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REMARKS ON CASE-MANAGEMENT CRIMINAL MEDIATION

MAUREEN E. LAFLIN*

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I. INTRODUCTION

Many in the legal community expressed surprise when the judge in the well-publicized Florida patricide trial of Derek and Alex King appointed a mediator to negotiate punishment for the boys after rejecting the jury verdicts of second degree murder against them both.¹ Yet the judge's action was far from unprecedented. Mediating criminal cases is no longer a vague concept, limited to only juveniles, non-serious adult criminal cases, and so-called "victim-offender" programs. From major murders to average possession cases, an increasing number of judges and attorneys are turning to mediation as a method of resolving felony cases.² While non-victim-offender criminal mediations are still relatively rare,³ what is sometimes called "case-management" or "voluntary settlement conference" ("VSC")⁴ mediation⁵ is beginning to take hold in the criminal context.

1. See, e.g., Stephanie Francis Cahill, *Punishment By Mutual Agreement: Lawyer for Boy Accused in Dad's Murder Doubts Mediation Will Work*, 41 A.B.A. J. E-REPORT 1, Oct. 25, 2002; Brett Norman, *Mediation to Chart Unfamiliar Course*, PENSACOLA NEWS J., Oct. 18, 2002, at 2A.

2. See Marie R. Volpe, *Promises and Challenges: ADR in the Criminal Justice System*, DISP. RESOL. MAG., Fall 2000, at 4-5.

3. *Id.* (noting that despite the increased use and acceptance of ADR in the civil arena over the past thirty years, its effective use in the criminal justice milieu has been simultaneously overlooked and controversial); see also Jennifer Smith, *Scrapping the Plea-Bargain: Mandatory Mediation of Criminal Cases Would Further Justice, at a Lower Social Cost*, DISP. RESOL. MAG., Fall 2000, at 19 (noting that ADR is rarely used in major criminal cases involving adults); KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 282-83 (2003) ("The use of mediation to assist prosecutors and defense lawyers in the plea bargaining process has not been very common."); Cahill, *supra* note 1, at 1.

4. See H. WARREN KNIGHT ET AL., *CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION* ch. 3-E (2002). The guide distinguishes between "classic" mediation and voluntary settlement conference by providing that:

A voluntary settlement conference (VSC) is similar to the classic mediation format However, unlike classic mediation, there is no concerted attempt to get the parties to focus on their respective interests, attack the underlying problem, and come up with their own solution. Instead, a VSC is more focused on settlement of litigation.

Id.; see also JONATHAN M. HYMAN ET AL., *CIVIL SETTLEMENT STYLES OF NEGOTIATION IN DISPUTE RESOLUTION* 40-55 (1997) (discussing judicial settlement actions); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253 (1997) (providing an in-depth look into negotiation styles and noting the wide spread use of positional bargaining).

5. While I maintain that mediation and settlement conferencing are distinct forms of ADR, Maureen Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 491-99 (2000), I also recognize that many ADR practitioners use the terms interchangeably. For ease of understanding and consistency with the broad definition of me-

Yet even modest growth in the frequency of criminal mediations triggers controversy. Criminal mediation raises concerns largely unknown in the civil context, concerns that stem from three critical differences between criminal and civil mediation—what is at stake, who are the stakeholders, and who is the mediator. In civil mediation, the issue usually centers around money. In contrast, the greatest of interests—life and liberty—are at stake in criminal mediation. Moreover, the identity of the principal stakeholders in civil cases is usually straightforward. While complex civil mediations often include secondary interested parties, the principal stakeholders are the plaintiff(s) and defendant(s) to the underlying action. The identity of the stakeholders becomes more complicated in the criminal arena as the prosecutor brings the charges on behalf of the government or “the people.” Thus, juxtaposed to the defendant in a criminal mediation as a principal stakeholder is the government, not the actual victim. Yet the victim’s interest in the matter provides good reason to consider him or her a stakeholder with something more than a secondary interest. Criminal mediation thus inherently takes the form of a multi-party, multi-interest process. Finally, the identity of the mediator differs between civil and criminal mediation. Civil mediations usually are conducted by trained mediators, while most criminal mediations of the case-management form are handled by judges who may or may not have training, experience, or even any real understanding of mediation practice.

These differences between civil and criminal mediation raise concerns that for many are of such weight as to militate against any use of mediation in the criminal arena. Victims’ rights advocates caution that mediation processes that do not include victims may undermine the attainment of resolution or closure that so many victims need. Experienced, trained civil mediators look with puzzlement and concern at the casual, almost cavalier attitude many criminal court judges take toward how easy they imagine it to be to dye the hue of their robes from those of adjudicators to mediators. And while many prosecutors fear losing control and the competitive edge they usually enjoy in the criminal process,⁶ defense attorneys worry that criminal mediation portends widespread waiver of the constitutional rights of the accused.

diation set forth in the Uniform Mediation Act, I will use the term “mediation” when referring to the voluntary settlement process many judges are using in the criminal arena.

6. See, e.g., Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 52, 52–53 (1968) (stating that a prosecutor has four roles: (1) acts as an administrator, (2) acts as an advocate, (3) acts as a judge, and (4) acts as a legislator).

Concerns about criminal mediation thus mark every participant in the process. Nevertheless, criminal mediation is becoming more and more common. In the State of Idaho, for example, some trial court judges strongly encourage mediation, sometimes treating it as “a prerequisite to trial” for many cases on their criminal calendars.⁷ As of spring 2001, one Idaho trial judge had personally mediated seven homicides, with six resulting in plea agreements, in addition to cases involving rape and conspiracy to commit murder.⁸

Criminal mediation is thus an emerging reality, for better or worse. In hopes that reflective consideration of the process as it is emerging will help produce a better reality, this article explores several of the central questions and concerns that attend criminal mediation. Part II begins with an examination of the distinctiveness of criminal mediation—what is mediation, and how the specific, emergent form of criminal mediation under review, case-management or voluntary settlement conference mediation, is different from the more restorative models such as Victim Offender Mediation. Part III turns to the five principal concerns arising under criminal mediation: (1) Who are the stakeholders, and should victims be invited to the table; (2) Whether training in mediation practice, regarded as essential for civil mediators, is equally requisite for criminal mediators as a check on the coercive nature of criminal mediations; (3) What case-management criminal mediation offers the defendants and whether it threatens to effectively (and involuntarily) waive the constitutional rights of the accused; (4) How to avoid prosecutorial resistance to criminal mediation; and (5) Whether current mediation privilege rules adequately protect mediation communications in the criminal context. Despite these concerns, Part III acknowledges there are several advantages to criminal mediation and offers several suggestions to ensure that the process does develop into a fruitful and beneficial reality. Specifically, I suggest that states and members of the ADR community interested in pursuing case-management criminal mediation proceed with caution. The process which has grown organically needs to ensure safeguards for all concerned, particularly the criminal defendants who participate in civil and criminal mediations with the belief that all communications are confidential. States need to adopt court rules to ensure that the mediation privilege rules protect the confidentiality of mediation communications that occur. Advocates of the case-management model of criminal mediation should take time

7. Conversation with various participants of the “Mediating the Criminal Case” seminar, Northwest Institute for Dispute Resolution, University of Idaho College of Law (May 2003) (notes on file with author) [hereinafter Seminar].

8. Cathy Derden, *Criminal Mediation*, ADVOCATE, Feb. 2002, at 25.

more frequently than others, many mediators move along the continua and among the quadrants.¹⁵

Riskin noted that the greatest disagreement and confusion in mediation practice is over whether a mediator should take an evaluative approach.¹⁶ He characterized an evaluative mediator as one who "assumes that the participants want and need her to provide some guidance as to the appropriate grounds for the settlement."¹⁷ Riskin noted that "the parties should understand that once they involve a third party, and allow that 'neutral' to give an opinion on the merits, that determination will almost always have a powerful impact on all further negotiations."¹⁸ By contrast, the facilitative mediator "assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers."¹⁹ As noted by Riskin and others, the concerns over the evaluative approach primarily focus on the parties' potential loss of self-determination²⁰ and the mediator's loss of impartiality.²¹

A number of commentators have criticized Riskin and his "grid" framework.²² Some have argued strenuously that evaluation is not mediation.²³ Others have taken a cautionary approach to evaluation, maintaining that to be effective, a mediator may well need to evaluate sometimes.²⁴ Finally, some commentators have advocated evaluation,

15. *Id.* at 35-36.

16. *See id.* at 9.

17. *Id.* at 24.

18. *Id.* at 44.

19. *Id.* at 24.

20. *See, e.g.,* Welsh, *supra* note 10, at 49-52; Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 672 (1997) (arguing that if the parties want evaluation, then the principle of self-determination should govern and allow evaluation); Riskin, *supra* note 11, at 45.

21. Moberly, *supra* note 20, at 671.

22. For a summary of the debate, *see, e.g.,* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146-54 (2001), and Welsh, *supra* note 10, at 27-30.

23. *See, e.g.,* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) [hereinafter Kovach & Love, *Mapping Mediation*]; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

24. James Alfini & Gerald S. Clay, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spring 1994, at 8. Gerald S. Clay, an attorney mediator, argues that "[e]ffective mediation almost always requires some analysis of the strengths and weaknesses of each party's position should the dispute be arbitrated or litigated." *Id.* Marjorie Corman Aaron, executive director of the Program on Negotiation at Harvard Law School, maintains that situations do exist in which the careful and thoughtful use of mediator evaluation can serve the parties. Marjorie Corman

arguing that mediators should use evaluation at times, so long as they do so with restraint and only at the parties' request or insistence.²⁵

Nearly ten years since publication of his influential essay, Riskin, noting certain deficiencies with his original grid, has now revised its structure and proposes using the terms "directive" and "elicitive" in place of "evaluative" and "facilitative."²⁶ He also advocates a new system which focuses on the "influence that each participant exerts or hopes or plans to exert."²⁷ The new system looks both at the parties' predisposition regarding influence as well as their actual influence.²⁸

Beyond Riskin and his critics, definitions of mediation have been offered by several other scholars,²⁹ as well as by court rules³⁰ and

Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 62-64 (1996). The mediator's evaluation should not be the final word, but should provide "a range within which an intelligent, neutral, fair-minded person would find it reasonable for the parties to settle." *Id.* at 64; Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 57, 61 (1996) ("Complex mediation these days often involves legal questions and mediator prediction or evaluation of the legal merits or 'likely outcomes' of cases. Wouldn't you want a mediator with legal expertise if you were involved in an important case?" She goes on to say, "Just because a mediator has a law degree—or even an up-to-date license to practice—does not mean that he or she will give accurate legal advice, prediction or evaluation.").

25. See John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 101-05. Professor Leonard Riskin commented that "if the parties intelligently decide that they want the narrow evaluative mediation, . . . the mediator ought to evaluate and it is ethical . . ." *Id.* He further stated that "evaluation can enhance self-determination." *Id.*; see also Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 504, 552 (1997) (arguing that evaluation at certain times can enhance rather than deny party self-determination). Furthermore, Weckstein argues that "when consistent with the parties' expectations and the mediator's qualifications, activist intervention by the mediator should be encouraged rather than condemned." *Id.* In addition, he argues for the use of evaluations "only after other more facilitative measures have failed to break an impasse." *Id.*; see also Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 743 (1997) (advocating for the development of a "code that encourages the parties to pick the mediation model that works for them").

26. Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG., Winter 2003, at 22, 24.

27. *Id.* at 24.

28. *Id.* at 25 (explaining that his new problem definition grid includes "participants' predispositions about both what the problem definition should be and about who should influence its development," and that "[o]ther potential grids could deal with actual influence . . . during . . . the mediation process").

29. See, e.g., John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 478 app. A (1997). The Model Standards define mediation as:

[A] process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or 'self-determination') by the parties to the dispute. A mediator facilitates communications, promoting understanding, focuses the parties on their interests, and

cases.³¹ Throughout and central to the definitional debate has been concern over whether certain evaluative processes are truly mediation.³² The Uniform Mediation Act ("UMA") weighed in on the topic by adopting a broad definition. The UMA defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."³³ As reflected in the Reporter's Notes,

[t]he emphasis on negotiation in this definition is intended to exclude adjudicative processes, such as arbitration and fact-finding, as well as counseling. It was not intended to distinguish among styles or approaches to mediation The use of

seeks creative problem-solving to enable the parties to reach their own agreement.

Id.

30. States which have adopted rules for mediation generally define the term. The Idaho Rules of Civil Procedure define mediation as:

[T]he process by which a neutral mediator appointed by the Court or agreed to by the parties assists the parties in reaching a mutually acceptable agreement. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decision of the parties, and not the decisions of the mediator"

IDAHO. R. CIV. P. 16(k). The Idaho Federal District Court defines mediation as:

[A] process in which an impartial third party (the 'mediator') facilitates communication between parties and assists them in their negotiations (e.g., by clarifying underlying interests) as they attempt to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. Whether a settlement results from mediation and the nature and extent of the settlement are within the sole control of the parties."

U.S. DIST. CT. D. IDAHO L. CIV. R. 16.5.

31. Definitions from court cases have a law-related spin on them. For example, *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995), involved a motion to disqualify an attorney from representing one of the parties based on the attorney's previous role as a mediator in a substantially factually related matter. The court defined a mediator for purposes of the case as "an attorney who agrees to assist parties in settling a legal dispute, and in the course of assisting those parties undertakes a confidential relationship with them." *Id.* at 1493.

32. See Laflin, *supra* note 5, at 491-93; Riskin, *supra* note 11, at 40; Kovach & Love, *Mapping Mediation*, *supra* note 23, at 79.

33. UNIF. MEDIATION ACT, Prefatory Note (2003), available at <http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm> (last visited March 27, 2004) [hereinafter UMA]. The UMA is the result of a historic collaboration between the ABA Dispute Resolution Section and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). In August 2001, the NCCUSL adopted the UMA, and in February 2002 the ABA House of Delegates endorsed it.

the word 'facilitation' is not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely.³⁴

Thus the pressing debate over the last several years among mediation scholars and practitioners over the definition of mediation has to this point resulted in no real consensus. Rather, as reflected in the UMA's definition and the reporter's comments, an all-inclusive approach has won out.³⁵

B. Two Models of Criminal Mediation

Two significant mediation models—the restorative justice model and the case-management evaluative model—have emerged in the context of criminal cases, each with a different focus, different philosophies, and a different bargaining scheme. Most of what has been written about mediation in the criminal arena discusses restorative justice programs such as victim offender programs ("VOM").³⁶ Just as

34. UMA, *supra* note 33, § 2 cmt. 1.

35. While the all-inclusive definition reflects the common usage of the term, it does in my mind distort the view of mediation as a true alternative to the adjudicative system of dispute resolution. As I argued in a prior article:

The ADR spectrum . . . must not be conceived as a number line where each form of ADR occupies a clearly marked independent position. Rather, it forms a spectrum along the lines of a color spectrum, such that every ADR method can be understood only in relation to the others into which it blends and fades.

Lafin, *supra* note 5, at 492. At some point however, the colors stop blending, and the process stops being mediation.

36. See, e.g., Andre R. Imbrogno, *Recent Development: State v. Tolia*, 14 OHIO ST. J. ON DISP. RESOL. 699, 705-06 (1999) (stating that mediation has been used in the criminal arena in two mediation contexts—victim-offender mediation programs and community dispute resolution programs which remove minor disputes from the courts); Sheila D. Porter & David B. Eells, *Mediation Meets the Criminal Justice System*, 23 COLO. LAW. 2521 (1994) (discussing the victim-offender mediation models and encouraging their growth and study); Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 250 (1999) (writing on the number of victim-offender mediation programs that exist in the United States); Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?*, Victim-Offender Reconciliation Program Info. & Resource Center, at <http://www.vorp.com/articles/crime.html> (last visited Mar. 29, 2004) (advocating a restorative approach to justice); Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U. L. REV. 17 (1979) (indicating criminal mediation programs include the victim and the accused in order to arrive at a mutually agreeable solution to their dispute); Adina Levine, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal "Justice" System*, 24 HAMLINE J. PUB. L. & POL'Y 369 (2003) (arguing for the use of mediation in the plea setting to reduce or eliminate the racism inherent in the criminal justice process).

a continuum exists in the ADR spectrum, one also exists between restorative and retributive justice.³⁷ The role of healing and the influence of the victim fades as one spans the spectrum from restorative justice to retributive justice.

VOM programs historically have focused on a restorative justice approach,³⁸ while traditional criminal law focuses on retributive justice.³⁹ Under the retributive model, crime is a violation of the laws of the state,⁴⁰ and the state is viewed as the victim, to whom the offender owes an obligation to suffer punishment.⁴¹ Retributive justice “is designed to answer the questions of, ‘what laws were broken, who broke them and how should the law-breaker be punished.’”⁴² In contrast, the restorative model sees the actual victim of the crime as the party to be made whole, and the offender is held accountable by taking responsibility for his or her actions.⁴³ The goal of restorative justice is “to repair the harm that crime causes.”⁴⁴

1. Restorative Justice Model: Victim Offender Mediation

The restorative justice model is “relationship-driven,” focusing on healing⁴⁵ and attaining closure.⁴⁶ It demands accountability and obli-

37. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 4 APPALACHIAN J.L. ___ (forthcoming 2004) (citing Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68, 70).

38. See Price, *supra* note 36 (“Restorative justice sees crime as a violation of human relationships rather than the breaking of laws. Crimes are committed against victims and communities, rather than against a government.”) (emphasis omitted). For a history of restorative justice, see Reimund, *supra* note 37, at 8–10, and Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, ADVOCATE, May 2003, at 22.

39. Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207, 216 (1996).

40. See Reimund, *supra* note 38; HOWARD ZEHR, CHANGING LENS: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990) (Crime is viewed as a violation against the state, “defined by law breaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state by systemic rules.”).

41. Joseph, *supra* note 39, at 216.

42. Price, *supra* note 36.

43. *Id.*; see also Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 29 (2001) (stating that the reconciliation process generally takes place through face-to-face meetings between the offender and the victim, often referred to as “conferencing” or “dialogue,” at which the offender is made to understand the effects of his conduct and given an opportunity to offer personal atonement to those he or she has directly harmed).

44. Reimund, *supra* note 37, at 7 (citing Gordon Bazemore & Lode Walgrave, *Introduction: Restorative Justice and the International Juvenile Justice Crisis*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 4 (Gordon Bazemore & Lode Walgrave eds. 1999)).

45. *Id.* (advocating that we “move as far as we can toward a process that puts victims, offenders and members of the affected community—and their respective needs

gations. The underlying premise is that crime is a violation of people and relationships. "It creates obligations to make things right. Restorative justice involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance."⁴⁷ As one commentator has written, "[r]estorative justice as a framework for dealing with crime and its aftermath offers great possibilities for changing the focus of criminal justice from simply incarcerating wrongdoers to focusing on the needs of victims, on repairing communities and on holding offenders accountable in meaningful ways."⁴⁸ The goal of restorative programs is thus to resolve criminal conflicts in ways that both the victim and the offender accept as fair.⁴⁹

"Forgiveness" is a central and contentious concept among restorative justice scholars. Forgiveness does not occur in every restorative process, though victim offender programs do provide an opportunity for such healing to occur.⁵⁰ When forgiveness is given it brings the potential for closure, allowing both victim and wrongdoer to move forward with their lives. While forgiveness is a state of mind held by the victim, it has aspects directed inwardly toward the victim and outwardly to the wrongdoer. From the inward standpoint of the victim's rights and self-interest, forgiveness requires a "willingness to abandon one's right to resentment, negative judgment, and indifferent behavior toward one who unjustly injures us"⁵¹

Directed outwardly toward the wrongdoer, forgiveness begins when the victim starts to see the wrongdoer differently, specifically,

and roles—at the center of our search for a justice that heals"); see also Porter & Ells, *supra* note 36, at 2521 (suggesting that VOM "offers an opportunity to create a balance between what is legally right and what is morally or ethically right"); Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1486 (1994) ("Advocates contend that mediation is a holistic process; by focusing on the reparation of relationships rather than concentrating on individual rights, mediation contains community building aspects.").

46. Umbreit et al., *supra* note 43, at 30.

47. Bakker, *supra* note 45, at 1515.

48. David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1664 (2000).

49. See Bakker, *supra* note 45, at 1485.

50. Price, *supra* note 36 ("The primary focus is upon healing and closure Forgiveness is a process, not a goal. It must occur according to the victim's own timing, if at all. For some victims, forgiveness may never be appropriate."); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1200-04 (1997) (discussing the role of apology in criminal matters).

51. Lerman, *supra* note 48, at 1663 (citing Robert D. Enright, *The Psychology of Interpersonal Forgiveness* (1995) (Paper presented at National Conference on Forgiveness, Madison, Wisconsin), *quoted in* WALTER DICKEY, FORGIVENESS AND CRIME: THE POSSIBILITIES OF RESTORATIVE JUSTICE, EXPLORING FORGIVENESS (Robert D. Enright & Joanna North eds., 1998)).

when the victim develops an empathetic view that takes in more of the wrongdoer than his or her crime. This aspect of forgiveness constitutes a form of understanding—indeed, in the moral sense, quite an elevated form of understanding that involves seeing the wrongdoer as a whole (though imperfect) moral being, one whose wrongful act is an instance wedged in a life with a past and a future not without prospects and possibilities. It is this outward aspect of forgiveness that is the more difficult to attain and the true source of potential for closure, for it is here that forgiveness becomes forward-looking and directed toward acts of reconciliation.

Nevertheless, some in the restorative community argue that seeking forgiveness asks too much of the victim,⁵² suggesting that some lesser degree of understanding be encouraged.⁵³ But any degree of understanding, in the restorative justice framework, is premised on an admission of wrongdoing,⁵⁴ an admission thought to benefit both sides. As one author has noted, “[w]hat many victims want most from offenders [is] true remorse, and an acknowledgment of responsibility for the harm they’ve done”⁵⁵ Yet many offenders want something similar, their victims to “listen” to them.⁵⁶

VOM programs are the most common form of restorative criminal mediations.⁵⁷ VOM programs personalize the consequences of crime as both offender and victim come together in a controlled, safe setting to “share the pain of being victimized and to answer questions about why and how.”⁵⁸

VOM programs provide a valuable avenue for addressing the exploding American prison population. Prisons have become one of the nation’s fastest growing industries with some state penal budgets exceeding their education budgets.⁵⁹ Nevertheless, the criminal justice

52. Robert B. Coates & John Gehm, *Victim Meets Offender: An Evaluation of Victim-Offender Reconciliation Programs* 9 (1985) (quoting one victim as saying, “it’s like being hit by a car and having to get out and help the other driver when all you were doing was minding your own business.”).

53. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1280–81 (1994).

54. *Id.* at 1280.

55. *Id.* at 1281.

56. Coates & Gehm, *supra* note 52, at 6.

57. Brown, *supra* note 53, at 1258 (citing PACT INSTITUTE OF JUSTICE, *VICTIM-OFFENDER RECONCILIATION & MEDIATION PROGRAM DIRECTORY 1* (Harriet Fagan & John Gehm eds., 1993), stating that in 1993, Victim-Offender Mediation (VOM) programs in the United States handled 16,500 cases); Umbreit et al., *supra* note 43, at 29 (stating that as of 2001, there were 1,300 VOM programs in 18 countries).

58. Umbreit et al., *supra* note 43, at 30.

59. Price, *supra* note 36.

system in the country is in shambles with high recidivism rates,⁶⁰ and ever rising incarceration numbers.⁶¹ As one commentator has noted, “[t]he criminal justice system has the wrong focus. Its major interest lies in incarcerating someone convicted of a particular crime. The system does not adequately deal with a major consequence of crime: the destruction of trust between people that results from crime.”⁶² Our current “get tough on crime” policy burdens the government with the high cost of housing inmates⁶³ and is overburdening the courts.⁶⁴ Some argue that VOM provides one option to this national culture of retributive incarceration, an option that may lead to lower recidivism rates.⁶⁵

60. Bakker, *supra* note 45, at 1492 (indicating that studies suggest that people who are or have been incarcerated are 41% more likely to commit some form of crime that will land them back in jail within 3 years of their release).

61. Scott Shane, *Locked Up in Land of the Free Inmates: The United States has Surpassed Russia as the Nation with the Highest Percentage of Citizens Behind Bars*, BALT. SUN, June 2, 2003, at 2A (stating that the United States has the highest prison population of any developed or developing countries). More than two million men, women and children in the U.S. are imprisoned and more people are in prison in Maryland (approximately 35,200) than in the country of Canada (approximately 31,600) even though Canada's population is six times that of Maryland). *Id.*

62. Lerman, *supra* note 48, at 1664.

63. It costs approximately \$20,000–\$25,000 a year to house one inmate. Interview with Ryan S. King, The Sentencing Project (March 2004) (notes on file with author). The average cost of housing an inmate in the state system in 1996 was \$20,100 and in the federal system it was \$25,327. U.S. DEPT. OF JUSTICE, DEPT. OF JUSTICE BUDGET AUTHORITY BY AGENCY FOR 2003 REQUEST 117–19, available at http://www.usdoj.gov/jmd/budgetsummary/btd/1975_2002/2002/html/page117-119.htm (last visited Mar. 29, 2004). The poverty level for a single person under 65 in 2002 meant living on \$9,359 or less. U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2002, available at www.census.gov/hhes/www/poverty.html (last visited on Jan. 25, 2004). As of December 31, 2002, there were over two million people held in federal, state, or local jails in the United States. Media Awareness Project, *US HI: Editorial: Prison Costs Skyrocket* (2003), at www.mapinc.org/drugnews/v03/n1146/a08.html (last visited Mar. 29, 2004).

64. Bakker, *supra* note 45, at 1492. Between 1994 and 2000, the number of defendants charged in criminal cases filed in U.S. district courts increased 34%, from 62,237 to 83,251. BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf> (last visited March 14, 2004). During 2000 criminal cases involving 76,952 defendants were concluded in U.S. district courts. *Id.* Of these, 89% were convicted. *Id.* In state courts, criminal filings increased 30% from 1984–1993, felony caseloads have increased 70% since 1984 (these cases require the most judicial attention), and the number of those convicted of drug offenses and sentenced to prison has increased over 500 % since 1983. NATIONAL CENTER FOR STATE COURTS, CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF THE STATE COURTS (1995), available at http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf (last visited March 14, 2004).

65. Bakker, *supra* note 45, at 1503 (noting that restorative justice advocates claim that involving the victim and the offender in the resolution of the conflict will reduce the high recidivism rate. Studies suggest that people who are or have been incarcer-

VOM differs from case-management criminal mediation in several significant ways. In VOM, the only party compelled to attend is the offender.⁶⁶ The victim's participation is voluntary, though many victims are willing to meet with the offender.⁶⁷ Victims frequently want the opportunity to ask questions of the offender, vent about the incident, or achieve closure.⁶⁸ They often want to know why or how they were chosen, i.e., whether they were a random victim or for some reason personally selected. Many victims desire the opportunity to tell the offender how the crime impacted their life, a process often instrumental to obtaining some degree of closure and restoration.⁶⁹ The actual victim-offender process is fluid and highly self-selective.⁷⁰ VOM programs seek to bring the victim and the perpetrator together with a neutral third person⁷¹ in an attempt to reach a mutually agreeable resolution of the offense.⁷² Three models of VOM have developed—church-based (reflecting VOM's roots in Christian theory), community-based, and system-based.⁷³ One central theme for each is that "crime involves injury to both victims and the community. The primary emphasis, however, is the wrong done to the person, as opposed to that done to the state."⁷⁴

The type of crime at issue significantly determines the appropriateness of VOM. More than half of the United States restorative justice programs require the offender to plead or admit guilt before participating in the program.⁷⁵ Moreover, in many VOM programs, the offenders' attorneys are not invited to attend.⁷⁶ These practices trigger

ated are 41% more likely to commit some form of crime that will land them back in jail within three years of their release).

66. Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85, 89 (1988) (stating that in actual practice the offender must attend).

67. KOVACH, *supra* note 3, at 284.

68. *Id.* at 283.

69. *Id.* at 283 ("The foundation for victim-offender mediation is that the offenders, particularly first and second time offenders, are often remorseful about having injured someone and could benefit from an opportunity to apologize and make restitution.").

70. Umbreit et al., *supra* note 43, at 30 (noting in one study, forty to sixty percent of those offered the opportunity to participate in VOM declined).

71. See Teresa V. Carey, *Credentialing for Mediators—To Be or Not To Be?*, 30 U.S.F. L. REV. 635, 637 (1996) ("A substantial proportion of local mediation services are dispensed by volunteers, usually under the umbrella of a local community organization.").

72. Price, *supra* note 36.

73. See Terenia Urban Guill, Comment, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1328 (1997); Joseph, *supra* note 39, at 209; Porter & Ells, *supra* note 36, at 2522.

74. Bakker, *supra* note 45, at 1515-16.

75. Umbreit & Greenwood, *supra* note 36, at 239.

76. Brown, *supra* note 53, at 1287-91; Guill, *supra* note 73, at 1330 (arguing that the contention that the right to counsel is not implicated in VOM programs as such "is not a critical stage in the proceeding smacks of disingenuousness").

encourage programs to handle more serious crimes in order to make a larger impact on the criminal justice system.⁸⁴

2. Voluntary Settlement Conferencing/Case-Management Mediation

Where VOM is “relationship driven” with an emphasis on restoration, the case-management model is “settlement driven.”⁸⁵ Judicial mediation, or what some call “muscle mediation,”⁸⁶ is a case management tool which assists the parties in the risk analysis process. The case management model focuses on fostering settlement, saving governments money, and reducing burgeoning dockets.⁸⁷ As one judge noted, criminal mediations “are driven by need, case explosion, . . . and [a recognition that] it is a better way to do business.”⁸⁸ Case management mediation provides “another window in the courthouse besides jury trials.”⁸⁹

Another goal for some advocates of case-management criminal mediation is that inserting a neutral third party into a failed plea negotiation may also regulate the potential abuses or mishandling of cases. Examples of this include: overzealous police who overcharge incidents, prosecutors who refuse to bargain with defense counsel on cases which “should settle,” and defense counsel who fail to properly assess a case or need a “nudge from a judge” to help the defendant understand the strengths and weaknesses of the case and any options available.⁹⁰

84. Reimund, *supra* note 37, at 11 n.51.

85. Umbreit et al., *supra* note 43, at 29–30.

86. Various writers use the term “muscle mediation” to describe a highly evaluative mediation style. See, e.g., Welsh, *supra* note 10, at 23–27 (defining “muscle mediation” as “engaging in very aggressive evaluations of parties’ cases and settlement options . . . with the goal of winning a settlement, rather than supporting parties in their exercise of self-determination”); Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 444 (2003) (“The increasing role of lawyers and former judges as mediators has caused a proliferation of evaluative mediation in recent years. This correlation is largely attributable to the mediators’ view that they were selected to participate in the mediation process because of their familiarity with the litigation system. As a result, such mediators are more inclined to evaluate disputes rather than merely facilitate parties toward settlement.” (citations omitted)).

87. See Thomas H. Oehmke, *Arbitration Highways to the Courthouse—A Litigator’s Roadmap*, 86 AM. JUR. TRIALS 111, § 2 (2003) (“With burgeoning dockets, the judiciary is even more reluctant to adjudicate cases which, arguably, can be arbitrated or to interfere with the arbitration process or award. . . .”). The author used the word “arbitration” to refer to all alternative dispute resolution processes.

88. Interview with Judge Barry Wood, Administrative Judge for Jerome County, Idaho (Sept. 11, 2003) (notes on file with author).

89. *Id.*

90. *Id.*

III. CONCERNS WITH CASE-MANAGEMENT MEDIATION IN THE CRIMINAL CONTEXT

A. Introduction

The better established victim-offender forms of criminal mediation have long been subject to several criticisms. Critics argue that VOM and community dispute resolution programs perpetuate and sometimes exacerbate power imbalances between victims and offenders,⁹³ have unsettling constitutional implications,⁹⁴ potentially violate separation of power considerations when the programs are operated inside a prosecutor's office,⁹⁵ and inappropriately privatize public justice.⁹⁶ Central to these criticisms is the conviction that criminal actions belong to the state, not the victim, making it fundamental that criminal law be enforced publicly with full constitutional protections and opportunity for public input and oversight, rather than through private dispute resolution mechanisms.⁹⁷

These concerns are also present under the case-management model.⁹⁸ In those states where case-management mediation has gained a foothold in the criminal context, the practice has leaped ahead without adequate reflection on the potential problems it creates and the safeguards that need to be put into place in order to protect the integrity of the criminal justice system. We will now turn to the five most pressing concerns arising in the criminal mediation context. The purpose of this section is to begin reflection, free of the illusion

93. Brown, *supra* note 53, at 1271-72 (noting that in VOM programs, the inexperienced wrongdoer is frequently a first time offending juvenile who often lacks the experience and the information about the criminal justice system that might increase their bargaining power); Guill, *supra* note 73, at 1329 ("On the one hand, a prisoner may be coerced into participation through the specter of doing poorly in a jury trial. On the other hand, the victim also may feel coerced into participating in mediation by the uncertainty of a jury trial or pressure from a state official.").

94. Reimund, *supra* note 37, at 16-44 (discussing the constitutional implications of restorative justice and concluding that "[r]estorative justice is not on a collision course with the constitution"); Brown, *supra* note 53, at 1287-91 (including the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel, particularly in jeopardy in VOM programs where offender's attorney is not invited to attend).

95. Guill, *supra* note 73, at 1330 (suggesting that when VOM programs are run out of the prosecutor's office, they can eliminate the judicial branch from the determination of guilt).

96. See Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1968 (1993).

97. *Id.* at 1968-69.

98. More has been written about the concerns in the VOM context because that form of ADR has been around longer than the fairly recent case-management model. Many of the concerns identified in this article come from notes taken at the "Mediating the Criminal Case" seminar. Seminar, *supra* note 7.

that definitive answers to the complexities surrounding case-management criminal mediation could be forthcoming at this early juncture.

B. Who are the Stakeholders, and Who Comes to the Table

Critical to any mediation is the need to identify the stakeholders to the dispute, to determine who should come to the table, and to agree upon the roles of each participant.⁹⁹ In the case-management criminal mediation model, these issues are particularly pronounced as to the role of the victim.

1. The Stakeholders in a Case-Management Mediation

In case-management mediations, attorneys assume prominent roles, coming to the table in their representational/advocacy capacities. The defense counsel represents his or her client; the prosecutor represents the interests of the state. The stakeholders on the defense side are fairly predictable—foremost the defendant and the defense counsel,¹⁰⁰ and possibly co-defendants and their counsel, as well as significant others or support persons. Certain uninvited and invisible participants also attend with the public defender—the chief public defender, other clients, other defense counsel, the public, the governmental funding sources, and the media. These lesser stakeholders are best understood by comparing the individualized and the institutional paradigms under which public defender offices operate.

99. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1430–31 (1991) (noting that the court describes the mediation process as including “direct involvement by representatives of the stakeholders in the deliberative process”). See generally, John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, The Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL’Y 133, 174 (2001) (noting that effective mediations require all stakeholders to be present in person or through representation, ground rules must be set, and a manageable number of stakeholder representatives attend).

100. Defense counsel has numerous roles—social worker, investigator, resource center, negotiator, diagnostician, and advisor. See Benson B. Weintraub, *The Role of Defense Counsel at Sentencing*, 150 P.L.I./CRIM 145, 152 (1989). Participants in the “Mediating the Criminal Case” seminar described the role of the defense attorney as one who zealously advocates for his/her client—the defendant; the protector of the system; the protector of people’s constitutional rights; wheeler and dealers; the educator for their clients; a business person who must make business considerations in order to stay in business; a friend to the accused; one who strives to rehabilitate the defendant; someone who makes numerous assessments and provides a reality check; and the watch dog of the criminal justice system. Seminar, *supra* note 7.

Defenders' offices experience tension between their role as the zealous defender of the rights of the individual defendant (their individualized role)¹⁰¹ and the institutionalized paradigm where they deliberate collectively about budgets, operations, and issues common to all clients.¹⁰² These two competing paradigms co-exist in public defenders' offices: the individualized paradigm encourages autonomy and idiosyncratic approaches to their client's defense; the institutional paradigm compels defenders to consider office-wide policies even when defending individual clients.¹⁰³ Under the institutional paradigm, public defender offices act "as an institutional obstacle to the state's exercise of unchecked power," thus "provid[ing] a more vigorous defense to the class of clients they represent[]." ¹⁰⁴

While the institutional paradigm thus generally supplements and strengthens the public defender's individualized role, the two paradigms sometimes become opposed, as when a defender's office is faced with a conflict of interest between two or more clients.¹⁰⁵ In the face of such conflict, a defender under the individualized paradigm would take a first-come, first-served approach, securing the consent of every client involved. The institutional paradigm, however, would direct the defender to use strategies that consider the greater interests of the class of clients the office represents.¹⁰⁶

The individualized role of the public defender is premised on the Sixth Amendment guarantee of the right to counsel to defendants in criminal cases and designates the lawyer as an assistant who helps guide the client in his "interaction with an otherwise impenetrable legal system."¹⁰⁷ It is also premised on the underlying structure of the adversary system—that the truth will show itself when two adversarial parties each present their strongest case. As one commentator has written, "the truth will emerge through a dialectical process, in which the vigorous advocacy of thesis and antithesis will equip the neutral arbiter to synthesize the data and reach a conclusion."¹⁰⁸ Thus, the in-

101. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2428, 2435 (1996) (This individualized paradigm took hold in the 1960s and 1970s and prevails in today's public defender offices.); see also *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("Defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client.").

102. Taylor-Thompson, *supra* note 101, at 2431.

103. *Id.* at 2432.

104. *Id.* at 2433.

105. *Id.* at 2433.

106. *Id.* at 2441.

107. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1250 (1993).

108. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 136 (1987); see also Herring

dividualized paradigm manifests itself in counsel's role as a zealous advocate.

The public defender's institutionalized role is premised on the distinction found in the Constitution between lawyers representing defendants in criminal cases and those representing other clients. The Constitution requires that criminal clients be afforded a lawyer.¹⁰⁹ Appointed lawyers serve fundamental institutional functions essential to an adversarial criminal justice system by providing guarantees that the system operates properly so that the defendant receives a fair trial.¹¹⁰ One of the essential institutional duties of a defender is to "utilize an intricate system of checks and limits on behalf of his client and against the government."¹¹¹ The defense lawyer is thus an officer of the court. For example, it is argued that a lawyer must put her personal knowledge of the truth aside and, as an officer of the court, is forbidden to act upon that knowledge so as to allow the adversary system to function properly. The system, on this view, is our basic protection against governmental overreaching.¹¹²

The list of potential stakeholders on the prosecution's side is more diverse than for the defense. It may include the victim, potential support persons including the victim advocate¹¹³ or significant others, members of the affected community, the public, the media, the electorate,¹¹⁴ or other government officials.¹¹⁵ The victim and these exter-

v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

109. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

110. Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 187 WIS. L. REV. 1, 1-3 (1987).

111. *Id.* at 12.

112. Subin, *supra* note 108, at 143.

113. See, e.g., Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 432 (2001) (stating that advocates are used most in counseling the victim and providing information to the victim); Anna Farber Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, COLO. LAW., Dec. 30, 2001, at 43 (stating that the victim advocate basically educates, communicates, investigates, builds trust, and identifies resources); *Commonwealth v. Harris*, 409 Mass. 461, 470 (1991) (recognizing that victim advocates serve an important and "salutary" function by providing "victims, witnesses, and family members needed assistance, information, and support, and generally help them to cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma"); *Allen v. Commonwealth*, No. 1999-SC-0897-MR, 2003 WL 1193352, at *4 (Ky. Jan. 23, 2003) (warning that the victim advocate cannot in any way impair a defendant's constitutional rights to a fair trial).

114. An uninvited but always present stakeholder in any prosecution is the electorate who holds the power to re-elect the prosecutor; thus the deputy prosecutor's boss, the elected prosecutor, is also a stakeholder. See Anthony C. Thompson, *It Takes a Com-*

nal others influence the prosecution and hold the prosecutor accountable for the outcome.

The overarching question in a criminal mediation is who comes to the table. Under the UMA, participants at a mediation can be “parties” or “nonparty participants.”¹¹⁶ A “[m]ediation party” is defined under the UMA as “a person that participates in a mediation and whose agreement is necessary to resolve the dispute.”¹¹⁷ “Nonparty participant” includes “a person, other than a party or mediator, that participates in a mediation.”¹¹⁸ The UMA makes these distinctions for purposes of determining the level of privilege.¹¹⁹ Examples of “nonparty participants” under the UMA include “experts, friends, support persons, potential parties, and others who participate in the mediation.”¹²⁰ The Reporter’s Notes add that “counsel for a mediation party would not be a mediation party, because their agreement is not necessary to the resolution of the dispute.”¹²¹

The criminal case-management context raises interesting questions about who qualifies as a “mediation party” under the UMA. Neither the victim nor counsel for the defendant would be mediation parties under the UMA, as neither of their “agreement[s] [are] necessary to resolve the dispute.”¹²² Nonetheless, everyone agrees that certain stakeholders must attend a criminal mediation—the prosecutor, the defendant, and the defense counsel. The most controversial potential non-participant attendee is the victim. The victim’s role in our current criminal justice system and thus in a criminal mediation is best understood by looking briefly at the role of the victim and the prosecutor from a historical perspective.

During the American colonial period, the prosecution of crime was private, and the victim or other interested party had a right to prosecute a case against a criminal defendant.¹²³ During this time, a system of public prosecution developed that relegated the victim from

munity to Prosecute, 77 NOTRE DAME L. REV. 321, 329 (2002) (noting that prosecutors wield their discretionary powers in ways that seek support from the electorate in future elections).

115. In the federal system, the Attorney General appears to be inserting himself into the capital cases and thus is a stakeholder as well. John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1697–98 (2003).

116. UMA, *supra* note 33, § 2(4), (5).

117. *Id.* § 2(5).

118. *Id.* § 2(4).

119. *Id.* § 4(b)(3) (stating that nonparty participants have a limited privilege).

120. *Id.* § 2, cmt. § 2(4).

121. *Id.* § 2, cmt. § 2(5).

122. *Id.* § 2(5).

123. Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125 (1984).

an active participant to that of a witness.¹²⁴ Because the public prosecutor became an officer of the local government, his role superceded that of the private individual prosecutor, and the state's interests superceded those of the private individuals.¹²⁵ The decline of restitution as a criminal sanction further limited the victim's role to that of a witness.¹²⁶ This signaled a rejection of criminal law as the mechanism for the victim to receive a remedy from the offender himself, and the remedy became instead a civil suit in tort.¹²⁷

However, in the 1970s and 1980s the idea of restitution enjoyed a resurgence and has facilitated the idea that restitution is a valid sentencing alternative.¹²⁸ Because of the victim's interest in restitution as well as retribution and knowing that the sentence will determine if the victim receives either one and how much, victims often want to communicate their wishes to the sentencing court.¹²⁹ Today, courts may not ignore the concerns of victims, and prosecutors are required to consider the victim's interests in the criminal process.¹³⁰ Nonetheless, prosecutors retain the ultimate decisionmaking authority.

Prosecutors perform a unique role in our criminal justice system. The prosecutor is the party who brings the action on behalf of the State. As one commentator has noted, "the prosecutor is not merely the sovereign's lawyer. The sovereign delegates most of its authority and discretion to its prosecutors. Thus, the prosecutor makes decisions that are ordinarily entrusted to a client."¹³¹ Yet the prosecutor is not a client, nor does he or she represent a single client. Rather, prosecutors represent groups of constituencies.¹³² These constituencies include victims, enforcement agencies, the prosecutor's office, and even neighborhoods.¹³³

124. *Id.*

125. *Id.* at 126.

126. *Id.* at 132.

127. *Id.* at 135.

128. *Id.* at 137.

129. *Id.* at 172.

130. Kirk J. Nahra, *The Role of Victims in Criminal Investigations and Prosecutions*, PROSECUTOR, Aug. 1999, at 28, 31.

131. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633 (1999).

132. Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 931 (1996); see also NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS (1991) The Prosecution Function commentary states: "The prosecutor must seek justice. In doing so there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is *paramount* for the prosecutor." *Id.* at 11.

133. *Id.*

Some maintain, however, that prosecutors are the client. They do not need to consult with a private individual; prosecutors only have to make up their minds and the decision is made.¹³⁴ The lack of a defined client¹³⁵ gives the prosecutor unfettered discretion in many areas.¹³⁶ While prosecutors must consider many contrasting interests when making decisions, including the wishes of the victim, they are the ultimate decisionmakers. They call the shots, and victims are dependent on prosecutors to extract revenge or their pound of flesh.¹³⁷

2. The Role of the Victim in a Case-Management Criminal Mediation

In the case-management mediation setting, the question remains whether the victim should be allowed to participate in the process. The victim's participation raises significant concerns for both the prosecutor and the defendants. Prosecutors fear giving up control,¹³⁸ and defense counsel worry that the victim will preclude the prosecutor from making the defendant a reasonable offer.¹³⁹ Even with these concerns, the victim generally attends.

The presence of the victim or even the victim's family often gives the victim a greater voice in the ultimate outcome. In one mediation involving the death of a homosexual man, the mother of the victim attended and adamantly insisted that the case settle because she did not want the public to learn of her son's sexual preference.¹⁴⁰ While the presence of the mother advantaged the defense in this particular case, defense counsel on the whole have concerns about the presence of the victim in a mediation. If presence of the victim increases the likelihood that the prosecutor will take tougher stands, be less flexible, or make fewer concessions, then defense counsel do not want the victim present. Similarly, if the prosecutor wants to be more flexible

134. *Id.* at 932.

135. *Id.*

136. *Id.*

137. See Price, *supra* note 36, at 3 ("Punishment is primarily for revenge (or *retribution*). Victims of heinous crimes commonly demand revenge."). See generally ROY J. LEWICKI, DAVID M. SAUNDERS & JOHN W. MINTON, *ESSENTIALS OF NEGOTIATION* 159 (1997) ("A dependent audience will generally insist that the negotiator be tough, firm, demanding, and unyielding in her struggle to obtain the best possible outcome for her constituents. Failure to perform in this manner (in the eyes of the audience) may lead to public criticism of the negotiator, in order to pressure (embarrass) her into better performance.").

138. This concern is addressed more fully, *infra* Part III.D.

139. The presence of additional people may have a significant impact on negotiation styles. Negotiators want a favorable evaluation from the audience. Research studies have shown that being under surveillance motivates negotiators to "act tough."

140. Judge Monte Carlson served as the mediator in this case and spoke about it in the "Mediating the Criminal Case" seminar. Seminar, *supra* note 7.

and conciliatory, then she would want the actual negotiations to be less visible to the victim. Research studies have shown that being under surveillance motivates negotiators to “act tough.”¹⁴¹

At the same time, the key participants—prosecutor, defendant, and defense counsel—may not have any real choice whether to allow victim participation. Prosecutors are required to consider victims’ interests in the criminal process.¹⁴² Victims consult informally with prosecutors, they are heard by the prosecutor and court before pre-trial dispositions are finalized, and are allowed to speak at sentencing.¹⁴³ Nonetheless, the prosecutor retains discretion to exclude the victim from the courtroom¹⁴⁴ and the right to make the final charging decisions and sentencing recommendations.¹⁴⁵

Prosecutors and judges that are in the trenches of the criminal justice system everyday have been struggling to hold the balance between the State and the defendant.¹⁴⁶ To find third persons who are not parties trying to get inside the courthouse is sometimes seen by some as only complicating life.¹⁴⁷ Some see the victim as having a detrimental impact on the defendants and their interests.¹⁴⁸ They see the victim’s right to be heard as interfering with the defendant’s efforts at formulating a defense.¹⁴⁹

Nonetheless, based on the proliferation of victim rights statutes,¹⁵⁰ the modern Crime Victim’s Rights Movement,¹⁵¹ and the po-

141. See LEWICKI, SAUNDERS & MINTON, *supra* note 137, at 158 (“When negotiators were observed negotiating with others, those who believed they were under surveillance were significantly more likely to conduct their negotiations in a distributive bargaining manner and to use threats, ‘commitment tactics,’ and put-downs of their opponents to gain advantage.”).

142. Nahra, *supra* note 130.

143. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 296 (1999).

144. *Id.* at 319.

145. *Id.* at 313–14 (arguing that the victim should have a veto power over whether the charge is brought).

146. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 480 (1999).

147. *Id.*

148. *Id.* at 484.

149. *Id.* at 486 (claiming that if a victim has a right to be heard at all stages of the criminal proceeding then judges will not be able to limit victim testimony at trial and elsewhere to the detriment of the defendant). However, the author further states that the right to be heard is limited to bail, plea, and sentencing. *Id.*

150. NAT’L CTR. FOR VICTIMS OF CRIME, 1996 VICTIMS’ RIGHTS SOURCE BOOK: A COMPILATION AND COMPARISON OF VICTIM RIGHTS LAWS 1 (1996), available at <http://www.ncvc.org/resources/reports/source/book/> (last visited Mar. 26, 2004) (stating there were a handful of victim rights statutes thirty years ago in a few states compared to the thousands of statutes in all fifty states at present).

tential public outcry if a victim who wanted to attend was excluded, it makes sense that victims generally be allowed to attend mediation sessions. Consistent with this, some argue that any wall of separation between the prosecutor and the victim is counterproductive and unnecessary.¹⁵² Moreover, prosecutors and defense counsel need to understand that simply because someone is not at the table does not preclude them from having a significant role in the process. The critical question is whether the absence of the victim will preclude the parties from reaching an agreement or foil a resolution. Thus, the question the defense and prosecution must ask is what effect will the victim's absence have on the outcome? One commentator describes this as the "audience effects,"¹⁵³ maintaining that "[w]hether an audience is present or absent will affect how a negotiator behaves because she may say one thing with the audience present and another with the audience absent."¹⁵⁴

Having the victim present has several advantages. Victims may have important information that may be relevant to an informed decision.¹⁵⁵ Research has shown that the value of the victim's statement at sentencing depends on the content of the statement. Judges find victim information regarding the financial, physical, and psychological impact of crime to be most useful to the sentencing decision. Judges also have indicated that the victim's opinions or recommendations regarding the actual sentence are generally not useful.¹⁵⁶

In addition, the mediation session provides the victim a forum to vent and to tell his or her story.¹⁵⁷ It also presents the potential for

151. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689-90 (2002) The modern Crime Victim's Rights Movement began thirty years ago from a common law tradition that once included victims in the criminal process. This movement has been very successful and has cut across many political lines by incorporating general civil rights, general victim law, woman's issues, and the law and order lobby. *Id.*

152. Nahra, *supra* note 130, at 31.

153. LEWICKI, SAUNDERS & MINTON, *supra* note 137, at 155.

154. *Id.* at 156.

155. See Gittler, *supra* note 123, at 125.

156. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 85-86 (1999).

157. JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 53 (2000). The authors stated that in mediation there is a series of conflicting stories and that the task of mediation is the "teasing out" of these stories to open up possibilities for new ones. *Id.* The narrative mode of thinking looks for the complexity and diversity in the stories instead of searching for one true story. *Id.* This is conducive to producing a range of possible futures from which mediation parties can choose. *Id.* "In this kind of climate, substantive changes are possible." *Id.* See also Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*,

healing.¹⁵⁸ A skilled criminal mediator should sense when the storytelling assists the process and when venting simply drives a larger wedge between the prosecution and the defense, making settlement impossible. Similarly, the mediator should decide when to hold joint sessions and when to work in caucus.

While allowing the victim or others to attend a criminal mediation may be wise, it also significantly changes the dynamics of the process. The structure of the negotiation becomes more complex as additional parties and roles are added. Basic negotiation theory teaches that “[t]he greater the number of individuals, groups, and organizations that are involved in a negotiation or have a stake in its outcome, the greater the number of possible interactions between the parties, the greater the number of roles that can be played, and thus the more complex the flow of interaction becomes.”¹⁵⁹ Multi-party mediations introduces a number of different views or positions, multiple mediations/negotiations going on at the same time, a lengthier process, multiple closures, and extra preparation time.¹⁶⁰

In multi-party mediations, multiple negotiations are occurring simultaneously, all under the auspices of the larger negotiation. In a criminal mediation, the prosecutor is negotiating with the defendant and defense counsel at the same time that he or she is negotiating with the victim. Similarly, the defense counsel is negotiating with the defendant and with the prosecutor and potentially the prosecutor’s audience—the victim, the public, and the community. The prosecutor must build relationships with both the victim and the defendant in order to resolve the matter.

The question remains as to who appropriately makes the decision of whether the victim should be permitted to attend a case-management criminal mediation. The UMA favors letting the parties decide.¹⁶¹ Considered judgment suggests that if the principal parties

14 MEDIATION Q. 201, 210 (1997) (noting that mediators recognize the “intrinsic healing quality of storytelling when speaking and listening from the heart”).

158. Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1265–67 (2003) (Speaking out can be a healing experience). Furthermore, Russell notes that “[c]oming to know that one’s suffering is not solely a private experience, best forgotten, but instead an indictment of a social cataclysm, can permit individuals to move beyond trauma, hopelessness, numbness, and preoccupation with loss and injury.” *Id.* at 1266 (quoting MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 67 (1998)).

159. LEWICKI, SAUNDERS & MINTON, *supra* note 137, at 151.

160. ROY J. LEWICKI ET AL., NEGOTIATION 334–51 (1999).

161. UMA, *supra* note 33, § 10 (providing that “[a]n attorney or other individual designated by a party may accompany the party to and participate in a mediation”). Comments to Section 10 further state: “the Drafting Committee elected to let the parties, not the mediator, decide [who comes to the table] As a practical matter, this provi-

cannot decide themselves, then the decision should fall to the mediator.¹⁶² The latter, however, is problematic; if a party strenuously objects to the mediator's decision, he or she will probably opt out of the process. Thus the UMA approach is the most workable.

Once it is determined who can attend, the parties then must decide what role each participant will play. The roles should be clear and articulated as part of the ground rules. Multiple logistical questions arise. If several people want to attend, should they appoint a spokesperson? Should support persons be allowed to be present but remain silent? Should support persons be present in the room or be asked to remain outside and thus serve strictly on a consultative basis? A potential obstacle is that if one side brings in a support person, then the other may wish to do the same—for example, the victim advocate for the victim and the defendant's mother. How far should this be extended? The answers to these questions must come from a case by case analysis of the particular circumstances of each dispute.

C. Judges as Mediators

The predominate use of judges to facilitate case-management criminal mediation raises several concerns. I will focus on two—the need for judges (among others) to receive training in mediation, and the potential for judges, because of the somber authority of their positions, to exert undue coercion on defendants that could lead defendants to plead guilty and waive their constitutional rights.

The field of criminal mediation has grown organically based on requests from either the assigned judge or the parties. During this growth, little attention has been given to the qualifications for criminal mediators. Thus far, extensive criminal experience and expense seem to be the deciding factors in selecting a person to conduct criminal mediations.

The lack of training for mediators in the criminal context is a major concern. Just as in civil mediation,¹⁶³ mediators in the criminal arena must be trained. Experience as a judge (or as a criminal litiga-

sion has application only when the parties are compelled to participate in the mediation . . . In other instances, any party or mediator unhappy with the decision of a party to be accompanied by an individual can simply leave the mediation." *Id.* § 10 cmts.

162. Opinion of the participants in the "Mediating the Criminal Case" seminar held as part of the University of Idaho's Northwest Institute for Dispute Resolution in May 2003. Seminar, *supra* note 7.

163. See Hiram E. Chodosh, *Judicial Mediation and Legal Culture*, 4 E-JOURNAL OF THE U.S. DEPARTMENT OF STATE ISSUES OF DEMOCRACY, ¶ 10 (1999) at 8 (defining judicial mediation in the civil context as "a confidential, consensual form of dispute resolution facilitated by a sitting or retired judge who is *trained* in conflict resolution" (emphasis added)), at <http://usembassy-australia.state.gov/hyper/wf991201/epf312.htm>. (last visited Mar. 29, 2004).

diation for users of mediation services,¹⁶⁹ and increasing the public and legal community's confidence in mediation so as to "earn favor with legislatures and lead to increased funding of mediation."¹⁷⁰

As civil mediation has grown in popularity and acceptance, courts, administrators, disputants, the mediation community, and the legal community have searched for some quality assurances.¹⁷¹ Over the past two decades, this search has resulted in the adoption of qualification requirements by most states and federal courts for their civil and domestic rosters of mediators.¹⁷² Standard requirements for selecting mediators usually include at least two or more of the following qualifications: training in mediation; experience as a mediator; educational degrees; and, sometimes, receiving a passing score on a skills-based test.¹⁷³ The purpose behind such requirements is to have some basis to effectively predict performance ability in mediation.¹⁷⁴ The first two requirements of training and mediation experience are fairly universally accepted certification standards. The latter two—educational degrees and achieving a passing score on a skills-based test—generate substantial controversy in the civil context.

In the criminal context, the importance of training, experience, and educational degrees must be addressed. Performance-based testing, though widely acclaimed in the civil arena,¹⁷⁵ remains controver-

Id.; see also Moberly, *supra* note 20, at 707 (stating that "[a]lthough competence of the mediator is a goal, it is relatively difficult to define"); Carey, *supra* note 71, at 641 (providing her own list of eight competencies necessary for mediators).

169. Henning, *supra* note 165, at 190 (talking about certification).

170. *Id.* at 196.

171. *Id.* at 196-97, 207 (citing Cavanaugh, *supra* note 165) (noting that one study showed that lawyers have an unwillingness to mediate cases through unregulated mediators).

172. Norma Jeanne Hill, *Qualification Requirements of Mediators*, 1998 J. DISP. RESOL. 37, 39-43 (1998).

173. *Id.* at 40.

174. *Id.* at 45. But see Paul F. Devine, *Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?*, 12 ST. LOUIS U. PUB. L. REV. 187, 207 (1993) ("[T]he only qualifications necessary are the skills used in the process itself. This is not to say that there is no need for training. However, imposition of specific requirements of length and scope of training, education, and background is both unnecessary and impractical."). But see Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 473 (1994) (advocating a selection and training process comparable to a residency in psychiatry which uses interviews for selection and experience and supervision for training).

175. Barbara Filner & Michael Jenkins, *Performance-Based Evaluation of Mediators: The San Diego Mediation Center's Experience*, 30 U.S.F. L. REV. 647, 656-57, 658 (1996); Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified—Lessons From the San Diego Experience*, 30 U.S.F. L. REV. 677, 704-06 (1996) ("Any requirements concerning who can practice as a neutral should be based on performance."); 1989 SPIDR REPORT, *supra* note 168, at 9 (finding that performance-based

sufficient to ensure competence.¹⁸⁰ Training serves as an introduction. Continuing education and ongoing professional growth and experience help ensure competence. At the same time, no amount of training can make certain people competent mediators. Good mediators generally possess a mixture of training, experience, and personal characteristics¹⁸¹ conducive to the practice.¹⁸²

Several commentators in the mediation community have written on the appropriate content for a basic mediation course.¹⁸³ The dialogue, at least in the context of civil mediation, has resulted in substantial agreement on the appropriate format for training programs.¹⁸⁴ In the criminal context, however, the field is wide-open. To date, no comprehensive mediation course has been designed to date specifically for those interested in the case-management model of criminal mediation.¹⁸⁵ Training for criminal mediation must address many of the same topics present in civil mediation training—dynamics of conflict, mediation process and theory, communication skills, confidentiality, ethics, styles of mediation, and the role of the mediator.¹⁸⁶ The training also must address topics specific to criminal

completed a prescribed course of study, are hesitant to use mediators who are not required to satisfy even a minimal set of qualifications." citing Cavanaugh, *supra* note 165).

180. Henning, *supra* note 165, at 16; Margaret Shaw, *Selection, Training, and Qualification of Neutrals*, in THE NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 156, 163 (Susan Keilitz ed. 1994) (asserting that training alone is not sufficient to ensure competence).

181. See Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125, 163 (1988) (the research shows that "predisposition to being an able mediator, as measured by an individual's conflict management style, was more significantly determinative of mediator effectiveness across time and in post-training role play and actual mediation performance than either training or prior experience").

182. Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOT. J. 23, at 26-30 (1990).

183. See Kathy Kirk, *Mediation Training: What's the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637, 653-57 (1998) (providing, in addition, a list of reasons for engaging in training).

184. Henning, *supra* note 165, at 220.

185. The sixteen-hour "Mediating the Criminal Case" seminar offered in May 2003 as part of the University of Idaho College of Law's Northwest Institute for Dispute Resolution served as an overview and exploration of the process. A fuller and more in-depth training needs to be developed and offered on an on-going basis. Seminar, *supra* note 7.

186. In the civil realm, scholars and practitioners differ as to whether the mediator has a role in ensuring the fairness of the outcome of a mediation. See, e.g., KOVACH, *supra* note 3, at 159 (arguing that mediators should not substitute their own judgment regarding the fairness of the outcome of a mediation as the participants may not share the reasons that they made their decision and thus it is difficult for a mediator to discover all the information necessary to make a determination of what is fair); Filner & Jenkins, *supra* note 175, at 650 (arguing that if a mediator communicates to the parties what she considers to be a fair settlement, then she is not practicing mediation); John W. Cooley,

mediation—who are the stakeholders, coercion,¹⁸⁷ constitutional waiver issues, conflicts of interest,¹⁸⁸ confidentiality,¹⁸⁹ reports to the assigned judge,¹⁹⁰ and substantive knowledge. While some in the civil arena argue that too much substantive knowledge can close a mediator's mind to innovative ideas,¹⁹¹ in the criminal case-management context, defense counsel, prosecutors, and the trial judge all want a mediator with significant criminal experience.¹⁹²

Mediator & Advocates Ethics, 55 DISP. RESOL. J. 73, 78 (2000) (asserting that the mediator's role is to perform checks during the process of mediation to guarantee that the agreement is fair and equitable from the perceptions of the participants); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 903 (1997) (noting the fairness/protection of rights model has been criticized as not upholding mediator neutrality). In contrast to civil cases, Rule of Criminal Procedure 11 requires that all settlements be approved by the court. Thus the sitting judge assures the soundness of the agreement. This is in contrast to civil cases where the disputants may privately resolve a dispute and simply agree to dismiss the underlying complaint.

187. Training must address the potential coercive effect judicial mediators may have on defendants or their counsel.

188. Role identification is critical. Judges should not serve both as adjudicator and neutral facilitator anymore than an attorney-mediator can serve in both adversarial and neutral conciliator capacities. See, e.g., James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them For Trial*, DISP. RESOL. MAG., Fall 1999, at 11; Frank E. A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG. Fall 1999, at 11; *State v. Tolias*, 954 P.2d 907 (Wash. 1998). In *Tolias*, the county prosecutor attempted to resolve an ongoing dispute between neighbors and subsequently successfully prosecuted one of the parties on a felony charge arising out of the same dispute. The Court of Appeals reversed the conviction and held that the trial court should have granted defendant's motion to recuse because "the prosecutor violated the appearance of fairness doctrine" as the prosecutor's efforts to mediate the dispute precluded him from prosecuting the case. *State v. Tolias*, 929 P.2d 1178, 1181 (Wash. Ct. App. 1997). The Washington Supreme Court subsequently reversed the appellate court on procedural grounds asserting that the appearance of fairness issue was not properly raised at the trial court level. *Tolias*, 954 P.2d at 907; see also Imbrogno, *supra* note 36.

189. One participant of the "Mediating the Criminal Case" seminar suggested that the parties could agree to make non-disclosure of confidential information a factor to be taken into consideration at any subsequent parole hearing. Seminar, *supra* note 7.

190. See UMA, *supra* note 33, § 7. This section, entitled "Prohibited Mediator Reports," states exactly what may be disclosed. It does not allow a judicial mediator to talk with the assigned judge or other judges about what happened during a particular mediation. *Id.* See also Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 7 (1995) ("Confidentiality is particularly important in court-annexed programs, where parties may fear that if they do not reach a resolution of their dispute, anything they say may be reported back to the court.").

191. See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 762 (1997).

192. This was the opinion expressed by judges, prosecutors, and defense counsel during the sixteen-hour seminar on "Mediating the Criminal Case." Seminar, *supra* note 7.

Even though most of the mediators in the criminal context are judges, this does not exempt them from the need for mediation training. In fact, some argue that judicial mediation is a contradiction in terms.¹⁹³ Similar to other good lawyers, judges who wish to be mediators must have training.¹⁹⁴ For the most part, judges have the experience and subject matter expertise to adjudicate disputes. For most of them, law school and subsequent continuing legal education seminars, however, have not adequately equipped them with the conciliatory skills necessary to successfully negotiate or mediate a case.¹⁹⁵

2. Experience in Mediation

In the civil arena, experience is also largely accepted as a helpful screening device for mediator selection.¹⁹⁶ It is this aspect of the mediator's background that has been shown to correlate most with effectiveness in reaching settlement.¹⁹⁷ While some people are "naturals," even good mediators can look back and reflect about how they handled their first few mediations versus those they conducted later in time. Experience brings more confidence and allows mediators to develop new tools and bring new approaches and ideas to the mediation table. The biggest debate in this area is the quantity versus the quality of experience.¹⁹⁸

193. Chodosh, *supra* note 163. Chodosh states: "Judges are suppose to judge (not mediate), to apply law (not interests), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle)." *Id.* Having said this, he also argues that judging and mediating are not mutually exclusive functions. *Id.*

194. See ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 8 (1994) ("Un equivocally, specific mediation training is essential for anyone who holds himself out to be a mediator. Some lawyers, feeling they have been negotiating all their practice lives . . . simply declare themselves to be 'mediators' without receiving any specific mediation training. Mediation . . . is a process. As with any other process, appropriate training and study is necessary.")

195. See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 277 (1993) ("Judges must also learn to use those conciliatory skills that are likely to generate negotiated settlements.")

196. See NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 11:02 (2d ed. 1994) (pointing out that actual experience mediating has emerged as an important qualification factor); 1989 SPIDR REPORT, *supra* note 168, at 9 ("Experience can be a useful screening tool to identify those who can mediate. . ."); Shaw, *supra* note 181, at 131 (mediation experience is a "valuable asset, and an important factor in the mediation selection process"); Hill, *supra* note 172, at 41 ("Given the widespread acceptance of training and experience as qualification requirements . . . these two requirements as a means of measuring competence are not hotly debated issues in the ADR community."). *But see* Dobbins, *supra* note 164, at 105-06 (pointing out that some doubt the importance of experience at all).

197. Hill, *supra* note 172, at 41.

198. Shaw, *supra* note 181, at 131 (maintaining that it is the debate regarding the quality versus the quantity of experience that matters.)

already wield nearly absolute power in the criminal arena and exert that power in the plea bargaining setting.²⁰² Some have argued that in the plea context coerciveness is so pervasive that it sometimes results in innocent people pleading guilty.²⁰³ Judicial mediators need to be cautious not to unduly add the power of the robe into the equation.²⁰⁴

Participants in the mediation process want the judicial mediator to perform multiple tasks which at times may conflict. The judicial mediator is expected to assist the participants with a risk analysis, to bring a voice of objective reason to the table, to protect the defendant from coercive tactics, to persuade the participants to settle, and to preserve the integrity of the mediation process and ultimately the criminal justice system. They want the judicial mediator to determine when one side or the other is not acting in good faith and to either get them to change their bargaining position or to call the mediation.²⁰⁵

Although judicial mediators may not perceive their actions as coercive, they cannot underestimate their influence on the settlement process and the weight their "judicious recommendation" carries, while still maintaining they are simply accommodating the parties' desires.²⁰⁶ Parties and attorneys generally perceive a judge as "a person of integrity, as an impartial and fair mediator with a background of experience in their type of case, and as an administrator of justice from whom they can expect a judicious recommendation for settlement."²⁰⁷ And that is usually what they get. As one judge noted,

202. Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 521 (1999). The Federal guidelines offer an incentive to plea bargain by reducing the defendant's offense level if he or she pleads with or without mediation. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 3E1.1(a) application note 3 (2002) (stating that an "entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense . . . will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a)").

203. The 1992 Yale Law Journal's symposium articles discussed the risk that innocent people would plead guilty. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992).

204. See Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085-86 (1993) (maintaining that judicial mediators can "coerce" settlements).

205. This reflects the opinions of some of the participants in the seminar, "Mediating the Criminal Case" seminar. Seminar, *supra* note 7. But see *supra* note 186, regarding whether the role of the mediator is to ensure fairness.

206. See Robert C. Zampano, *Settlement Strategies for Trial Judges*, in JUDGING: A BOOK FOR STUDENT CLERKS 125, 126-27 (Matthew Bender & Co. 2002) ("The settlement judge must have the patience, open-mindedness, and skill to fashion a settlement that is fair and reasonable under all circumstances.").

207. *Id.* at 127.

free from even the feeling of coercion."²¹⁵ Is that enough of a disclaimer? The answer is unclear. What is clear is that such statements alert counsel and the defendant to the issue of coercion.

Some argue that the presence of competent counsel serves as a security blanket or buffer which protects defendants from coercive intimidation. However, the strength of this assertion is dependent on the caliber of defense counsel.²¹⁶ The belief that the defendant can walk out of this "voluntary process" underestimates the control and power judicial mediators exert. Whether mediation is truly mandatory versus voluntary depends on one's perspective. Thus, while judges may deny that mediation in a particular situation is mandatory, defense counsel understand a request from the bench. As one of the defense attorneys in the King brothers' mediation noted, "[t]he judge asked us—he basically ordered mediation between the parties."²¹⁷ It is critical that the growth of criminal mediation involves a truly voluntary process and not an implicit requirement leaving defense counsel in conflict between abiding by the wishes of the client and complying with the not-so-subtle messages from the court.

Judicial mediators thus need to be trained in mediation and mindful of the power they exert over the participants in the process. The judge-mediator sits on a powder keg of rights and liberties that must not be cavalierly or even inadvertently ignited. The defendant's life and liberty are at stake in the criminal context. Judicial mediators need to proceed cautiously and not wait for complaints to arise. A proactive response to this burgeoning field is prudent.

D. Defendant and Defense Counsel Concerns: What Does Mediation Offer Defendants, and How Seriously Does it Threaten Waiver of Constitutional Rights?

The greatest concern about criminal mediation from the defense standpoint goes to the waiver of defendants' constitutional rights. Analysis of this threat requires that it be considered in context, specifically the context of a criminal justice system that depends heavily on the process of plea bargaining. The relevant question is whether the concerns regarding waiver of constitutional rights are substantially different in criminal mediation than in the plea bargaining context where a like threat already exists. Put another way, it is critical to ask how case-management mediation differs from plea bargaining,

215. E-mail from Magistrate Judge Kelly Arnold, Federal Magistrate Judge for the Western District of Washington, to author (Aug. 29, 2003) (on file with author).

216. *Id.*

217. CNN, *Rosie Hires Attorneys in King Brother's Case* (Oct. 20, 2002), at <http://www.cnn.com/2002/LAW/10/19/rosie.king.trial/>.

or whether it is merely a natural extension of the plea bargaining process.

Criminal case-management mediation carries with it many of the same concerns inherent in the plea bargaining process—coerciveness, waiver of constitutional rights, power imbalance—as well as some new ones. At the same time, the process retains all the advantages of plea bargaining—certainty, resource allocation, closure—with certain additional advantages. The question becomes whether, if case-management mediation amounts to a natural extension of the plea bargaining process, it provides a more or less problematic “next step” on the criminal dispute resolution spectrum.

Considered from one standpoint, ADR must be seen as having very deep roots in the criminal justice system. Most criminal cases are resolved prior to trial,²¹⁸ most through the plea bargaining process, which has become a standard part of the American criminal justice system.²¹⁹ During plea bargaining, the prosecution and the defense counsel negotiate the specific charge and sometimes the corresponding punishment.²²⁰ Thus the process generally involves the state offering the defendant various “charge bargaining concessions” and “sentence bargaining concessions.”²²¹ The parties often negotiate both the specific charges and the corresponding punishment. In accepting a plea, defendants waive certain constitutional rights, including their right to a trial by jury with the assistance of counsel, their right to confront witnesses, and the privilege against self-incrimination.²²²

218. ADMIN. OFFICE OF THE U.S. COURTS 2002 ANNUAL REPORT, available at <http://www.uscourts.gov/judbus2002/appendices/d04sep02.pdf> (last visited Mar. 27, 2003) (stating that out of the 78,835 defendants during the twelve-month period of 2002, 67,856 cases settled in plea bargaining and 332 entered pleas of *nolo contendere*).

219. Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753 (1998) (citing a 1992 survey of the seventy-five most populous counties finding that guilty pleas accounted for 92% of all state court convictions and arguing that while plea bargaining has its flaws, it is “a natural component of our adversarial system that has been regulated since the nineteenth century”).

220. Black’s Law Dictionary defines plea bargaining as:

The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant’s pleading guilty to a lesser offense or to one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.

BLACK’S LAW DICTIONARY 1152 (6th ed. 1990).

221. Guidorizzi, *supra* note 219, at 756.

222. See, e.g., FED. R. CRIM. PROC. 11(c)(3). This rule sets forth the rights that the court must address with the defendant in open court before accepting a guilty plea. *Id.*

Criminal defendants can waive nearly all of their constitutional rights in the plea context so long as the plea is entered voluntarily and intelligently, and with the assistance of competent counsel.²²³ The Supreme Court has noted that “[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.”²²⁴

Criticisms of plea bargaining go both directions. One set of critics argues that plea bargaining is wrong because it is too beneficial to the defendant; another set maintains that it is wrong because it is too unfair to defendants. Central to both sides of the argument is a belief that plea bargaining “undermines the integrity of the criminal justice system.”²²⁵ As one commentator aptly put it, “[o]bservers criticize[] plea bargaining both as an ‘incompetent, inefficient, and lazy method of administering justice’ and as a compromise of the defendant’s right to a jury trial.”²²⁶

Some oppose plea bargaining and complain about the loss of the virtues inherent in public trials.²²⁷ These critics argue that the process subverts many of the values of the criminal justice system including the due process standards and proof elements which influence the nature of a plea.²²⁸

Other critics argue that criminals benefit from bargaining and thus “get away” with unduly lenient sentences.²²⁹ Statistics somewhat bear this out—the average prison sentence for a felony conviction following trial is higher than the average felony guilty plea.²³⁰ While

223. Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2025 (2000); *United States v. Broce*, 488 U.S. 563, 569 (1989) (“When the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.”).

224. *United States v. Mezzanatto*, 513 U.S. 196, 209–10 (1995) (citation and internal quotation marks omitted).

225. Guidorizzi, *supra* note 219, at 767.

226. *Id.* at 761 (footnotes and internal quotation marks omitted).

227. *Id.* at 768 (citing Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *CAL. L. REV.* 652, 720 (1981)).

228. *Id.* at 769 (citing Thomas W. Church, *In Defense of Bargain Justice*, 13 *LAW & SOC’Y REV.* 509, 514–15 (1979)).

229. *Id.* at 770.

230. *Id.* at 770 n.117 (“The average prison sentence following a felony conviction by jury trial was 190 months while the average sentence following a felony guilty plea was seventy-two months. The medians also reflect a significant sentencing differential, 108 months following jury trial and 48 months following a guilty plea.”) (citing U.S. DEPT OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 505 (1995)).

these statistics support the “get away” with something argument, it is generally necessary to give concessions in order to secure convictions. Critics, however, argue that “securing concessions from the prosecutor perpetuates the image that criminals can evade the law provided they are willing to bargain”²³¹ and that “plea bargaining undermines the deterrent effect of criminal sanctions.”²³² They maintain that defendants view it as a way to beat the system.²³³ In response to the public’s apparent “loss of faith” in a system which bargains with criminals, some policymakers have attempted to “ban” plea bargaining all together.²³⁴ None of these bans have been sustained long term.²³⁵

On the other hand, some scholars have argued for years that plea bargaining is inherently flawed and unfair to defendants.²³⁶ They argue that the state’s bargaining power is so great that it can coerce innocent defendants into pleading guilty.²³⁷ The common criticism is “that the threat of much harsher penalties after trial is impermissibly coercive upon the defendants and causes them to abandon the procedural protections of trial.”²³⁸ The risk of not accepting the plea, going to trial, and having the prosecutor up the charges²³⁹ is too great a risk and causes some innocent people to plead guilty. Critics argue that “it is hypocritical to use ‘an elaborate trial process as window dressing, while doing all the real business of the system through the most un-elaborate process imaginable.”²⁴⁰ The power imbalance between the government and the defendant is such that it “renders the plea bar-

231. *Id.* at 771.

232. *Id.*

233. *Id.*

234. *Id.* at 753–54.

235. *Id.*; see, e.g., Michael L. Rubinstein et al., *The Effect of the Official Prohibition of Plea Bargaining on the Disposition of Felony Cases in the Alaska Criminal Courts*, in *ALASKA BANS PLEA BARGAINING* 1, 257–59 (U.S. Government Printing Office 1980).

236. Guidorizzi, *supra* note 219, at 753.

237. See *supra* note 205.

238. Blank, *supra* note 223, at 2016 (citation and internal quotation marks omitted).

239. Courts refuse to find vindictive prosecution when prosecutor threatens to up the charges if the defendant does not accept the plea. See, e.g., *State v. Tilson*, 794 A.2d 465 (R.I. 2002) (holding that in the course of pre-trial plea negotiations, a prosecutor’s threat to recharge the defendant with greater charges should the defendant not plead to the current lesser charges is not grounds for a finding of vindictive prosecution, even when the threat is made immediately before trial); *Blackledge v. Perry*, 417 U.S. 21, 25–28 (1974) (stating that “by ‘upping the ante’ through a felony indictment whenever [one] pursues his statutory appellate remedy—the [government] can insure that only the most hardy defendants will brave the hazards of a de novo trial”).

240. Blank, *supra* note 223, at 2016 (citation and internal quotation marks omitted).

gaining process inaccurate and unfair, especially to poor and unsophisticated defendants."²⁴¹

In spite of the critics on both sides of the aisle, plea bargaining is an integral part of our criminal justice system. While it is hard to determine when plea bargaining actually began in this country,²⁴² what is uniformly accepted is that by the late nineteenth and early twentieth centuries the use of plea bargaining had become pervasive.²⁴³ By the 1920s, plea bargaining was an established part of our criminal justice system.²⁴⁴ In the 1970 "*Brady* Trilogy," the Supreme Court held plea bargains presumptively constitutional so long as defendants enter into them voluntarily and intelligently, and with the assistance of counsel.²⁴⁵ The following year, the Supreme Court reaffirmed its commitment to plea bargaining in *Santobello v. New York*, observing that plea bargaining is "an essential component of the administration of justice" that should, when properly administered, be encouraged.²⁴⁶ The Court added that plea bargaining "is not only an essential part of the process but a highly desirable part."²⁴⁷ In a very real sense, plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."²⁴⁸

In spite of the criticisms and concerns, plea bargaining thus exists and is well-recognized as a central part of the criminal justice process. Its existence and prevalence follows from its advantages—the possibility of increasing certainty and efficiency, and offering closure at the expense of fewer resources.

Moreover, plea bargaining benefits, at least potentially, all with an interest in a criminal prosecution—the prosecutor, defense counsel, defendant, victims, judiciary, and community. By plea bargaining, both prosecutor and defense counsel gain greater flexibility in disposing of their criminal caseloads. Plea bargaining "provides a quick, efficient method of handling a large caseload," allowing the prosecutor and defense counsel "to concentrate [their] efforts on the more serious and high profile cases that will be of greater concern to the public."²⁴⁹

241. *Id.* (citation and internal quotation marks omitted).

242. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979) (noting that some argue that it "has 'always' been with us").

243. Guidorizzi, *supra* note 219, at 758–59. For an extensive discussion of the history of plea bargaining see Alschuler, *supra* note 243, and Jay Wishingrad, *The Plea Bargain in Historical Perspective*, 23 BUFFALO L. REV. 499 (1974).

244. Guidorizzi, *supra* note 219, at 759.

245. See *Parker v. North Carolina*, 397 U.S. 790, 796 (1970); *McMann v. Richardson*, 397 U.S. 759, 772 (1970); *Brady v. United States*, 397 U.S. 742, 757–58 (1970).

246. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

247. *Id.* at 261.

248. Scott & Stuntz, *supra* note 203, at 1912.

249. Guidorizzi, *supra* note 219, at 765.

It provides flexibility regarding resource allocation issues and reduces the pressures associated with going to trial.²⁵⁰ This is as true for defense counsel as for the prosecution. Public defender offices especially have scarce resources to handle high caseloads. Yet even among the private defense bar, “[p]lea bargaining provides an easy compromise for an attorney to adequately represent her client and still make a living.”²⁵¹ Plea bargaining, in other words, fits the need of defense attorneys to zealously represent their clients while making wise business decisions.

Defendants generally receive some charge and sentencing concessions. “Although they lose the chance of an acquittal, defendants escape the maximum penalties provided by statute while at the same time ‘avoiding the anxieties and uncertainties of a trial.’”²⁵²

Plea bargaining also conserves judicial resources. “[A] large number of plea bargains alleviate congested caseloads and reduce the expense of providing jury trials.”²⁵³ The Supreme Court has stated that plea bargaining is a highly desirable part of our system because it is quicker and provides a less expensive way of disposing of criminal cases.²⁵⁴ It also provides victims with an “immediate sense of closure along with the knowledge that the defendant will not go unpunished for the crime . . . avoids the rigors of testifying at trial and the possibility of the prosecution not getting a conviction.”²⁵⁵

Criminal case-management mediation embraces all the concerns and criticisms associated with plea bargaining and waiver of constitutional rights and then ratchets them up to a new level. The defendant and defense counsel are concerned about fairness and coercion. They worry about an overly aggressive “nudge from the judge” exacerbating the already enormous pressure from the prosecutor.²⁵⁶ The prosecutor is confronted with the public’s loss of faith in a process which bargains with “criminals” coupled with opening the prior private plea bargaining negotiations to the scrutiny of a member of the judiciary. The judicial mediator faces the potential of a defendant challenging the voluntariness of the plea agreement in a subsequent habeas petition and attempting to disclose confidential mediation communications.

250. *Id.*

251. *Id.* at 766.

252. *Id.* at 766 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

253. *Id.* at 767.

254. *Santobello v. New York*, 404 U.S. 257, 261 (1971).

255. *Guidorizzi*, *supra* note 219, at 767.

256. *But see Smith*, *supra* note 3, at 19–20 (arguing that mandatory mediation is preferable to the “unsupervised negotiation” currently in place as it protects the defendant against “potential discrimination and abuse” of prosecutorial discretion while ensuring that the interests of the public are adequately represented).

As noted previously, judges should be cognizant of the power of the robe and the ultimate impact they may have on the defendant's decision to plead guilty. The attraction of the judicial mediator's knowledge, experience, authority, and persuasiveness, is exactly what should make judges cautious. Their efforts to help out a fellow judge, to clear the docket, and to get the settlement could come back to haunt them. A settlement crafted in the shadows of trial may be viewed differently in the light of a prison cell. It is easy to envision the *pro se* habeas petition alleging that the plea was involuntary as the judge pressured the defendant into accepting the plea.²⁵⁷

The process also provides unique advantages and potential to improve our criminal justice system. Various factors operate to impede settlements and preclude the parties from negotiating a plea agreement. The most common is that the parties lock themselves into positions²⁵⁸ and refuse to budge or consider objectively the proposals being propounded by the other side.²⁵⁹

Another is the parties' inability to accurately assess the strengths and weaknesses of the case. Case-management mediation inserts a neutral third party into the negotiation process and allows the neutral to help assess the merits of the case and to facilitate a settlement.

The presence of a neutral third person also has the potential of mollifying an overzealous prosecutor. As some have noted the "inherent inequalities" between the prosecutor and the defendant have intensified over the past thirty plus years, making the adversary process almost obsolete.²⁶⁰

One commentator argues that criminal mediation may serve as a tool to reduce the racial bias inherent in our system.²⁶¹ Plea bargain-

257. It is not beyond the pale to envision the petition—"Judge X made me take the plea. He said that if I did not agree to the offer that I rot in jail for life." Even if the prisoner does not prevail, judges are reluctant to have their names splattered throughout a habeas petition as the cause for the involuntary plea.

258. Positions are an assertion of what one wants; they are the initial and at times subsequent lines which parties draw delineating acceptable solutions or resolutions to the dispute. See generally, STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* 173-74 (2001).

259. See generally, CRAVER, *supra* note 195, at 279 ("Careful and patient conciliation can frequently induce . . . litigants to reconsider their own underlying needs and interests and to more realistically evaluate the proposals being suggested by their adversaries.").

260. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395 (1992).

261. See Levine, *supra* note 36, at 389-99. Concerns about racial bias haunt our criminal justice system. Statistics on the number of blacks or Latinos in prison bears this out. Of the 1,976,019 persons incarcerated in adult facilities, 1,239,949 or 63% are black or Latino. These two groups only comprise twenty-five (25%) of the national population. See also Human Rights Watch Press Backgrounder, *Race and Incarceration in the United*

ing is one of the points in the criminal justice system which is particularly vulnerable to racial bias.²⁶² One author argues for the use of mediation and arbitration in the plea setting to reduce the racial bias inherent in the criminal justice process.²⁶³ She asserts that the prosecutor's unbridled discretion creates the opportunity for bias.²⁶⁴ She argues that ADR, particularly mediation, is a more collaborative process and could provide neutrality during the plea process.²⁶⁵ Her argument assumes the mediator will bring neutrality and objectivity to the process and that it is the mediator's job to ensure fairness.²⁶⁶ All of this is premised on the prosecutor being the one primarily at fault and that the insertion of a neutral person can rectify the racial bias inherent in the criminal justice system. If her assertions are correct, then the argument has value. In this instance, one has to wonder if the judicial mediator does not in fact also come with his or her own bias.

E. Prosecutor Resistance²⁶⁷

Prosecutors in the American criminal justice system play a pivotal role in the resolution of cases, and unless they can affirmatively answer the question about criminal mediation—"What is in it for me?"—they cannot be expected to participate voluntarily.

In one of the first seminars of its kind, the University of Idaho's "Mediating the Criminal Case" seminar, offered in May 2003, asked participants to describe the role of the prosecutor. Their list included the following: the gatekeeper; an attorney with no real client; the ultimate decision maker; the possessor of the power; one who has the obligation to do justice; and a wearer of multiple hats.²⁶⁸ These are all accurate.

States (Feb. 27, 2002), at www.hrw.org/background/usa/race. Black males, ages 18–64, outnumber Caucasian males in prison by a ratio of 7.4 to 1. *Id.*

262. Andrew Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 559 (1998).

263. Levine, *supra* note 36, at 389–99.

264. *Id.* at 392 ("The current process of plea-bargains thus leaves much room for personal, and cumulatively, systematic racial bias.").

265. *Id.*

266. See *supra* note 186 (discussing the role of the mediator to ensure fairness).

267. The University of Idaho College of Law offered a two and a half day seminar during its Northwest Institute for Dispute Resolution in May 2003. Seminar, *supra* note 7. Although every prosecutor and defense attorney in the northwest was invited, only one prosecutor attended.

268. *Id.*; see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2 (3d ed. 1993) [hereinafter ABA STANDARDS] (describing the prosecutor's role as "an administrator of justice, an advocate, and an officer of the court").

The prosecutor has a unique role in the American criminal justice system. It has been said that "[p]rosecutors are the hub of the criminal justice system."²⁶⁹ As the gatekeepers of the criminal justice system, they must "seek justice, not merely to convict,"²⁷⁰ using their vast power judiciously.²⁷¹ The prosecutors' clients are "an amorphous entity of the 'people,' 'state,' or 'government.'"²⁷² The prosecutor must balance their multiple roles in a fair and equitable manner.²⁷³

The lack of a readily identifiable client results in the prosecutor having boundless discretion in many ways.²⁷⁴ Nonetheless, prosecutors must consider many contrasting interests when making decisions.²⁷⁵ They do not have the singular purpose of defeating their adversary.²⁷⁶ Because prosecutors are both zealous advocates and seekers of justice, they play a dual role that is quasi-judicial.²⁷⁷ In the continuing search for justice, prosecutors act as a judge and fact finder when they decide who to investigate, who to charge, and who not to charge.²⁷⁸ Furthermore, prosecutors must consider their beliefs as to guilt of the suspect and avoid a presumption favoring a certain out-

269. Lerman, *supra* note 48, at 1667; see also Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 8 (1998) (discussing the shift in the role of initiating criminal process from the private prosecutor of Colonial times where the victim themselves served as the initiators of the criminal process to the current public prosecutor system).

270. ABA STANDARDS, *supra* note 268. In *Berger v. United States*, 295 U.S. 78, 87 (1935), the Court noted that the modern prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

271. ABA STANDARDS, *supra* note 268 ("A prosecutor should not permit his or her own professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.").

272. Caplow, *supra* note 269, at 10.

273. *Id.* at 9 ("The prosecutor balances the often conflicting priorities of the community, the victim, the defendant, and the judiciary while enforcing legislative goals and constitutional mandates. Although tempered by office policies and prosecutorial priorities, the individual prosecutor has broad powers and discretion, and operates as a free agent, making myriad daily judgments and decisions, hopefully in a lawful, ethical, and honorable fashion.").

274. *Id.*

275. Green, *supra* note 131, at 614. The prosecutor's role is twofold: to ensure that "guilt [shall] not escape or innocence suffer," and to be impartial and nonpartisan. *Id.* To fulfill these roles, the prosecutor must "strike hard blows" while avoiding foul ones. *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

276. Green, *supra* note 131, at 614.

277. *Id.*

278. *Id.* at 625 (asserting that the justification for the prosecutor's duty to seek justice comes from the need to redress the "gross imbalance of power between prosecutors and defense lawyers").

come.²⁷⁹ When they make the above decisions, “doing justice” may be achieving a just result, not necessarily the most harsh result.²⁸⁰ This idea runs contrary to prosecutors’ win-loss record keeping mentality which has little to do with justice.²⁸¹ It is also at odds with the nation’s desire to see prosecutors as “tough on crime.”²⁸² Some argue that the intense media coverage under which many prosecutors operate has changed them from “champions of justice to advocates of victory.”²⁸³

Doing justice or seeking justice is thus the main role of the prosecutor. Even though it is not specifically defined in rules, this role has developed over time becoming entrenched in our legal system. In sum, the prosecutor must not only fight people who break the law, but also fight against anything that would prove to be an injustice. For this reason, the prosecutor “retains the trump card in the decision making process. It is the prosecutor who ultimately makes the charging, plea, and sentenc[ing] recommendation decisions whether or not the victim endorses those choices.”²⁸⁴

As noted earlier, prosecutors fear giving up control of the criminal process through the use of mediation. Allowing a neutral third party into their private negotiations and permitting the victim to attend the mediation sessions potentially gives both the mediator and the victim a stronger voice in the outcome. Mediation thus potentially diminishes the power that lies in the unique client-independent, yet quasi-representational role of the prosecutor.²⁸⁵

Prosecutors also worry that the ultimate sentence coming out of a mediation may be lower than if the case were to proceed to trial. The question is whether this concern is well-founded. If a recommended settlement is lowered during mediation as the parties exchange facts and the mediator helps the parties assess the strengths and weaknesses of case, it is reasonable to assume that a court would likewise probably lower the sentence after hearing all the evidence. There is, or at least should be, a correlation between the strength of the case,

279. THE PROSECUTION FUNCTION, ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9(b)(i) (1995); see also Green, *supra* note 131, at 638.

280. Green, *supra* note 131, at 614.

281. See Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice For Prosecutors?*, 38 CAL. W. L. REV. 283, 284 (2001) (discussing the power of prosecutors and how that has affected the role of a win-lose mentality amongst some prosecutors).

282. James McCloskey, *The Death Penalty: A Personal View*, CRIM. JUST. ETHICS P2, June 22, 1996. The Westlaw citation to this article is 1996 WL 13108692.

283. See JOSEPH F. LAWLESS, JR., PROSECUTOR MISCONDUCT 23 (2d ed., Matthew Bender & Co. 1999).

284. Caplow, *supra* note 269, at 12.

285. *Id.*

the evidence, and the ultimate sentence regardless of how one arrives at the sentence.

Prosecutors are elected officials and are concerned about the loss of political capital. At times, the decision on how to charge and plea a particular case is politically driven. Prosecutors believe that they need to appear to be "tough on crime" in order remain in office.²⁸⁶ The perception that criminal mediation is "soft on crime," equates with "political suicide" despite potential cost-cutting and restorative benefits.²⁸⁷ Politicians know that public perception equates with political reality when the votes are counted.

Recognizing all the above, the question remains—Why would prosecutors want to open up their negotiations to "outsiders," risking intrusion into what is now a fairly unbridled realm of discretion?²⁸⁸ To a certain extent, choice over the matter is not within their hands. Criminal mediation is increasingly taking hold, irrespective of prosecutor concerns over threats to their virtual autonomy of the prosecutor.²⁸⁹ Criminal mediation is happening and will continue to happen.²⁹⁰

Moreover, criminal mediation offers advantages for the prosecutor. Joining the dialogue about criminal mediation and willingly par-

286. Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 946-47 (1994) (noting that prosecutors running for office typically remind voters who they are by referring to notorious cases).

287. See Bakker, *supra* note 45, at 1506 (Victim offender mediation programs "may not accommodate a public desire for retribution and punishment. Prisons instill public confidence; mediation may not."); Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207, 219 (1996) ("It is political suicide . . . to support a project that is perceived as soft on crime.").

288. Gershman, *supra* note 260, at 407-08 (describing the "uncontrolled discretion" of prosecutors); Guidorizzi, *supra* note 219, at 756 (noting "judges seldom reject plea bargaining agreements involving sentencing recommendations by the prosecutor").

289. See Kaczor, *supra* note 200 (District Attorney Kevin Meenan, of Casper, Wyoming, "the immediate past president of the national prosecutors group, called the King case 'an aberration. It's a unique circumstance, and I'd be very surprised if there was a subsequent flood of mediations.'").

290. While there is no empirical data on this topic, the response after the King brothers' mediation is instructive. Bill Eddins, the Pensacola lawyer who served as the mediator for the King brothers' case, spoke positively of the process, stating: "Our justice system in America will have to look at the mediation process." Kaczor, *supra* note 200. He noted that mediation "eliminates expense" and "uncertainty, and I'd like to think in this case we reached an agreement that was in the best interest of both the state and the defense." *Id.* Miami lawyer and past president of the National Association of Criminal Defense Lawyers, Jeffrey S. Weiner, spoke positively about the use of mediation to help resolve criminal cases after the King brothers' case was successfully mediated. *Id.* "It's so beneficial that it should be available to virtually everyone in every case when negotiation with the state attorney doesn't work." *Id.* He further stated, "It's a no-lose situation. It would save millions of dollars across the country." *Id.* But see *supra* note 289 (prosecutor's response).

ticipating in the process presents some distinct advantages for prosecutors. First and foremost, if prosecutors wish to have a voice in the development of this process, they must join the dialogue before it is forced upon them without input. Their voice could make the process more conducive to prosecutors and responsive to their concerns. Furthermore, prosecutors have a self interest in the growth and use of mediation in particular cases.

The insertion of a third party neutral into certain failed plea negotiations could be incredibly beneficial to the prosecutor. Mediation presents new opportunities to resolve cases which "should settle." For example, when a defendant will not listen to defense counsel, a well respected criminal mediator could assist with client control and aid the client's ability to assess the strengths and weaknesses of the case. Similarly, it could benefit the prosecutor if the defense attorney is either too inexperienced or too arrogant to recognize a reasonable offer. In addition, mediation could save the prosecutor money. Prosecutors' offices are financially strapped²⁹¹ and may welcome reprieve from a potentially lengthy and costly trial. Furthermore, the victim's buy in during mediation may help insulate the prosecutor and defuse claims of being soft on crime. Thus prosecutors have a self-interest in the expansion of the process.

F. Lack of Effective Privilege Rule

While an in-depth discussion of mediation privilege is beyond the scope of this article, it would be imprudent not to briefly discuss the need for a sound privilege rule as a significant concern in the criminal context. States which are using criminal mediation no less than civil mediation to resolve cases need to look at mediation privilege rules and determine whether they adequately protect the process and the parties.

While some states such as Florida, California, and Texas have comprehensive ADR mediation programs and have already seriously studied the issue of privilege, not all states have such developed privilege rules.²⁹² Since criminal mediation is taking root, states must de-

291. In February 2004, the Whitman County Prosecutor in Washington State dropped charges against a man who failed to deliver the purchased products from an eBay sale "in the interest of justice and judicial economy." The cost of prosecuting the case was too high. Ron Marose, *Prosecutor Drops Charges Against WSU Student*, MOSCOW-PULLMAN DAILY NEWS, Feb. 21-22, 2004, at 8A; Craig Clohessy, *Changes Needed to Prosecute Net Cases*, MOSCOW-PULLMAN DAILY NEWS, Feb. 25, 2004, at 7A ("Whitman County Prosecutor . . . dropped prosecution of a case based on money.").

292. See UMA, *supra* note 33, at prefatory note 3 ("Importance of Uniformity") ("Virtually all States have adopted some form of privilege, reflecting a strong public policy

termine which mediation communications should be protected and ensure that all mediators, including judicial mediators, are bound by confidentiality. Mediators' assertions that all mediation communications are confidential can be misleading especially in the criminal arena.²⁹³ Mediators, lawyers, and their clients must know the limits of any existing mediation privilege rules and whether they apply to criminal cases.²⁹⁴

IV. CONCLUSION

Certain serious concerns accompany the growing popularity of case-management criminal mediation. The aim of this article has been to begin the dialogue regarding some of those concerns. It is important that the dialogue for criminal mediation continue, despite the need for caution.

Courts generally favor settlements in both the civil and the criminal arena, and for similar reasons. Settlements are less resource intensive, reduce litigation, provide certainty and closure, and lessen the costs for the courts and the parties.²⁹⁵ In the criminal context,

favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting)."); *Id.* at prefatory note 4 ("Ripeness of a Uniform Law") (noting that half of the States have adopted general application privilege rules); see generally Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995) (providing a comprehensive overview of mediation privilege).

293. Case law in this area is sparse yet instructive on the critical role mediation rules play in the mediation process. See e.g. *State v. Trejo*, 979 P.2d 1230 (Ct. App. 1999) (holding that wife's statement in a child custody mediation, "I want to see him six feet under," is not privilege in subsequent criminal case because wife is not a party in the criminal matter); *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984) (refusing to quash the subpoena of a mediator from a neighborhood dispute resolution program when the accused claimed that threats made during the mediation would support his claim of self defense); *Williams v. State*, 342 S.E. 2d 703 (Ga. Ct. App. 1986) (holding that an employee's privately negotiated settlement agreement admitting that she had taken money and agreeing to repay her former employer \$60,000 was admissible in her subsequent criminal trial); *Bryd v. State*, 367 S.E. 2d 300 (Ga. Ct. App. 1988) (holding that the mediation agreement from the Neighborhood Justice Center was inadmissible in a subsequent criminal case).

294. See Kirtley, *supra* note 292, at 29 (noting, "[m]ediation privileges which do not apply to criminal cases are inconsistent with traditional privileges and produce a chilling effect upon mediation discussions"); UMA, *supra* note 33, at Prefatory Note 3, Importance of uniformity and Note 4, Ripeness of a uniform law (discussing the value of uniformity for mediators and participants).

295. JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 49 (2d ed. 2001) (citing these as generally recognized principles). In response

courts, governments, prosecutors, and public defenders expend fewer public resources when cases settle before trial. Moreover, mediators can assist the parties in evaluating the strengths and weaknesses of their cases. From the recalcitrant, unreasonable defendant to the overzealous prosecutor, mediation gives the parties and the attorneys a dry run with an experienced judge or lawyer who can provide a dose of reality. It also brings with it the advantages of plea bargaining, such as closure, certainty, cost savings, and the minimization of media coverage in high-profile cases.

Nonetheless, mediating criminal cases bespeaks caution for all involved—the judicial mediator, the prosecutor, the defendant, and the defense attorney.²⁹⁶ Saving money and judicial efficiency cannot be allowed to erode the defendants' constitutional protections.²⁹⁷ Prosecutors must be assured that the process will provide benefits worth the loss of control they face. Moreover, considerations of confidentiality and privilege must be addressed. Amidst the haste to settle cases and clear dockets, it is also critical to seriously think about the objectives and methods of criminal mediation. Is criminal mediation potentially a fluid alternative to the adversarial process, or does it simply short-circuit the process? Are there lessons to learn from more established mediation settings, particularly civil mediation and restorative programs, that should be studied before states run headlong into encouraging criminal mediation?

As in the civil context, mediators in the criminal context must receive mediation training. Judge-mediators must understand the critical importance of setting aside their adjudicative skills when they transform from judge to mediator. Additionally, judges need to be cognizant of the power of the robe, and the ultimate impact then may have on a defendant's decision to plead guilty. The attraction of the judicial mediator who possesses knowledge, experience, authority, and persuasiveness, is exactly what should make judges cautious about blindly or even nobly entering into the process.

to Idaho's proposed Criminal Mediation Rule, the Idaho Association of Criminal Defense Lawyers ("IACDL") wrote, "The use of mediation in criminal cases presents new opportunities to resolve cases in a timely manner and reduce court dockets." Letter from Andrew Parnes, Vice-President of IACDL, to Cathy Derden, Staff Attorney, Idaho Supreme Court, (Dec. 28, 2001) (on file with author).

296. See Imbrogno, *supra* note 36, at 706 ("The use of ADR in the criminal law context is among the most controversial uses of ADR.").

297. See generally Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 ALTERNATIVES TO HIGH COST LITIG. 65, 76 (arguing that "programs that are designed by persons whose primary concern is docket reduction could pose serious threats to . . . values that ADR should be promoting").

In many ways, criminal case-management mediation is the logical extension of a failed plea bargaining process. If a neutral third person can help break an impasse without exerting extensive control over the outcome, criminal mediation presents a positive addition to the dispute resolution processes. If the process simply allows a judicial mediator to clear a calendar by strong-arming a defendant into accepting a plea, then the process must stop. Heavily evaluative mediation allows judges to revert to the skills they know best—deciding disputes. The purpose of mediation, however, is to let the parties decide the outcome without undue pressure from the “neutral.”

Another downside to evaluative case-management style mediation is that it subverts the healing potential of mediation. Case-management mediation with its narrow focus on settlement and clearing court calendars misses an important opportunity for healing. In this respect, case-management mediators could learn something from the restorative justice community. Restorative mediation offers a creative and proven workable alternative to the retributive approach to dealing with crime. Yet as long as case-management mediation serves the function of judicial settlement conferencing and is seen as simply a mechanism to settle more cases, it appears to merely substitute one form of retributive justice for the next. The focus remains harm to the State without reflection on the entire criminal justice system. The question is whether more should be expected of the developing case-management process, i.e., whether it should be viewed as an important opportunity to refocus our criminal justice system away from retribution to restoration and healing.