

Victim-Offender Mediation and Plea Bargaining Reform in Texas

by Marc Levin Esq., director of the Center for Effective Justice

Introduction

Throughout most of human history, crime victims, rather than government prosecutors, drove the criminal justice train. Even in colonial America, victims often brought their own prosecutions, as few prosecutors were available.¹ While prosecutors now play an indispensable role given the rise in violent crime, the loss of community, and the complexity of our criminal justice system, crime victims should not be pushed to the margins when the harm they suffered is itself the primary justification for government involvement. We must reject the imperial view that a criminal act is primarily an offense against the sovereign and that, therefore, the prosecutor's prerogatives should solely determine sentencing. Rather, the government's role should be to advocate for victims, not supplant them, and the primary goals of the system should be to restore the harm done to victims and reform offenders.

One way to empower crime victims in Texas would be to offer mediation and binding contracts as a voluntary alternative to traditional prosecution for certain types of crimes. Pretrial victim-offender mediation in other states and countries has resulted in improved victim satisfaction, better offender outcomes, and reduced costs to taxpayers. Similarly, Arizona's example demonstrates how Texas can reform plea bargaining to ensure that victims are not shut out of this process that accounts for most criminal sentencing today.

Victim-Offender Interaction Programs in Texas

There are several successful statewide post-trial victim-offender interaction programs. Although they do not serve as substitutes for traditional trials and sentencing, these initiatives demonstrate the benefits of victim-offender interaction in cases where the victim desires positive change from the offender and a sense of closure, and the offender is willing to take responsibility for the crime and make major life changes. The Texas Department of Criminal Justice initiated the Victim Offender Mediation/Dialogue program in 1994 pursuant to legislation codified in Section 56.13 of the Code of Criminal Procedure. This program allows victims and victims' families to correspond with and meet the violent incarcerated offender, provided both parties consent.

As of December 2004, 187 mediated sessions had been completed, mostly between victim's families and murderers.² Satisfaction surveys show that 97 percent of participants were satisfied with the process and some 80 percent reported major life changes as a result. The study found that following the discussions, victims' families did not excuse the crime, but were able to ease their feelings of anger and vengeance.³ Participating offenders gained self-esteem from a sense that they were able to provide some measure of compensation to the victim and caused fewer disciplinary problems in prison following the mediation.

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Additionally, the privately run program Bridges to Life, operating in 11 Texas prisons, features facilitated sessions involving offenders within six months of release and volunteer crime victims. Unlike the Victim Offender Mediation/Dialogue program, the victims and offenders were not parties to the same crime. The current recidivism rate for released offenders who have participated is 14.9 percent, compared to Texas' average recidivism rate of 30.7 percent.⁴

While Texas' victim-offender interaction programs that follow traditional trials and sentencing do reap benefits, these same benefits could also be obtained from implementing a pretrial victim-offender mediation procedure. Furthermore, pretrial victim-offender mediation offers the additional advantage of reducing costs associated with incarceration and court clog.

Although there is no statewide system of pretrial victim-offender mediation, some Texas counties have initiated their own programs. For example, in 1993 Nueces County began a criminal mediation program that is currently handling 10 to 15 cases per week with an agreement rate of 70 percent.⁵ Unlike some victim-offender mediation programs where the victim and offender work out an agreement themselves, a special prosecutor hired for mediations is present along with the defense attorney and mediator.

Pretrial Victim-Offender Mediation: What and Where?

A pretrial victim-offender mediation program (VOMP), also known as a victim-offender reconciliation program, generally involves a face-to-face meeting between offenders and victims, with the assistance of a trained mediator, where the victim and offender attempt to reach an agreement on how to resolve the case. Victims must, of course, choose VOMP over the traditional court system and offender participation must also be voluntary, since the offender is required to take responsibility for his conduct and waive his right to trial and appeal.

A written agreement is reached that typically requires restitution, community service, and counseling. The agreement is then ratified by the prosecutor and/or judge. Failure to comply with the terms of the agreement subjects the offender to traditional prosecution and, if necessary, incarceration. The U.S. Department

of Justice has published guidelines for implementing a successful VOMP.⁶

The first pretrial VOMP was created in Kitchener, Ontario, Canada in 1976; followed by the first U.S. program in Elkhart, Indiana in 1978. VOMPs have grown from 150 in 1990 to over 1,300 today, including more than 300 in the U.S. and Canada.⁷

The Benefits of Pretrial Victim-Offender Mediation

The success of pretrial VOMPs is well documented. Some 95 percent of cases mediated result in a written agreement and 90 percent of these restitution agreements are completed within one year, a rate of restitution payments that far exceeds the national collection rate of 20 to 30 percent for court-ordered restitution.⁸

Some of the difference in restitution performance has been attributed to the sense of moral obligation instilled in the offender after the face-to-face meeting and agreement with the victim, as compared with traditional sentencing in which the offender may tend to lump restitution together with the fines and court costs imposed by an impersonal court system. Also, because an offender who goes through a VOMP may avoid a conviction on their record, they are likely to be far more successful in finding or retaining a job that enables them to pay restitution.

Evidence also suggests that VOMPs improve victim satisfaction. A multi-site study found that 79 percent of victims participating in VOMPs were satisfied, compared with 57 percent of victims who went through the traditional court system.⁹ Victim participants in VOMPs reported being less fearful of being victimized again than those in the control group.

VOMPs can also reduce recidivism. A national study of 1,298 juveniles who participated in pretrial victim-offender mediation found 32 percent less recidivism compared to the control group.¹⁰ Evidence also indicates that, among those offenders who recidivate, those who have participated in VOMPs commit less serious crimes.¹¹

The availability of VOMP may also promote crime control by increasing the percentage of crimes reported by victims. A New Zealand study found that

28 percent of victims who failed to report a crime did not do so because they thought that the crime should be solved by the community or by themselves.¹² VOMPs offer victims an expedited means of obtaining justice in contrast to protracted pretrial proceedings, jury selection, and the prospect of seemingly endless appeals.

Pretrial VOMPs also save taxpayers' money, as they reduce utilization of courts and prosecutors. One study found that a California VOMP cost only \$250 per case.¹³

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Recommendations

Expand the Availability of Pretrial Victim-Offender Mediation to Texas

All levels of government in Texas should explore ways to make victim-offender mediation more widely available. The Legislature could require that all jurisdictions above a certain size establish a VOMP and provide seed funding. Counties would be the primary entities in charge of implementation, but cities would also use the programs as alternatives to the prosecution of certain misdemeanors in municipal court. The seed funding could be generated by reallocating monies that would otherwise be used to create new courts to handle the expanding criminal docket or through a fee that the offender would pay to participate in the mediation.

New VOMPs in Texas should focus on nonviolent offenses and juvenile cases, as most of the research demonstrating pretrial VOMPs effectiveness has focused on programs in these areas. Property offenses are especially ripe for VOMPs because most victims want to be compensated for their financial loss and do not desire incarceration if the offender accepts responsibility and makes full restitution.¹⁴ Offenders who have failed to comply with a binding contract resulting from a mediation could not only be sentenced through the traditional means, but made ineligible for future VOMP participation.

Reform Plea Bargaining to Empower Victims

The Legislature should also examine reforms to the current plea bargaining process to give victims a seat at the table. Texas is not among the 22 states that require prosecutors to obtain the victim's views concerning the proposed plea agreement.¹⁵ Arizona has become the national leader in this area, requiring not only that prosecutors consult with victims, but also guaranteeing victims the right to be present and heard during any settlement discussions attended by the defendant. Arizona further requires that judges consider the victim's viewpoint in deciding whether to accept the plea. Texas' current law only mandates that the judge must "inquire as to whether a victim impact statement has been returned."¹⁶

The most far-reaching reform would be to give victims veto power over plea agreements.¹⁷ Although no North American jurisdiction has adopted such a proposal, France has no plea bargaining and permits victims to bring their own prosecutions and join prosecutions as a party, while prohibiting prosecutors from unilaterally dropping a case.¹⁸

Conclusion

We have succumbed to a false dichotomy that pits the rights of the victim against the rights of the accused. While critics have justified limiting victims' roles because they fear retributive motives will lead to overly harsh sentences, one study found that, when victims of nonviolent crimes are given the opportunity to choose from various sentencing alternatives, 99 percent are willing to accept an alternative to incarceration.¹⁹

In fact, the marginalization of victims in the modern criminal justice process has occurred while prison populations have swelled. Victims of violent crime almost universally express a desire to make sure it does not happen to someone else, which justifiably requires incarceration as a means of incapacitation in cases involving serious violent crimes. However, unlike some district attorneys, victims don't stand for election on a platform of how many criminals they have incarcerated, regardless of whether they are violent or willing to take responsibility for their actions. To better align the incentives in the system, we must ensure that prosecutors get as much credit for arranging a successful victim-offender mediation as they

would for winning a conviction in court. When Texas truly empowers victims through victim-offender mediation and plea bargaining reform, we will likely find that many victims, particularly of nonviolent offenses, prefer sentencing alternatives that provide real restitution and reform the offender.

By making a VOMP an option for nonviolent crimes such as property offenses, the evidence suggests that Texas can increase victim satisfaction while reducing incarceration, recidivism, and the costs associated

with operating courts and prosecutors' offices. Making this option available would also reinforce the primacy of the individual victim in our criminal justice system while signifying that the state's principal role is to ensure that the victim is made whole and the offender is deterred from harming others. ★

Marc Levin, Esq., is the director of the Center for Effective Justice at the Texas Public Policy Foundation. Contact Marc Levin at: mlevin@texaspolicy.com.

Endnotes

¹R. Elias, "The Politics of Victimization," (1986) 11-12.

²See <http://www.tdcj.state.tx.us/victim/victim-vomd.htm>.

³Meeting with Dr. Marilyn Armour, June 14, 2005.

⁴See <http://www.bridgestolife.org> and Criminal Justice Policy Council, Update in Statewide Recidivism Rates of Offenders Released from Texas Prisons (Austin, Texas, Sep. 6, 2000) 2.

⁵See <http://www.co.nueces.tx.us/drs/history.asp>.

⁶Mark Umbreit and J. Greenwood, "Guidelines for Victim-Sensitive Victim Offender Mediation: Restorative Justice Through Dialogue," (Washington, DC: U.S. Department of Justice Office of Justice Programs, 2000) available at http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96517-gdlines_victims-sens/welcome.html.

⁷Mark Umbreit, "The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research," (San Francisco: Josey-Bass, 2001).

⁸Marty Price, "Can Mediation Produce Restorative Justice for Victims and Offenders?" Victim-Offender Reconciliation Program (VORP) Information and Resource Center, available at <http://www.vorp.com/articles/crime.html>.

⁹Mark Umbreit, R. Coates and B. Kalanj. "Victim Meets Offender: The Impact of Restorative Justice and Mediation." (Monsey, N.Y.: Criminal Justice Press, 1994).

¹⁰William Nugent, Jeff Paddock, Mark Umbreit and Lizabeth Winamaki, "Participation in victim-offender mediation reduces recidivism," *VOMA Connections* 3 (Summer 1999): 5, 10, available at <http://www.voma.org/docs/connect3.pdf>.

¹¹See endnote 9.

¹²Experiences of Crime and the State's Response, Published in Monograph No 45, Justice versus Retribution: Attitudes to Punishment in the Eastern Cape, (Feb. 2000), available at <http://www.iss.co.za/Pubs/Monographs/No45/experiences.html>.

¹³Niemeyer, M. and D. Shichor, "A Preliminary Study of a Large Victim/Offender Reconciliation Program," 60(3) *Federal Probation* (1996) 30-34.

¹⁴Mark Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment," 1(1) *Western Criminology Review* (1998), available at: <http://wcr.sonoma.edu/v1n1/umbreit.html>.

¹⁵Victim Input Into Plea Agreements, U.S. Department of Justice Office of Justice Programs, Office for Victims of Crime, (Nov. 2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin7/welcome.html>.

¹⁶See Texas Code of Criminal Procedure Section 26.13(5)(e).

¹⁷Karen L. Kennard, "The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions," 77 *California Law Review* (1989) 417, 437 (advocating that victims be given a veto over any plea).

¹⁸"Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?" 78 *California Law Review* (1990) 539.

¹⁹Henderson & Gitchoff, "Using Experts and Victims in the Sentencing Process," 17 *Criminal Law Bulletin* (1981) 226, 230.

