VICTIM-OFFENDER MEDIATION: AN ALTERNATIVE ACCOUNTABILITY METHOD IN POLICE BRUTALITY CASES

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I. INTRODUCTION

It is no secret that our nation has a historical, deep-rooted racial divide. Today’s political climate has done nothing but uncover the racial tension that still exists 154 years after the abolition of slavery. Political campaign rhetoric, executive orders, and Tweets are a few avenues that have shed light on the extreme amount of racism that still exists in America. But the more prominent trend to exploit society’s racism is the outrageous amount of police brutality against unarmed black men and women and the aftermath that follows.

Unfortunately, police brutality has become an all-too-common scenario in the past seven years. While the statistics of these scenarios compared to other decades may be disputed, there is no question that the media more heavily covers these shootings now more than ever. Advances in technology have made the accessibility of these tragedies almost instantaneous through cell phone video footage, police officer body camera footage, and police cruiser dashboard cameras. These technologies have served not only to spread the news of a police shooting, but also to prove that many times, the victim was either unarmed or not acting in a threatening manner. Because of these technological advances, everyone can see and hear these horrors exactly as they unfolded.

In the past several years, the aftermath of these deaths has resulted in extensive, sometimes violent civil unrest. Violent protests, uncooperative community engagement with law enforcement officers, and racial division seem to now be the normal response to these situations. What has also become

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1 Roland G. Fryer, Jr., An Empirical Analysis of Racial Differences in Police Use of Force 28 (Nat’l Bureau of Econ. Research, Working Paper No. 22399, 2016) (finding no statistically significant differences in the likelihood that a black or Hispanic man is more likely to be the victim of police lethal force than a white man is); but see James W. Beuhler, Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010–2014, 107 AJPH RESEARCH 295 (2017) (concluding that while the largest number of deaths were white males, when that number is compared to deaths per million, black and Hispanic males were 2.8 and 1.7 times higher respectively. Therefore, the study found, black males are 2.8 times more likely and Hispanic males are 1.7 times more likely to be victims of police brutality resulting in their death).


a commonality in these tragic instances is the shortcomings of the justice system in placing accountability on these officers. If the justice system will not hold them accountable, who will?

Recent data suggests that, generally, officers are not being punished or taking responsibility for shooting unarmed black men. This is often because prosecutors may decide to drop charges altogether or the officer could be acquitted at trial. Part II of this article will begin by analyzing a few high-profile police brutality and shooting incidents, the community responses, and the fates of the officers involved. Part III will then analyze the Alternative Dispute Resolution (ADR) technique known as “victim-offender mediation” and how it is typically used to resolve conflicts. Part IV will identify some potential criticisms with using victim-offender mediation in police brutality and shooting situations and address ways in which those critiques could be avoided. Part V of this article will then advocate for the use of victim-offender mediation as an appropriate conflict resolution method in the police officer’s punishment, or non-punishment, phase. Due to the high number of officers that go unpunished in the traditional criminal justice system and the outrage that stems from that, victim-offender mediation provides a viable solution when implemented appropriately.

II. HIGH-PROFILE CASE STUDIES: POLICE SHOOTINGS OF UNARMED BLACK MEN

This section discusses four brief case studies of high-profile police brutality incidents against unarmed black males. All of these cases resulted in extreme civil disobedience and violent protests that lasted over a span of weeks. It is essential to analyze these case studies to get a better understanding of the divide between African-Americans, police officers, and the communities they live and work in. These cases also show the chaos that follows these shootings and how the civil unrest is harmful for both the communities and our country. Lastly, the case studies highlight the fact that

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6 Id.

7 Alternative Dispute Resolution is a field in which professionals use methods such as arbitration, negotiation, and mediation to resolve disputes among aggrieved parties instead of judicial intervention and litigation. Alternative Dispute Resolution Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw. This article will primarily focus on the mediation aspect of ADR, specifically the restorative justice method of victim-offender mediation.
most police officers that are committing these shootings go unpunished, which ultimately leads to more violence and destruction.

A. Michael Brown

In Ferguson, Missouri on August 9, 2014, police received a complaint that two young, black males had robbed a convenience store. Surveillance footage showed that Michael Brown, an eighteen-year-old African American teenager, was stealing small cigars. Officer Darren Wilson, a white police officer, was patrolling in his police cruiser when he spotted young men fitting the robber’s description. Officer Wilson used his vehicle to stop Michael Brown and questioned him. By all reports, Michael Brown approached Officer Wilson’s vehicle and then an altercation took place. Officer Wilson fired two shots while in his vehicle, one that missed Brown and one that grazed his thumb.

Michael Brown then took off running and Officer Wilson exited his vehicle and pursued Brown on foot. Soon, Brown stopped and turned toward Officer Wilson. Some accounts state that Brown began to run towards Officer Wilson. Other witnesses stated that Michael Brown put his hands in the air, as if to surrender to Officer Wilson. Officer Wilson then fired ten more shots at Michael Brown, resulting in Brown’s ultimate death. His body was left lying in the street for several hours and no weapons were ever found on his person.

The teenager’s death immediately resulted in civil unrest. Protests began that day and lasted for the next several months. There were numerous

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9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
19 Buchanan, supra note 8.
altercations between protestors and police officers. Officers used such tactics as shooting rubber bullets into the crowd of protestors and deploying tear gas. Numerous local businesses were destroyed by the protest, resulting in many cases of looting. Missouri’s Governor eventually called in the National Guard to aid in the chaos.

Nearly three months after the shooting, Officer Wilson’s fate and punishment rested in the hands of a grand jury. A jury comprised of nine white members and three black members decided there was not enough probable cause to show Officer Wilson used excessive force. Therefore, he was not criminally charged. The decision not to indict Wilson sparked another round of outrage and demolition in Ferguson. Protestors threw rocks, bottles, and glass at officers and damaged their vehicles. They broke windows, looted from businesses, and set buildings on fire. Police were dressed in riot gear and continued to deploy tear gas and rubber bullets into the crowds. The city later settled in civil court with the Brown family, but the community and its relationships were destroyed.

B. Freddie Gray

On April 12, 2015, in Baltimore, Maryland, another life was lost to the hands of police brutality. Freddie Gray was stopped by Baltimore police early on April 12, detained, and placed into the police van. Gray was handcuffed and bound at his feet, put into the van headfirst, and was not secured by a seatbelt. This police behavior was completely inconsistent with

20 Id.
21 Id.
22 Id.
23 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Park, supra note 5.
Baltimore Police Department’s (BPD) policy.\textsuperscript{32} Freddie Gray suffered severe spinal and neck injuries as a result of the brutal, unprofessional way police detained him.\textsuperscript{33} The officers stopped the van on four separate occasions and noticed that Freddie Gray was in need of medical attention, but did not make efforts to get him help.\textsuperscript{34} It was not until the officers arrived at the police station that they called for medical assistance, but by that time Freddie Gray was already in cardiac arrest; Gray succumbed to his severe injuries a week later.\textsuperscript{35}

Baltimore residents began to protest Gray’s death in a peaceful manner.\textsuperscript{36} The main group of protestors marched throughout the streets of Baltimore with signs and chants.\textsuperscript{37} However, after a few days, a small group broke off and turned their protest into violence.\textsuperscript{38} This led to complete chaos with hundreds of people throwing large, heavy objects at police officers, physical altercations, and destruction of businesses.\textsuperscript{39} The scene was déjà-vu like from what happened in Ferguson after Michael Brown’s death.

Yet, unlike Michael Brown’s death, the officers involved were criminally charged for their behavior in relation to Freddie Gray’s death.\textsuperscript{40} This brought a bit of optimism that the city desperately needed after Gray’s senseless death, the riots that resulted, and the injustice of police brutality. However, that hope began to fade when three officers—those who faced the most serious charges in connection to the death—were acquitted.\textsuperscript{41} Then, hope was completely lost after the Baltimore prosecutor decided to drop all remaining charges against the three other officers involved.\textsuperscript{42}

\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.

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C. Sylville Smith

A year and a half later, this tragically too familiar pattern occurred again in Milwaukee, Wisconsin. Police pulled over a vehicle they believed to be suspicious in the early afternoon. Officer Heaggan-Brown, an African-American officer, eventually began chasing Smith on foot. Bodycam footage showed Smith tossing his weapon as he ran, but Officer Heaggan-Brown shot at Smith, hitting him once in the arm and once fatally in the chest.

Smith’s death once again sparked outrage both locally and nationally. This specific area of Milwaukee had long been critical of police brutality in their community, and Smith’s death was the final straw. Their protests quickly turned violent and continued for the next two days: gas stations and cars were set on fire, police vehicles were smashed and damaged, and gunshots rang out throughout the night. Multiple were injured from these shots and numerous arrests followed. The National Guard was brought in to calm the chaos, attempting to restore peace.

Officer Heaggan-Brown was charged with first-degree reckless homicide. The case proceeded to trial during which the entire country held its breath in anticipation of the verdict and the public’s response to it. Not surprisingly, given the unfortunate trend, the officer was acquitted. Once again, the community was left destroyed both physically and emotionally and with no justice for Smith.

D. Anthony Lamar Smith

Anthony Lamar Smith was shot and killed by Jason Stockley, a white St. Louis police officer, in 2011. After witnessing a suspected drug deal, the


44 Id.

45 Id.


47 Id.

48 Id.

49 Id.

50 Siemaszko, supra note 43.

51 Id.

52 Bill Chappell, Former St. Louis Police Officer is Acquitted of Murder in Anthony Lamar Smith Case, NAT’L PUB. RADIO (Sept. 15, 2017, 11:54 AM),
police engaged in a high-speed chase with Smith. The police cruiser ultimately crashed into Smith’s vehicle and Officer Stockley exited and approached Smith. He then shot into Smith’s vehicle five times, resulting in Smith’s death. The officer alleged self-defense, and the police did find a gun on Smith’s person. However, the only DNA that was found on the gun was from Officer Stockley, leading many to believe the officer planted the gun after he shot Smith.

Officer Stockley was charged with first-degree murder. From the time of Smith’s death until a verdict was announced, there was an extreme amount of tension in the city. Many threatened civil disobedience if the officer was not convicted, therefore police presence was heightened in the area throughout the trial. In September 2017, the officer’s bench trial concluded with the officer’s acquittal.

St. Louis erupted into mass chaos once again. Much like other violent protests in response to police brutality and non-punishment of the officers, heavy objects were thrown, people were assaulted, buildings were destroyed, and businesses were looted. This civil unrest resulted in over thirty arrests and over ten police officers were injured badly enough that they had to be taken to hospitals. Only three years after the Michael Brown riots, this renewed civil disobedience only deepened the divide between the community and the police force.

From these case studies, it is apparent that tremendous civil tension and violence is often sparked by police brutality—as evidenced through


53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
61 Id.
62 Id.
63 Id.
64 Helmore, supra note 59.
numerous shootings of unarmed black men. The fact that police officers involved in these tragedies are not being held accountable only worsens tensions. The remainder of this article explores the possibility of restorative justice, specifically victim-offender mediation, as a forum to hold these officers accountable when our justice system fails.

III. RESTORATIVE JUSTICE AND VICTIM-OFFENDER MEDIATION: AN OVERVIEW

Restorative justice is defined as, "a theory of justice that emphasizes repairing the harm caused by criminal behavior. It is best accomplished through cooperative processes that allow all willing stakeholders to meet, although other approaches are available when that is impossible. This can lead to transformation of people, relationships and communities."\(^{65}\) Victim-offender mediation is a sub-category of restorative justice. Thus, to understand victim-offender mediation, it is first essential to analyze the history of restorative justice and its evolution over time.

A. History and Evolution

The focus of restorative justice principles is to repair the victim and make them whole again, not to punish the offender. These principles have been traced as far back as biblical times, stemming from Christian culture and beliefs.\(^{66}\) The Christian bible characterized crime as harms committed against individuals and families, not against a government or state entity.\(^{67}\) This idea has carried on throughout history. It can be seen in many early tribes and peoples that founded modern wealthy, industrious nations, such as Native Americans.\(^{68}\) The traditional Navajo justice system relied on re-establishing harmony and peace; therefore, those that violated community norms faced "a system based on clan relations and mediation."\(^{69}\)


\(^{67}\) *Id.*

\(^{68}\) *Id.* at 255.

The concept of crime took a dramatic turn away from restorative justice principles in England during the eleventh century. The British monarchy began to characterize crimes committed by their citizens as "crimes against the Kings peace." No longer was there a focus on the harms done to individuals as a result of these crimes. Instead, the bad behavior was now seen as an injury to the state and emphasis was placed on punishing the offender. Victims seemed to be forgotten about in the process.

The United States adopted their principles of crime and punishment from England. The criminal justice system placed heavy emphasis on the harm done to society and the "state." A prime example of this can be seen in the judicial system where criminal complaints are filed. The caption for these cases is typically "State v. Defendant" or "United States v. Defendant." The traditional focus was for the state to bring the offender before a tribunal to judge his/her guilt. If guilt was found, the state punished that offender with different forms of incarceration. The idea behind the system was retributive justice, to punish the offender and ensure they were "getting what they deserved."

However, the concept of restorative justice began to gain attention and use again in the United States starting in the mid-1970's. Originally, victim organizations themselves were skeptical of restorative justice because the United States criminal justice system historically only focused on the offenders and their needs. Yet, the field continued to grow in other industrial and civilized societies. About twenty years after the concept had been introduced, the American Bar Association (ABA) finally accepted victim-offender mediation as a legitimate form of restorative justice and conflict

70 Umbreit et al., supra note 66, at 255.
71 Id.
72 Id.
73 See generally id.
75 Umbreit et al., supra note 66, at 257.
76 Id.
77 See id.
78 Id.
79 Id. at 259.
80 Id. at 260.
81 Id. at 259–60. Canada was the first country to implement the Victim Offender Reconciliation Program in 1974. For the next decade, many European countries developed programs based off of the Canadian model. England soon thereafter created the first government sponsored victim-offender mediation program.
resolution. Nonetheless, although victim-offender mediation was endorsed by the ABA, its suspicion still persisted. Throughout the 1990’s, professionals made changes to victim-offender mediation guidelines. These revisions helped the American society’s understanding of the process, causing victim-offender mediation to become a common practice today. Nearly every state implements some form of victim-offender mediation or restorative process in to their justice system. Some states choose to codify their practices through legislation. Others decide to legislate restorative justice practices as an option, leaving discretion whether to utilize it up to the judicial branch of government. There are also some states that have no mention of restorative justice or victim-offender mediation in their statues, but still choose to implement techniques in to their systems. While some criticisms still remain, it is apparent that restorative justice and victim-offender mediation programs have become both accepted and popular forms for conflict resolution.

B. Restorative Justice Principles

Once again, because victim-offender mediation is the “child” of restorative justice, it is first essential to understand the principles of restorative justice. Howard Zehr, one of the most influential scholars in the restorative justice world, explains that: “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

Restorative justice methods place concentration on the individuals who were victimized, as well as their families and communities. The actual victims are viewed as being the ones who were harmed and thus need to be made whole again, as opposed to the traditional justice system that emphasizes the harm done to society. Restorative justice also focuses on the offender and

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82 Id. at 260.
83 Id. at 261.
84 Id. at 291–92.
85 Id. at 292–93.
86 Id. at 294.
87 Id. at 294.
89 Umbriet et. al., supra note 66, at 256.
his/her family and community. While holding offenders accountable, restorative justice also aims to treat any underlying problems the offender has, rebuild a relationship with the victim(s), and integrate the offender back into society.

To further understand what restorative justice is, it is important to discuss the principle in the context of how it differs from the traditional form of "justice," i.e. the criminal justice system and incarceration. The following chart serves to highlight the main differences between restorative justice principles and the traditional criminal justice system.

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90 See generally id. at 258-59.
91 See generally id.
Two Approaches to Justice

<table>
<thead>
<tr>
<th>Criminal Justice</th>
<th>Restorative Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violation of the law and harm done to the state/society.</td>
<td>The harm done is an offense against an individualized person and relationships between the victim, offender, and community.</td>
</tr>
<tr>
<td>Breaking of law creates a sense of wrongfulness and guilt.</td>
<td>The harm done creates an obligation on behalf of the offender to take responsibility and make the victim whole again.</td>
</tr>
<tr>
<td>The state and society are tasked with determining guilt and imposing punishment.</td>
<td>Victims, offenders, and the community must work together to achieve “justice.”</td>
</tr>
<tr>
<td>The focus is on offenders getting the punishment they deserve for violating the law.</td>
<td>The focus is on the victims’ necessities and the offender repairing the harm he/she caused.</td>
</tr>
</tbody>
</table>

As many scholars point out, implementing restorative justice principles is not a matter of creating programs that highlight the values laid out in the chart above. Instead, it must be a systematic process with changes in the ways society as a whole view crime, punishment, and one another. To

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92 Id. at 257.
93 Id. at 258.
94 Id. at 263.
achieve restorative justice, reforms must be made within the criminal justice system, the legal process, politics, and even in family and work life.\textsuperscript{95} While there are no specific criterion or requirements for a successful restorative justice approach, Mark Umbriet, professor and director of the Center for Restorative Justice and Peacemaking at the University of Minnesota, School of Social Work, discusses several factors that should be present when applying restorative justice values to a conflict situation:

- "Focus on the harms of wrongdoing more than the rules that have been broken;
- Show equal concern and commitment to victims and offenders, involving both in the process of justice;
- Work toward the restoration of victims, empowering them and responding to their needs as they see them;
- Support offenders while encouraging them to understand, accept, and carry out their obligations;
- Recognize that while obligations may be difficult for offenders, they should not be intended as harms, and they must be achievable;
- Provide opportunities for dialogue, direct or indirect, between victims and offenders as appropriate;
- Involve and empower the affected community through the justice process, and increase its capacity to recognize and respond to community bases of crime;
- Encourage collaboration and reintegration rather than coercion and isolation;
- Give attention to the unintended consequences of our actions and programs; and
- Show respect to all parties including victims, offenders, and justice colleagues."\textsuperscript{96}

The chart and list above provide a framework for what principles and goals restorative justice programs should consist of. It is essential that programs differ from the criminal justice system by bringing the offender and harmed parties together, using effective communication and respect to rebuild the relationships and repair the victim, and ensuring everyone is able to have a voice.

\textsuperscript{95} Id. at 258.
\textsuperscript{96} Id. at 258–59.
1. VICTIM-OFFENDER MEDIATION PROGRAMS

In what ways does victim-offender mediation achieve these restorative justice principles and goals? Victim-offender mediation is a restorative justice program that entails the victim of a crime and the offender of that crime being brought together for a meeting, usually face-to-face. The conversation between the victim and offender is facilitated by a trained mediator, and in some rare cases multiple mediators.97

The mediator facilitates the dialogue with the purpose of highlighting the victim’s and offender’s needs. Each is given the opportunity to describe their perception of the crime.98 Victim-offender mediation serves as a forum for victims to verbally express to their offenders how the crime impacted their lives. Therefore, a victim has the chance to describe how the crime harmed them physically, emotionally, financially, and in any other way.99 The offender also is able to describe underlying reasons why he/she committed the crime, take responsibility for their actions, and offer repairs to the victim.

The goal of victim-offender mediation is to reach an agreement that repairs the relationship between the victim and offender.100 For this reason, participation by the victim is completely voluntary.101 Usually, the offender’s participation is voluntary as well, but there are some instances where an offender will be required to engage in a victim-offender mediation.102

In contrast to arbitration, the mediator does not listen to both parties with the intent of determining who is “right and wrong.”103 Instead, the mediator generates the conversation so that the victim and offender can create their own resolution on how to move on from the crime.104 Often, these agreements involve the offender paying the victim restitution for any financial loss they may have suffered.105 If and when the victim and offender reach an agreement, the victim and offender may sign a written agreement that outlines the terms of the repair.106

98 Id.
99 See id.
100 Id.
101 Id.
102 Some offenders may be required by a court order or as a term of their probation/parole to participate in victim-offender mediation. Additionally, some programs allow offenders to choose victim-offender mediation to avoid future criminal prosecution. Id.
103 Id.
104 Id.
105 Id.
agreement, the mediator will write down the terms of the agreement, read it back to the parties, have both sign the agreement, and file it with a court so that its terms are enforceable.\textsuperscript{106}

2. \textit{Does Victim-Offender Mediation Work?}

Scholars estimate that there are roughly 400 victim-offender mediation programs that exist throughout the United States today.\textsuperscript{107} As over 2015, 32 states have created some type of restorative justice program through statutory implementation or through the cooperation and voluntariness of mediation professionals.\textsuperscript{108} Because the use of these programs is becoming much more prevalent, it is important to analyze whether they are actually effective and what improvements could be made.

Mark Umbriet and his colleagues compiled numerous research studies to determine whether empirical evidence supported victim-offender mediation effectiveness.\textsuperscript{109} They first analyzed the overall participation rates in victim-offender mediation programs.\textsuperscript{110} They found that victim participation averages between 40-60\%, but some studies report participation as high as 90\%.\textsuperscript{111}

The article discusses several factors that led to increased victim participation: getting restitution, holding the offender accountable, and explaining the harm and pain caused by the crime. The researchers also concluded that victims were more willing to participate if the offender was white and it was a misdemeanor offense.\textsuperscript{112} The reasons behind offender participation were: helping their own rehabilitation, changing how their victims viewed them, and spiritual reasons.\textsuperscript{113} The authors also explored reasons given for choosing victim-offender mediation in response to violent crimes.\textsuperscript{114}

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{109} Umbriet et al., supra note 66, at 271.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 272.
\textsuperscript{113} Id. at 273.
\textsuperscript{114} Victims: "wishing to meet are to seek information, to show the offender the impact of their actions, and to have some form of human contact with the person responsible for the crime." Offenders: "to apologize, to help victims heal, to do whatever would benefit victims, hoping the experience would benefit themselves, that it could change how their victims viewed them spiritual reasons." Id. at 272–73.
Given the reasonably high number of victims and offenders that volunteer for mediation, how many actually walk away satisfied from the process and made whole again? Umbriet and his colleagues also reviewed this question. They found that participant satisfaction was consistently high, with 80-90% feeling satisfied with the process.\textsuperscript{115} Research also suggests that, when compared to the criminal justice system, victims and offenders are both generally more satisfied with victim-offender mediation than with traditional prosecution in the judiciary.\textsuperscript{116}

From this overview, one can see how restorative justice and victim-offender mediation stand in stark contrast to America’s current criminal justice system. Criminal acts have been viewed as harms to individuals and communities ever since biblical times. Attention to those victim’s needs and the offender’s responsibility to make things right again are ingrained in that perspective.

While victim-offender mediation methods and values may have been pushed to the backburner throughout history, it is clear that they should be made more prevalent than ever today. Now that it is very apparent that our current criminal justice system is flawed beyond repair, states have started to move back to restorative justice principles. Victim-offender mediation has been adopted and implemented throughout the United States.

States are choosing victim-offender mediation programs as an alternative to incarceration. Because these programs are much more popular in today’s society, it is essential to analyze other aspects of crime and conflict they can be applied to. It is increasingly important to implement these victim-offender mediation programs into police brutality and shooting situations to help heal those involved and to prevent the extreme civil unrest escalates from these cases.

IV. CRITICISMS ON VICTIM-OFFENDER MEDIATION IN POLICE BRUTALITY CASES

At first glance to some, using victim-offender mediation as a conflict resolution technique in police brutality and shooting situations might not seem feasible. From both scholarly and common-sense perspectives, victim-offender mediation applied to the police brutality context faces many criticisms.

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\textsuperscript{115} Factors related to victim satisfaction: the victim felt positively about the mediator, the outcome was viewed as fair; and the victim had a strong initial desire to meet the offender. \textit{Id.} at 273–74.

\textsuperscript{116} \textit{Id.}
One major criticism is that, in many police shooting cases and the case studies used for purposes of this article, the victim is fatally wounded. Clearly then, it would be impossible for the victim to participate in any victim-offender mediation program. But the “victim” in victim-offender mediation does not have to be only one person. The family members and loved ones of those who are killed at the hands of a police officer are victims. Communities that are oppressed and harassed by police officers are victims. The officer’s department and family members are victims. All of these parties suffer harm and loss in one way or another and victim-offender mediation provides a method for them to express their pain and help find healing.

Another potential problem that victim-offender mediation could face in this context is voluntariness. In its endorsement of victim-offender mediation, the ABA specifically laid out guidelines to ensure that the process must be completely voluntary. Yet, in police shooting and brutality cases, parties may be reluctant to volunteer for victim-offender mediation. These cases usually involve issues that go far beyond the violence. There is usually a strong distrust between the community members and police officers, there are often accusations of stereotyping and racism, and as seen in Anthony Lamar Smith’s case study, officers have been accused of framing the victim.

When there is such a high amount of emotion, tension, and underlying issues, parties may not want to try victim-offender mediation. They may not have any interest in repairing the relationship. Victims may only want to see officers be punished by a court of law. Or acquitted officers may not have any concerns about the victims or communities.

Yet, this barrier could be overcome with education on victim-offender mediation programs. It is clear from many different studies and statistics that for the majority of cases, everyone involved in victim-offender mediation feels more positive after. Victims of police shootings and brutality may be more willing to participate if they understood the victim-offender mediation process better and knew that it was a forum for them to speak with the offender directly. Officers might be more willing to participate if they knew that this forum could help repair their relationship with the community and help them get reintegrated back into their careers.

Additionally, more education on victim-offender mediation programs would help decrease the amount of civil unrest and violence that erupts from

118 Umbriet et al., supra note 66, at 260.
119 Helmore, supra note 59.
120 Umbreit et. al., supra note 66, at 273–74.
VICTIM-OFFENDER MEDIATION

these cases. Many cases of riots and physical violence stem from the decisions not to indict or an acquittal of these officers. But even if justice is not administered through a court of law, victims and communities could use victim-offender mediation as another way to reach the justice they are seeking. While the officer may not face a conviction or jail time, victim-offender mediation could provide a forum for the officer to hear the victim and community’s perspective and, after that, possibly accept responsibility for the harm the officer caused.

V. VICTIM-OFFENDER MEDIATION APPLIED IN POLICE BRUTALITY CASES

Before presenting an analysis of how and why victim-offender mediation should be used in police shootings and brutality cases, it is important to crystalize a key point: This article is not suggesting that victim-offender mediation should be used in place of or instead of the traditional criminal justice system. Rather, the purpose of this article is to argue for victim-offender mediation programs in addition to the criminal justice system. These programs should be implemented whether or not an officer is convicted in court. Due to the conflicts that could arise if victim-offender mediation were to happen before a trial, I argue victim-offender mediation should be implemented after the determination of guilt phase.

Officers responsible for the death of an unarmed African American should still be subject to criminal prosecution. But because statistics show that these officers are rarely indicted or found guilty, victim-offender mediation programs would serve as an additional forum for justice, repair, and accountability when the criminal justice system fails. Additionally, this article advocates for victim-offender mediation usage even when an officer is found guilty and criminally punished by a court of law. Even after a conviction, victim-offender mediation can still achieve the goal of repairing victims, offenders, and communities.

A. Modified Framework for Victim-Offender Mediation in Violent Cases

121 Salter, supra note 60.
122 A few potential conflicts that could arise are interference with witness testimony, victims/community members’ willingness to participate, and the offender’s voluntariness and attitude at trial.
Because police brutality and shooting offenses are inherently violent, application of victim-offender mediation would have to be slightly modified from its traditional form. In the mid-1990’s, Mark Umbriet proposed a victim-offender approach that was designed specifically for violent crime situations. Rather than focusing on reaching an agreement between the victim and offender, like a specified restitution amount, the mediation centers focused around emotionally healing and repairing dialogue between the parties. Umbriet’s “victim-sensitive offender dialogue” method of victim-offender mediation is a proper way to implement this alternative dispute resolution technique to violent police acts against unarmed African Americans.

Umbriet’s modified form of victim-offender mediation progresses in three phases. The first phase is the case development stage. During this stage, a professional gathers information to determine if mediation is possible for the case. This is determined through victim interviews, offender interviews, and others involved. If the professional decides the case is appropriate for mediation, then the victim, offender, and others participating meet with the mediator to discuss expectations, anticipations, and concerns. The last part of this stage is for the professional mediator to prepare the parties for the actual mediation and reach agreements on how it will be conducted.

The second phase of Umbriet’s model is the actual discussion between the victim and offender. Here, the mediator must safeguard the expectations and agreements set by all parties in the case development stage. Doing so reduces the resentment, fears, and tension that are inherent to violent crime cases. The mediator must also be skilled and trained to empathize with the victim and avoid re-victimization, work with violent crime parties, and facilitate a constructive, healing conversation.

The third and final stage of Umbriet’s “victim-sensitive offender dialogue” that is unique to the victim-offender mediation process is the follow-up phase. This stage requires the professional mediator to follow up with

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the parties after the victim-offender mediation is complete. Here, the parties would express any concerns that were not addressed or met in the mediation. If any are present, the mediator, victim, offender, and involved community members would engage in another conversation to discuss them. Once all needs are met, the case is then closed.

B. How Modified Framework Should Be Implemented to Police Shootings and Brutality

Umbriet’s modified victim-offender mediation should be adopted in police shooting and brutality cases. In this context, Umbriet’s first stage is essential. A victim-offender professional would have to speak to victims (if they survived the incident), victims’ families, the offending police officer, his/her family members, and the community. Those that constitute the “community” could change from case to case. These could be angry residents of the town in which the incident occurred, it could be civil rights leaders that go from city to city responding to these tragedies, and it could even be entire police departments. The mediator needs to speak with all of these key individuals in order to determine if they are willing to participate in mediation and willing to work with one another to repair harm that was done.

The second phase, the dialogue between parties, would call for numerous accommodations in a police brutality situation. First, all mediators facilitating these mediations would have to undergo very extensive and serious training. Additionally, depending on how many victims, offenders, and community members are willing to voluntarily participate in the conversation, a proper venue would need to be located. The location would need to ensure safety, space, and comfort for all involved. While the facilitation would require higher levels of skills and training, the overall goals of mediation would still be present: to ensure that everyone has a voice in repairing the relationships damaged from the crime.

The third and final follow-up phase is also essential to police shooting and brutality cases. Not only is follow up victim-offender mediation helpful if it is necessary, but so is follow up from other sources and organizations. As we have seen in many of the highly publicized police brutality cases, communities and/or police departments attempt to add safeguards to ensure a

134 Id.
135 Id.
136 Id.
similar tragedy will not happen again.\textsuperscript{137} This could include police department trainings and policies or meetings between the police and community members to continue to build relationships and trust.

It would be naive to think that a victim-offender mediation could solve all issues that are involved in police shootings, but it is certainly a viable place to start. Victim-offender mediation gives everyone involved a forum to express their voice. It can help parties better understand one another, discuss the individual and community harms that the conduct in question caused, take responsibility for that conduct, and lay the foundation to build and/or repair future relationships between the victim, the offender, and the relevant community.

VI. CONCLUSION

As the case studies presented at the beginning of this article show, police brutality and police shootings of unarmed African Americans are all-too-common scenarios today. What is also too common is the extreme amount of civil unrest and violence that results from these officers' actions. That chaos is only worsened when officers are not indicted at all or are acquitted in court.

Because statistics show that our justice system is failing in these cases, with an overwhelming amount of police officers going unpunished\textsuperscript{138}, it is time for something different to be done. The alternative dispute resolution method of victim-offender mediation should be used in these cases. The highly skilled, trained mediator should facilitate a dialogue between the victims of these cases, the officers involved, and the communities harmed by these tragedies.

Victim-offender mediation should be used whether an officer sees his/her day in court or not. These programs can help the victims and communities communicate to the offender how the shooting or brutality impacted their lives, resulting in both a sense of justice and closure. The officers have the opportunity to hear these perspectives and take responsibility for their actions. The process serves as a way for everyone involved in these highly emotional, divisive cases to repair and rebuild relationships. America can only continue to be a strong, powerful nation if we stand united, not


divided. Using victim-offender mediation in police brutality cases and police shootings can help reach the unity our country so desperately needs.