

Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?

I. INTRODUCTION

Victim-offender mediation is a viable alternative to the traditional criminal justice system in the United States.¹ In the appropriate setting it provides benefits for the victim, the offender, the judicial system, and the community. The first section of this Note will provide a background on victim-offender mediation. It will describe the process of victim-offender mediation, its values, and its effects on the participants and the community.² The second section will discuss several social and political factors that will influence the future success and continuity of victim-offender mediation programs. The third section offers suggestions that proponents can implement in order to ensure the future success of victim-offender mediation programs.

II. DISCUSSION

A. *Victim-Offender Mediation*

1. *Description*

The Victim-Offender Reconciliation Program in Kitchener, Ontario, is widely regarded as the model for many of today's victim-offender mediation programs.³ The first mediation session in Kitchener took place as a result of a suggestion from a probation officer.⁴ The probation officer (Worth) was also a full-time volunteer for a religious organization named the Mennonite

¹ For research on international mediation programs, see generally *INFORMAL JUSTICE?* (Roger Matthews ed. 1988); *RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION: INTERNATIONAL RESEARCH PERSPECTIVES* (Heinz Messmer & Hans-Uwe Otto eds., 1992).

² This Note will focus primarily on Victim-Offender Reconciliation Programs when offering specific examples of victim-offender mediation processes and effects.

³ See Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 *SMU L. REV.* 2191, 2195 (1993); see also Dean E. Peachey, *The Kitchener Experiment*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 14, 14 (Martin Wright & Burt Galaway eds., 1989). Although the Kitchener program is often cited as the forerunner of today's victim-offender mediation programs, there were a few programs, including the Columbus Night Prosecutor Program, in existence before the Kitchener program had begun. Peachey, *supra*, at 16.

⁴ Peachey, *supra* note 3, at 14.

Central Committee (MCC).⁵ Consistent with his Mennonite values of pacifism and individual responsibility, Worth recommended that two vandals personally face their victims.⁶ To his surprise, the judge accepted this recommendation.⁷ The judge ordered a one-month remand of the offenders' cases to allow them time to meet with the victims and determine the amount of their losses.⁸ The judge also ordered that Worth and another member of the MCC (Yantzi) oversee these meetings.⁹

Both offenders visited the homes and establishments that they had vandalized.¹⁰ Worth and Yantzi took notes as the offenders explained who they were and why they were there.¹¹ The offenders spoke to twenty-one victims whose damages, after insurance recoveries, totaled \$1065.¹² The judge ordered each of the offenders to pay a \$200 fine and sentenced them to eighteen months of probation.¹³ As part of the boys' probation, the judge ordered that they each pay a total of \$550 and the probation officer required that the victims be recompensed within three months.¹⁴ The offenders paid back the victims within the three-month period.¹⁵

The offenders reported that the experience had been difficult, but beneficial.¹⁶ A variety of responses came from the victims, including positive responses such as: "Thanks, I never expected to see that money. I think I'll spend it in a very special way to help somebody else[.]" and "Thanks a lot. I was young too, only some of us didn't get caught."¹⁷ There were also negative responses, for example:

"Aren't you ashamed of yourself? You know this really isn't going to cover it all. Who is going to pay for all those trips to Guelph for parts? Who is going to pay when they raise my insurance premiums? I don't

⁵ Peachey, *supra* note 3, at 14.

⁶ *Id.* at 14-15.

⁷ *Id.* at 15.

⁸ *Id.*; Mika, *supra* note 3, at 2195.

⁹ Peachey, *supra* note 3, at 15.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 15-16.

¹⁴ Peachey, *supra* note 3, at 16.

¹⁵ *Id.*; Mika, *supra* note 3, at 2195.

¹⁶ Peachey, *supra* note 3, at 16.

¹⁷ *Id.*

VICTIM-OFFENDER MEDIATION

want anybody to go to jail, but you know I hope we don't ever have this problem with you again, or anybody else."¹⁸

Although this case was a successful experiment, it foreshadowed issues that formal programs would encounter in the future.¹⁹ These issues include: "multiple victims with a range of personal responses, the involvement of insurance companies in restitution, and the considerable time lapse between the . . . offense and the completion of the restitution process."²⁰

Worth, Yantzi, and the MCC continued to experiment with their new project, which came to be known as the Victim-Offender Reconciliation Project (VORP).²¹ This model was adopted a few years later in Elkhart, Indiana, and became the Center for Community Justice.²²

There are various VORP programs in the United States.²³ These programs may vary in the types of cases and clients they handle. Some VORP programs serve only adult or juvenile offenders, or both.²⁴ Some may be limited to certain types of crimes, such as, misdemeanors, felonies, property crimes, or violent crimes.²⁵ VORP programs also vary in their affiliations. They may be affiliated with a religious organization, a nonprofit community organization, or the traditional court system.²⁶ They may have paid or volunteer staff. VORP programs also differ in their size, "funding, . . . referral sources, and points of intervention in the criminal and juvenile justice processes."²⁷ Notwithstanding these differences, the VORP process generally follows the same basic steps.

The first step is a referral of the case to the mediation program.²⁸ These referrals generally come from people within the justice system, such as

¹⁸ Peachey, *supra* note 3, at 16.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 16-17.

²² Mika, *supra* note 3, at 2195.

²³ The American Bar Association has identified approximately 150 community dispute resolution programs that include mediation of criminal matters. There are approximately 100 programs which exclusively handle victim-offender mediation. *Id.* at 2192.

²⁴ *Id.* at 2196.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Mika, *supra* note 3, at 2196. VORP programs may also differ in their formal or informal values and their goals. *Id.* See also *infra* notes 80-104 and accompanying text.

²⁸ *Id.*

“police, prosecutors, judges, and probation officials,”²⁹ and may take place any time from the date of the offense to the period of parole.³⁰

The second step is the preparation of the case.³¹ The victim and offender are contacted separately and asked to agree to participate in the mediation.³² During this stage, the staff gathers information about the offense, answers questions from the parties, and schedules the mediation session.³³

The third step of the VORP process is the actual meeting between the victim and the offender.³⁴ The meeting “is structured to allow the parties, in turn, to elaborate on the facts of the case, to ask questions of each other, to reveal feelings, to review consequences of the conflict, and to discuss a resolution.”³⁵ When the parties reach an agreement, it is written and is signed by both parties. Such an agreement will specify a restitution or community service schedule.³⁶ If the parties cannot come to an agreement, another meeting may be scheduled or the case will be returned to the traditional justice system.³⁷

The fourth step of the VORP process involves preparing the file and returning it to the referral source.³⁸ Some programs collect and distribute restitution payments.³⁹ Some continue to monitor and enforce compliance with the agreement, although most do not.⁴⁰ However, many programs evaluate offender compliance with the agreement and client satisfaction with the process.⁴¹

²⁹ Mika, *supra* note 3, at 2197.

³⁰ *Id.* For example, a police officer might refer an offender to a VORP program before any criminal proceedings have begun in order to allow the offender to avoid the criminal process. A parole officer might also refer a parolee who has committed an offense that would cause a revocation of parole. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* If the staff finds that the case is inappropriate for mediation, the case will be removed during this stage. *Id.*

³⁴ Mika, *supra* note 3, at 2197.

³⁵ *Id.* at 2197-98.

³⁶ *Id.* at 2198. The agreement may also specify behavioral directions, such as to end harassment or to refrain from creating a nuisance. RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE 93 (1987).

³⁷ Mika, *supra* note 3, at 2198.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

2. Participants' Expectations

The participants come to victim-offender mediation programs from various backgrounds⁴² and with different expectations and goals.⁴³ Victims' goals include: to recover their losses,⁴⁴ to participate directly in the criminal justice system,⁴⁵ to help⁴⁶ and confront⁴⁷ the offenders, and to explain their injury so that the offenders understand the harm they have caused.⁴⁸ Although victims may initially be nervous about meeting the offender, they participate voluntarily and generally do not feel pressured to interact with the offender.⁴⁹

Offenders come from less diverse backgrounds.⁵⁰ Their goals include: "to avoid harsher punishment, to get the whole experience of crime and consequences behind them, and to make things right."⁵¹ Although offender participation is generally portrayed as voluntary, at least one study found this not to be the case.⁵²

⁴² See Robert B. Coates & John Gehm, *An Empirical Assessment, in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 251, 252 (Martin Wright & Burt Galaway eds., 1989).

⁴³ A study of VORP programs found that the three highest-rated goals for victims were: "recovering loss, helping offenders stay out of trouble, and participating meaningfully in the criminal justice process." Coates & Gehm, *supra* note 42, at 253.

⁴⁴ *Id.*

⁴⁵ *Id.* See also Mika, *supra* note 3, at 2196.

⁴⁶ Coates & Gehm, *supra* note 42, at 252; Mika, *supra* note 3, at 2196.

⁴⁷ See Coates & Gehm, *supra* note 42, at 252; Mika, *supra* note 3, at 2196.

⁴⁸ Coates & Gehm, *supra* note 42, at 252.

⁴⁹ *Id.* at 253.

⁵⁰ *Id.* at 252. "Seventy-three percent of the offenders . . . were juvenile Over 90 per cent [sic] were male and Caucasian Overall, . . . the offenders were mainly young, with little prior criminal justice experience, and in the mid-range of offense seriousness." *Id.* The relative youth of the group is to be expected given the correlation between youth and criminal acts. See Candace McCoy, *From Sociological Trends of 1992 to the Criminal Courts of 2020*, 66 S. CAL. L. REV. 1967, 1967 (1993).

⁵¹ Coates & Gehm, *supra* note 42, at 253.

⁵² *Id.* (study of VORP programs in Indiana and Ohio). Many offenders are referred from the court system and participate because they feel it is required. The study also found that offenders felt that their punishment would be reduced if they participated in the mediation. *Id.*

3. Benefits

Victim-offender mediation programs affect the parties, the community, and the criminal justice system.⁵³ Although responses from participants vary, parties generally report that the programs are beneficial.⁵⁴ Victims appreciate the chance to directly participate in the criminal justice process.⁵⁵ Victims of crime may feel helpless because they were not able to prevent or stop the crime that was committed against them. The traditional justice system does not allow them to regain any control because the prosecution of the offender is in the hands of the state. Victims may feel as if they are simply a tool of the state, a mere witness against the offender.⁵⁶ Through mediation, victims can participate in fashioning a resolution for the offense and thereby regain control. In the Coates & Gehm study, victims reported that they were most satisfied with the chance to meet the offender.⁵⁷ Through this interaction, the victims were better able to understand the crime and the offender's situation, and to be present while the offender expressed remorse.⁵⁸

Offenders also experience benefits from mediation. Many feel that it is beneficial for them to meet their victims, and are pleased that the victims are willing to listen to them.⁵⁹ The most obvious benefit to the offender is a lighter sentence,⁶⁰ but there are other benefits as well. Offenders also

⁵³ Mika, *supra* note 3, at 2198.

⁵⁴ See Coates & Gehm, *supra* note 42, at 254. In the previously cited study, 83% of the offenders and 59% of the victims were satisfied. All of the offenders and all but one of the victims said they would choose to participate in the program again if they were involved with another crime. *Id.*

⁵⁵ Mika, *supra* note 3, at 2198; Mark S. Umbreit & Robert B. Coates, *Victim-Offender Mediation: A Review of Research in the United States*, in GWYNN DAVIS ET AL., MAKING AMENDS: MEDIATION AND REPARATION IN CRIMINAL JUSTICE 190, 192 (1992).

⁵⁶ Mediation is not free of criticism from victims' rights activists. Helen Reeves cautions that proponents of victim-offender mediation should take care to ensure that mediation programs are not undertaken primarily for the benefit of offenders and that victims are not exploited for this purpose. See Helen Reeves, *The Victim Support Perspective*, in MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 44, 48 (Martin Wright & Burt Galaway eds., 1989).

⁵⁷ Coates & Gehm, *supra* note 42, at 254. The victims were least satisfied with the delay between the offense and the resolution and the lack of follow-up to assure that the offender fulfilled the agreement. *Id.*

⁵⁸ *Id.*; Umbreit & Coates, *supra* note 55, at 192-93.

⁵⁹ Umbreit & Coates, *supra* note 55, at 193; Coates & Gehm, *supra* note 42, at 254.

⁶⁰ See Mika, *supra* note 3, at 2198. Many offenders are able to avoid jail time and, in some cases, even a criminal record. Coates & Gehm, *supra* note 42, at 254.

VICTIM-OFFENDER MEDIATION

appreciate the opportunity to “make things right”⁶¹ and put the offense behind them. Offenders, like the victims, are given a chance to regain control through active participation in the process. The traditional justice system does not provide this opportunity. The offender may gain more respect for the criminal justice system through this process. Further, the offender may come to understand the personal costs that result from criminal actions, and gain an appreciation for other people’s rights.⁶² The fulfillment of the mediation agreement can be a positive, productive action, in contrast to jail, which is usually a negative, unproductive experience.

Mediation also offers benefits to the community as a whole. VORP programs that include volunteers increase the participation of community members in the criminal justice process.⁶³ Mediation agreements which require community service directly benefit the community.⁶⁴ “To the extent that VORP enhances the possibilities of offender rehabilitation and reduces recidivism, the community is spared future criminal conflict and victimization.”⁶⁵

The justice system benefits from mediation as well. Mediation provides an efficient, less costly alternative to criminal litigation and relieves the overburdened criminal court system.⁶⁶ By reducing recidivism, mediation further relieves the justice system. Participant satisfaction lends credibility to mediation programs and gives victims and offenders a more positive attitude toward the criminal justice system.

Mediation also helps to integrate the offender back into the community. This is a benefit for the offender as well as for the community. The offender is treated with respect, and negotiates an agreement with the victim as an equal party. Each person is allowed to “tell his or her own truth,” and each party comes to understand the circumstances of the other. Because the offender listens and is listened to by the victim, there is an interpersonal connection that bonds the offender to the community. When offenders are sent to jail, they are treated as inferior and not fit to live within the community. When they are released, they carry a stigma which continues to separate them from others. If a person is not accepted by the community, there is little incentive to follow its rules. Mediation provides a mechanism for offenders to correct their wrongs and make a positive contribution to society.

⁶¹ Coates & Gehm, *supra* note 42, at 254; Umbreit & Coates, *supra* note 55, at 193.

⁶² Mika, *supra* note 3, at 2198.

⁶³ *Id.* at 2199.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

B. Factors That Will Influence the Development of Victim-Offender Mediation

The development of victim-offender mediation programs will be affected by various social and political factors. Proponents of victim-offender mediation will have little control over these factors, but they can adapt their programs and public relations focus appropriately. The factors that will have the most influence are: (1) crime rates; (2) the growth of alternative dispute resolution in general; (3) the acceptance by the public of reparative justice values; (4) the Victims' Rights Movement; and (5) the political need to be "tough" on crime.

1. Crime Rates and the Response from the Criminal Justice System

The success of victim-offender mediation programs will depend upon the amount and types of crimes that will be prevalent in the future and the ability of mediation programs to adapt to new developments. Mediation is thought to be particularly well-suited for property crimes, minor violent crimes, juvenile crimes, and crimes within families.⁶⁷ The extent to which these types of crimes increase or decrease will affect the growth of victim-offender mediation programs. If these types of crimes decrease to a great extent, victim-offender programs may need to adjust in response.

Several factors contribute to the crime rate, including poverty, gang activity, and legislative responses to crime and other social problems.⁶⁸ If Congress or state legislatures take extreme actions that increase poverty levels, crime could increase dramatically. Conversely, if Congress decriminalizes drugs or, in place of incarceration, promotes mandatory medical treatment for drug addicts, a significant group of people might be cut out of criminal statistics.⁶⁹

⁶⁷ Mediation is considered appropriate for interfamily crimes because family members, for financial or emotional reasons, are often reluctant to prosecute each other. However, spousal abuse cases may carry special problems that make those cases unsuitable for mediation. There will be power imbalances between the abuser and the victim that the mediator may not be able to alleviate. Cf. Sally Engle Merry, *Myth and Practice in the Mediation Process*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 239, 240-43 (Martin Wright & Burt Galaway eds., 1989). Further, an established practice of referring spousal abuse cases to mediation may reinforce the idea that spousal abuse is not a real crime, but that it is a personal dispute with which the state should not concern itself.

⁶⁸ McCoy, *supra* note 50, at 1982.

⁶⁹ See *id.*

VICTIM-OFFENDER MEDIATION

The relative age of the population is the most significant indicator of crime levels.⁷⁰ Teenagers, particularly male teenagers, are the most likely to commit violent offenses.⁷¹ Although it is generally acknowledged that the United States population is aging, local demographics may vary and unforeseen social factors may alter this scenario.⁷² The aging of the population would seem to indicate that there will be less crime in the future. However, there are at least two mitigating factors. First, offenders are starting to commit crimes at an earlier age.⁷³ Second, the age of the population may simply affect the types of crime committed rather than the amount of crime committed. For example, younger people are more likely to commit typical street crimes, while older people are more likely to commit crimes related to drunkenness and child or spousal abuse.⁷⁴ Thus, the aging of the population may simply decrease typical street crime and increase alcohol-related crime and interfamily abuse.⁷⁵

While proponents of victim-offender mediation cannot control crime levels (except to the extent that their programs prevent recidivism), they must remain flexible and adjust their programs so as to offer quality service that is responsive to community needs.

2. *The Growth of Alternative Dispute Resolution*

As alternative dispute resolution (ADR) continues to produce successful results in the civil arena, more people will implement ADR in criminal conflicts. Mediation has gained considerable support with the bench,⁷⁶ bar,⁷⁷ and client participants.⁷⁸ Further, overloaded criminal court systems are in need of inexpensive and efficient alternatives to reduce their caseloads.⁷⁹ In a climate where politicians are striving to make government more efficient, ADR is an attractive option.

⁷⁰ McCoy, *supra* note 50, at 1968.

⁷¹ *Id.* at 1969.

⁷² *See, e.g., id.* at 1971-79. McCoy cites several factors that may alter demographic predictions including immigration, attitudes toward childbearing, AIDS, and war. *Id.* at 1978-79.

⁷³ *Id.* at 1973-75.

⁷⁴ *Id.* at 1969.

⁷⁵ If mediation programs are to serve interfamily abuse cases, they must find a way to counteract the power imbalances inherent in an abusive relationship. *See* note 67, *supra*.

⁷⁶ *See* Lynn A. Kerbeshian, *ADR: To Be or . . . ?*, 70 N.D. L. REV. 381, 398-99 (1994).

⁷⁷ *See id.* at 397-98.

⁷⁸ *See id.* at 385-90.

⁷⁹ *See* Mika, *supra* note 3, at 2194.

3. *Acceptance of Reparative Justice Values*

Victim-offender mediation is based on goals and values that are significantly different from those of the conventional punitive justice system in the United States. While the conventional system is based on a theory of retributive justice, victim-offender mediation is based on a theory of restorative justice. Howard Zehr has developed a model comparing the different values of retributive and restorative justice as they relate to crime, accountability, and justice.⁸⁰ According to Zehr, retributive justice defines crime as the violation of rules set by the State. Thus, the State is the victim when a crime is committed.⁸¹ Retributive justice ignores the needs and rights of the victim, as well as any interpersonal dimensions of the crime.⁸² In contrast, restorative justice defines crime by the harm that the act causes both to people and relationships.⁸³ Where retributive justice views wrongs as creating guilt,⁸⁴ restorative justice views wrongs as creating liabilities and obligations to victims.⁸⁵ Under retributive justice, debt is owed to society in the abstract and is paid by suffering punishment.⁸⁶ Under restorative justice, debt is owed first to the victim and is paid by making the victim whole.⁸⁷ Thus, the offender is held accountable by taking responsibility for his or her actions, not by "taking one's 'medicine.'"⁸⁸

In addition to different definitions of crime and accountability, there are distinct differences between the retributive and restorative definitions of justice. Under retributive justice, assigning blame for past actions is essential.⁸⁹ This model of justice is adversarial and assumes win-lose outcomes.⁹⁰ The infliction of pain is considered normative; the injury to the offender is balanced against the harm by the offender.⁹¹ Victims' interests are ignored; they lack information about the case and rarely obtain

⁸⁰ Mika, *supra* note 3, app., at 2204-06 (citing HOWARD ZEHR, CHANGING LENSES 184-85, 202, 211-14 (1990)). See Appendix, *infra*.

⁸¹ Mika, *supra* note 3, app., at 2204.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Mika, *supra* note 3, app., at 2204.

⁸⁷ Mika, *supra* note 3, app., at 2204.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2205-06.

⁹⁰ *Id.*

⁹¹ *Id.*

VICTIM-OFFENDER MEDIATION

restitution.⁹² The offender has little direct participation in the process and has no responsibility for the resolution.⁹³ The offender's ties to the community are weakened.⁹⁴ Justice is seen as "right rules," and is tested by the "intent and process."⁹⁵ Finally, retributive justice ignores the relationship between the victim and the offender, as well as the social, economic, and moral context of the situation.⁹⁶

In contrast, restorative justice focuses on problem-solving and future behavior.⁹⁷ The emphasis is on repairing social injuries.⁹⁸ Cooperation is encouraged to achieve win-win outcomes.⁹⁹ The victims' needs are central; victims' suffering is acknowledged and their role in the process is recognized.¹⁰⁰ The offender also has a role to play in creating a resolution.¹⁰¹ The imbalance created by the offender's actions is balanced by raising the status of both the victim and the offender.¹⁰² The offender's ties to the community are increased.¹⁰³ Justice is seen as "right relationships," and is tested by its results.¹⁰⁴ Finally, the relationship between the victim and the offender is central, and the complete social context of the behavior is relevant.¹⁰⁵

The extent to which the public accepts the values of restorative justice will influence the level of public support for victim-offender mediation programs. If the public accepts these values, and this acceptance is communicated to potential funders, victim-offender mediation programs are likely to continue to grow.

⁹² Mika, *supra* note 3, app., at 2205.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2206.

⁹⁶ *Id.*

⁹⁷ Mika, *supra* note 3, app., at 2205.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2205.

¹⁰¹ *Id.*

¹⁰² Mika, *supra* note 3, at 2206.

¹⁰³ *Id.* at 2205.

¹⁰⁴ *Id.* at 2206.

¹⁰⁵ *Id.*

4. *Victims' Rights Movement*

The modern criminal justice system has neglected the needs of crime victims.¹⁰⁶ Victims have no formal participation in the criminal justice system other than as witnesses.¹⁰⁷ Victims' rights organizations have formed in response to this neglect.¹⁰⁸ The movement seeks to demonstrate that victims have a legitimate interest in participating in the criminal process.¹⁰⁹ Victim-offender mediation responds to this need. Mediation provides the victim with a means of achieving restitution that is more satisfactory than pursuing a civil suit.¹¹⁰ It also allows victims to actively pursue restitution, instead of hoping that a judge will order repayment on his or her own initiative. Most importantly, mediation allows victims to participate in shaping their own remedy. Because mediation addresses victims' need to participate in the criminal justice process, the growth of the victims' rights movement should have a positive effect on the growth of victim-offender mediation programs.

5. *Politics: The Need to be "Tough" on Crime*

A brief review of recent political campaigns demonstrates how critical it is for politicians to show that they are "tough" on crime in order to gain

¹⁰⁶ Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 389 (1986); Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN'S J. LEGAL COMMENT 107, 107 (1992); see Andrew J. Karmen, *Who's Against Victim's Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT 157, 157 (1992); Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 EMERGING ISSUES ST. CONST. L. 163, 163 (1988).

¹⁰⁷ See THE INTERNATIONAL LIBRARY OF CRIMINOLOGY, CRIMINAL JUSTICE & PENOLOGY, VICTIMOLOGY at xi (Paul Rock ed., 1994). For a history of the development of prosecution from a private right to a state action, see generally *id.* See also Cardenas, *supra* note 107, at 359-72; Frank, *supra* note 107, at 109-10.

¹⁰⁸ See generally CHARLES G. BROWN, FIRST GET MAD, THEN GET JUSTICE (1993); FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM (Ezzat A. Fattah ed., 1986).

¹⁰⁹ Cardenas, *supra* note 107, at 357-58.

¹¹⁰ For relatively minor crimes, pursuing a civil suit is often too costly and time consuming to be worth the effort. Civil courts are a "slow, expensive and ineffective avenue of redress for the vast majority of crime victims." Alan T. Harland & Cathryn J. Rosen, *Impediments to the Recovery of Restitution by Crime Victims*, 5 VIOLENCE & VICTIMS 127, 134 (1990).

VICTIM-OFFENDER MEDIATION

public support.¹¹¹ Being tough on crime seems to mean that one must advocate the death penalty and mandatory incarceration policies like "three strikes and you're out." Politicians who do not advocate these policies must change their stance or pay the political price.¹¹²

It is political suicide for any politician to support a project that is perceived as soft on crime. There is a danger that victim-offender mediation could be perceived as soft on crime because it sometimes results in lighter sentencing for offenders.¹¹³ If the public adopts this perception, politicians who might otherwise fund victim-offender mediation programs will be reluctant to support them. If, however, victim-offender mediation programs are perceived as beneficial for the victims of crime, politicians can easily support such programs. As Andrew Ashworth noted:

Championing victims' rights is not merely attractive politically but also a seemingly unanswerable cause. Any doubter can swiftly be characterized as arguing in favor of injustice, and that would be absurd "[I]n the criminal justice debate, concern for the interests of victims of crime constitutes an almost unassailable moral position."¹¹⁴

¹¹¹ See David S. Broder, *Races for Governor Could Show if Women Candidates are Vulnerable on Crime Issue*, PHILA. INQ., June 17, 1994, at A22; Susan Estrich, *Death Penalty Politics: A Clever Cop-Out for Politicians Who Don't Have a Handle on Crime*, USA TODAY, July 14, 1994, at 13A; Anthony Flint, *Voters' Fear of Violence Takes Hold in Senate Race*, BOSTON GLOBE, Oct. 24, 1994, at 1; Mimi Hall, *In Pa., Issue Seems to Be Machismo*, USA TODAY, Oct. 21, 1994, at 4A; Tom Kenworthy, *Clinton Crime Speech Gets Warm Greeting*, WASH. POST, Oct. 18, 1994, at A12; *Tough on Crime; Pataki and Cuomo Want to be Crime-Busters; Pataki Would be a Budget Buster as Well*, NEWSDAY, Oct. 14, 1994, at A50; Susan Yoachum, *Brown, Wilson Take Gloves Off, Trade Jabs about "Lies:" She Denies She's an "ACLU Liberal," He Calls Her Ads "Ludicrous,"* S.F. CHRON., July 19, 1994, at A3.

¹¹² See, e.g., Estrich, *supra* note 112, at 13A (remarking that Kathleen Brown promised to enforce the death penalty even if she opposes it, and that Mario Cuomo offered to turn the issue over to the voters); Flint, *supra* note 112, at 1 (noting that Senator Ted Kennedy has lost voter support due to his opposition to the death penalty).

¹¹³ See Mika, *supra* note 3, at 2198; Coates & Gehm, *supra* note 42, at 254.

¹¹⁴ Andrew Ashworth, *Some Doubts about Restorative Justice*, 4 CRIM. L.F. 277, 279 (1993) (citing David Miers, *The Responsibilities and the Rights of Victims of Crime*, 55 MOD. L. REV. 482, 496 (1992)).

Thus, a program that has the support of victims' rights organizations can be supported by politicians without fear of negative consequences.¹¹⁵

C. Encouraging Victim-Offender Mediation Program

Proponents of victim-offender mediation programs must react to each of the factors previously discussed in order to enhance the growth and development of victim-offender programs. Although proponents certainly cannot control crime rates, they must remain attentive to changing patterns in the level and types of crime so that they can more efficiently serve the public. With this information, they can train their staff so that their skills are used to the fullest extent possible.

The positive reputation of ADR is a great advantage for proponents of victim-offender mediation. However, a certain amount of discomfort remains as a result of unfamiliarity with the process. Proponents must keep the economic and social benefits of victim-offender mediation in the public eye and continue to promote alternative processes to members of the Bench and Bar.

Convincing the general public to adopt the values of restorative justice might be the most difficult task, since the values of retributive justice have such a powerful and familiar presence in the American criminal justice system. Proponents must emphasize the benefits to the community and the victims.¹¹⁶ The majority of the public will probably not be sympathetic to the offenders, however they will probably respond favorably to the reduction in recidivism rates. Thus, these benefits should be emphasized.

The victims' rights movement can be a great asset to proponents of victim-offender mediation. As discussed previously, to support victims' rights is to put oneself virtually beyond reproach. Proponents should form visible local or national coalitions with victims' rights organizations in order to display to the public that victim-offender mediation programs are truly beneficial for victims. Public opinion can be crucial in this time of threatened government spending cuts. The support of the public could create government support for mediation programs and increase private donations.

Government support is important because many programs are court-connected or government funded. To retain and expand these programs, proponents will need financial and political support from politicians.

¹¹⁵ This is generally true, but any politician's career can be destroyed by one "Willie Horton." It is possible that a politician could be blamed if an offender avoided imprisonment because of participation in a mediation program and subsequently committed a violent crime.

¹¹⁶ See *supra* notes 106-10 and accompanying text.

VICTIM-OFFENDER MEDIATION

III. CONCLUSION

Building public support is primarily a means to influence government actors. Politicians seem to be compelled to advocate programs that are tough on crime. In the current political climate, proponents of victim-offender mediation will not be able to convince politicians to support mediation if the public perceives mediation as soft on crime. Thus, it is essential for proponents to convince the public that victim-offender mediation is not soft on crime, but that it is a cost-effective, legitimate way to benefit the community and victims, and to prevent offenders from repeating their criminal behavior.

Katherine L. Joseph

APPENDIX

COMPARING JUSTICE PARADIGMS*

A. *Understandings of Crime*

<i>Retributive Justice</i>	<i>Restorative Justice</i>
Crime defined by violation of rules (i.e., broken rules)	Crime defined by harm to people and relationships (i.e., broken relationships)
Harm defined abstractly	Harm defined concretely
Crime seen as categorically different from other harms	Crime recognized as related to other harms and conflicts
State as victim	People and relationships as victims
State and offender seen as primary parties	Victim and offender seen as primary parties
Victims' needs and rights ignored	Victims' needs and rights central
Interpersonal dimensions irrelevant	Interpersonal dimensions central
Conflictual nature of crime obscured	Conflictual nature of crime recognized
Wounds of offender peripheral	Wounds of offender important
Offense defined in technical legal terms	Offense understood in full context: moral, social, economic, political

VICTIM-OFFENDER MEDIATION

B. Understandings of Accountability

<i>Retributive Justice</i>	<i>Restorative Justice</i>
Wrongs create guilt	Wrongs create liabilities and obligations
Guilt absolute, either/or	Degrees of responsibility
Guilt indelible	Guilt removable through repentance and reparation
Debt is abstract	Debt is concrete
Debt paid by taking punishment	Debt paid by making right
Debt owed to society in the abstract	Debt owed to victim first
Accountability as taking one's "medicine"	Accountability as taking responsibility
Assumes behavior chosen freely	Recognizes difference between potential and actual realization of human freedom
Free will or social determination	Recognizes role of social context as choices without denying personal responsibility

C. Understandings of Justice

<i>Retributive Justice</i>	<i>Restorative Justice</i>
Blame-fixing central	Problem-solving central
Focus on past	Focus on future
Needs primary	Needs secondary
Battle model; adversarial	Dialogue normative
Emphasizes differences	Searches for commonalities
Imposition of pain considered normative	Restoration and reparation considered normative

One social injury added to another	Emphasis on repair of social injuries
Harm by offender balanced by harm to offender	Harm by offender balanced by making right
Focus on offender; victim ignored	Victims' needs central
State and offender are key elements	Victim and offender are key elements
Victims lack information	Information provided to victims
Restitution rare	Restitution normal
Victims' "truth" secondary	Victims given chance to "tell their truth"
Victims' suffering ignored	Victims' suffering lamented and acknowledged
Action from state to offender; offender passive	Offender given role in solution
State monopoly on response to wrongdoing	Victim offender and community roles recognized
Offender has no responsibility for resolution	Offender has responsibility in resolution
Outcomes encourage offender irresponsibility	Responsible behavior encouraged
Rituals of personal denunciation and exclusion	Rituals of lament and reordering
Offender denounced	Harmful act denounced
Offender's ties to community weakened	Offender's integration into community increased
Offender seen in fragments; being definitional	Offender viewed holistically
Sense of balance through retribution	Sense of balance through restitution

VICTIM-OFFENDER MEDIATION

Balance righted by lowering offender	Balance righted by raising both victim and offender
Justice tested by intent and process	Justice tested by its "fruits"
Justice as right rules	Justice as right relationships
Victim-offender relationships ignored	Victim-offender relationships central
Process alienates	Process aims at reconciliation
Response based on offender's past behaviour	Response based on consequences of offender's behavior
Repentance and forgiveness discouraged	Repentance and forgiveness encouraged
Proxy professionals are the key actors	Victim and offender central; professional help available
Competitive, individualistic values encouraged	Mutuality and cooperation encouraged
Ignores social, economic, and moral context of behavior	Total context relevant
Assumes win-lose outcomes	Makes possible win-win outcomes

