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Doyeon Kim

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EXPANDING THE ROLE OF VICTIM-OFFENDER MEDIATION IN THE CRIMINAL JUSTICE SYSTEM: MEDIATING CASES OF INVOLUNTARY MANSLAUGHTER

Doyeon Kim*

ABSTRACT

Involuntary manslaughter is distinguishable from other types of murder by the perpetrator's lack of intent to kill. This lack of intent suggests that restorative justice programs, specifically victim-offender mediation, may be a better alternative compared to the traditional adversarial criminal justice system because offenders can express their remorse and victims can receive closure through a facilitated dialogue. Limiting the scope of remedies in criminal proceedings to incarceration has led to serious financial and societal ramifications, as well as harmful psychological and emotional repercussions by failing to address the underlying lasting impacts of crime on victims, offenders, loved ones, and the community at large. Therefore, it is imperative the criminal justice system improves how cases of involuntary manslaughter are processed by implementing victim-offender mediation as a more tailored means to achieving justice.

* Doyeon Kim received her Juris Doctor from Pepperdine University Caruso School of Law and her Masters of Dispute Resolution from the Straus Institute for Dispute Resolution in 2024. She thanks her friends and family for their love and support throughout law school. She would like to give a special thanks to her Editor-in-Chief, Reeve Lanigan, for her helpful comments and tireless dedication to the Dispute Resolution Law Journal.

I. INTRODUCTION

In criminal proceedings, “the State takes the victim’s place and prosecutes the matter to bring [j]ustice to society;” however, “justice to society” is not always synonymous with justice for the victim.¹ Restorative justice programs such as victim-offender mediation bridge this gap in the criminal justice system by “unit[ing] victims with their offenders in order to facilitate dialogue that will aid in both the victims’² and the offender’s healing.”³ Though the application of victim-offender mediation has traditionally been limited to lesser offenses that require no more than a simple apology to resolve the issue, this article proposes that victim-offender mediation can help to address more serious crimes as well, namely involuntary manslaughter.

The California Criminal Jury Instructions define involuntary manslaughter as an “unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life.”⁴ Based on this definition, offenders convicted of involuntary manslaughter lack the specific malicious intent to harm the victim.⁵ This lack of intent to kill suggests a higher likelihood for offenders to feel remorse for their actions, in

¹ Joycelin Kyte, *Mediation as a Tool to Reduce Prison and Pre-Trial Detainee Population for Minor Criminal Offences: A Case Study of Guyana*, INTERGOVERNMENTAL RSCH. & POL’Y J. (Mar. 24, 2022), <https://irpj.euclid.int/articles/mediation-as-a-tool-to-reduce-prison-and-pre-trial-detainee-population-for-minor-criminal-offences-a-case-study-of-guyana/>.

² “Victims” in the context of this article does not refer to the individuals directly harmed by offenders, and instead refers to those impacted by the offense, including the individual’s loved ones and the community at large.

³ Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1, 1 (2004).

⁴ CALCRIM No. 580.

⁵ See CAL. PENAL CODE § 192 (defining manslaughter as the “unlawful killing of a human being without malice”). Compare CAL. PENAL CODE § 192(b) (defining involuntary manslaughter as killing “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection”), with CAL. PENAL CODE § 192(c) (defining vehicular manslaughter as killing while “driving a vehicle in the commission of an unlawful act, not amounting to a felony . . . or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner” with or without gross negligence). The California Penal Code differentiates between involuntary manslaughter and vehicular manslaughter, but for the purposes of this article, they will be discussed together.

which restorative justice programs may offer the opportunity for offenders to right their wrongs.

To demonstrate the instrumental role of restorative justice practices in improving the criminal justice process for parties in cases of involuntary manslaughter, this comment evaluates the efficacy of victim-offender mediation as a means of restoration rather than retribution. Part II introduces the concept of restorative justice and provides a brief overview of victim-offender mediation. Part III lays out the general victim-offender mediation framework from beginning to end, illustrating how this practice can be incorporated into the current legal system. Part IV discusses the efficacy of victim-offender mediation in rehabilitating offenders and healing those who have been harmed, as well as the lasting benefits on the wider community. Part V addresses various criticisms and concerns regarding the victim-offender mediation process, especially in the context of more serious offenses. Because victims' needs are often neglected in criminal proceedings, victim-offender mediation offers potential as an effective restorative justice practice to improve how involuntary manslaughter cases are addressed by the current criminal justice system. Implementing this alternative approach to justice can help heal victims, rehabilitate offenders, and reduce the risk of recidivism—thereby decreasing mass incarceration in the United States.

II. BACKGROUND

A. RESTORATIVE JUSTICE IN A CRIMINAL CONTEXT

Restorative justice is an “approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things right as possible.”⁶ Restorative justice programs provide redress for the current system’s preoccupation with punishment and police militarization, shifting the focus to “safety as the primary consideration for the community.”⁷ Certain key principles guide the general process of

⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 48 (2002).

⁷ DANIEL W. VAN NESS ET AL., *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 26 (6th ed. 2022). Safety for the community is the first principle of the Community Safety/Restorative Justice Model. *Id.* The other principles are as follows: (2) persons responsible for the harm are held accountable, (3) those harmed need restoration, (4) conflicts underlying the harm should be resolved, (5) various services and treatment options should be made available to parties involved, and (6) a system

restorative justice and differentiate restorative justice programs from other types of alternative dispute resolution practices. First, restorative justice is not primarily about forgiveness or reconciliation.⁸ Although forgiveness and reconciliation are potential outcomes of restorative justice, it is entirely up to the person harmed and not a “prerequisite to or a necessary outcome of restorative processes.”⁹ Second, restorative justice does not focus on continuing a relationship between the parties.¹⁰ Restorative justice strives to help parties move forward “towards a new sense of identity and health,” and not “return to the pre-conflict status quo,”¹¹ which sometimes may involve discontinuing an unhealthy relationship. Moreover, the parties are not “assumed to be on a level moral playing field.”¹² To participate in restorative justice programs, the person who committed the harm must admit to the offense and take full responsibility; therefore, the “‘neutral’ language” used in mediation does not apply in this setting.¹³ Restorative justice is also not a replacement for the current criminal justice system, nor an alternative to prison.¹⁴ Restorative justice is not applicable to all types of crime, but in appropriate cases, it helps meet a victim’s needs neglected by punitive legal procedures, incorporating instead, “processes that are collaborative and inclusive and outcomes that are mutually agreed upon rather than imposed.”¹⁵ Lastly, restorative justice is a holistic process that

should be implemented that “incorporates both public and private resources.” *Id.*

⁸ ZEHR, *supra* note 6, at 13.

⁹ *Id.* at 14. Victims are never expected or required to forgive their offenders; depending on the nature of the offense, forgiveness may not be appropriate. Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?*, 1 ONLINE J. PEACE & CONFLICT RESOL. (1998), https://www.trinstitute.org/ojpcr/1_2price1.htm. Although “[f]orgiveness is not a focus of the mediation process . . . the process provides an ‘open space’ in which forgiveness may occur, for victims who wish to consider it at that time.” *Id.* For victims willing to consider accepting an offender’s apology, this act of forgiveness may contribute to restoring the victim’s sense of dignity. PETER RUFO ROBINSON, APOLOGY, FORGIVENESS, AND RECONCILIATION FOR GOOD ATTORNEYS AND OTHER PEACEMAKERS 46 (2019).

¹⁰ ZEHR, *supra* note 6, at 13.

¹¹ *Id.*

¹² *Id.* at 15.

¹³ *Id.*

¹⁴ *Id.* at 19–20.

¹⁵ *Id.* at 36.

“balances concern for all” and seeks to repair harm on multiple levels.¹⁶

B. THE VICTIM-OFFENDER MEDIATION FRAMEWORK

Falling under the larger umbrella of restorative justice, victim-offender mediation is a unique process that provides crime victims the opportunity to meet with their offender in a secure setting and engage in a mediated dialogue regarding the impact of the crime on both parties.¹⁷ The first victim-offender mediation program originated in Kitchener, Ontario in a case involving two boys who “destroyed property during a drunken rampage.”¹⁸ Since the boys were juveniles and had no prior offenses, the judge agreed to have the boys face the victims in lieu of criminal punishment.¹⁹ The boys visited the homes of the victims, confessed their criminal activity, and worked out restitution agreements.²⁰ Within three months, the boys satisfied their agreements and paid the victims back for their losses.²¹ This alternative approach to justice was successful because it allowed the young offenders to “experience a kind of meaningful accountability” that incarceration does not provide.²² The process of victim-offender mediation generally progresses in five phases: (1) case referral, (2) intake and screening, (3) preparation, (4) mediation, and (5) follow-up.²³

1. CASE REFERRAL

Suitable candidates are typically referred to a restorative justice program by the prosecutor, the court, law enforcement, or a representative of the victims or defendant.²⁴ Victims may also request to participate in victim-offender mediation.²⁵ The

¹⁶ *Id.* at 42.

¹⁷ *Victim/Offender Mediation*, CAL. CTS., <https://www.courts.ca.gov/documents/VictimOffenderMediation.pdf> (last visited May 1, 2024).

¹⁸ Wellikoff, *supra* note 3, at 2.

¹⁹ *Id.* at 2–3.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ ZEHR, *supra* note 6, at 58–60.

²⁴ *Id.* at 58.

²⁵ Jee Young Kim & Rasmus H. Wandall, *An Alternative to Prosecution: Victim Offender Mediation*, NAT’L ASS’N ATT’YS GEN. (2017), <https://www.naag.org/attorney-general-journal/an-alternative-to-prosecution-victim-offender-mediation/>.

government cannot compel participation because anything short of the parties' informed, voluntary consent would run the risk of disrupting the healing process by further traumatizing the victims.²⁶ Consent involves having the right to say 'no' to mediation, but also the right to exit or discontinue the process at any point.²⁷

2. INTAKE AND SCREENING

During intake and screening, facilitators meet with the parties and assess the nature of the offense to determine whether the case is appropriate for a face-to-face mediation.²⁸ Effective screening involves gauging the offender's capacity for empathy and moral maturity.²⁹ The mediator must ensure the offender is not participating in mediation to delay trial, intimidate the victims, or lessen their sentence by gaining sympathy from the judge—all of which would indicate the offender is not an appropriate candidate for mediation.³⁰ Victim-offender mediation requires that both parties mediate with each other in "good faith"—this kind of "well-intentioned participation" is essential to "provide a 'minimal safeguard against bad-faith and abusive conduct'" on the part of the offender.³¹

3. PREPARATION

To prepare the parties for a face-to-face conversation, the mediator meets with the parties individually beforehand to help participants organize their thoughts and process their emotions. Screening and preparation should be proportional to the crime's severity to ensure participants' safety throughout the process and most importantly, prevent revictimization.³² Holding pre-mediation

²⁶ Lois Presser & Christopher T. Lowenkamp, *Restorative Justice and Offender Screening*, 27 J. CRIM. JUST. 333, 336 (1999).

²⁷ Mark S. Umbreit & Jean Greenwood, *Criteria For Victim-Sensitive Mediation & Dialogue With Offenders*, NAT'L CRIM. JUST. REFERENCE CTR. 1, 4-5 (1997), <https://www.ojp.gov/pdffiles1/Digitization/177657NCJRS.pdf>.

²⁸ See VAN NESS ET AL., *supra* note 7, at 117-18.

²⁹ Presser & Lowenkamp, *supra* note 26, at 338.

³⁰ DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 1, 100-02 (2d ed. 2018).

³¹ Megan Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 604 (2007).

³² Revictimization can occur when a victim is forced to face someone that has harmed them. Ayonna Johnson, *Treat Domestic Violence Like the Crime It Is*, N.Y. TIMES (Sept. 11, 2014),

meetings gives the mediator time to establish rapport with the parties so that all participants develop a sense of trust in the mediator and in the process as a whole.³³ During these preliminary meetings, the mediator must “listen carefully, patiently, and empathetically out of a genuine desire to hear the victim's experience.”³⁴ It is imperative for mediators to make authentic connections with the victims and understand the importance for victims to feel safe grieving and coping with their losses.³⁵ This step is crucial in ensuring the victims feel heard and validated that they are a priority throughout the process.³⁶

During pre-mediation meetings with the defendant, the mediator should emphasize they are a neutral third party not there to judge the defendant in any way.³⁷ Defendants are more likely to show vulnerability throughout the process if the mediator first shows their willingness to learn about them and see them not as a criminal, but as a human being.³⁸ Taking time to listen to the offender's life experiences that may have contributed to committing the crime, as well as other pertinent information about the offender, will give the mediator a holistic understanding of the offense and thereby better facilitate the actual mediation itself.³⁹

The perpetrator's delicate role in victim-offender mediations is critical to the rehabilitation of the victims.⁴⁰ The mediator should take extra care in helping the defendant find the right words to effectively convey their remorse to the person they harmed.⁴¹ However, mediators should avoid putting words in the defendant's mouth, staying true to the defendant's intentions.⁴² For a truly

<https://www.nytimes.com/roomfordebate/2014/09/10/going-after-abusers-like-nfl-player-ray-rice/treat-domestic-violence-like-the-crime-it-is>. Victims of crime are especially at risk for revictimization when they are compelled to testify against the defendant “in the presence of others” and must “articulate the painful details” of the harm they suffered in court.

Id.

³³ Umbreit & Greenwood, *supra* note 27, at 6.

³⁴ *Id.*

³⁵ Wellikoff, *supra* note 3, at 9.

³⁶ Umbreit & Greenwood, *supra* note 27, at 6.

³⁷ Wellikoff, *supra* note 3, at 9.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 8–9.

⁴¹ *Id.* at 4.

⁴² ROBINSON, *supra* note 9, at 121–22. To remain truly neutral and impartial, but still effectively guide the mediation in a way that benefits both parties, one strategy mediators may employ is to ask questions that act as a “catalyst of conscience” for the offender. They may ask questions such as whether the offender feels regret or guilt for their actions, whether

effective apology that conveys the defendant's remorse, they must first "identify personally with the offensive conduct and the injury it caused."⁴³ The defendant must recognize the offensive nature of their actions, condemn their crime, be specific in their apology to the victim, avoid conditional apologies, and take accountability for their behavior.⁴⁴ Defendants may also open up about the reasons and motives behind their actions, but must be careful not to phrase the explanation in a way that the victim may perceive to be an excuse or a justification.⁴⁵

4. MEDIATION

The actual meeting should be a safe and comfortable environment that invites honesty, introspection, and vulnerability. Victim-offender mediations must employ trained facilitators that have the necessary skills, sensitivity, and experience to encourage and empower participants during this difficult process. Effective mediators must also be "skilled diagnosticians," meaning they are able to assess the parties' various interests, the nature of the dispute, and the proper tactics necessary to successfully mediate the case.⁴⁶ Most importantly, mediators must refrain from making any personal judgments and understand the situation from both parties' perspectives, since it is not the mediator's job to distinguish right from wrong or make a ruling as a judge would, but to facilitate a healthy dialogue between the parties.⁴⁷

The meeting should be victim-centric, meaning the discussion should focus primarily on the victims' healing. A transformative mediation approach may be most well-suited for victim-offender mediations, which focusses on empowering the parties, restoring the participants' sense of selves by acknowledging and empathizing with the parties' grievances, and helping

the offender feels apologetic for putting the victim and the victim's family in this position, or whether the offender understands how their actions made the victim and their loved ones feel. *Id.* at 120.

⁴³ Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1174–75 (1997).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1202.

⁴⁶ FRENKEL & STARK *supra* note 30, at 15.

⁴⁷ See generally James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263, 265–67 (2013) (suggesting that mediators use certain persuasive techniques to promote good faith and healthy communication, which leads to better outcomes).

participants identify their own triggers.⁴⁸ In a secure and structured setting, victims can get answers to haunting questions lingering on their mind that only the offender can answer, such as “why did you do this to me?” or “was this my fault?”⁴⁹ Victims commonly report feeling more at peace after asking these questions regardless of the offender’s answers.⁵⁰ It is paramount the mediator ensures victims feel comfortable and safe when facing the offender during mediation.⁵¹ Throughout the mediation, the mediator must consider whether the situation poses a threat to the safety and well-being of the victims.⁵² Ultimately, the goal of victim-offender mediation is to empower the victims and restore their sense of selves so they can take steps to process their grief and move forward with their healing.⁵³

5. FOLLOW-UP

Lastly, it is good practice for the mediator to follow up with the parties after the meeting to ensure they were satisfied with the process, and also show that they, as well as their communities of care, are genuinely concerned about their long-term well-being.⁵⁴ Participants should understand this meeting is not a means to an end, but just the beginning of a continuous healing process.⁵⁵ Facilitators

⁴⁸ See FRENKEL & STARK *supra* note 30, at 74. Other approaches that mediators may employ in a non-criminal context include a facilitative approach, in which the mediator focuses on asking probative questions to propel the conversation forward but refrains from giving advice to not influence the parties or the outcome of the mediation, or an evaluative approach, in which the mediator uses their knowledge and experience to provide feedback on the participants’ perspectives. *Id.* at 78.

⁴⁹ Price, *supra* note 9.

⁵⁰ *Id.*

⁵¹ Umbreit & Greenwood, *supra* note 27, at 1.

⁵² *Id.* at 3. Mediators should consistently check in with the parties throughout the process and if at any point the victim indicates they feel unsafe, the mediator should act according to the victim’s needs, whether that is terminating the mediation or connecting the victim to other resources. *Id.* at 1, 5.

⁵³ *Id.* at 4–6.

⁵⁴ VAN NESS ET AL., *supra* note 7, at 78, 81–87.

⁵⁵ See ZEHR, *supra* note 6, at 70. The mediator may also suggest further steps for healing and personal growth to help both parties move forward, such as reaching out to various support systems or learning about different resources. See *Coping with Traumatic Events*, NAT’L INST. HEALTH <https://www.nimh.nih.gov/health/topics/coping-with-traumatic-events#:~:text=If%20you’re%20not%20sure,are%20coping%20with%20traumatic%20events>. (last visited May 1, 2024).

may further contribute to the parties' healing journeys by checking in on the parties periodically and ensuring any commitments or restitution plans agreed upon by the parties during the mediation are fulfilled.⁵⁶ This final step ensures the mediation has a lasting positive impact on the parties post-mediation.

III. RECONCILING RESTORATIVE JUSTICE WITH THE CRIMINAL JUSTICE SYSTEM

A. VICTIM-OFFENDER MEDIATION IN CASES OF INVOLUNTARY MANSLAUGHTER

In a case study where a family lost a loved one to a drunk driver, the victim's father requested a mediation session with the offender.⁵⁷ He explained the greatest comfort to his family was feeling they were, "mak[ing] something positive out of a very negative situation, as [the victim] would have wanted."⁵⁸ During the mediation, each family member had the opportunity to individually convey their grief and heartache face-to-face with the offender.⁵⁹ After patiently listening to each of the family members, the offender expressed her sincere remorse, and the parties collectively created a restitution agreement, making sure to incorporate all of the family members' needs.⁶⁰ The victim's family described the immediate positive changes they felt after the mediation.⁶¹ The victim's sister reported tension lifting off her shoulders and feeling relieved as she let go of long-held emotions of vengeance and despair, and the victim's husband noticed his "brightness and vigor" were restored.⁶² The case study also highlights the positive impact on the offender, who completed all of the provisions of the restitution agreement, remained sober since the incident, and used her experience as a catalyst to "better her life."⁶³

In another example where a mother lost her daughter in a drunk-driving accident, the mother requested to mediate with the offender after years of failing to find closure regarding her daughter's death.⁶⁴ The victim's mother arranged to meet with the

⁵⁶ See VAN NESS ET AL., *supra* note 7, at 78, 81–87.

⁵⁷ Wellikoff, *supra* note 3, at 8.

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Levi, *supra* note 43, at 1204.

offender while he was serving his prison sentence.⁶⁵ During the mediation she showed him a picture of her daughter, conveying her pent-up anger and grief.⁶⁶ The mother's story moved the offender, compelling him to apologize and ask for her forgiveness.⁶⁷ After accepting his apology, the victim's mother stated she could finally move forward with her life.⁶⁸

As these anecdotes illustrate, victim-offender mediation in the context of involuntary manslaughter is beneficial to the victim's families. By getting answers to lingering questions and receiving genuine apologies from offenders whose non-malicious, yet still reckless, actions caused them to lose loved ones, families may "find some solace and relief from the haunting effects of the crime" and provide a path towards "victim fulfillment and appropriate offender retribution."⁶⁹ Though the anger and resentment victims' families feel towards the offenders may make them reluctant to mediate, they are also often keenly aware the criminal justice system will not offer them any support or consolation for the lasting effects of the crime.⁷⁰ Because victim-offender mediation provides participants with the unique opportunity to converse with the offender, mediation is likely to be far more satisfying for the victim's loved ones than having the offender imprisoned indefinitely with no chance of receiving an apology or restitution.⁷¹ In an increasing number of victim-offender mediation programs, parties affected by violent crimes, including murders and sexual assaults, report that confronting the perpetrator in a safe and controlled setting supported by a trained mediator rehabilitates their "stolen sense of safety and control in their lives," thereby helping repair the lives of surviving family members left devastated by the offense.⁷²

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Wellikoff, *supra* note 3, at 7; *see also* ROBINSON, *supra* note 9, at 46 (noting the power of apologies in healing emotional injuries caused by the offender's criminal acts is still effective in cases involving serious and violent offenses).

⁷⁰ Wellikoff, *supra* note 3, at 8; *see also* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 1, 1 (2020) (discussing how the criminal justice system focuses primarily on convicting and punishing defendants, rather than the victim's needs).

⁷¹ Levi, *supra* note 43, at 1204.

⁷² Price, *supra* note 9.

B. IMPLEMENTING VICTIM-OFFENDER MEDIATION WITHIN THE CRIMINAL JUSTICE SYSTEM

Victim-offender mediation may be incorporated at any stage of judicial procedure and does not interrupt or supplant the criminal justice process in any way.⁷³ Victim-offender mediation does not absolve offenders' wrongdoings or serve as a "substitute for punishment;" rather, it supplements the criminal justice process by focusing on the victim's needs and providing healing and closure for all parties.⁷⁴ Regardless of whether the parties choose to mediate, the state may still pursue its own criminal charges and prosecute the offender in criminal proceedings.⁷⁵

The key to implementing victim-offender mediation within the legal system is standardization to ensure programs are fair, equitable, and accessible nationwide.⁷⁶ Access to restorative justice programs largely depend on whether a local police department or district attorney's office has a victim-offender mediation program or access to a mediator.⁷⁷ Broad prosecutorial discretion also affects who gets referred to victim-offender mediation.⁷⁸ One solution to address the discrepancies in accessibility and referral to restorative justice programs is to "create rules for the automatic referral of cases involving eligible offenses[.]"⁷⁹ Explicit guidelines would ensure

⁷³ Wellikoff, *supra* note 3, at 3; *see also* Levi, *supra* note 43, at 1204 (noting that victim-offender mediation programs do not conflict with the criminal justice system since apologies to the victim and restitution agreements resulting from criminal mediations play only a limited role and are procedurally separate from the offender's sentencing).

⁷⁴ Price, *supra* note 9.

⁷⁵ *Id.*

⁷⁶ Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 669 (2021).

⁷⁷ *Id.* at 670.

⁷⁸ *Id.*

⁷⁹ *Id.* at 671. For example, the provision for a "duty to bargain in good faith" when negotiating between employees and employers does not require parties to reach a settlement, only that they "genuinely participate in the process." Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 622–23 (2001); *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.26a (2d ed. 1998) (defining unfair dealings to include refusing to negotiate, imposing improper conditions, using improper tactics, making unreasonable proposals, making improper disclosures, and breaking off negotiations). Courts may also consider certain administrative and procedural matters, giving the court the "discretion to sanction a wide range of conduct indicating whether a party 'intentionally misled or

the legitimacy and efficacy of victim-offender mediation programs. The government must also provide the funding, personnel, and resources necessary to oversee these programs and maintain the quality of their services. This also includes setting an annual budget and obtaining sources of funding, connecting with the courts, and establishing a system for the management and referral of cases, selecting qualified mediators, and offering basic training in accordance with the laws of each jurisdiction.⁸⁰ However, programs should be flexible enough to allow the mediator to tailor the process to each individual case's specific needs.⁸¹

IV. KEY BENEFITS OF VICTIM-OFFENDER MEDIATION

A. A CHANCE FOR PSYCHOLOGICAL AND EMOTIONAL CATHARSIS FOR THE VICTIM

Restorative justice bridges the existing gap between the criminal justice system and achieving justice for victims by allowing victims to become the “protagonists.”⁸² Restorative justice practices empower those affected by crime “to speak their truth in their own words, as opposed to being directed or controlled by a larger purpose or narrative,”⁸³ in contrast to “adversarial adjudication,” which is directed towards “convicting and incarcerating offenders risks retraumatizing victims rather than promoting healing.”⁸⁴ Research

coerced a party into reaching an agreement . . . [or] intentionally obstructed or delayed negotiations.” *Id.* at 624. Similarly, the *Restatement (Second) of Contracts* holds that good faith requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. A (1981). A similar duty of good faith should be imposed to establish a general standard of conduct to protect parties in criminal victim-offender mediations.

⁸⁰ *Handbook on Justice for Victims*, U.N. OFF. FOR DRUG CONTROL & CRIME PREVENTION 1, 48 (1999), https://www.unodc.org/pdf/crime/publications/standards_9857854.pdf.

⁸¹ Lanni, *supra* note 76, at 672.

⁸² Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POLI. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/>.

⁸³ Sarah Souli, *Does America Need a Truth and Reconciliation Commission?*, POLITICO (Aug. 16, 2020), <https://www.politico.com/news/magazine/2020/08/16/does-america-need-a-truth-and-reconciliation-commission-395332>.

⁸⁴ Bazelon & Green, *supra* note 70, at 1.

shows victim-offender mediation leads to higher satisfaction rates for both parties compared to victims and offenders whose cases go through the conventional criminal justice process.⁸⁵ The criminal justice process treats crime merely as an “affront to public order where the victim is relevant only as a witness, [while] mediation treats the victim as a party with a personal right to vindication.”⁸⁶ Research shows victims who participate in restorative programs have “greater perceptions of fairness”⁸⁷ compared to those processed by the traditional justice system because while punishment may be retributive, it fails to “restore the victim through restitution, compensation, or forgiveness.”⁸⁸ The current criminal justice system fails to acknowledge a victim’s “desire for safety and justice does not necessarily mean that they want offenders to suffer long terms of incarceration.”⁸⁹

B. THE EFFICACY OF VICTIM-OFFENDER MEDIATION IN REHABILITATING OFFENDERS

Studies report restorative programs are “significantly more effective in reducing recidivism than the traditional justice system.”⁹⁰ Additionally, these programs lower rates of recidivism for offenders, which may be attributed to restorative justice processes being “fairer and more just,” because the parties have a say in the outcome and feel heard.⁹¹ The dialogue in victim-offender mediations is central to both the “empowerment of the victims and the development of victim empathy in the offenders, which can help

⁸⁵ Jiska Jonas-van Dijk et al., *Victim-Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, 66 CRIME & DELINQ. 949, 953 (2020).

⁸⁶ Levi, *supra* note 43, at 1200.

⁸⁷ *Restorative Justice for Juveniles*, OFF. JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles#2-0> (last visited May 1, 2024).

⁸⁸ Levi, *supra* note 43, at 1201.

⁸⁹ Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUMATIC STRESS 182, 184 (2010).

⁹⁰ Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497, 504–05 (2013); *see also* Jeff Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 1, 13 (2016).

⁹¹ Jonas-van Dijk et al., *supra* note 85, at 953.

to prevent criminal behavior in the future.”⁹² This lower rate of recidivism may be attributable to the personal impact offenders experience after facing their victim, or as in the case of involuntary manslaughter, the victims’ loved ones.⁹³ When offenders are confronted with the grief and suffering they caused upon their victims, the harm is no longer abstract; rather, it becomes tangible and visible. This makes it increasingly difficult for offenders to defend and rationalize their criminal actions.⁹⁴

Mediation also enables the victim’s loved ones to relay consequences of the crime and its impact on their life to the offender, thereby compelling the offender to see the crime from their perspective and trigger feelings of genuine empathy.⁹⁵ Having the perpetrator step into the shoes of the victims generates sincere feelings of responsibility and remorse, lowering the chance that the perpetrator reoffends.⁹⁶ Feelings of empathy and remorse also help to “mitigate[] the detachment from social and community connections”⁹⁷ that those within the justice system often experience. Moreover, many formerly incarcerated individuals “exhibit a low crime risk but have high psychological, financial, and vocational demands that have been greatly exacerbated by their lengthy incarceration.”⁹⁸ Rather than fund systems within prisons that demoralize inmates and increase their chances of recidivism after release, the government should divert resources to restorative programs.⁹⁹

⁹² *Victim-Offender Mediation: A National Perspective*, OFF. FOR VICTIMS OF CRIME (Apr. 2000), https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

⁹³ Wellikoff, *supra* note 3, at 5.

⁹⁴ *Id.* at 4.

⁹⁵ Jonas-van Dijk et al., *supra* note 85, at 964.

⁹⁶ *Id.*

⁹⁷ *Using Trauma-Informed Restorative Justice with Youth*, CSG JUST. CTR, https://csgjusticecenter.org/wp-content/uploads/2021/06/CSGJC_Field-Notes_Trauma-Informed-Restorative-Justice_2019-MO-BX-K001_508.pdf (last visited May 1, 2024).

⁹⁸ Ashley Nellis, *A New Lease on Life*, SENTENCING PROJECT (June 30, 2021), <https://www.sentencingproject.org/reports/a-new-lease-on-life/#footnote-59>.

⁹⁹ For example, educational programs can help incarcerated individuals work towards receiving their GEDs, associate degrees, or other technical licenses, mentorship programs, and support groups to help set them up for success upon completion of their sentence. *See generally* Lucius Couloute, *Getting Back on Course: Educational exclusion and attainment*

C. MOVING TOWARDS A MORE COHESIVE SOCIETY

Restorative justice processes benefit the wider community by allowing formerly incarcerated individuals to reintegrate into their communities, reducing recidivism rates, and thereby alleviating the wider community from crippling financial burdens stemming from mass incarceration. Studies show that incarcerated individuals who participate in restorative educational programs have a “43% lower chance of being reincarcerated than those who do not, and for every dollar spent on prison education, the government saves four to five dollars on the costs of reincarceration.”¹⁰⁰ Incorporating general restorative practices into local communities, such as prioritizing mental health, education, and a system of a “prison-to-work pipeline” would significantly lower recidivism rates in the United States.¹⁰¹ Lower recidivism rates benefit society by reducing the overall rate of crime, but also by “reducing prison populations, saving taxpayers’ dollars, and most importantly, ensuring that prisons are serving their purpose of reform and improvement.”¹⁰²

V. POTENTIAL CONCERNS ASSOCIATED WITH THE IMPLEMENTATION OF VICTIM-OFFENDER MEDIATION IN ADDRESSING SERIOUS CRIMINAL OFFENSES

A. THE RISK OF REVICTIMIZATION

The primary concern of incorporating victim-offender mediation in cases of involuntary manslaughter is whether there is too high of a risk that victims’ families will relive the trauma of the crime.¹⁰³ Many critics argue that expecting offenders to be genuinely remorseful is naive and unrealistic.¹⁰⁴ Others contend that mediation is likely to put undue pressure on the victims to grant forgiveness to the offender, which may in turn invalidate the trauma

among formerly incarcerated people, PRISON POL’Y INITIATIVE (Oct. 2018), <https://www.prisonpolicy.org/reports/education.html> (showing how formerly incarcerated people are often excluded from education, which makes it harder for them to “compete in an increasingly skilled labor market”).

¹⁰⁰ Benecchi, *supra* note 82.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Wellikoff, *supra* note 3, at 5.

¹⁰⁴ Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 765 (1999).

the victims experienced.¹⁰⁵ Critics also argue that violent crimes are too complex and far too terrible for any form of restorative justice to be appropriate.¹⁰⁶ Despite these concerns, those opposed to victim-offender mediation still concede that issues of overcrowded jails and increasing recidivism rates are pressing, and the criminal justice system is in need of major reform.¹⁰⁷

One potential remedy to protect victims' families from the possibility of revictimization is to make sure all parties consent to every step throughout the process, and only proceed with mediation once all participants are thoroughly screened and prepared.¹⁰⁸ Though there is always a chance the person harmed will not like what the offender has to say, oftentimes an answer is more comforting than no answer at all.¹⁰⁹ It is important to give those affected by crime the option to participate in restorative justice programs because the restorative justice process allows for the flexibility and creativity necessary to explore different kinds of reparations that meet the participants' varying needs.

Revictimization may also occur because of an imbalance of power between the victims and the offender. Participants should be permitted to have advocates, representatives, or other sources of support partake in the mediation to help facilitate dialogue and act as an additional safeguard for the parties' safety and well-being.¹¹⁰

¹⁰⁵ *Id.* at 762.

¹⁰⁶ Wellikoff, *supra* note 3, at 7.

¹⁰⁷ *Id.* Research shows that “as the world leader in incarceration, the U.S. locks up more people per capita than any other nation.” Benecchi, *supra* note 82. Currently, “there are approximately 2.3 million people incarcerated in the United States, with an additional 4.5 million people on probation or parole.” *What is the Prison Industrial Complex?*, TUFTS U. PRISON DIVESTMENT, <https://sites.tufts.edu/prisondivestment/the-pic-and-mass-incarceration/> (last visited May 1, 2024). Unsurprisingly, the United States also has one of the highest recidivism rates in the world: “76.6%” of previously incarcerated individuals are “rearrested within five years.” Benecchi, *supra* note 82.

¹⁰⁸ See Thompson, *supra* note 31, at 604 (screening entails an initial evaluation of the participants to assess their suitability for mediation to ensure “good-faith participation” throughout the process).

¹⁰⁹ Even if the offender's answers to their questions are shocking or worse than expected, crime victims, even victims of more serious crimes, still report these responses are better than leaving questions unanswered. Price, *supra* note 9.

¹¹⁰ See Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Program on Victims of Domestic Violence through a Feminist Positionality Lens*, 15 U. ST. THOMAS L. REV. 883, 890 (2003) (allowing domestic violence victims to bring attorneys or victim-advocates with them to mediation and having them step in and

Participation of advocates, counselors, or social workers can also help to empower victims, build stronger, more engaged communities of care, and promote important values within the wider community.¹¹¹ Moreover, a trained mediator is in a better position to address potential power imbalances and other sensitive issues that are likely to arise in victim-offender mediations than a “neutral and detached magistrate.”¹¹²

B. PROTECTING THE DEFENDANT’S CONSTITUTIONAL RIGHTS

Another potential concern in victim-offender mediation is accounting for the defendant’s constitutional rights to due process and protection against self-incrimination. However, mediation is only appropriate for cases where the defendant takes full responsibility for their actions, so there is typically no issue of the defendant intending to plead not guilty at any point during the legal process.¹¹³ Moreover, if victim-offender mediation is implemented prior to trial, the parties’ conversations are protected by confidentiality, and the defendant is assured nothing they say in the meeting will be used against them at trial. Mediators are held to the highest standard of confidentiality and cannot relay any communication during the mediation or how the parties acted in the mediation to the court or to any non-participant, unless parties expressly so authorize.¹¹⁴ This helps create an open and vulnerable atmosphere where parties can converse with each other on a deeply emotional level, tapping into both parties’ compassion and humanity, without fear of repercussion.¹¹⁵ If completed prior to sentencing, the judge can take into account the restitution agreement and the defendant’s remorse at the sentencing hearing to lay down a more “fair and just punishment.”¹¹⁶ If the meeting takes place after sentencing, no constitutional issues arise because the defendant has

speak on the parties’ behalf when necessary helps to address issues of power imbalance between victims and offenders).

¹¹¹ ZEHR, *supra* note 6, at 51.

¹¹² Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

¹¹³ Lanni, *supra* note 76, at 654. Because restorative justice programs are completely voluntary, defendants who choose to participate are “typically deemed to have voluntarily waived many constitutional rights.” *Id.*

¹¹⁴ See FRENKEL & STARK *supra* note 30, at 335.

¹¹⁵ See generally Jonas-van Dijk et al., *supra* note 85, at 953–55.

¹¹⁶ Jessica M. Marshall, *(I Can't Get No) Satisfaction: Using Restorative Justice to Satisfy Victims' Rights*, 15 CARDOZO J. CONFLICT RESOL. 569, 573 (2014).

already been convicted, so restorative justice practices focus more on helping the parties heal emotionally.¹¹⁷

C. LACK OF PRECEDENT

Another major criticism of victim-offender mediation is the “lack of adequate guidelines established to ensure an effective and ethical process.”¹¹⁸ Many opponents raise concerns regarding the lack of formal training for mediators, particularly in the specialized area of victim-offender mediation.¹¹⁹ Critics suggest a failure to provide proper regimented training can lead to ambiguous “goals or policies, inappropriate referrals, and unhappy participants.”¹²⁰ Without a set standard, there may be no clear method to monitor mediations, ensure mediations are conducted properly, evaluate the mediator’s overall effectiveness, regulate the mediator’s conduct during mediations, nor ascertain parties’ satisfaction with the process as a whole.¹²¹

Concerns regarding the lack of guidelines for victim-offender mediation within violent crimes could be dispelled if the American Bar Association set out more explicit and detailed guidelines for victim-offender mediation programs.¹²² The overwhelming concerns against the expansion of victim-offender mediation to serious and violent crimes are predominantly based on worries regarding the safety of the victims’ loved ones, mainly safeguarding against re-victimization and the appropriateness of cases selected for mediation.¹²³ Therefore, next steps should ensure mediators are rigorously and properly trained, cases undergo a strict selection process, all parties are thoroughly prepared prior to mediating, and criminal courts continue their role in prosecuting cases unfit for mediation.¹²⁴ Another potential recourse is to implement surveys or reflections during follow-ups after the mediation where parties can anonymously express their likes and dislikes regarding the mediation process which the mediator, courts,

¹¹⁷ Rachel Alexandra Rossi, *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*, 9 PEPP. DISP. RESOL. L.J. 185, 197–99 (2008).

¹¹⁸ Wellikoff, *supra* note 3, at 5.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 6.

¹²³ *Id.* at 10.

¹²⁴ *Id.*

or even an independent board can review.¹²⁵ Once these protective measures are put in place, “no reason exists that would justify prohibiting the expansion of victim-offender mediation to serious and violent crimes.”¹²⁶

VI. CONCLUSION

Moving forward, the criminal justice system should dedicate ample resources to provide official training for mediators to facilitate mediations involving serious and violent crimes. Additionally, further research should assess the overall effectiveness of victim-offender mediation programs to determine whether mediation conclusively lowers recidivism rates of offenders and whether victims truly benefit from this process long-term. Additional research should analyze how various countries that regularly offer restorative programs to victims of violent crimes are implemented so that similar programs can be modeled in the United States.¹²⁷ It may also be beneficial to look at how different societal norms and cross-cultural influences affect the efficacy of victim-offender mediation in different countries. Through proper implementation of victim-offender mediation programs in cases of involuntary manslaughter, victims may finally receive the closure they deserve, revolutionizing the way criminal justice is served in modern society.

¹²⁵ U.N. OFF. FOR DRUG CONTROL & CRIME PREVENTION, *supra* note 79, at 89–90.

¹²⁶ Wellikoff, *supra* note 3, at 10.

¹²⁷ See *Youth Justice*, NIDIRECT, <https://www.nidirect.gov.uk/articles/youth-justice> (last visited May 19, 2024) (Northern Ireland creating a separate justice system for youth offenders, including youth engagement clinics and diversionary youth conferences). See *Review of Family Group Conferences*, MINISTRY SOC. DEV., <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/evaluation/review-family-group-conferences/index.html> (last visited May 19, 2024) (New Zealand implementing family group conferences to help vulnerable children and address complex familial issues). See *This Brazilian prison gives inmates the keys to their cells*, WORLD ECON. F. (Sept. 24, 2018), <https://www.weforum.org/agenda/2018/09/in-these-humane-brazilian-prisons-inmates-hold-the-keys-to-their-cells/> (Brazil establishing an “alternative methodology of incarceration and rehabilitation” that focuses on “humanizing the punishment and preparing offenders to re-enter society” through a privately-owned prison system operated by the Association for the Protection and Assistance to the Convicted (APAC)).