

Mediation in the Criminal System: an Improved Model for Justice

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Final Paper Spring 2005

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In the United States, our criminal law system defines crime as acts against the State rather than as acts against individuals or communities at large. In these definitional parameters, we often overlook the unmet needs of victims and society after a crime is committed. In our current system, we are preoccupied with retribution instead of restoring the victims and healing the harm done. From here stems the goals of restorative justice: an alternative to the typical criminal justice process.¹ Restorative justice is concerned with healing the wounded victim: financially, emotionally, and socially.² It expects offenders to rectify the harms they have inflicted, but then seeks to reintegrate both parties back into society as contributing, law-abiding citizens.³ Restorative justice seeks to keep those most effected by the crime directly involved with the process of responding to it.⁴ It is about looking to the root of crime in its social context, and trying to break the cycle.⁵ The process empowers victims, allows offenders to repent and heal, and restores relationships within the community.

In recent years, there has been an expansion of alternative dispute resolution into various fields of law, and criminal law is a prime example. As the goals of restorative justice become increasingly popular, and alternatives to the courtroom become more versatile, mediation has become a provocative option for criminal defendants and prosecutors alike. The oldest and most widely used expression of restorative justice is victim-offender mediation, where the victim and offender come to an out-of-court agreement with the help of a mediator.⁶ This paper will explore the benefits of victim-offender mediation in criminal law and address concerns voiced about it, explore ways in which it is currently being practiced in this country and internationally, and last it will set forth a design for a criminal mediation program which would specifically deal with sex based crimes.

¹ Restorative Justice, at www.restorativejustice.org. Restorative justice advocates restitution to the victim by the offender, seeking to make people whole, rather than retribution or punishment inflicted by the state against the offender. *Id.*

² *Id.*

³ *Id.*

⁴ Restitution, at <http://www.restorativejustice.org/rj3/Introduction-Definition/Tutorial/Restitution.htm>.

⁵ Restorative Justice, at www.restorativejustice.org.

⁶ Mark S. Umbreit, Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment, *Western Criminology Review* 1(1) (1998) at <http://wcr.sonoma.edu/v1n1/umbreit.html>. There are over 1300 victim-offender programs in 18 countries all over the world. *Id.*

I. Dispel the Myth: Overcoming the Apprehension Surrounding Victim-Offender Mediation

Victim-offender mediation originated in Kitchener, Ontario where two boys destroyed private property in a drunken rampage.⁷ The court allowed them to go to the homes of their victims, confess to the crimes, and work out a restitutionary agreement.⁸ In three months, the boys had completed their agreements and paid back all the losses.⁹ This led to the creation of the first North American victim-offender mediation/reconciliation program.¹⁰

Victim-offender mediation is somewhat different than traditional mediation.¹¹ In both, the process starts when the two parties come together with a neutral third person to resolve a dispute and reach a settlement. Whereas in a regular mediation, there is an assumption that both sides contributed to the conflict at hand, in victim-offender mediation there is an innocent victim and an offender who has usually already admitted to the crime.¹² This puts the parties at different positions when negotiations begin. However, this is not a problem because the focus is not on reaching a fair negotiated settlement, but instead on communication, confrontation, accountability, healing, and restoration.¹³

Despite the advantages it offers, there have been critics that have voiced several areas of concern with the program. However, studies have shown that victim-offender mediation is successful, improving lives, and changing the way society looks at criminal justice one case at a time.¹⁴

A. Is there a true benefit in mediating criminal matters?

There are numerous psychological benefits for victims who have a chance to confront their offender that do not exist in a criminal trial. The belief that severe punishment imposed on an offender

⁷ Marty Price, VOMA Quarterly, Victim-Offender Mediation: The State of Art, (discussing the beginning of victim-offender mediation) at <http://www.vorp.com/articles/art.html>.

⁸ *Id.* The boys had no prior offenses, so their probation officer convinced the judge that instead of punishment that would result in a criminal record, the boys should face the owners of the destroyed property. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Umbreit, *supra* note 6; See also Price, *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ The research of scholars like Umbreit, Coates, Gehm and Davis are discussed in detail below.

will bring about some kind of peace of mind for the victim is unfounded.¹⁵ Revenge does not restore the losses of victims, answer questions, relieve fears, provide closure, or help to make sense of a tragedy.¹⁶ Further, being able to forgive someone who has caused harm provides a sense of healing to the victims of crimes. One way to meet these needs is confrontation with the offender, and this is the type of justice which victim-offender mediation can facilitate.

It is incorrect to assume that the psychological benefit is limited to the victims in the mediation. Offenders are also given the opportunity to truly face the situation and make it right. Retaining a degree of control enables offenders to take responsibility of their action in a unique way, and this in turn purges them of the guilt and label associated with their crime. Receiving true forgiveness for a criminal act is one aspect of victim-offender mediation that is absent in traditional criminal proceedings. Often this forgiveness provides some offenders with sort of a “clean slate,” deterring them from repeating criminal conduct.¹⁷

The mediation process offers parties direct control over the outcome of their dispute. Often in criminal processes there are huge concerns at stake: incarceration for defendants and the vindication of rights for victims. Leaving the decision power in the hands of a distant third party judge creates a lot of apprehension in the parties.¹⁸ Mediation relieves some of this tension, giving parties a sense of power in the process. Being given the ability to navigate a stressful criminal process empowers both sides.

¹⁵ Lorenn Walker, Conferencing: A New Approach for Juvenile Justice in Honolulu (June 2002) (stating that western justice does not focus on victims or even the offenders, but is instead overly concerned with retribution and finding appropriate forms of punishment); *See also*, In the Words of Gandhi, at http://www.toomuchsexy.org/index/weblog/comments/in_the_words_of_gandhi (stating “an eye for an eye leaves us all blind”).

¹⁶ *See* Umbreit, *supra* note 6.

¹⁷ *Id.*

¹⁸ Kimberlee K. Kovach, *Mediation: Principles and Practice*, 3rd ed. 75-76 (1994).

B. Are participants really satisfied with the mediation process?

In several studies that tried to assess the benefits of victim-offender mediation, researchers saw extremely high levels of satisfaction from both parties.¹⁹ They found these consistent results across program sites, types of offenses, and cultures. One victim stated, “it was important to find out what happened, to hear his story, and why he did it and how.”²⁰ However, it must be noted that those participants that were interviewed for the study chose mediation themselves, making involvement a “self-selective process.”²¹ This could be an overlaying factor in the findings because satisfaction may have to do with having the opportunity to choose among options for justice.²² The mediations were done face-to-face (where victims and offenders met together with a mediator), and also done via shuttle mediation (where the mediator met with each side separately and conveyed details about the agreement between the victim and the offender). The findings were that participants who actually had face-to-face mediations were more satisfied with the process than those who engaged in shuttle mediation.²³

C. Are the restitutionary agreements reached during mediation actually completed?

Though the idea of mediation sounds good in theory, many critics have asked whether the offenders really complete the terms of agreements they reach with their victims. The only consequence of not completing such restitutionary agreements would be the possibility that the victim would report the incomplete agreement and a traditional proceeding would ensue. Therefore the offender would

¹⁹ Umbreit, Coates & Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 Federal Probation 29 (Dec 2001). Where comparison groups were studied, those victims and offenders going through mediation were far more satisfied with the criminal justice system than those who went through regular court (79% to 57%). *Id.* at 30-31. There have been numerous efforts to evaluate the workings of victim-offender mediation in various settings over the last 20 years. *Id.* at 29. More studies have examined the impact of this mediation than any other correctional interventions that cost the US millions of dollars on each year. *Id.*

²⁰ *Id.* at 30.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 30-31. In the face to face mediation, 84% of the participants expressed satisfaction, while 74% who mediated without ever meeting stated they were satisfied with the process. *Id.* Despite the high level of satisfaction reported by many studies, there were still those participants who did not like the mediation. One male victim stated that victim-offender mediation was like “being hit by a car and having to get our and help the driver when all you were doing was minding your own business.” *Id.* at 30.

have nothing to lose by failing: he could leave the agreement incomplete since the worst consequence puts him same place as he stood before the mediation. However, across studies it has been shown that about 80 to 90% of the restitutionary contracts reached during victim-offender mediation are reported as completed.²⁴

The more interesting studies are those that actually compare restitution completion of offenders who participated in victim-offender mediation with those offenders who went through traditional court proceedings. A statistically significant study of juvenile offenders reported that 81% of those in mediation completed their restitutionary contracts, while only 57% of the juveniles not in the mediation program completed their court ordered agreement.²⁵ There is a sense of justice and real closure for both the victim and the offender through mediation, and that is one factor that motivates completion of these self-constructed contracts. Common sense tells us that parties that create their own conditions and make their own rules are more likely to abide by them.

D. Does victim-offender mediation deter recidivist crime, or is it just an interference in the criminal justice system?

Victim-offender mediation models in use currently can be started at any point in the judicial process. Therefore, they do not interrupt criminal justice in any way. The victims of crimes can chose mediation or decide to partake in the regular criminal and civil proceedings. In some counties that run victim-offender mediation programs, the state retains its right to pursue criminal prosecution of the offender, regardless of what restitutionary agreement is reached during the mediation.²⁶ This way, the current criminal process remains in tact, but the civil system can be traded for mediation. Even in

²⁴ *Id.* at 31. Though most studies showed significantly higher rates of restitutionary agreement completion with those in mediation programs, there are studies that have shown no difference. *Id.* Both a Michigan county with a victim-offender mediation program, and an Indiana county with none reported 80% completion rates of restitutionary agreements. *Id.*

²⁵ *Id.*

²⁶ Juhani Ivari, Victim Offender Mediation- An Alternative, An addition or Nothing but a Rubbish Bin in Relation to Legal Proceedings?, Restorative Justice Online (April 2002), at <http://www.restorativejustice.org/rj3/Full-text/Finland/VOMarticle.pdf>

counties that drop criminal charges if a mediated agreement is reached, the agreement is usually reviewed by a judge or agency for appropriateness and fairness.

Recidivism is the traditional measure used to evaluate the long-term impact of justice programs, and can provide insight to the effectiveness of victim-offender mediation as well.²⁷ Most of these studies are done on juvenile offenders because their cases qualify for victim-offender mediation most often. In a thirty month study of Washington DC youth, the victim-offender mediation participants were found to be less likely to commit subsequent offenses than youth in a comparison probation group.²⁸ Of the youth that did commit more crimes, the ones involved with victim-offender mediation appeared in court for less serious charges than their “comparison counterparts.”²⁹ In a recent article, prominent scholars in this field reanalyzed prior studies of offenders in victim-offender mediation and reported favorable results.³⁰

E. Is victim-offender mediation a cost effective process?

Other than through studies on recidivism, another way to judge the success of victim-offender mediation is to look at the cost of it. In figuring out the cost impact of the program, its effect on the criminal justice system must be considered. An overall reduction of jail or prison time saves the state or county considerable funds.³¹ Also, when cases are mediated they are not tying up the court’s time for trial.³² In Henderson County, North Carolina, trials were reduced by two-thirds as a result of the implementation of victim-offender mediation.³³ Another way to look at the cost benefit of this process

²⁷ See Umbreit, Coates & Vos, *supra* note 20 at 32.

²⁸ *Id.* Further studies of youth in four different states revealed that those in mediation had lower recidivism rates after one year than a comparison group who did not go through mediation. *Id.* In Tennessee, a study of 125 juvenile offenders revealed that these youth were significantly less likely to re-offend than a randomly selected comparison group. *Id.*

²⁹ *Id.*

³⁰ *Id.* Their data consisted of reports on 1,298 juvenile offenders, and revealed that those who went through the program recidivated at 32% lower rate than those who did not mediate. *Id.*

³¹ *Id.*

³² *Id.* Criminal trials, where the defendant has the option for a jury can end up costing the state a lot of money and mediation skips this entire process and saves valuable court costs. *Id.*

³³ *Id.* at 33.

is the saying, “time is money.”³⁴ Researchers who evaluated the victim-offender mediation program in Cobb County, Georgia found that the time required to process a mediated case was one third of the time needed for non-mediated cases.³⁵

II. Case Studies of International and Domestic Victim-Offender Mediations

Internationally, victim-offender mediation is gaining increasing levels of popularity. Though the programs differ among various countries, they adhere to the same support for restorative justice. The United Nations supports the use of “informal mechanisms for the resolution of disputes, including mediation,” where it is appropriate to “facilitate conciliation and redress for victims.”³⁶ The UN uses the restorative justice scheme in dealing with human rights violations, cases of genocide, and war crimes.³⁷ Though these are serious crimes, the mediation and dialogue helps the process of healing between governments and people who must learn to live together again.³⁸ It helps bring about social structural change and mass reconstruction that would not come out of traditional court hearings of individual cases.³⁹

In the Ukraine, a new restorative justice program is in its third year.⁴⁰ The program was supported by several institutions and seeks to reform the justice sector of the country.⁴¹ A major part of the Ukraine’s Restorative Justice is the pilot victim-offender mediation program. Its key focus is providing adequate financial and emotional restitution for the harm suffered by the victim.⁴² The

³⁴ *Id.*

³⁵ *Id.*

³⁶ Alternative Dispute Resolution of the World, at www.adrworld.com. The United Nations uses the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985. *Id.*

³⁷ Beyond Intractability, at http://www.intractableconflict.org/m/restorative_justice.jsp. Repentance can also help conflicting parties in a nation move towards reconciliation. *Id.* Parties remember the atrocities, repent, and then forgive one another. *Id.*

³⁸ *Id.*

³⁹ Alternative Dispute Resolution of the World, at www.adr.world (stating that our adoption of the UN model is predicted to encourage international parties to bring their disputes to the US for resolution). This model has been so provocative that American states that have recently adopted the Uniform Mediation Act are adding provisions that would extend this United Nation’s model to their domestic mediations. *Id.*

⁴⁰ Search for Common Ground, Restorative Justice Initiative, at http://www.sfcg.org/programmes/ukraine/ukraine_restorative.html.

⁴¹ *Id.*

⁴² *Id.*

program is implemented by the Supreme Court of the Ukraine and the Ukrainian Legal Systems officials, which provides for better monitoring and evaluation of the process.⁴³ In the Ukrainian system, mediators are especially trained in mediation as well as criminal justice procedures.⁴⁴

In 2003, laws and regulations of Poland were modified to make more cases eligible for victim-offender mediation.⁴⁵ In Poland, a referral to mediation can be made by the court, prosecutor, or police officers.⁴⁶ Then the mediator meets the victim and offender individually, followed by a required meeting of the victim and offender.⁴⁷ This meeting must be face to face, and cannot be substituted for indirect or shuttle mediation.⁴⁸ If the parties work out an agreement, the court may discontinue the criminal proceedings, uphold the judgment reached in the mediation agreement, or assign a sentence without a trial if the offender submits to it voluntarily.⁴⁹

Within the United States, some Oregon counties are using the victim-offender mediation program for misdemeanor crimes and certain felony property crimes.⁵⁰ The mediation starts with a referral by either the court or the prosecuting attorney.⁵¹ If both sides agree to mediate, the process is set up and the offender can avoid a criminal record if he complies with the agreement reached in mediation.⁵² Similarly, in Ohio the Private Complaint Mediation Service provides an alternative to formal judicial processes for misdemeanor cases.⁵³ Like in Poland, police officers and other social

⁴³ *Id.* The prosecutor's office and juvenile court system are also partners in this project. *Id.*

⁴⁴ *Id.*

⁴⁵ Restorative Justice, Victim-Offender Mediation: Short Notes from Poland, at <http://www.restorativejustice.org/rj3/Feature/2004/Novemeber/poland1.htm>

⁴⁶ *Id.*

⁴⁷ *Id.*; See also Elzbieta Czwartosz, Qualifications of Mediators Between Victims and Offenders in Poland, at <http://www.restorativejustice.org/rj3/Full-text/Poland/qualifications.pdf>.

⁴⁸ *Id.*

⁴⁹ Restorative Justice, Victim-Offender Mediation: Short Notes from Poland, at <http://www.restorativejustice.org/rj3/Feature/2004/Novemeber/poland1.htm>

⁵⁰ Oregon State Bar, at <http://www.osbar.org/public/legalinfo/1221.htm>. Property crimes that qualify for victim-offender mediation are unauthorized use of motor vehicle, burglary, theft, criminal trespass, and some lower level assaults. *Id.*

⁵¹ *Id.*

⁵² *Id.* Oregon claims that utilizing mediation for criminal cases provides a benefit for victims who are given an outlet to express their anger, offenders who have the opportunity to take responsibility for their crimes, the courts that save valuable time, and citizens who can become volunteer mediators and actively reduce crime in their communities. *Id.*

⁵³ Mediation of Criminal Misdemeanor Disputes, at http://www.hamilton-co.org/MunicipalCourt/Mediation/mediation_of_criminal.htm.

service agencies can refer misdemeanor cases to mediation in attempt to get them to settle before they reach the prosecutor's desk.⁵⁴ If a settlement is reached, the case is withdrawn altogether, but if no agreement is reached then the case goes to the prosecutor.⁵⁵ In Cook County Illinois the Center for Conflict Resolution also provides mediation services for criminal mediation cases.⁵⁶ Mediation in this county is utilized for more serious cases like assault, battery, and harassment cases between individuals with ongoing relationships.⁵⁷

Florida has an adult mediation program where attorneys of either side can recommend mediation for the case at any stage in the criminal proceeding.⁵⁸ Mediators involved in the victim-offender mediation are appropriately trained and certified by the Florida Supreme Court.⁵⁹ Any unresolved issues can be mediated: restitution, the plea itself, and even whether or not formal charges will be filed.⁶⁰ Though a state attorney and the defendant are required to be present, the victim's attendance in the mediation is voluntary.⁶¹ Unlike in Oregon or Illinois, any agreement reached in the mediation is not confidential as it may be subject to review by the court and can become a part of the court file in the case.⁶²

⁵⁴ *Id.*

⁵⁵ *Id.* Interestingly, the conditions of the agreement reached between the parties are kept in a confidential record by the Private Complaint Mediation Services, so the court never knows what was decided if the agreement is completed.

⁵⁶ Mediation Programs in Cook County Conducted by the Center for Conflict Resolution, *at* <http://www.caadrs.org/adr/ccrprogs.htm>. The Center for Conflict Resolution has been providing mediation services for criminal misdemeanor cases since 1982. *Id.*

⁵⁷ *Id.* In Cook County if the parties agree to mediate with the Center and reach a settlement, they sign an agreement and the criminal charge against the offender is dropped. *Id.* If the parties do not reach an agreement, the case is returned to court but anything discussed during mediation remains confidential. *Id.*; *See also*, Kovach *supra* note 19 at 76.

⁵⁸ Delinquency and Adult Criminal Mediation Program, *at* <http://circuit8.org/adr/criminal.html>.

⁵⁹ *Id.* Though the Supreme Court of the United States does not allow mediations of any kind in criminal cases that it hears, a state court's approval of it can help the program's expansion. Supreme Court Rules of Appellate Procedure Article I, Provisional Rule A, Mediation Conference Procedures. In Florida, the monumental support of the Supreme Court was extremely beneficial to the endorsement of victim-offender mediation in that state. Delinquency and Adult Criminal Mediation Program, *at* <http://circuit8.org/adr/criminal.html>. Similarly, if the California Supreme Court would support the program, our state could become a leader in the forefront of criminal mediation.

⁶⁰ *Id.*

⁶¹ *Id.* The offender's attorney must always be allowed because of the criminal defendant's right to counsel. *Id.*

⁶² *Id.*

III. Local Use of Victim-Offender Mediation: Los Angeles County

In Los Angeles County, mediation is used for some juvenile cases. Though the Los Angeles County District Attorney does not have a victim-offender mediation program, they have a mediation-like process called the Truancy Mediation Program.⁶³ However, unlike in real mediation the agreement is pre-constructed by the DA.⁶⁴ The student, parent and school district are not creating their own settlement agreement in truancy mediation, nor are they engaging in any meaningful dialogue with one another. The program in Los Angeles that comes closest to victim-offender mediation is called the Juvenile Offender Intervention Network.⁶⁵ However, the only cases that qualify for the program are those of non-violent, first-time juvenile offenders.⁶⁶ The offenders enter a ready-made contract where they “acknowledge responsibility for their acts, agree to pay restitution to their victims, maintain good school attendance, and perform community service.”⁶⁷ The cases are intensely supervised by the hearing officer over the course of one year and if the juvenile re-offends or fails to complete the contract, the case is sent back to the prosecutor.⁶⁸ A three year study of the program stated that only 5% of youth participants re-offended, making this an extremely effective program for Los Angeles County.⁶⁹ The success of this program may encourage the Los Angeles District Attorney to endorse the expansion of criminal mediation to serious adult cases as well.

⁶³ Los Angeles County District Attorney’s Office, Truancy at <http://da.co.la.ca.us/cpys/act.htm>. In 1997 the California Youth Authority conducted a survey which revealed a strong link between truancy and juvenile crime, so the District Attorney’s Office initiated programs to combat truancy. *Id.* When students or their parents violate school attendance laws, the case is referred to the DA’s Office where instead of immediate prosecution, parents and students are given an opportunity to enter into a District Attorney School Attendance Contract. *Id.* In this contract, they agree to immediately eliminate unexcused absences and tardies and correct behavioral problems. *Id.* Failure to adhere to the contract can result in formal prosecution. *Id.*

⁶⁴ *Id.*

⁶⁵ Los Angeles County District Attorney’s Office, Juvenile Office Hearings at <http://da.co.la.ca.us/arbitration.htm>.

⁶⁶ *Id.*

⁶⁷ *Id.* Parents agree to attend parenting classes, and all families are referred to group counseling.

⁶⁸ *Id.*

⁶⁹ *Id.*

IV. A Victim-Offender Mediation Model for Sex Based Crimes

So far, victim-offender mediation models have been most popular in juvenile offense cases, and second to that in petty crime cases. There is a substantial hesitation in taking victim-offender mediation into the realm of serious crimes.⁷⁰ However, concerns about the application of the model to these cases are not well grounded, and scholars as well as their research support its expansion.⁷¹ The fact of the matter is that the ideas of restorative justice are most useful for serious crimes, particularly as a substitute for civil litigation in sex based offenses where the offender has admitted to the crime. It is precisely in these situations where the victims are most in need of closure and some sort of explanation or apology that only the offender can provide. Statistics reveal that the perpetrator in sex based offenses is most often someone that the victim knows.⁷² For sex based offenses where the victim is in a relationship with or even related to the offender, staying out of an adversarial courtroom is advantageous.⁷³

The current system offers little opportunity for the victim to really be heard, as victims of sex based offenses rarely want to testify in front of strangers in a courtroom due to the personal nature of their story. Also, the victims are often taken apart on the stand by opposing counsel, and so are limited as to what they reveal about the incident. Allowing the victim of a sex crime to tell their story to the person who inflicted the harm in a controlled environment meets a need that is not addressed in the criminal courtroom. The offender of a sex crime brings with him a sense of guilt that can truly be relieved by forgiveness. Taking away the guilt and feeling anew can provide offenders with the push they need to stop repeating this crime. Restorative justice allows for the victim-offender dialogue which can lead to the healing of both parties that is most vital when a sex based crime has occurred.

⁷⁰ See *infra* section IV, note 84 (District Attorney voices concern about the expansion of mediation to serious crimes).

⁷¹ Umbreit, Coates & Vos, *supra* note 20 at 33.

⁷² Elizabeth Robertson, *Known Danger*, Orange Student Magazine (Fall 2003). Nine out of ten victims of rape know their attacker. *Id.*

⁷³ Mediation Programs in Cook County Conducted by the Center for Conflict Resolution, *at* <http://www.caadr.org/adr/ccrprogs.htm>. This theory is in line with the belief of Cook County, Illinois's victim-offender mediation program which is designed to take cases where the parties are in a relationship, or part of ongoing relationships. See also Kovach, *supra* note 18 at 76.

The American Bar Association endorses victim-offender mediation as a whole, and specifically the notion of “mediating cases of a violent and severe nature,” so long as “special care” is taken and mediators are “extensively trained to handle these “highly sensitive cases.”⁷⁴ Further, studies reveal that offenders involved in sex based charges have the highest levels of participation in victim-offender mediation.⁷⁵ This shows that they are a category of offenders that want to partake in this process, need forgiveness, and are willing to provide victims with whatever restitution they can provide.

The main arguments against the extension of victim-offender mediation to sex based crimes are rooted in the concern for the victim and potential for re-victimization.⁷⁶ For example, even the idea of having to face their offender is too emotionally harmful for some victims. However, mediations would only occur if the victim wanted to participate. Also, the mediation does not have to be face-to-face like in the Polish model, and instead shuttle mediations would meet the needs of both sides. For victims, knowing that the offender is being relayed their full story can be a healing technique. Of course many victims are able to find closure, peace, and forgiveness through the process of coming face-to-face with their offenders. Regardless, the victim-offender mediation programs are aware of these issues with confrontation and they would be a part of what gets looked into when a case is considered for mediation. To ensure that neither victims nor offenders are hurt by the process, courts should only refer appropriate cases for mediation. Mediators should also put the cases through a strict selection process. Training mediators in criminal law and teaching them appropriate ways to deal with these special victims will be necessary. It must also be noted that mediation would not be forced on parties, but instead would only proceed if both parties wanted to be involved. Therefore, there are enough precautionary steps in place to ensure that neither party is being re-victimized or harmed by the mediation process.

⁷⁴ Endorsement of: Victim-Offender Mediation/Dialogue Programs, Part 1 (Aug. 1994), at <http://vorp.com/articles/abaendors.html>.

⁷⁵ Mike Niemeyer & David Shichor, 60 A Preliminary Study of a Large Victim/Offender Reconciliation Program, *Federal Probation* 30, 32 (September 1996). The highest number of offenders willing to participate in victim-offender mediation were those charged with sodomy, sexual battery, and rape. In this group 86 percent of the cases were mediated. *Id.*

⁷⁶ Marty Price, Comparing Victim-Offender Mediation Program Models, 6 *VOMA Quarterly* 1 (1995) at <http://www.vorp.com/articles/compare.html>.

Another concern is that allowing mediation to replace criminal procedure results in allowing the local public to make informal punishments for criminal sex acts. Potentially, the victim would be creating a penalty for the offender. However, this objection overlooks a major aspect of victim-offender mediation which is that there is no penalty.⁷⁷ The mediation provides a place to engage in dialogue and create a restitutionary agreement, it is not an avenue to find proper retribution.⁷⁸ Also, the model for mediation of sex based crimes would be structured like the Ukrainian pilot program in which the mediation is only a substitute for civil proceedings.⁷⁹ The government would retain rights to prosecute the offender criminally and any settlement reached between the parties would only be considered by the criminal court during the sentencing phase of the proceeding. This way, the current criminal justice system remains unaffected by the mediation model for sex based offenses.

It is important to point out that mediation preceding a criminal trial puts offenders at a weaker bargaining position during negotiations at the mediation since guilt is assumed and substantial rights of the defendant may be compromised. However, in the model being proposed the case would only be referred to mediation where the defendant has already admitted to the crime. Secondly, both parties must agree to mediate. Like in Florida's victim-offender mediation model, a the criminal offender would be represented by counsel at all times during the mediation as to ensure that no rights are overlooked and the process is not in any way unfair.⁸⁰ Further, the mediation dialogue would be confidential and there would be a full and fair criminal proceeding aside from the mediation. Therefore, none of the protections afforded to criminal defendants would be cut short by initiating victim-offender mediation.

In 1992, the California legislature discussed using alternative dispute resolution in criminal cases, specifically victim-offender mediation.⁸¹ However, the idea was met by much opposition from the

⁷⁷ Restorative Justice, at www.restorativejustice.org.

⁷⁸ *Id.*

⁷⁹ Search for Common Ground, Restorative Justice Initiative, at http://www.sfcg.org/programmes/ukraine/ukraine_restorative.html.

⁸⁰ Delinquency and Adult Criminal Mediation Program, at <http://circuit8.org/adr/criminal.html>.

⁸¹ 1992 California Assembly Bill 3011(submitted by Representative Isenberg).

California District Attorney's Office.⁸² In discussing mediation with two professionals in this area: one at the Orange County District Attorney's Office and one at the private Mediation Center in Fresno, the opposing views can be explored. A district attorney at the Sex Crimes Unit in Orange County explained that when an offender is not the relative of the victim, the DA and police department "go to great lengths to protect the victims" from any contact with the offender, and therefore there is no place for mediation.⁸³ In her opinion, the victims are "very fragile" and even indirect contact with the offender is "not advisable." She further explained that sex-offenders are often "fixated" with their victims, so this may be the reason that as a group they are so willing to partake in mediation.⁸⁴ As for restitution, the district attorney pointed out that the DA's Victim Witness Advocacy Program works out these matters so that the victim is adequately taken care of in the civil realm.⁸⁵ Conversely, Duane Ruth-Heffelbower, a victim-offender reconciliation program administrator from the Fresno Mediation Center stated that their organization wants to do victim-offender mediation for sex based crimes, but the Fresno District Attorney's Office will not allow it. However, he expressed that in his discussions with the District Attorney in charge of juvenile cases, they both agreed that mediation would be "great," especially in cases "where relationships matter and victim-offender dialogue is important."⁸⁶ This seems to be the popular trend among mediating professionals, and in a 1996-97 survey many stated that they are being asked to "mediate crimes of increasing severity and complexity."⁸⁷ All the mediators interviewed agreed that "advanced training is necessary in working with cases of severe violence."⁸⁸

⁸² Bill Ainsworth & Monica Bay, ADR Bill Under Fire from DAs, Trial Lawyers, *The Recorder*, May 5, 1992, at 2.

⁸³ Interview with a District Attorney from the Sex Crimes Unit at the Orange County District Attorney's Office (April 28, 2005). The district attorney I spoke with has asked to remain anonymous for the purposes of this paper. She stated that even when the offender is a family member or acquaintance, "the opportunity for continued power and control as well as manipulation of the victim would be possible side effects of any face to face or indirect encounters." *Id.*

⁸⁴ *Id.* The DA was also a strong proponent of recent statistics she talked about which showed that "most sex offenders are not subject to rehabilitation," and therefore would not benefit from mediation with their victims. *Id.*

⁸⁵ *Id.* Also, if the civil trial occurs when the offender is incarcerated or on probation, no contact with the victim is allowed and so any contact with the victim, direct or indirect, "would be prohibited." *Id.*

⁸⁶ Interview with Duane Ruth-Heffelbower, administrator at the Fresno Mediation Center, Center for Peacemaking and Conflict Studies (April 23, 2005).

⁸⁷ Umbreit, Coates & Vos, *supra* note 20 at 33.

⁸⁸ *Id.* Studies involving murder, vehicular homicide, manslaughter, armed robbery, and sexual assault in New York, Wisconsin, Alaska, Minnesota, Texas, Pennsylvania, Ohio, and British Columbia are reporting promising, positive results.

In the face of opposition and despite the lack of statutory authority, Orange County was able to develop a model of victim-offender mediation using California laws.⁸⁹ The California Welfare and Institutions Code Section 654 provided broad enough language to give law enforcement agencies the power to “divert” criminal cases.⁹⁰ Under this legal framework, and with funding from the California Dispute Resolution Programs Act of 1991, Orange County rerouted minor criminal cases to mediation in a process they have coined “Victim Offender Reconciliation Process.”⁹¹ Similarly, other California counties can use this Code and available funds to refer victims and offenders in sex based crimes to mediation. In some states, there are long lists of victims who want to meet with their violent offenders, and the number of willing victims by far exceeds the resources available to meet their needs.⁹² Currently, there are over six mediation firms throughout California that specialize in sex based victim-offender mediation cases privately, and dozens that are willing to try out such cases.⁹³ These institutions can be utilized to take court referred cases and the process can easily be initiated. In the end, let the numbers of effected people be the most persuasive factor in determining whether sex based cases are suitable for victim-offender mediation. Studies have shown sexual offenders are the most willing to participate in this mediation program.⁹⁴ There are lists of victims who seek out the program along with those who have tried it and expressed gratitude for not being forgotten and unheard.⁹⁵ Restorative justice is the only initiative that addresses the needs of victims of sexual assault because it is truly an area of criminal law where retribution fails to heal victims. Victim-offender mediation can bring about emotional restoration and closure that is of the utmost concern in sex based crimes.

⁸⁹ Mike Niemeyer & David Shichor, *supra* note 76 at 31; *See also* Victim Offender Reconciliation Program, at <http://www.svdpc-center.org/progmain.htm#VORP>.

⁹⁰ Mike Niemeyer & David Shichor, *supra* note 76 at 31.

⁹¹ *Id.*

⁹² *Id.* at 32.

⁹³ The following specialize in sex based crimes: Victim Offender Reconciliation Program of the Central Valley, Victim-Offender Reconciliation Program of Sacramento County, Los Angeles Victim-Offender Reconciliation Program: Pasadena Pilot, Dispute Resolution Program Services of Santa Clara County, RE-VORP/RE-COURSE of Santa Rosa, Victim-Offender Reconciliation Program of San Joaquin County.

⁹⁴ Mike Niemeyer & David Shichor, *supra* note 75 at 32.

⁹⁵ Umbreit, Coates & Vos, *supra* note 20 at 30.