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# THE PRACTICE AND PROSPECT OF VICTIM-OFFENDER PROGRAMS

*Harry Mika\**

## I. INTRODUCTION

**A**N increasingly significant factor in the provision of local justice services has been the development of alternative responses to crime, delinquency, and victimization. Such innovations attempt to stand in stark contrast to the conventional processing and punishment of offenders and the obvious system attributes of enforcement targeting, the prevalence of mandatory and determinant sentencing, and the centrality of incarcerative responses. Despite the scope and costs of such contemporary criminal justice policy, crime rates and victimization rates, as well as the needs of victims and offenders, have been affected only marginally.<sup>1</sup> Applications of alternative dispute resolution (ADR) in the United States, Canada, and across Europe pose some seductive possibilities for enhancing the local justice equation. This paper provides a non-technical overview of victim-offender mediation, with specific reference to the Victim-Offender Reconciliation Program (VORP). The most unique feature of this alternative strategy is its promotion of face-to-face negotiations between victim and offender, in the presence of a third party mediator.

As is certainly true for the processing of civil disputes, where the vast majority of cases within the litigation framework settle prior to trial, the processing of criminal and delinquency matters exhibits a parallel reliance on negotiations in the form of plea bargaining. In general, however, the distinctions between the conventional use of plea negotiations within the criminal process and applications of negotiations in an alternative dispute resolution framework are straightforward. Where plea bargaining involves negotiations between a prosecutor and defense counsel, on behalf of the state and the accused respectively, victim-offender mediation programs are predicated upon direct negotiations without intermediaries between the victim/complainant and the offender/accused. In contrast to negotiations over

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1. See MARC MAUER, *THE SENTENCING PROJECT, AMERICANS BEHIND BARS: ONE YEAR LATER* 6-7 (1992).

the charge, perhaps the most tangible and obvious results of successful victim-offender mediation are restitution, and to a lesser degree, community service work. In response to the excesses of the conventional criminal and juvenile justice system, each of these outcomes is considered attractive, if not vital, to advocates and proponents of such politically disparate strategies as client-specific alternative sentencing<sup>2</sup> and rational punishment schemes.<sup>3</sup>

It is somewhat difficult to ascertain, with any precision, the prevalence of victim-offender mediation programs. The American Bar Association identifies approximately 150 community dispute resolution programs that include, among their menu of services, applications of mediation for criminal matters.<sup>4</sup> Indeed, the estimate that approximately 58 percent of 44,000 cases mediated in New York's Community Dispute Resolution Centers Program (fiscal 1990-91) pertain to issues of crime and delinquency<sup>5</sup> suggests the importance of this ADR application for some community-based, generalist mediation programs. A widely cited estimate of the number of exclusively Victim-Offender Reconciliation Programs in the United States is 100.<sup>6</sup> Several victim-offender mediation programs exist in Texas, including juvenile justice initiatives with long tenure in Dallas and Houston. The Dallas program, affiliated with Dispute Mediation Service and the Dallas County Juvenile Department, is thought to be the largest in the United States.<sup>7</sup> This initiative has been analyzed elsewhere as a case study of mediation intervention in the juvenile justice system.<sup>8</sup>

Apparently, interest in victim-offender mediation is substantial, and increasing. One proxy measure of its popularity is the recent publication of two extensive volumes of references and annotations to the English language literature on direct victim-offender negotiation of monetary restitution and community service work orders, sponsored jointly by the United States Department of Justice and the Solicitor General Canada.<sup>9</sup> The internationalization of the victim-offender mediation movement lends additional credence to the view that this response to the needs of victims, offenders, their com-

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2. ANDREW R. KLEIN, *ALTERNATIVE SENTENCING: A PRACTITIONER'S GUIDE* 161-62, 187-88 (1988).

3. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 6-7 (1990).

4. ABA SPECIAL COMMITTEE ON DISPUTE RESOLUTION PROGRAM, *DISPUTE RESOLUTION DIRECTORY* 1986-87 (1986).

5. Community Disp. Resolution Centers Program, *Highlights of the Annual Progress Report of the New York State Community Dispute Resolution Centers Program 1-2* (March 31, 1991) (available from the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York).

6. Mark S. Umbreit, *Mediation of Victim-Offender Conflict*, 1988 J. DISP. RESOL. 85, 86.

7. Stephen Woolpert, *Victim-Offender Reconciliation Programs*, in *COMMUNITY MEDIATION* 275-276 (Karen Grover Duffy et al. eds., 1991).

8. Harry Mika et al., *Mediation Interventions and Restorative Potential: A Case Study of Juvenile Restitution*, 1989 J. DISP. RESOL. 89.

9. RICHARD N. NUTTER ET AL., U.S. DEPT. OF JUSTICE, *MONETARY RESTITUTION AND VICTIM/OFFENDER CONTACT: AN ANNOTATED AND CROSS-REFERENCED BIBLIOGRAPHY* (1989); RICHARD N. NUTTER ET AL., U.S. DEPT. OF JUSTICE, *COMMUNITY SERVICE AND VICTIM/OFFENDER CONTACT: AN ANNOTATED AND CROSS-REFERENCED BIBLIOGRAPHY* (1989).

munities, and justice services in general continues to grow in significance and impact. In 1991, a NATO-sponsored conference in Italy, "Conflict, Crime and Reconciliation: The Organization of Welfare Intervention in the Field of Restorative Justice," brought together representatives of seventeen countries to discuss victim-offender programs. Critical and frank discussions of the status of program development, legal constraints, public needs, strategies of implementation, evaluation research, and the crime and social policy contexts for each of these countries revealed considerable diversity in their respective applications of what is generally acknowledged to have begun as a relatively homogeneous, North American ADR initiative.<sup>10</sup>

The scope and extensiveness of program development in the victim-offender mediation field, particularly in light of its relatively recent (early 1970s) emergence as a viable response to criminal conflict, strongly suggests that this strategy is neither experimental nor exotic. Rather, ample evidence exists to affirm that victim-offender mediation has forged for itself an increasingly significant role and place as an alternative approach even within the continuum of largely conventional justice services.<sup>11</sup> The remainder of this paper, mindful of this premise, examines selected themes related to the contemporary U.S. practice of victim-offender mediation, and proposes several critical issues that will bear upon the continued development and impact of this justice initiative.

## II. THE PRACTICE OF VICTIM-OFFENDER MEDIATION

### A. THE CRIME AND JUSTICE CONTEXT

In a series of highly publicized reports on crime and justice, The Sentencing Project has detailed the dramatic effects of expansion of the criminal justice apparatus in the United States: a tripling of Americans behind bars has resulted in an incarceration rate that is significantly higher than that of any country in the world; disproportionate effects of criminal justice policies result in one in four young black men being on probation or parole, or in jail or prison, at a rate almost five times greater than that of young black men in South Africa; and incarceration costs that exceed twenty billion dollars a year.<sup>12</sup> Get tough crime policies since the 1970s have fueled such expansion, including enforcement targeting such as the drug war, mandatory minimum incarcerative sentences, and restrictions on parole.<sup>13</sup> Further, these reports argue that despite the unparalleled growth and general punitiveness of the

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10. See RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES (Heinz Messmer & Hans-Uwe Otto eds., 1992). For additional information on the international theme, see Mark S. Umbreit, *Victim and Offender Mediation: International Perspectives on Theory, Research, and Practice*, 11 MEDIATION Q. (forthcoming 1994).

11. See *supra* notes 4-8 and accompanying text.

12. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990); MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 1-3 (1991); MARC MAUER, AMERICANS BEHIND BARS: ONE YEAR LATER *supra* note 1, at 1.

13. MAUER, YOUNG BLACK MEN, *supra* note 12, at 5.

criminal justice system, and the manifold policies that animate its excesses, crime rates have not decreased appreciably, nor are citizens safer or more secure.<sup>14</sup> Massive increases in arrests, prosecution and incarceration, for example, have apparently not resulted in reduced drug abuse.<sup>15</sup>

Criminal justice policies in the past twenty years reflect a reluctance to invest in prevention and services to address social problems that are known to be closely related to crime and delinquency, or in alternatives to incarceration.<sup>16</sup> Where alternative programs or intermediate sanctions exist, they appear to only supplement probation, and do not substitute, in whole or in part, for incarceration.<sup>17</sup> The total number of adult offenders served in alternative programs remains minuscule compared to the magnitude of arrests.<sup>18</sup> Yet, increasingly the public looks to alternative sentencing programs to assist in crime prevention and the rehabilitation of offenders, and to provide relief from the spiraling costs of crime control.

While certainly not limiting themselves to these themes, proponents of victim-offender mediation in Europe and the United States have closely tied rationalizations for their program innovations to the failures of contemporary criminal justice policy.<sup>19</sup> Citing the inability of such policy to reduce crime and recidivism, the glut of criminal prosecution, costs that far exceed the benefits of formally processing minor criminal conflict, inattention to the needs of victims and offenders, and the inflexibility of the criminal justice system in the face of changing needs of communities, advocates of victim-offender mediation have promoted alternative discourse on the contemporary crime and justice problem.<sup>20</sup> While numerous justice philosophies undergird alternative dispute resolution in its varied applications,<sup>21</sup> the practice of victim-offender mediation gravitates toward a restorative justice framework.

Among Europeans and American statements of the core precepts of restorative justice, Howard Zehr—in arguing that alternative programs must embrace alternative values—provides the most systematic comparison of the alternative restorative justice “lens” and the conventional retributive (punishment) orientation to crime and justice.<sup>22</sup> His point by point contrast of these diverse justice models, from the vantage of how crime is understood, perceptions of accountability, and the implications for applied justice,<sup>23</sup> is presented as an Appendix to this article. In general, Zehr views retributive justice as the formal processing of an individual who, because he broke the

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14. MAUER, AMERICANS BEHIND BARS: ONE YEAR LATER, *supra* note 1, at 6-7.

15. *Id.* at 9.

16. *Id.* at 10, 15.

17. *Id.* at 11.

18. *Id.*

19. See RESTORATIVE JUSTICE ON TRIAL, *supra* note 10.

20. See *id.*; HOWARD ZEHR, CHANGING LENSES (1990).

21. See Maureen Cain, *Beyond Informal Justice*, in *INFORMAL JUSTICE?* 51 (Roger Matthews ed., 1988).

22. ZEHR, *supra* note 20.

23. *Id.* at 184-85, 202, 211-14.

law, is prosecuted to determine guilt and is punished.<sup>24</sup> Retributive justice, as a process, does not anticipate or welcome the direct involvement of the victim. As an outcome, retributive justice requires little if any direct accountability to the victim by the offender. It is an organization of justice that depends heavily on proxies, where defense attorney, prosecutor, and judge presume to represent the offender, the victim, and the community and relegate them to minor roles in the adjudication of interpersonal, criminal conflict. Punishment functions as an execution of a debt to society of sufficient severity to deter future criminal behavior. The need of victims to be made whole, the need of offenders to be accountable and to responsibly restore fractured relationships, and the need of communities to confront the underlying causes of criminal conflict and be actively involved in creating justice are generally ignored in the retributive justice model in favor of an obsession with form, procedure, and process.

The competing restorative justice paradigm is outcome-oriented, emphasizing collective problem-solving through direct negotiations between the offender and the victim. The mediation of restitution is a means to an end, namely, the reconciliation of victim and offender and the restoration of interpersonal relationships damaged by criminal conflict. The direct involvement of victim, offender, and community are integral to the process of justice, not tangential. Crime is personal and social. Justice includes restoring victims and the community. The idea of crime as rule-violation, the adversary nature of the process, the peripheral roles of victim and offender, and the fixation on punishment are held counter-productive and antithetical to justice. It is this restorative justice orientation that has, in large measure, guided the development of the Victim Offender Reconciliation Program.

#### B. THE VICTIM-OFFENDER RECONCILIATION PROGRAM

In 1974, a Kitchener, Ontario court, following the recommendations of a probation officer, ordered two young men to speak with victims of a crime spree involving twenty-two separate crime scenes, for the purpose of negotiating restitution for uninsured damages. The offenders subsequently met face-to-face with twenty of their victims, in the victims' homes, and within a few months, had delivered to victims the total agreed-upon restitution. Thus began the first Victim-Offender Reconciliation Program (VORP), established initially as a joint venture of the local probation department and the Mennonite Central Committee Ontario. Within a few years, the VORP took root in the United States, as the Ontario model was adopted by a nonprofit organization in Elkhart, Indiana (1978) that became the Center for Community Justice. The contemporary VORP in the United States trace its heritage to this earlier tradition.<sup>25</sup>

As noted above, the VORP developed quickly in Canada, the United States, and across Europe during the past twenty years. A loose configura-

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24. The following discussion of retributive and restorative justice is a summary of Zehr's book and is further summarized in the Appendix.

25. Umbreit, *supra* note 6, at 87.

tion of associations attest to the institutionalization of this practice.<sup>26</sup> In the United States, the VORP is characterized by the sheer diversity of its applications. For example, the VORP may be only one of several activities of a community mediation center. The VORP may be the exclusive service activity of a church-based program, or a community-based, nonprofit program, or a court-annexed program such as a probation department. The VORP may be geared to adult offenders, or juvenile offenders, or both. The VORP may address misdemeanors and/or felonies, and may limit itself to property offenses, or include cases of interpersonal violence. VORP initiatives differ dramatically in their size, whether they have paid or volunteer staff, their sources and levels of funding, stages of organizational development and sophistication, variation and consistency of referral sources, and points of intervention in the criminal and juvenile justice processes. VORP applications differ as well in the degree to which they formally subscribe to values implicit in restorative justice, with most programs reflecting in their practice the tensions of the competing restorative and retributive models. Such diversity certainly complicates the task of characterizing goals and objectives of the VORP, the VORP process itself, and its beneficiaries. Hence generic descriptions can only serve as rough approximations of the varied applications of the Victim-Offender Reconciliation Program in the United States.<sup>27</sup>

### C. VORP GOALS

Several generally accepted goals and objectives animate the mediation of victim-offender conflict in the context of the VORP. Given the personal and social consequences of crime and delinquency, the VORP promotes equity among the victim, the offender, and the community at large. For example, the process attempts to recover damages, in whole or in part, for the victim of crime while reducing criminal processing costs by expediting negotiations, or incarceration costs to the community. The process further advocates offender responsibility to victims of crime, and fully enfranchises victim and offender in creating justice and resolution to criminal conflict. Moreover, the VORP is a forum characterized by accountability, where the offender confronts and is confronted by the personal and social consequences of criminal behavior, and where the victim shares in the responsibility for addressing and resolving problems she or he encounters due to victimization or conflict in general.

The VORP is a process of negotiation that seeks to facilitate restitution, where fair and equitable costs of crime to the victim are established, and

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26. Three major associations of organizations and practitioners exist for VORP-styled initiatives: Network for Community Justice and Conflict Resolution [298 Frederick St., Kitchener, Ontario N214 2N5, Canada], the Victim Offender Mediation Association (VOMA) [PACT Institute of Justice, 254 South Morgon Blvd., Valparaiso, Indiana 46383], and Mediation UK [82a Gloucester Road, Bishopstan, Bristol, B578BN, England].

27. For two such generic overviews, see HOWARD ZEHR, *MEDIATING THE VICTIM/OFFENDER CONFLICT: THE VICTIM OFFENDER RECONCILIATION PROGRAM* (1990); HOWARD ZEHR ET AL., *PACT INST. OF JUSTICE, THE VORP BOOK: AN ORGANIZATION AND OPERATIONS MANUAL* (n.d.).

restitution agreements specifying the type of restitution, the amounts of restitution, and the payment schedule are fashioned to enhance the likelihood that an offender can discharge the obligation to the satisfaction of the victim. The VORP also seeks to be an alternative to more severe sanctions, including diverting some cases from the formal justice system entirely, facilitating plea negotiations that cannot proceed due to disputes between the victim and offender over damages and restitution, resolving restitution disputes where non-compliance by the offender with court-ordered restitution may result in additional, more severe sanctions, or serving as an alternative to incarceration. Finally, the VORP provides the incentives for rehabilitation and future crime prevention because an offender both learns and confronts the personal and social consequences of criminal behavior, and exercises positive, constructive roles as a participant in the justice process and as a responsible member of the community by directly addressing the needs of their victim and, to the extent possible, making their victim whole again.

#### D. THE VORP PROCESS

The VORP process, irrespective of its particular configuration designed to suit the specific needs of diverse applications, is centered around the face-to-face meeting of victim and offender. In the presence of a mediator, the victim and offender encounter places the responsibility for resolution in their hands exclusively. The third party neutral serves as a resource and facilitates direct communication between the victim and offender.

In general, the VORP process includes four stages. First, a referral is made to the VORP. While the source(s) of referrals may differ from program to program, generally the VORP takes referrals from the criminal or juvenile justice system, such as police, prosecutors, judges/courts, and probation officials. Programs differ as well in terms of the points within formal criminal processing where referrals are appropriate. These might range from a police referral in order to divert an offender from the formal criminal process entirely, to referral by a parole officer after incarceration, seeking to have a conflict resolved in lieu of filing a new charge or technical violation that might result in revocation of parole.

The second stage in the VORP process is the preparation of the case. Volunteers or staff generally contact the victim and offender separately, either in person, by phone, or by mail seeking agreement to participate in the mediation, answering questions the parties may have about the process and its consequences, developing information, such as securing documentation of victim losses, and scheduling the mediation session. Based upon program criteria, inappropriate cases will be removed from the VORP process at this stage and referred elsewhere.

The third stage of the VORP process is the meeting between the victim and offender. Programs differ in terms of the locations for such meetings, but they can include the victim's home or a more neutral site. The victim-offender encounter is structured to allow the parties, in turn, to elaborate on the facts of the case, to ask questions of each other, to reveal feelings, to

review consequences of the conflict, and to discuss a resolution. The resolution itself is usually a written, enforceable agreement, signed by the victim and offender, that specifies the form, amount, and schedule of restitution and/or community service. Where such an agreement is not reached, additional meetings may be scheduled between the victim and offender, or the VORP may return the case to the referral source. Mediators who facilitate these victim-offender encounters are usually community volunteers who have received training in interpersonal communication and conflict resolution skills and techniques.

The fourth stage of the VORP process generally involves preparing the file, which would include the written agreement, for return to the referral source. VORPs differ in their responsibilities at this stage. While some programs monitor and enforce compliance with the restitution agreement, most do not. Some programs collect and distribute monetary restitution. A greater number of programs evaluate compliance and satisfaction with the VORP process. In all programs, this final stage involves bringing closure to the particular case.

#### E. PROGRAM BENEFICIARIES

In general, the VORP targets the needs of four key constituencies: victims, offenders, the community, and the justice system.<sup>28</sup> For victims the VORP enfranchises their participation in a process that includes the opportunity to ask questions, and express feelings and anger in face-to-face encounters with offenders. Direct involvement in negotiations over restitution enhances victims' satisfaction both with the VORP process and the justice system in general. Victims' needs are taken seriously and the process attempts to make them whole again. Through monetary restitution or restitution in the form of direct victim services by the offender, victims' needs are being met, usually with much higher probability than when restitution is ordered from the bench. Victims actively participate in the rehabilitation of offenders, and symbolically represent the community at large where negotiations include an offender's obligation to provide community service.

For offenders, the VORP is a learning experience to the extent that offenders are confronted by, and in turn respond to, the human and social costs of their actions. In this regard, the VORP enhances the possibility that at least some offenders will come to a better understanding and appreciation for the rights of others and the larger community impact of their behavior. With their direct and active participation in the negotiation process, offenders take ownership of an agreement to provide restitution to their victims. The successful execution of the restitution obligation is a productive, affirmative action in sharp contrast to criminal behavior. Offenders benefit directly from restitution agreements when successful negotiations with victims result in less punitive and severe sanctions.

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28. The priority of these constituency needs within the VORP is the subject of some debate, particularly with respect to whether the VORP is too offender oriented. *See, e.g.,* MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS* (1991).

For the community at large, VORPs promote active, local involvement in the development of sentencing alternatives that more directly respond to the local impact of crime and victimization. The VORP is certainly a less costly alternative to incarceration, and to the extent it contributes to diversion and rehabilitation of offenders, the VORP may contribute to future cost savings as well. Through reliance on trained community volunteer mediators, the VORP increases participation of the community in the justice process. Offenders may contribute, as part of negotiated community service work orders, to the quality of community life. To the extent that the VORP enhances the possibilities of offender rehabilitation and reduces recidivism, the community is spared future criminal conflict and victimization. The VORP is a community-based process that promotes consideration of the community impacts of crime and community needs among victims, offenders, and justice organizations.

For the justice system, the VORP promotes efficiency and economy in the delivery of services to victims and offenders. The VORP is a mechanism for establishing, by consensus, the terms and conditions of restitution to address victims' needs and offenders' capacities. VORP participants, including victims, offenders, and community volunteers, learn about the justice system as they participate in the justice process. Victims' cynicism about offender accountability and perception that the system does not take their needs seriously, are eroded considerably through the VORP process. Victims receive tangible evidence that needs are being addressed as the justice process incorporates their input. The VORP provides an alternative to both the processing of criminal matters and more severe, costly sanctions. The VORP is a resource within the continuum of local justice services.

### III. IMPACTS AND PROSPECTS OF VICTIM-OFFENDER MEDIATION

Research on the impact of victim-offender mediation is of recent vintage and far from systematic, which is a fair characterization of the entire field of alternative dispute resolution. Compilations of articles published in the past five years provide some sense of the dominant research themes with respect to evaluating and planning for victim-offender programs.<sup>29</sup> Empirical research exists on the use of restitution for property offenses, the process and outcomes of the VORP, and participant attitudes and perceptions of the mediation experience.<sup>30</sup> For example, the public at large views restitution both as appropriate and satisfactory for property offenses.<sup>31</sup> Restitution generally has a positive impact on recidivism for juvenile offenders, even serious juvenile offenders, and in general, juveniles participating in restitution have

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29. See *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* (Martin Wright & Burt Galaway eds., 1989); *INFORMAL JUSTICE?*, *supra* note 21; *RESTORATIVE JUSTICE ON TRIAL*, *supra* note 10.

30. See Umbreit, *supra* note 10; Mika et al., *supra* note 8.

31. Mika et al., *supra* note 8, at 91-92.

lower recidivism rates than those receiving other traditional dispositions.<sup>32</sup> Restitution is most successful when it is a sole sanction, instead of one of several conditions of probation.<sup>33</sup> The size or amount of restitution is a better predictor of success than the number of prior offenses or the seriousness of the crime.<sup>34</sup>

With respect to evaluations of victim-offender mediation, most victims of property crime report that they would be willing to meet with their offender, and more victims of violent crime would participate in face-to-face encounters than is commonly assumed.<sup>35</sup> Most victims and offenders characterize their participation in the VORP as voluntary, and each group reports high satisfaction rates with the process.<sup>36</sup> Likewise, victims and offenders perceive both the process and the outcome (agreement) as fair.<sup>37</sup> Completion rates for mediated restitution range high above eighty percent.<sup>38</sup> Restitution is more likely to be completed by juveniles if it is mediated, rather than ordered and assigned.<sup>39</sup> After participating in the VORP, victims report feeling less fearful about revictimization by their offender, less upset about their victimization, and more satisfied with how the courts handled their case.<sup>40</sup>

The incremental development of research and evaluation agendas designed to critically appraise and improve the delivery and impact of victim-offender mediation somewhat erodes the author's earlier skepticism regarding the prognosis for increasingly effective and responsive applications of informal, alternative justice.<sup>41</sup> As victim-offender mediation enters its third decade, a number of emerging themes promise to affect its future course. A concluding review of some issues will help to illustrate the broad parameters of ongoing discussion and debate within this relatively new field.

#### A. ON CASE SELECTION. . .

Against the backdrop of the criminal justice context, discussed above, it is prudent to note that many innovative alternative justice programs retain the conventional punishment prerogative, and only give lip service to the needs of victims, offenders, and the local community. In most states, there has been a proliferation of programs that tout themselves as alternatives to the costly traditional criminal and juvenile justice system approaches. What is actually happening is becoming more clear; alternative programs focus upon less serious crime and offenders, and in doing so, only "widen the net" of

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32. *Id.* at 92.

33. *Id.*

34. *Id.* at 92-93.

35. Umbreit, *supra* note 10.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See Harry Mika & Kathleen Utecht, *The Prognosis for Informal Dispute Resolution in Local Communities: Rethinking the Parameters of Organization Responses in the 1990's*, in DISPUTE RESOLUTION AND DEMOCRACY IN THE 1990'S: SHAPING THE AGENDA (1990).

formal control to include increasing numbers of offenders who might be better served by not being served at all. Might this be the case as well for victim-offender mediation programs? Putting aside for the moment the goals of addressing the needs of victims and the community, in addition to serving offenders, what are the implications of the apparent marginalization of alternative justice programs for the VORP? Indeed, it would appear that many applications of the VORP, due in part to the nature of referral relationships with the conventional justice system and their organizational capacity, deals in large part with relatively minor property offenders and victims. High mediation success rates may reflect the selectivity of referral criteria. In some states, there are statutory limits that make this so, including restrictions on the types of cases appropriate for mediation (e.g., no violent felony cases).<sup>42</sup> If there is any truth to the maxim that to be taken seriously, programs will have to involve themselves in serious conflict, then the VORP generally will have to make this important transition. Individual VORP initiatives have involved themselves in serious conflicts, and the process of mediation itself appears suited to the task, given adequate training of mediators and the willingness of victims and offenders to participate.

#### B. ON PROGRAM DEVELOPMENT. . .

A number of program operationalization issues persist for the VORP. For example, as is true for many small community-based programs, there is preoccupation with the budget, and perhaps fragile relationships with referral sources. The subversion of the ideals of restorative justice loom, given the necessity, often related to budget and referrals, of a close working relationship with the conventional justice system. Many of these problems reflect growing pains. As VORP initiatives mature in their respective communities, they tend increasingly to become legitimate players in the local justice system, and are accorded due weight and respect by other system participants. For example, they may become acknowledged experts and clearinghouses for alternative dispute resolution by providing technical assistance to the courts. They may serve as the "pulse" of community needs in the justice arena. Such outcomes are a soothing imagery for most VORP initiatives, which are caught up in the struggle to survive and to promote an alternative vision of justice, a very critical tension.

#### C. ON VICTIMS. . .

By and large, victims of crime in the United States have had only mixed success in advocating their agenda within the conventional criminal justice system. Public victim compensation schemes, and statutory and even constitutional victim bills of rights notwithstanding, victims have long been relegated to very marginal justice roles. The VORP proposes a very different agenda for victims, of course. But the nature of the case menu that most

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42. See STANDING COMM. ON DISPUTE RESOLUTION, AM. BAR ASS'N., LEGISLATION ON DISPUTE RESOLUTION 77-111 (1990).

VORP initiatives pursue, largely property offenses, still means that significant categories of victims lack a venue for their needs, despite the existence of alternative justice programs. For example, a reluctance to intervene in criminal conflict involving interpersonal violence means that women as victims of violence will fare no better with or without victim-offender mediation programs. Without knowing what victims want, and certainly in the face of strong evidence that women victims have fewer remedies in the conventional justice system, many states have placed statutory limitations on the use of mediation for domestic abuse.<sup>43</sup> The challenge of enfranchising victims of crime for VORP-styled initiatives remains a critical issue, particularly for classes of victims with special needs, such as women and, increasingly, youths who are victims of violence.

#### D. ON RESEARCH AND IMPACT. . .

To this point, research on victim-offender mediation has focused predominantly on the perceptions and experiences of fairness and justice by offenders and victims. The larger significance of mediation programs, including victim-offender mediation programs, with respect to social problems and social justice, receives only scant attention. It is possible that the limited focus of existing research is an accurate barometer of the limited way that the VORP movement thinks of its impact and significance. The core precepts of restorative justice appear, however, to be considerably more extensive than such narrow views of the VORP's impact. A more comprehensive research agenda for the VORP, one that aggressively assesses this outcome-oriented, restorative model of justice, must go hand-in-hand with more expansive consideration, rooted in practice, of the unique program outputs and impacts of an alternative, consensus-based justice program.

#### E. ON RESTORATIVE POTENTIAL. . .

Finally, the VORP and other mediation strategies focus primarily on the affective dimensions of conflict. The process, particularly the victim-offender encounter, emphasizes the relational dimension of crime and victimization. Both offender and victim, in the social process of mediation, address the personal consequences of their conflict. However, crime and delinquency, and all forms of conflict for that matter, are linked to larger social issues that are often beyond the immediate control and manipulation of disputants. There are social problems in communities—unemployment, racism, violence, etc.—that give rise to conflict between individuals. How does the mediation process, or how does the VORP, mindful of its explicit restorative, social justice goals, address these larger issues? Is it possible for informal, alternative justice programs such as the VORP to be more sensitive to the predicaments of offenders and victims that result from this larger social context? Program attributes, based upon research, have been suggested to

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43. See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 214-18 (1989).

address the micro-level bias of mediation practice.<sup>44</sup> It will be a formidable task to shape victim-offender mediation to be more responsive to larger social problems. The prize—the significant role of victim-offender mediation in creative self-management and problem-solving in communities—appears well worth the effort.

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44. Harry Mika, *Social Conflict, Local Justice: Organizational Responses to the Astruc-tural Bias*, INTERACTION, Spring 1992 (Special Supplement).

APPENDIX  
COMPARING JUSTICE PARADIGMS<sup>45</sup>

A. UNDERSTANDINGS OF CRIME

Retributive Justice

Crime defined by violation of rules  
(i.e., broken rules)

Harms defined abstractly

Crime seen as categorically  
different from other harms

State as victim

State and offender seen as primary  
parties

Victims' needs and rights ignored

Interpersonal dimensions  
irrelevant

Conflictual nature of crime  
obscured

Wounds of offender peripheral

Offense defined in technical legal  
terms

Restorative Justice

Crime defined by harm to people  
and relationships (i.e., broken  
relationships)

Harms defined concretely

Crime recognized as related to  
other harms and conflicts

People and relationships as victims

Victim and offender seen as  
primary parties

Victims' needs and rights central

Interpersonal dimensions central

Conflictual nature of crime  
recognized

Wounds of offender important

Offense understood in full context:  
moral, social, economic, political

B. UNDERSTANDING OF ACCOUNTABILITY

Retributive Justice

Wrongs create guilt

Guilt absolute, either/or

Guilt indelible

Debt is abstract

Debt paid by taking punishment

Debt owed to society in the  
abstract

Accountability as taking one's  
"medicine"

Assumes behavior chosen freely

Restorative Justice

Wrongs create liabilities and  
obligations

Degrees of responsibility

Guilt removable through  
repentance and reparation

Debt is concrete

Debt paid by making right

Debt owed to victim first

Accountability as taking  
responsibility

Recognized difference between  
potential and actual realization of  
human freedom

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45. ZEHR, *supra* note 20, at 184-85, 202, 211-14.

Free will or social determination	Recognizes role of social context as choices without denying personal responsibility
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### C. UNDERSTANDINGS OF JUSTICE

#### Retributive Justice

Blame-fixing central  
 Focus on past  
 Needs secondary  
 Battle model; adversarial  
 Emphasizes differences  
 Imposition of pain considered normative  
 One social injury added to another  
  
 Harm by offender balanced by harm to offender  
 Focus on offender; victim ignored  
 State and offender are key elements  
 Victims lack information  
 Restitution rare  
 Victims' "truth" secondary  
  
 Victims' suffering ignored  
  
 Action from state to offender; offender passive  
 State monopoly on response to wrongdoing  
 Offender has no responsibility for resolution  
 Outcomes encourage offender irresponsibility  
 Rituals of personal denunciation and exclusion  
 Offender denounced  
 Offender's ties to community weakened  
 Offender seen in fragments; being definitional

#### Restorative Justice

Problem-solving central  
 Focus on future  
 Needs primary  
 Dialogue normative  
 Searches for commonalities  
 Restoration and reparation considered normative  
 Emphasis on repair of social injuries  
 Harm by offender balanced by making right  
 Victims' needs central  
 Victim and offender are key elements  
 Information provided to victims  
 Restitution normal  
 Victims given chance to "tell their truth"  
  
 Victims' suffering lamented and acknowledged  
 Offender given role in solution  
  
 Victim, offender, and community roles recognized  
 Offender has responsibility in resolution  
 Responsible behavior encouraged  
  
 Rituals of lament and reordering  
  
 Harmful act denounced  
 Offender's integration into community increased  
 Offender viewed holistically

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