officers, judges, and prosecutors. Police officers are also frequent referrers. U.S. Department of Justice, *supra* note 11, at 7.

⁵³ In these cases, confidentiality of the mediation becomes of utmost important, discussed *infra*.

⁵⁴ Ikpa, *supra* note 32, at 313.

⁵⁵ Brown, *supra* note 48, at 1289.

⁵⁶ Indeed, conflicts that arise within mediation are often dealt with in court. This is not surprising, given that many mediations are pursued at the direction of, or as an alternative to, the court. Furthermore, the court is the default dispute resolution system. When alternative dispute resolution (mediation) is perceived to have generated a problem, parties understandably turn to the traditional mode of resolution.

This has meant that what we take for granted in adjudication are sometimes matters of debate in mediation.

For instance, privilege for mediator confidentiality varies among states. In State v. Castellano, the court found that there is no such privilege if the state has not explicitly created one through statute.⁵⁷ On the other extreme, the court in Wimsatt v. Superior Court found that there is no exception to the state's statutory privilege, even though the party had suffered possible attorney misconduct during the mediation.⁵⁸ In contrast to such reliance on the state legislature, the court in Folb v. Motion Picture Industry Pension & Health Plans decided to disregard the state's existing law on privilege and instead find privilege based on Rule 501 of the Federal Rules of Evidence.⁵⁹ Some courts have opted not to rely on statutes, whether state or federal, and instead apply fact-dependent balancing tests of competing concerns, with some finding privilege and some not.⁶⁰ All in all, unlike in the adjudicative context, the privilege of confidentiality in mediation is not uniform, predictable, or guaranteed. Further eroding the protection is the fact that most confidentiality statutes that do currently exist do not specifically include victim-offender mediation as a covered form of "mediation." Therefore, the privilege of a victim-offender mediator may even depend on how the courts construe the terms and labels.⁶¹ In mediation, confidentiality protections are essential as it encourages honest dialogue, yet the

⁵⁷ *State v. Castellano*, 460 So.2d. 480 (1984).

⁵⁸ *Wimsatt v. Superior Court*, 152 Cal.App.4th 137, 150-51 (2007). This case further complicates the legal scene because the court found privilege even though the party's attorney was accused of perjury and misconduct during the mediation. In states that adopt the Uniform Mediation Act, such facts would warrant an exception to the privilege.

⁵⁹ *Folb v. Motion Picture Indus. Pension & Health Plans*. 16 F. Supp. 2d 1164 (1998).

⁶⁰ See *Olam v. Cong. Mortgage Co.*, 68 F.Supp.2d 1110 (1999) ; *Bank of Am. Nat'l Trust & Sav. Ass'n v. Rittenhouse Ass'n.*, 800 F. 2d 339 (1986).

⁶¹ Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. Disp. Resol. 401, 406 (2005).

possibly-inadequate protections may mean that the offender may find that his having had such a dialogue has brought about more adverse consequences in the current trial (if there is one), or even caused a new charge.

Another such example of protections which are less secure in mediation than in adjudication is illustrated in the similar (as confidentiality) lack of predictability in whether the mediated agreement will be enforced. Mediation's comparative flexibility in structure and process has led courts to find some mediation agreements to be unenforceable—a result rarely contemplated for the end-products of the adjudicative process. In some cases, the lack of a (substantially) universal understanding of what mediation is and how it should be structured has caused the courts' unwillingness to enforce the mediated agreements. In Lindsay v. Lewandowski, for example, the court found a mediated contract to be null because the term “binding mediation” had no agreed-upon definition, and it was ruled to be a material term.⁶² Sometimes it has been mediation's lack of history and the court's lack of experience with it that brings findings of unenforceability. For instance, in Ali Haghghi v. Russian-American Broadcasting Co., the court held that in the face of a statute that required such agreements to contain a provision stating that it is binding, an agreement that did not contain one was unenforceable.⁶³ This lack of certainty in whether the mediated agreement will be enforced if reviewed by the courts means that an offender who relies on the mediated agreement may be surprised into having it become void (and possibly become required to go to trial).

Is Victim-Offender Mediation Appropriate for Criminal Matters?

⁶² *Lindsay v. Lewandowski*, 139 Cal.App.4th 1618 (2006).

⁶³ *Haghghi v. Russian-American Broadcast.Co.*, 577 N.W.2d 927 (1998).

Criminal mediation compromises on some safeguards that traditional adjudication typically provides for the parties. It is likely premature to declare, however, that mediation is not an appropriate dispute resolution method to be used in the criminal setting. Victim-offender mediation, as discussed above, is largely limited to misdemeanors and the less serious property crimes. Furthermore, the vast majority deal with juvenile crimes, with almost half dealing exclusively in them.⁶⁴ Mediation is particularly well-suited for these types of cases, where the offender is young and/or has committed a minor crime and therefore shows strong promise of rehabilitation. While the effect that restorative justice has on recidivism on populations is debatable, it has repeatedly shown to reduce recidivism in the individual participants. A meta-analysis of 19 studies with 9307 juvenile offenders found that victim-offender mediation reduced in its participants by 33% the rate of reoffending within 6 months.⁶⁵ The study also found that among those offenders who do recommit crimes after mediation, those who participated in mediation committed less serious offenses than those who had not.⁶⁶ Other existing evidences consistently find that restorative justice works as well or better than traditional adjudication to suppress recidivism.⁶⁷ Furthermore, victim-offender mediation also scores consistently high on

⁶⁴ U.S. Department of Justice, *supra* note 11, at 6.

⁶⁵ William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 Utah L. Rev. 137 (2004).

⁶⁶ *Id.* at 160-61, 164. However, there are many confounding factors in these studies. Comparisons of recidivism rates are subject to selection bias—those offenders who elect to participate in victim-offender mediations may be more likely than those who do not to refrain from re-offending, and victim-offender mediations also run a screening process to select those subjects most likely to benefit from the mediation. Furthermore, juveniles generally offend less as they grow older. Most evidences do control for or otherwise take into account these factors, but the data should be cautiously interpreted nonetheless. See Menkel-Meadow, *supra* note 8, at 176.

⁶⁷ See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 38 (2004). Jennifer Gerarda Browns disputes the claim that victim-offender mediation reduces recidivism in its participants. However, the one study the author offers as support does find that restorative justice programs “suppress subsequent offending to a greater degree than traditional court programs.” Brown’s claim that restorative justice program do not reduce recidivism in the individual participants come from the fact that the study

satisfaction by its participants—typically, 80 to 90% of both victims and offenders report being satisfied with the process and the outcome.⁶⁸ Mediation seems to be a productive means of dispute resolution even in the criminal field, at least on the cases it currently focuses on. Victim-offender mediators, possibly, are aware of the method’s potential procedural flaws and choose to be cautious when venturing into areas in which those flaws can become particularly damaging.

A Field of Potential Further Use – Plea Negotiations

But should mediation expand its reach to other areas of criminal law? As discussed above, the areas on which victim-offender mediation concentrates – misdemeanors and juvenile crimes post acknowledgement of guilt – are particularly responsive to mediation’s strengths and relatively less vulnerable to its procedural dangers. Nonetheless, it is worth exploring whether there are other areas in criminal law that would respond similarly to mediation. One such area may be plea bargain negotiations.

In 2004, 95% of all criminal convictions occurred through guilty pleas.⁶⁹ If mediation were to become a part of plea negotiations, the potential pool of people it would impact would be greatly enlarged from its present state. Furthermore, there seems to be a definite “zone of possible agreement” that, theoretically at least, a mediator could help the parties explore. While the crowding of dockets doubtless motivate (and some argue, compel) the prosecutors to seek

also notes that “the effect (of suppression of subsequent offending) could not be explained by a deterrence model.”) *See Brown, supra* note 48, at 1301, n. 209.

⁶⁸ Umbreit, *supra* note 6, at 287.

⁶⁹ U.S. Department of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004*, (2007), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=909>. It’s important to note that the figure does not include dismissed cases. Furthermore, that a defendant pleaded guilty does not necessarily mean that he underwent the plea bargaining process, although it is likely. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2466, n. 9 (2004). The reader should also note that even though the Bureau of Justice study is for state courts and felony convictions only, it is likely representative for all convictions as the Bureau also reports that 94% of convictions take place in state courts (and 6% in federal courts), and that 87% of all convictions are felony convictions (and 13% are misdemeanors).

plea bargains in lieu of trials, “‘routine’ plea agreements are rare” and each offender receives individualized treatment⁷⁰ because no two crimes, even of the same charge, are the same—the circumstances, the offender, and the defense attorney all affect the forecast of trial outcomes. Furthermore, plea negotiations are not a one-man show by the prosecutor as often believed. While many factors – disparity in resources, lack of judicial review, offender’s own uncertainties and possible lack of understanding of the process, sentencing guidelines - tilt the power balance to the prosecutor’s favor, other considerations – reluctance to dismiss a charge, aversion to going to trial, due to the time and resources it consumes, and the potential for the backlash from the media and the public in cases of loss, desire for career advancement with a favorable win-loss statistic, among others – drive him to refrain from “hard bargaining” and, in many cases, offer sentences very light relative to the charge.⁷¹ In sum, there is room for maneuver for both parties in these negotiations.

Whether mediators would indeed be useful in the parties’ navigation of this zone of possible agreement, however, seems far from certain. The traditional victim-offender mediator may wish to include the victim in a plea bargaining mediation, but may meet with resistance. Under the traditional criminal system, the victim’s role is little beyond being a witness for the prosecution, and accordingly the prosecutor and the victim typically have limited contact.⁷² Furthermore, since most victim-offender mediations take place after guilt is established or

⁷⁰ Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 53, n. 16 (1968). Alschuler clarifies that it is true that “common patterns... emerge whenever the practice is frequent.” However, he further notes that while some moves become routine, e.g., some concessions are often given without much negotiation, such are usually “only the starting point,” after which the results are individualized for the offender.

⁷¹ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470-73 (2004). Alschuler, *supra* note 72, at 59-62.

⁷² Stacy Caplow, *What if There is No Client?: Prosecutors as “Counselors” of Crime Victims*, 5 Clinical L. Rev. 1 (1998).

acknowledged, and the victim may be convinced that the accused in front of him is indeed guilty, victim-offender mediation may not be as well-suited in a situation like plea bargaining in which the accused should theoretically retain his presumptive innocence. The victim's presence may also skew the negotiations if he is unsure of the accused's guilt, because such may elevate the confidence of the accused (factually guilty or not), possibly giving rise to uncooperative bargaining postures. Therefore, prosecutors would vehemently oppose these kinds of victims to be present at the table while perhaps allowing those other victims who feel more assured of the guilt—an unequal treatment. Furthermore, such elevated confidence may not serve the accused well in the long run since the prosecutor can structure the trial so that the victim plays a limited role, or in a worse scenario convince the victim of the accused's guilt by the time of the trial. Indeed, a typical victim-offender mediation and a plea negotiation may have different goals and may not be compatible.

Even if the mediator looks beyond the victim-offender model and instead mimics the civil model to limit the mediation to the prosecutor and the accused and his attorney, plea negotiations are sufficiently different from civil negotiations that he should be careful not to assume that mediation's general efficacy in the civil field will facily transfer.⁷³ Nonetheless, a

⁷³ In civil negotiations, the parties bargain in the “shadow of expected trial outcomes.” In other words, the parties each forecast the trial result and meet at a point where both come out ahead when considering the saved trial costs. However, in plea negotiations, this model is significantly less useful, because 1) the parties themselves have strong self-interest that do not serve their ultimate clients (for example, prosecutors may wish to avoid adding to the case load even at the cost of the safety of the public, and defense attorneys may prefer to spend their resources on paying clients and so neglect the offenders), 2) levels of uncertainty is heightened as to the outcome of the trial because not only is information going to be withheld from both sides, criminal trial results are relatively more unpredictable; 3) risk aversion varies by demographics, meaning that repeat offenders and factually-guilty offenders with less risk aversion tend to do better in plea negotiations than first-time offenders and factually-innocent offenders, and of many others concerns. See Bibas, *supra* note 73 and F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. Pub. L.* 189 (2002).

mediator – who can add facilitation to the exchange without imposing his own views on the conflict – can add value.

Such a mediator can do so by improving the communication between the parties. Although communication is especially important for criminal law, it also is especially prone to fail in criminal law. Firstly, plea negotiations take place with fundamentally imperfect information on both sides. Inevitably, the accused withholds from the common pool of knowledge the key piece of information—whether he committed the crime. The prosecution, for its part, also guards against disclosing the evidences that it has against the accused for bargaining purposes. Secondly, parties in a plea negotiation often have unequal bargaining power. In contrast to the civil realm in which common law doctrines such as misrepresentation and unconscionability, on top of statutory law, guard against information disparity,⁷⁴ plea negotiations allow parties to stay under-informed. Bilateral discovery is limited, and both sides typically keep to themselves what they know about the case.⁷⁵ Combine such information disparity with the similar disparity of resources and experience,⁷⁶ and the result is the weakening of the accused's bargaining power relative to the prosecutor's. Further exacerbating the power imbalance is the fact that the prosecution can pressure the accused in ways that are apart from the actual negotiating table. He can, for example, lengthen pretrial detention, forcing the accused to consider the foregone wages and the duration already spent in detention.⁷⁷ Such tactics may feel especially coercive to an accused who cannot afford bail. The imperfect information on the

⁷⁴ Fred C. Zacharias, *Justice in Plea Bargaining*, 39 *Wm and Mary L. Rev.* 1122, 1130, n. 23 (1998).

⁷⁵ *Id.* at 1131.

⁷⁶ Even an offender with the highest recidivist tendencies would not be more experienced than a trained prosecutor. The presence of counsel only theoretically remedies this situation.

⁷⁷ Zacharias, *supra* note 76, at 1134, n. 34.

bargaining table and the unequal bargaining power allows a prosecutor who chooses so to overlook or even create poor communication to capitalize on it.

Adding a mediator to the plea negotiation room can alleviate many of the common effects of poor communication. Basic mediation tactics can help the accused better understand the plea bargaining process and its significance, and also his case, risk and exposure, and options. An attorney may simply explain (or just relay!) these concepts without ensuring that the accused has understood. A mediator, on the other hand, can test and ensure his understanding. Not only that, a mediator can effectively bring the accused to examine his own interests. An active mediator who repeats these exercises at every potentially beneficial occasion would likely greatly alleviate the confusion and under-comprehension that plague many potential defendants in traditional plea negotiations.

The accused who understands the process and his own state feels more confident. Thus he may decide to share what he knows, after discussing the consequences of doing so with his counsel, instead of staying silent and letting the attorney (who, arguably, knows less of the “facts” than either the accused or the prosecutor) speak for him without evaluating the effects. In some instances, the accused may share information that may allow the prosecutor frame the case in a new light.

This possibility may be of great appeal to the prosecutors. The prosecutor’s ultimate goal is not to give this particular accused the harshest sentence he can muster, nor is it to close the case with minimal effort. Rather, it is to prosecute the factually guilty offender of the committed crime. It is true that what much of the accused offers in the plea bargaining context should not be taken at face value. For example, an accused may claim that he now understands that the consequences he may face if he withheld relevant information may be greater than if he

disclosed it, and implicate another individual while admitting to a lesser crime. As Justice Sandra O'Connor noted in Williamson v. United States,⁷⁸ “one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.” Nonetheless, the prosecution with a case that had unexplained gaps or inconsistencies (and such is part of why a prosecutor may choose to initiate plea negotiations in the first place instead of going straight to trial) can judge whether the information offered deserves more exploration. If the prosecutor decides to take a new look at the case, then if the accused is actually factually innocent, all parties—the accused, the prosecutor, and the public—will have benefitted from the mediated plea negotiation.

Furthermore, the traditional mediation tactics discussed above for use on the accused would also benefit the prosecutors. For example, the mediator can lead the prosecutor to self-critique the strength of his case or to come to a more balanced judgment on the likelihood of trial success. The mediator can also help the prosecutor better grasp his own interests and options. In particular, when any person – including the prosecutor – relays the processes and the arguments to a third party, especially a third party who consistently challenges his assumptions and summarizes what he hears so that the person can hear “how it sounds” from another person, he is more likely to catch obvious flaws that previously escaped his attention.⁷⁹ One example of such flaws is the likelihood of false confessions, especially by juveniles. Approximately 24% of the 180 convictions that have been overturned by later DNA evidence have involved confessions,

⁷⁸ Williamson v. United States, 512 U.S. 594 (1994).

⁷⁹ “Groupthink” is a common problem in any cohesive organization that must reach a consensus, and the prosecutors and the police force are not immune to it. Irving Janis, who pioneered the concept, defined it as “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.” See Janis, Irving, *Groupthink among Policy Makers* (1971). For examples of groupthink by prosecutors, see Kim Rossmo, *Criminal Investigative Failures*, (2009) ; C. Ronald Huff & Martin Killias, *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2008).

admissions, or other such self-incriminations.⁸⁰ Although police interrogations are stressful for any person and can cause even the innocent to “conclude that confession is both a rational choice and his best option,”⁸¹ it rarely occurs to the police that a confession extracted could be false.⁸² The removed self-examination that the mediator can initiate can help the prosecutor to avoid such blind spots that overzealousness sometimes produces.

On top of the improved communication, a mediator may also positively impact the plea bargaining process by being a third-party presence. One of the causes of the power imbalance is the unilateral control the prosecutor exerts over the negotiation process. The prosecutor determines not only the charge to be filed but also the pace, tone, and what deals are offered to and removed from the table. A mediator who does not direct the substance of the mediation (and in plea negotiations, the mediator likely should not) can, however, still direct process, and thus alleviate some of the one-sidedness. Furthermore, the mediator can become a conduit for the accused, and enable him to place bargains on the table as well.

Being a third-party presence also enables the mediator to act as an unspoken check against any bargains that are grossly inequitable (to either the public or the accused). This will be true even if plea bargains were to remain free of judicial checks. The presence of a third party and the knowledge of being observed, without feedback or manipulation by the third party, have shown to be sufficient to change a person’s behavior for the better.⁸³ In the plea negotiation

⁸⁰ See Snyder, L., Mcquillan, P., Murphy, W. & Joselson, R, *Report on the Conviction of Jeffrey Deskovic, Prepared at the Request of Janet DiFore Westchester County District Attorney*, (2007), http://www.westchesterda.net/index.php?option=com_content&task=view&id=2537&Itemid=4407.

⁸¹ Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 Stud. L. Pol. & Soc’y 189, 195 (1997).

⁸² *Id.*, at 193.

⁸³ This is known as “the “Hawthorne effect.” Subjects improve their behavior simply in response to their knowledge that they are being watched, with no other stimulus. The name comes from a well-known study of worker behavior from the 1920s, conducted by Harvard scholars Elton Mayo and Fritz Roethlisberger in a factory called Hawthorne

context, this may mean that prosecutor's unfettered discretion is reigned in to stay within the boundaries that a typical person would find reasonable.

Conclusion

Compared to its civil counterpart, mediation in criminal law has not been extensively studied, practiced, or institutionalized. Nonetheless, a significant number of mediations is practiced to address lesser crimes and juvenile crimes. The dominant model for these criminal mediations is the "victim-offender" model, which brings the victim and the offender together for a dialogue in the presence of a trained mediator. Victim-offender mediation is the foremost expression of the model of restorative justice, a reaction against the traditional model of retributive justice. Retributive justice takes the victim out of the justice process because its primary goal is to give punishment to the offender that is "just" relative to his crime. Restorative justice, on the other hand, reintroduces the victim to the process by seeking to "restore" the victim, the offender, and the community at large.

Nonetheless, restorative justice has its own flaws, especially as expressed through victim-offender mediation. For the victim, the legitimacy of the victim's desire for just punishment for the person who wronged him may be dismissed too lightly. Furthermore, the victim is forced to make the choice of whether and/or how much to forgive the offender. He may feel compelled to forgive and lighten the punishment due to various facets of a victim-offender mediation, such as the offender's apology and the mediator's presence. As for the offender, victim-offender mediation may not be truly voluntary, given his vulnerable situation. This may compromise his constitutional rights, especially that against self-incrimination, because the restorative justice

model leads victim-offender mediations to often require the offender to admit his guilt prior to participation. Furthermore, because criminal mediation does not enjoy the precedents and conventions of the more-established criminal adjudication, it also contains many uncertainties, even on protections on basic assumptions such as confidentiality and enforcement of reached resolutions.

Victim-offender mediation, however, focuses largely on juveniles and less serious crimes. This focus alleviates many of its procedural weaknesses and greatly enlarges its benefit of rehabilitating the individual. Victim-offender mediation is spreading and consistently achieves a high satisfaction rating by all the participants. Given this success, it makes sense to inquire whether mediation should extend to other fields of criminal law.

Plea bargain process is one such field. While victim-offender mediation model may not be suitable because bringing in the victim may skew the bargaining process depending on whether he feels certain or uncertain of the guilt of the accused, the broader model of mediation – of adding a mediation to the parties’ negotiating table – may prove beneficial. A mediator can greatly enhance the communication between the parties, which may lead to more just and accurate outcomes. Furthermore, his presence as a third party may serve as a checking mechanism that counteracts the current unfettered discretion of the prosecutor.