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Participation in Victim–Offender Mediation

Lessons Learned From Observations

Patrick M. Gerkin

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Victim–offender mediation has grown to establish itself among criminal justice practices as an alternative to traditionally retributive notions of justice. As the number of programs claiming to be restorative in nature continues to grow, victim–offender mediation programs are emerging as one of the state’s preferred delivery methods for restorative justice. Restorative practices, including victim–offender mediation, are inclusive practices. Participation is not only encouraged, it is a necessary element for victim–offender mediation to achieve restorative outcomes. Through the use of observations and content analysis of agreements produced in victim–offender mediation, this research uncovers several impediments to individual participation, including problems in the implementation of restorative practices; participant domination, including victim lecturing; and a lack of awareness among the participants about the restorative vision of justice.

Keywords: *restorative justice; participation; victim–offender mediation; observations*

Restorative justice, in its many forms, has emerged as one of several competing philosophies to the approach of crime and justice in numerous countries throughout the world (Van Ness & Strong, 2006). An often cited definition provided by Tony Marshall (1996) states that restorative justice is “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (p. 37). There are many programs that claim to be part of the restorative justice movement, and as many if not more names to denote these different varieties. *Restorative justice* is used as an umbrella term to describe any number of programs that view crime and the response to crime through a restorative lens. Victim offender mediation programs (VOMP), victim offender reconciliation programs (VORP), family group conferencing, community reparative boards, sentencing circles, and sentencing panels are just a few of the names now used to denote restorative programs. In addition to these, there are a number of multiform programs that might include some combination of aspects from the programs previously listed. Declan Roche (2003) states, “Although this range illustrates confusion about the meaning and application of restorative justice, there remain four fundamental ideals: personalism, reparation, reintegration, and participation” (p. 60). According to Roche, the programs that attempt to integrate all four basic ideals represent the driving force of restorative justice.

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One form of restorative justice that has seen continued growth is victim–offender mediation. In the United States, cases may be referred to victim–offender mediation programs from a variety of sources, including judges, law enforcement officers, probation officers, victim advocates, prosecutors, and defense attorneys.

The goals of victim–offender mediation as reported by Bazemore and Umbreit (2001) include

Supporting the healing process of victims by providing a safe, controlled setting for them to meet and speak with offenders on a strictly voluntary basis.

Allowing offenders to learn about the impact of their crimes on the victims and take direct responsibility for their behavior.

Providing an opportunity for the victim and offender to develop a mutually acceptable plan that addresses the harm caused by the crime. (pp. 2-3)

This list of goals put forth by Bazemore and Umbreit is far from exhaustive. The outcomes and processes compiled in this list do not speak to the restorative nature of the intended mediation outcomes such as meeting needs, empowering victims and offenders, recognition, and reintegration. These are the outcomes that make justice restorative.

The goal of this research is to extend the knowledge about victim–offender mediation as a restorative process. The findings are derived from the amalgamation of data collected through observations of the victim–offender mediation process and analysis of agreements produced within.

Dennis Sullivan and Larry Tifft (2001) liken restorative justice to needs-based justice. In needs-based justice, “we seek to create and apply restorative values and meet needs in a harm situation” (p. 101). Meeting the needs of the parties involved is how the situation is made right. This includes meeting the needs of not only the victims but also the offenders and the community. Thus, restorative justice represents a shift from a rights-based or deserts-based justice system to a needs-based justice system. Sullivan and Tifft state:

When we examine what is required to embrace a restorative approach to justice, we see a political economy in which the needs of all are met, but met as they are defined by each person. Such an approach towards justice puts a great premium on the participation of everyone, and on the expression of the voice of each. In other words, the well-being of everyone involved in a given social situation is taken into account: that is, everyone involved is listened to, interacted with, or responded to on the basis of her or his present needs. (pp. 112-113)

Justice begins with identifying the needs of the persons involved. This concept can be difficult to grasp because it lies outside of the dominant retributive paradigm. In a needs-based system the thoughts and feelings of all people are vital. The psychological and emotional needs of victims and offenders are going to vary from person to person, which is part of the reason why participation in the restorative process is so significant. The only way to uncover victim and offender needs is to provide them with opportunities to communicate exactly what those needs are.

Another goal of restorative justice is to empower the participants. This is accomplished by involving the participants in the process of achieving justice. Harris (2003) states:

Everyone needs to feel that they are in control of their own lives. Only then can they give to others, participate in intimate relationships, make contributions to community life, engage in cooperative activities, and exercise leadership. These capacities are to be valued and nurtured in everyone. Learning to exercise self-control is critical for all of us and we learn to accept responsibility for ourselves and our actions only when we have opportunities for choice and occasions to find and use our power. (p. 134)

Empowerment is achieved in part through active participation in the creation of the outcome produced by the restorative justice response to harm.

The literature contained herein demonstrates why participation is so vital to restorative practices and needs to be examined as a topic of research in the evaluation of restorative justice. The four fundamental ideals of restorative practices—personalism, reparation, reintegration, and participation—identified by Roche (2003) implicitly suggest that the individuals who are all too often only subjects of the justice process need to participate in the restorative vision of justice. Furthermore, the goals of empowerment, recognition, and meeting needs cannot be met without the active participation of the individuals involved in the social practice of restorative justice.

Critiques of Restorative Practices

Recently, several critiques have emerged with specific focus on the power dynamics evident in restorative practices. One such work (Pavlich, 2005) examines the designations of victim and offender, suggesting that participants are encouraged by the mediators and in some ways by the mediation process to play particular roles in restorative justice. Pavlich is concerned with the ways in which one's response to the events that bring them to mediation is governed by the process.

Victims do not exist *sui generis*, in and of themselves; that is, they do not exist in any absolute abstract sense, but are produced through rituals, rules and techniques of power embedded in such social practices as restorative justice techniques. One is not, in essence, a victim; more contentiously, one becomes a victim by participating in contexts designed to create particular forms of the victim identity. (p. 52)

According to Pavlich, these governmentalities create roles for both victims and offenders that dictate not only what is expected of them as participants but also what is not acceptable. Consequently, Pavlich suggests that participants are limited in terms of the types of participation allowed in mediation.

Arrigo, Milovanovic, and Schehr (2005) claim that master signifiers in the restorative process, such as reconciliation, healing, restitution, community, and responsibility, force victims to explain their experiences within this master discourse. "For victims and offenders, VOM discursive practices only offer the opportunity to locate experiences of pain, hurt, confusion, regret, retribution, and the like, within a *master* discourse" (p. 105). Caging the participants within this master discourse means the participants are robbed of the opportunity to fully articulate their experiences with the harm produced. They go on to state, "Lost in this more scripted process is the opportunity for more genuine self-disclosure, more

authentic healing; occasions that would otherwise facilitate the subject to speak his or her own ‘true’ words” (p. 106).

Another recent criticism leveled at restorative justice is that it appears to exist both in opposition to and within the criminal justice system. Restorative practices rely on the police, the courts, and even criminal law to set the restorative process into motion. They also make use of many of the concepts used by criminal justice practitioners. The terms *victim* and *offender* are used to describe the two parties who meet for mediation. These terms are familiar to the individuals who occupy these positions and their usage cements restorative practices within the confines of the traditional criminal justice system.

We are suggesting that to conceive and speak of others in terms of identity-fixing and identity separating categories such as offender and victim is itself a source of harm because these designations are personally deconstructive and non-integrative. By using them, we force upon the person harmed and the person responsible of the harm a fixed, false identity. (Sullivan & Tift, 2001, p. 80)

Defining the situation in this way creates power relations that must be acknowledged and that shape the behaviors of the parties involved. Perhaps restorative justice is more coercive than conventional justice. “A far worse imbalance will emerge with the offender finding himself or herself not only lined up in defense against the state but also against the victims and perhaps some new entity or presence put there to represent the ‘community’” (Harris, 2004, p. 34).

Finally, Howard Zehr (1990) states, “In the aftermath of crime, victims’ needs form the starting point for restorative justice. But one must not neglect offender and community needs” (p. 200). The process of achieving justice begins with the needs of the parties involved, including victims, offenders, and the community. However, Sullivan and Tift (2001) have noted that victim and offender needs exist on two separate levels. We pay close attention to the victim’s psychological and emotional needs, and yet we often do not recognize the offender’s psychological and emotional needs. Instead we focus on needs such as employment, housing, and education. There is little doubt that these needs are significant; however, as Sullivan and Tift (2001) note,

by focusing on this level of needs alone we do not show the same level of concern for them as those who have been harmed. This is true even when the former might also be suffering from isolation and disorientation, and require the same psychological care and emotional support that those they harmed require. (p. 83)

By addressing offender needs in this fashion, the retributive justice system often neglects the offender’s other needs and as a result does little to address the issues that may cause one to engage in the harm-producing behavior in the first place. Often we find offenders are victims themselves in many ways. They are victims of violence, aggression, and neglect and may lack the emotional support and care networks that support their own psychological and emotional needs.

Harris (2004) acknowledges this as one significant challenge to restorative practices. She states:

Equality refers to the basic, yet radical, idea that all persons have equal value as persons. Once we develop a true comprehension of the basic sameness that flows from equality, we find it impossible to justify doing to others what we do not want done to ourselves. A commitment to equality thus carries with it a commitment to mutual care for the growth and welfare of all. (p. 132)

To deny that offenders also have needs would be to deny offenders the opportunity to heal and to have their harms repaired. As such it would cease to be a true needs-based justice. This research examines impediments to victim and offender participation in the social practice of restorative justice. One of the key elements in the restorative justice process is meaningful participation. The ability of restorative practices to achieve the desired outcomes depends in part on the ability of the parties involved to act as participants in the restorative process. Roadblocks to participation represent roadblocks to the practice of restorative justice and consequently to restorative outcomes. Yet this aspect of restorative justice remains a largely unexamined research topic. This research extends the body of knowledge about victim and offender participation in restorative justice. This research fills another void as it joins only a handful of studies reporting results from research based on observations of restorative processes (see Karp, 2001).

Specific attention is paid to the extent that the mediators and/or the mediation process itself encourages the participants to play a particular role in the processing of their case through a victim–offender mediation program. Through an examination of the agreements produced within the mediations observed, this research also examines the power that the participants have to determine the outcomes of the mediation process.

Methods

The unit of analysis for this research includes mediations processed at a Balanced and Restorative Justice (BARJ) Center. The BARJ center opened in 2000 and today they operate a victim–offender mediation program for the delivery of restorative justice to local communities. With an average caseload of more than 400 cases per year, 409 in 2003 and 405 in 2004, this center is an exceptional site for the evaluation of victim–offender mediation as a form of restorative justice.

This BARJ center serves four counties, although a vast majority of the cases come from the county where the BARJ program is located. This county has a population of approximately 175,000. The U.S. Bureau of Census data from the year 2000 indicate that the population was 81% White, 14% African American, 2% multiracial, and the remaining population was composed of less than 1% American Indian or Alaska native, Asian Indian, Chinese, Filipino, and Korean, or some other race. The population in the year 2000 was 49% males and 50% female. The median age in years was 36, with those 18 and older constituting 72% of the population.

The BARJ center handles mediations for both juvenile and adult cases, although a majority of the cases, more than 90%, involve juvenile offenders. All mediations occur at the BARJ center located in the heart of the downtown area adjacent to the county courthouse.

The program receives referrals from two sources. The first source of referrals is the court system. In court-referred cases, the mediation is used as a form of diversion. The second

source of referrals is city police officers. These types of referrals are on the rise, accounting for approximately 25% of all cases processed by the BARJ center. The process is voluntary for both victim and offender. On referral to mediation, the BARJ center director establishes contact with the determined victim by telephone to inquire about participation in mediation. If the determined victim agrees to participate, the BARJ center director establishes contact with the offender to inquire about participation. If both parties agree to participate, the BARJ center director determines the appropriate program for the participants.

Referrals to the BARJ center are assigned to either a victim–offender mediation or a family group conference. Assignment into one of these two programs is made at the discretion of the BARJ center director, who screens the cases using the police reports, comments from the juvenile court or the arresting officer, and discussion with the victims and offenders over the phone. According to the director, typical considerations for determining assignment include the seriousness of the harm, the restitution amount, the number of victims and offenders, and the perceived level of preparation required for the participants. The most significant variables of consideration are the seriousness of the harm and the need for participant preparation.

In some cases the BARJ center director determines that one or both participants need to be prepared before their case can be processed. These cases are referred to the family group conference program and involve more contact time between the BARJ center staff and the individual participants. Victims can be emotionally distraught, hostile, or simply have many questions about the restorative process. The extra preparation time allows the BARJ staff member to answer questions and to explain the mediation process and rules in more detail on a day prior to the scheduled conference. Offenders may also be curious about the process. Other offenders receive extra preparation time when the staff wants to ensure the individual is willing to take responsibility and that he or she will not be disrespectful to any of the individuals involved or to the restorative process. The need for preparation with either victim or offender is evaluated over the phone by the BARJ center director.

In family group conferences, a member of the BARJ center staff, not the assigned mediator, meets with the offender and/or victim individually on a day prior to their scheduled mediation. This meeting allows for one of the BARJ center case managers to spend time preparing the participant(s) for the mediation. On the day of the mediation, the victim and offender start the mediation together, as they have already been briefed about the mediation process and are prepared to participate.

Cases in which the BARJ center director determines that the participants require less preparation are scheduled for the victim–offender mediation program. In the case of victim–offender mediations, the victim and offender will attend their premediation session with the assigned mediator, on the same day as their mediation. Offenders are asked to arrive ½ hr earlier than the victims for their premediation meeting. The premediation meetings are held individually and then the participants are brought together to start the mediation.

The BARJ center uses a standard introduction for the premediation sessions for both the victim–offender mediations and the family group conferences. An outline of the process can be found in Appendix A. In addition to covering the information contained in the introductory outline, all participants are afforded the opportunity to ask questions about the process, restorative justice, their case, or any concerns they have about their scheduled mediation.

At the mediation itself, the participants are seated with their supporters on either side of a table with the mediator seated between the parties, at the head of the table. Procedurally, there is no difference between the victim–offender mediations and the family group conferences once the mediation begins. In late 2006, the BARJ center combined these programs and now offers a single program that they refer to as victim–offender mediation.

The BARJ center receives referrals for a wide array of criminal behavior; however, more than 60% of the cases processed are property crimes. The second leading cause of referral is for assaults, including young children and siblings. The BARJ center does not handle retail fraud cases, domestic violence cases between partners, or child abuse cases. They do process cases in which a child is abusive toward his or her parent(s) or sibling(s). Felony cases are extremely rare but have been referred to the center for mediation.

The BARJ center currently has 73 active mediators. All 73 have completed a 40-hr mediator training module following the BADGER model of mediation, and approximately half of them have additional victim–offender mediation training (see Appendix B). BADGER is an acronym that suggests an outline for the mediation process.

The 73 mediators who volunteer at the BARJ center come from six counties in this Midwestern state although a large majority of them reside in the BARJ center's home county. There are 35 male and 38 female mediators, with a median age of approximately 55. The ages range from 32 to 80. However, the youngest and oldest are both extremes. The vast majority of the mediators are White; less than 10% of the mediators are of a racial or ethnic minority, mostly African Americans.

All mediations were observed by one researcher, who compiled detailed notes. All premediation sessions were also observed for each case processed as victim–offender mediation but not for those processed as a family group conference, as they occurred on different days than the conference itself. The observations were completed between May and July 2005.

Participant consent was obtained by the researcher on the date of the scheduled mediation. For victim–offender mediations, consent was gained prior to the premediation meeting between the mediator and the participants. In the case of family group conferences, consent was obtained prior to the beginning of the mediation itself. In the case of juvenile participants, both the juvenile and their adult guardian were invited to participate and asked to provide consent. All participants were given the opportunity to raise questions before signing the consent document. The consent document was created and approved as part of a proposal submitted to the Human Subjects Institutional Review Board at Western Michigan University. To alleviate some apprehension, the participants were told the researcher was there to observe the process and its outcomes, not the individual participants involved. Each participant invited to participate in the study gave consent for the researcher to observe their mediation.

The researcher was not seated at the same table as the participants during the mediation and did not participate in any of the mediations in any way. A total of 14 mediations were observed in which 17 agreements were produced and collected. In addition to the observations, postmediation survey data from 119 victims and 130 offenders were collected. The findings reported herein are derived from the observations and agreements produced by the respective mediations.

I must express some caution about the conclusions of this research because of the study's limitations. In particular, the small number of cases observed at this BARJ center makes it

rather difficult to draw generalizable conclusions about this program, let alone about restorative practices as a whole. However, to the extent that all of these mediators were provided the same training and that each mediator follows the same procedural guidelines, one can assume these mediations would be representative of the mediation process at this BARJ center.

Despite these limitations, the results have much to offer. As Presser (2006) suggests about her observations of mediation, “It provides much-needed qualitative data on what goes on during victim–offender mediation, and thus offers a snapshot of restorative justice practice *in situ*” (p. 317). We must continue to evaluate restorative practices beyond the level of participant satisfaction and the ability to create agreements. Just because a program claims to be restorative, we cannot simply regard it as so and assume the outcomes will be restorative in nature. Restorative practices are a work in progress. Evaluations such as these can help shape the future of restorative justice. They can inform practitioners about what works and about the obstacles that stand in the way of achieving a justice that satisfies and restores people, repairs relationships, reintegrates participants, and meets needs. This research offers a firsthand examination of the interactions that take place in victim–offender mediations.

Findings

The findings of this research have been divided into three separate sections. The first section, titled The Mediations, includes background information about the participants, the process, and the mediations themselves. The second section, titled Participation, delineates the levels of participation observed in the mediations for victims and offenders and offers some explanation for the levels observed. This is followed by the section titled Effects of Power Imbalance on Level of Participation, which discusses the ability of the participants involved to influence the stipulations of the agreements produced by their respective mediations. The final section, titled Barriers to Participation, addresses one of the obstacles to participation for both victims and offenders and explains how traditional notions of justice can account for a lack of participation.

The Mediations

Twenty offenders and 16 victims participated in the 14 mediations observed. Eighteen of the 20 offenders were juveniles and 14 of the 16 victims were adults. Three of the cases observed had multiple offenders and two of the cases had multiple victims. Table 1 provides the demographic information of the mediation participants in the mediations observed.

Sixteen of the 20 offenders were accompanied by at least one supporter for their mediation. Twelve of the offenders had one supporter present. In 10 of those 12 cases the supporter present was the offender’s mother, whereas the other two included a brother and a father. All of these offenders were juveniles. Four of the offenders had two members of their social network present. In each of these cases, the members present were the offender’s mother and grandmother. All of these offenders were juveniles. The remaining four offenders had no members of their respective social networks present. This includes two mediations involving family members as both victim and offender and two other cases in which the offenders had no supporters present.

Table 1
Demographics of Mediation Participants

	Female	Male	White	Black	Interracial	Adult	Juvenile
Victim	9	7	11	3	2	14	2
Offender	2	18	9	10	1	2	18

Note: For further information including a case-by-case breakdown of demographic information regarding both victim and offender, see Appendix C.

Victims were far less likely to have supporters present. Of the 17 victims involved in the mediations, only two had supporters present. In both of these cases the victim was a juvenile and the supporter present was the victim's mother. In three other cases there were two victims present, thus creating an opportunity for the victims to support one another, but no other supporters were present.

The crimes for which the individuals came together for mediation ranged from property crimes to violent personal crimes, including one status offense also. There were seven cases of breaking and entering, five cases of arson, three cases of assault, two cases of larceny and malicious destruction of property, and one case each of mail fraud, trespass, receiving stolen property, and truancy. The five cases of arson and five of the seven cases of breaking and entering were the result of one case involving multiple offenders. The two cases of malicious destruction were also part of one case involving multiple offenders. One other offender was charged with two offenses, trespass and assault.

Five of the 14 mediations observed were considered family group conferences by the BARJ center and the remaining nine were considered victim-offender mediations. There were no differences in terms of the number of participants or the mediation process used in the family group conferences and the victim-offender mediation programs. For this reason, each of the encounters observed are referred to as mediations.

Participation

Following the lead of Karp, Sweet, Kirshenbaum, and Bazemore (2004), I have categorized victim and offender participation into three groups: high, medium, and low. My classifications into one of these three categories were based on my observations of the mediations, with specific attention to the participants' contributions. The specific characteristics of participation identified and used to determine one's level of participation are outlined in Appendix C.

Victim participation. There were a total of 16 victims in the 14 mediations observed. Eight of the victims were observed as having a high level of participation. Three of the victims were placed in the medium participation category and the remaining five victims were categorized as having a low level of participation. A further examination of these results revealed several interesting patterns of behavior.

Of the eight victims observed to have participated at a high level, seven of them had a preexisting relationship with their identified offender. A preexisting relationship was identified when the victim and offender knew one another and had some form of social relation

prior to the mediation. In two of the mediations, the victim and offender were family members. Other examples include juveniles who were patrons of the business they harmed and were on a first-name basis with the owners or managers; a juvenile in mediation with an adult administrator from the school the boy attended; and a juvenile who was part of the same circle of friends with the girl who harmed her. A preexisting relationship between the victim and offender appear to be one source of strong victim participation.

A preexisting relationship was also an indicator of victim lecturing in the mediations observed. Victim lecturing was identified when the victims talked down to the offenders and addressed the offender as a superior or authority figure. This included reprimands and disapproval of what victims had identified as bad behaviors and warnings about consequences for further bad behavior. The victims were found to have lectured the offender in four different mediations. All four of these mediations involved adult victims and juvenile offenders, and three of the four involved a preexisting relationship. The school administrator lectured his former student as though he was in his own office, talking down to the juvenile and issuing numerous warnings. Another victim of a breaking and entering lectured for several minutes at his juvenile offender about the value of hard work, and one of the parents involved with her child spent a significant portion of the mediation lecturing her child about responsibility. The victim's sex was not a predictor of lecturing, as two of those who lectured were male and two were female.

Victim lecturing is a powerful indicator of the power differentials within the relationship between the participants in the mediation. Victim lecturing sends a message to the offender that he or she is occupying a subservient status in the mediation process.

Of the four victims who demonstrated a low level of participation, one was a juvenile. Two of the other participants identified as having a low level of participation were involved in cases with multiple victims. In fact, there were only two cases that involved multiple victims and each of these cases had one victim who showed a low level of participation. In each of those cases, the other victim involved showed a higher level of participation, one high level and the other a medium level, respectively.

Juveniles were identified as victims in only two of the mediations. In one of those mediations, the juvenile demonstrated a high level of participation. This mediation involved juvenile girls as both victim and offender. The other case involved two juvenile males and both parties demonstrated a low level of participation. In this mediation, the juvenile victim's mother participated in the mediation extensively, even contributing to the stipulations of the agreement produced within the mediation.

There was only one mediation involving adults in the roles of victim and offender. This mediation involved two adult victims and one adult offender. The offender was a male and the identified victims were male and female. In this mediation, neither victim showed a high level of participation. The male victim demonstrated a medium level of participation whereas the female was observed to have participated at a low level.

Despite the relatively modest participation levels demonstrated by victims in the mediations observed, one stage of the mediation was dominated exclusively by victims. In the mediation's agreement-writing stage, victims were provided more opportunities to participate and consequently to identify needs and to have those needs addressed within the agreements produced. One of the tactics used to accomplish this end was selective facilitation. Selective facilitation is a tactic used by mediators to steer the mediation in one direction or another. It was used in virtually all of the mediations observed, to maneuver toward some issues and away

from others. The practice of selective facilitation can be accomplished in numerous ways. For example, the mediation can be moved into the agreement-writing stage when the mediator is satisfied with the interaction that has occurred by asking a series of questions. These questions are also indicative of what the mediators seek from the mediation participants. Selective facilitation was used in the mediations observed to elicit specific contributions from the victims, particularly in the late stages of the mediation where the participants are asked to identify their respective needs and to contribute to the creation of an agreement that will help them meet those needs. Typical questions posed by the mediators to the victims include

1. What can we do to make this right?
2. What would you like to see done in this situation?
3. What needs to be done to repair this situation?
4. What needs have been created by this harm? and
5. What would you like to see done here?

Although these questions are not standard, they are examples of the questions posed to the victims during the agreement-writing stage. This is not a criticism of the mediations observed. It demonstrates a commitment to identifying and meeting the victims' needs. Without this line of questioning it would be difficult to identify victim needs and to create an agreement that addresses them. These questions direct victim responses to issues that are important in the mediation's agreement-writing stage and demonstrate to the victims their ownership in the agreement created in response to the harm they experienced.

Offender participation

Seven offenders from four mediations were placed in the high participation category. In each of these cases, the offenders spoke at length about their involvement in the case. Each of these offenders answered questions and contributed significantly to the substance of the mediation, providing detail and even initiating conversations. In each of these mediations, there was very little parental involvement in the mediation process.

In five other mediations, the six offenders were placed in the medium participation category. These offenders contributed, but largely responded to questions and rarely initiated conversations. When these offenders did respond to questions, they often provided very little detail. Significant parental involvement was noted in one of these mediations. The parent answered questions about the minor involved and offered information about the child, the offense, and the believed causes of his or her actions.

Finally, seven offenders from five mediations were placed in the low participation category. These offenders were virtually nonparticipatory. These offenders often responded to questions with one- or two-word answers, if at all. They spent most of the time staring at the table or floor, looking out the window, and/or doodling on the scraps of paper provided by the BARJ staff.

Despite the high level of participation observed in case of seven offenders, their participation was not consistently demonstrated throughout the various mediation stages. The high level of participation was common in the early stages where offenders spoke about their involvement in the harm and provided answers to the questions posed by their victims, but disappeared in the later mediation stages. Specifically, offender participation dissipated with the start of the agreement-writing stage.

Victim lecturing also affected the offender's level of participation. In three of the four cases in which the victim lectured the offender, the offender's participation was low. In all three cases, the juvenile offender had a visible response to the victim's lecture. Each of these offenders responded by lowering their head and falling completely silent, only responding to questions posed. In each of these cases there was a preexisting relationship with clear power differentials among the participants. In each case, the dominant party in the preexisting relationship delivered the lecture.

In one other case, the offender was observed to have a medium level of participation. In this case, the victim did not lecture the offender throughout the case but only during the agreement-writing stage. Despite the victim lecture, there was no preexisting relationship. However, this mediation, like the others involving victim lectures, involved an adult victim and a juvenile offender.

None of the offenders identified or expressed any needs in their own words or from their own perspective. Others, including parents and victims, spoke about what they believed the offenders needed, most often citing a lesson to be learned from the situation. In these cases, after mediation the agreement-writing stage was dominated almost without exception by the victims. As previously suggested, the questions posed to the participants are crucial. They indicate what the participants' responses and contributions should be in the various mediation stages. The line of questioning used to address the offender in the agreement-writing stage was very different from what was used with the victims. Questions posed to the offenders included

1. Can you do this?
2. Does this sound fair to you?
3. Do you think you can do this?

These questions hardly amount to participation and certainly do not allow offenders to identify needs of their own; they simply ask the offenders to acquiesce to the victims' needs. Consequently, offender needs go unacknowledged and unaddressed, and offender participation in this mediation stage is rather limited.

In just two instances, the offender offered his or her own plan for how to repay his or her victim, to make the situation right. In one of the mediations, a boy wanted to work for a local marina to pay the restitution his victim was seeking. The offender had been apprehended by the police at the marina after stealing items from another business. In this instance, no damage was done at the marina and nobody was present as a marina representative to field such a request, so the offender's idea was dismissed. In another instance, two offenders requested to work off their restitution for the victim at his business. The business owner denied their request noting that such an arrangement would violate state labor laws. He further noted that it would be too dangerous. Eventually the participants left the BARJ center with the case unresolved and no agreement completed. The parties could not agree on the amount of restitution to be paid.

The point is not that the decisions to refuse these suggestions were wrong, for they appear to be quite logical. The point is that the ideas were rejected without exploring the more broad implications of the offer to make the victims whole again in hopes of repairing the situation. Each of the juveniles was trying to express what each believed to be the right thing. They hoped to work to repay the individual they harmed, and the ideas they suggested were not given full consideration.

The mediators' actions were directly responsible for the levels of participation exhibited by the offenders. The mediators' questions were used by the offenders as an indication of the level of involvement they should have in the mediation process. The offenders responded to the questions with varying levels of detail, but because they were never asked to provide input to the agreements, they were unable to do so.

Effects of Power Imbalance on Level of Participation

Perhaps nowhere was the victim's power in the mediation process more evident than in the agreement-writing stage. A pattern that emerged within the agreements produced was that the victims often created stipulations in the agreement that far exceeded the scope of the harm they experienced. They often acted as the victim and judge. I am not suggesting they imposed guilt, but many took advantage of the opportunity to impose a sentence. Many of the victims created stipulations within the agreements that appear to go beyond making the situation right or meeting their needs.

One case involved a juvenile who had stolen some money from her mother's purse. Contained in the agreement was a laundry list of items, including the following:

1. (Offender's name) agrees that her friends will not call after 9:00 p.m.
2. (Offender's name) will respect the curfew hour established by her mother.
3. (Offender's name) agrees she will perform chores in a timely manner when requested to do so by her mother.
4. (Offender's name) agrees there will be no visitors in the home unless (Mother's name) is present.

These stipulations were in addition to finding a job, paying restitution, and a host of other items. The scope of this agreement goes beyond the harm the parties came together to discuss and it demonstrates the power victims hold in mediation, particularly in the agreement-writing stage. The purpose of the agreement is to repair the harm inflicted by the offender's action, to make the victim whole again. In this case, the mother used the agreement as a means to address a number of issues with her daughter's behavior, issues that have little to do with the harm created by her daughter's actions.

In another agreement produced by the mediation, the stipulations included the following:

1. (Offender's name) will fill out five job applications until he gets a job.
2. At the end of the week, (Offender's name) will send (Victim's name) copies of these applications (by way of parole officer).
3. Once a full-time job is obtained, (Victim's name) would like to see (Offender's name) maintain that job for at least a six-month period without any absence or tardiness.

If the offender was able to accomplish these tasks he would not have to pay restitution to the victim. If he failed to do so, the offender was expected to pay the restitution in full.

Stipulations in various other agreements included to maintain a certain grade point average, enroll in the school band, perform various chores whenever asked by one's parents, read 20 books, flush the toilet, provide food and water to the dog daily, and keep one's room clean. Overall, I found the agreements went beyond the scope of the harm created in 7 of the 17 agreements produced.

The point here is not whether these stipulations are good or bad for the offenders. In fact, most of these stipulations appear to be suggested and written into the agreement with the offenders' best interest in mind. These stipulations may be in line with the current juvenile justice philosophy of promoting prosocial activities to help rehabilitate the juvenile offender and to insulate them from further trouble, but they also demonstrate the victim's power in the mediation process. In many ways this cements the practice of mediation alongside other forms of state-sponsored justice—a justice system in which the individuals involved do not participate.

Many of these stipulations go well beyond the harm created by the offenders' actions. They do not stem from any need identified by the victims but rather out of the victims' personal feelings about what they believe the offender needs. What these data demonstrate is that victims hold too much power in the agreement-writing stages. They can effectively impose their will on the offenders by individually creating the agreement and including stipulations that extend beyond the scope of the harm created by the offenders' actions.

There was only one case where the participants failed to reach an agreement. In this case it was the parents of the two juvenile offenders involved who disputed the victim's request for financial compensation. During the agreement-writing stage, the two parents actually went so far as to tell their children to be quiet as they negotiated the amount of restitution with the victim. The two boys sat silently as their parents debated with the victim to reach a dollar amount acceptable to each party. The victim and the offender's parents could not agree on an amount of restitution and the individuals eventually left without an agreement in place. This was the only case where the victim's requests were not agreed to by the individuals responsible for the harm. However, it was not the offenders themselves who rejected the victim's request; it was their parents, acting on their behalf.

Barriers to Participation

In his book titled *Changing Lenses* (1990), Howard Zehr argues that for one to envision the use of restorative justice, one must first be able to examine crime through a restorative lens. This requires that one “change lenses” that allows one to see crime and the potential responses to crime in a new way. The problem, however, is that many people are not even aware that such a lens exists, thus making it virtually impossible for those people to view crime and responses like restorative justice in this fashion.

I noted throughout my observations that both juvenile and adult participants were relatively unclear about the purpose and goals of mediation. The individuals were skeptical of participation and juvenile offenders often expressed an interest in the notes that mediators made throughout the mediation. They appeared to perceive the mediators as an authority figure, similar to a judge, able to make decisions and hand out judgments. One participant, when asked what the worst possible outcome of the mediation would be, stated, “To go to juvie [juvenile detention].” Her answer is very telling about her knowledge of the restorative vision of justice. Her biggest fear was to be sent to juvenile detention, a common result of a juvenile's interaction with the retributive criminal justice system. This suggests she assumed that the mediators of her case had the authority to make such a determination, which they did not. It is also an indication of the girl's beliefs about restorative justice and its home within the criminal justice field. The girl sat unprepared to be part of creating the justice herself—waiting for justice to be done to her and for someone to send her to juvenile detention.

Situating restorative justice within the criminal justice field gives victims and offenders an expectation about the process and outcomes. The restorative vision of justice shares very little with traditional forms of criminal justice, yet the participants' only knowledge of restorative justice is that it is criminal justice. Because they have knowledge about criminal justice, they often believe this knowledge to be accurate about restorative justice as well. In some ways they are right. After all, the participants are appearing for mediation because of state intervention in their lives, for a crime as defined by the state. It does not matter how restorative justice practitioners choose to define their actions. Offenders are still referred to mediation because they have violated a rule or law, and therefore the state has intervened in their lives. Would these people be in mediation if not for the order of the state or a referral from the police? How can restorative justice stand in opposition to a system that it is a part of and in some ways strengthens?

Of the 20 offenders involved in the 14 mediations, only 7 were considered to have provided a high level of participation and these offenders demonstrated a high level of participation in only a portion of the mediation. Six others were placed in the medium category and the remaining seven offenders were considered to have participated at a low level. What causes such minimal participation in a process that is designed for and encourages offender participation? I argue one cause is they are not aware of the principles of restorative justice and that they are supposed to be actively involved in creating the mediation's outcome.

Victims are also unprepared and unaware of what the restorative process entails. They often consider the mediator to be the administrator of justice. The victims I observed commonly questioned the mediators or looked to them for guidance about decisions regarding the agreement. In two of the three cases involving community service, the victims asked the mediators to help them provide a number of hours to be completed.

Both victims and offenders lack a restorative vision of justice. We cannot assume that one premediation meeting is going to be enough to overcome years of experience with retributive forms of justice. For many, the retributive form has been internalized and it may take more than one day or one meeting to provide victims and offenders with a restorative vision that is so essential to their participation in restorative justice. When participants lack an understanding of the principles of restorative justice, they become subjects of the process rather than participants. This adds yet another layer to the power dynamics within victim-offender mediation. Both victims and offenders appear to perceive the mediator as an authority figure: offenders waiting for the mediator to hand out justice and victims looking to the mediator for guidance in producing the mediation's outcome. However, restorative justice is about ownership of the problem and the solution resting with the individuals involved. Yet without this knowledge, both victims and offenders perceive the mediator as an authority figure and the power dynamics created are palpable. In this sense, the process itself has inadvertently become an obstacle to individual participation. The participants appear overpowered by the process. This can be attributed to their experiences and knowledge about traditional criminal justice processes within the United States' retributive criminal justice system and their belief that restorative justice is a part of it.

Conclusion

Meaningful participation is central to restorative processes like victim-offender mediation. Low levels of participation make it difficult for victim-offender mediation to

achieve the fundamental goals of empowering, recognizing, repairing the harm, meeting needs, and reintegrating the participants. I attribute the low level of participation exhibited by the participants to two underlying causes. The first cause is a problem in the implementation of victim–offender mediation as a restorative process. The second and closely related cause is the power dynamics evident in the mediations. It is closely related because some of the power dynamics evident in the mediations observed are the result of the aforementioned flaw in the mediation process implementation. One other form of domination that appears to affect both victims and offenders equally is their expectations about restorative justice.

My observations exemplify part of the criticism lodged against restorative justice by Pavlich (2005). Pavlich suggests restorative justice communicates to offenders that they are responsible for their harms and limits their involvement to an account of their responsibility in the harm produced. They can participate all they want in answering questions for their victims, explaining their involvement in the harms, and even offering an explanation for their actions. In a sense we ask the individual to acknowledge their responsibility and then sit idly by as the victim tells what they believe will make the situation right. This puts the offender in a difficult situation. They are not asked to contribute to the agreement, and having accepted responsibility for the harm they are given few viable options but to agree.

The agreement-writing stage of the mediation is perhaps the most important stage for participation on both sides. It is here that the individuals involved in the mediation come to own the response to the harm produced and ensure their needs are considered in the response. Maintaining a high level of participation throughout the mediation process is essential for the mediation to achieve the intended outcomes. An offender's agreement to the stipulations put forth in the agreement hardly amounts to full participation in the creation of the agreement.

Sustaining a high level of meaningful participation among the individuals involved requires a process that encourages and elicits participation throughout the process. This explains the higher level of participation among the victims in the agreement-writing stage as there is a premium placed on their participation. A high level of participation is elicited from the victims by the mediators through the questions posed, yet the same concern for the level of participation among offenders is not apparent.

Not only is victim participation elicited by the mediators but their authority also goes unchallenged. The victims have broad discretion to create restrictions on the behaviors of the offenders, who appear to be powerless in their ability to influence the agreement produced by their mediation. Moreover, the restrictions placed on the offenders go well beyond the harm experienced by the victims and appear to be a rather simple diagnosis of offender needs from the victims' point of view.

Offenders should not feel as though they are present only to accept responsibility and feel obliged to acquiesce to the victim's desires. The consequences of this are devastating for the practice of restorative justice. Without participation, offenders are less likely to feel empowered and to identify their needs, and consequently are less likely to have their needs addressed. This means restorative justice cannot be conceived of as needs-based justice. When it fails to identify and meet the offenders' needs, even when succeeding to do so for victims, the process is not needs based. In a needs-based response, the needs of one are not placed before another.

The power dynamics found in victim–offender mediation are further complicated by preexisting relationships in which there is a clear subordinate. The dynamics of the preexisting relationship carry over into the interaction between the participants in the mediation. When the participants enter the mediation with a preexisting relationship and the previous relationship is defined by a clear power imbalance, the power dynamics do not disappear. Instead, the parties enter the mediation in those same positions, and the individual with less power becomes less able to fully participate and influence the mediation’s outcome.

Finally, both victims and offenders perceive restorative justice as a form of criminal justice. Because participants do not possess a restorative lens to look through, they are often misguided by their assumptions about the restorative process. Their views are confirmed or strengthened in some ways by the mediation process itself. The designation of the individuals involved as victim and offender is familiar to the participants and helps establish their views of restorative justice as criminal justice.

Furthermore, restorative justice processes are only initiated in the wake of some behavior identified by the state as a crime. Restorative justice then does not challenge the state’s authority to define crime but strengthens it. “Restorative justice thus conceptually and practically subordinates itself to the very criminal justice system it claims to escape” (Pavlich, 2005, p. 35).

Much has already been communicated to the victim and offender by the time they appear for mediation. We should not be surprised when they retain their retributive notions of criminal justice that have been internalized by years of living within a society that chooses to deal with crime in this fashion. They expect to be a spectator as someone, usually a judge, makes decisions about their fate.

Thus, what we have are participants who are largely unprepared and wary of participation in a process that necessitates their participation for success. The situation is akin to placing someone into a foreign culture where common practices stand very much outside their own cultural norms (of which they know very little about) and asking them to participate. As in the situation described, full and knowledgeable participation is unlikely. It would take weeks, if not months, for the individual to learn about the culture, to desocialize from their own culture, and to be resocialized before meaningful participation could occur. Yet there is an expectation within the practice of restorative justice for people to be prepared to examine the situation through a restorative lens when they simply do not possess one. Perhaps this expectation is unreasonable.

Implications

The implications of this research for restorative justice practitioners are many. This research suggests that all participants need to be prepared to participate in restorative processes. Participants must first come to see crime and the response to it through a restorative lens. If one is not able to view the situation through a restorative lens, he or she will be unable to view the restorative outcomes that are desired. Preparation involves helping individuals to develop a restorative lens, making restorative outcomes a reasonable solution in the participant’s eyes.

A second policy implication deals with the administration of restorative practices. The restorative approach to justice entails a political economy in which the needs of all individuals are met, but met as they are defined by each person (Sullivan & Tifft, 2001). Insofar as the victim's needs become the sole focus of restorative practices, without concern for the offender's needs, a needs-based justice is not achieved. When this happens, the restorative process makes possible—and even encourages—victim domination. In the practice of mediation, this translates into victim's being asked to contribute more and to victim's desires becoming the sole focus of the agreements produced. This was evident in the mediations observed, particularly in the agreement-writing stage. Consequently, restorative outcomes like empowerment and meeting needs is less likely for offenders. A process or strategy that encourages offender participation, at least to the extent that it encourages victim participation throughout the mediation, is necessary.

One final implication for practitioners would be to acknowledge the power dynamics inherent in social practices such as restorative justice. Specifically, this research has discovered that preexisting power differentials among individuals tend to be reconvened in the restorative justice setting. When the power differentials manifest themselves in a reduced level of participation for the overpowered, it reduces the potential for restorative outcomes.

Finally, this research demonstrates a need for further inquiries about levels of participation in restorative practices and the need for preparation before participation. Ideally, this research will involve both observation and interviews with participants in restorative practices. Restorative practices are social events. They are very amenable to observation as a method of inquiry. Observations allow for an examination of these social events in their natural environment and interviews provide an opportunity for those who have participated to use their own voice to articulate their experiences with the restorative process.

Appendix A

The Restorative Justice Center

Victim Offender Mediation and Family Group Conferencing

Introduction

WELCOME . . . THANK YOU FOR PARTICIPATING
(Check name and address)

_____ and I are unpaid volunteers trained through the SCAO.

We are nonjudgmental
We do not tell you what to do
We assist you in coming to an agreement

Explain CONFIDENTIALITY (Sign forms)

Our purpose here today is sixfold:

1. Examine what happened. (victim first)

(continued)

Appendix A (continued)

2. Help the offender understand the harm done to:
 - a. the victim
 - b. the victim's family
 - c. the community
 - d. the offender's family
 - e. the offender
3. Help the victim understand the offender's motives.
4. To the extent possible, identify what needs to be done to repair the harm.
5. To the extent possible, arrange compensation for the victim and the community.
6. To the extent possible, reconnect the offender to the families and the community.

RULES:

1. No interruptions
2. Civility
3. Destruction of notes to ensure confidentiality

QUESTIONS?

DO YOU ACCEPT THESE RULES?

Appendix B

B- BEGIN THE MEDIATION DISCUSSION

- Case intake
- Room preparation
- Who participates
- Opening statement

A- ACCUMULATE THE INFORMATION

- Assumptions
- Bias awareness
- Listening/questioning/Note-taking skills

D- DEVELOP THE AGENDA

- Identify the issues
- Frame in neutral language
- Order for discussion

G- GENERATE MOVEMENT

- Process the issues
- Persuasive techniques

E- ESCAPE TO CAUCUS (If necessary)

- Purpose
- Order
- Closing

R- RESOLVE THE CONFLICT

- Writing the agreement
 - Nonagreement
 - Closing the mediation
-

Appendix C

Summary of Mediation Participants

	Race	Sex	Status	Preexisting Relationship
Mediation No. 1				
Victim(s)	White	Male	Adult	Owner
Offenders(s)	White	Female	Adult	Owner
	White	Male	Juvenile	Consumer
Mediation No. 2				
Victim(s)	White	Female	Adult	No
Offenders(s)	White	Male	Juvenile	No
Mediation No. 3				
Victim(s)	White	Male	Adult	No
Offenders(s)	White	Male	Juvenile	No
Mediation No. 4				
Victim(s)	Interracial	Male	Juvenile	No
Offenders(s)	Black	Male	Juvenile	No
Mediation No. 5				
Victim(s)	Interracial	Female	Juvenile	Same friends
Offenders(s)	Black	Female	Juvenile	Same friends
Mediation No. 6				
Victim(s)	White	Male	Adult	No ^a
Offenders(s)	White	Male	Juvenile	No
Mediation No. 7				
Victim(s)	White	Female	Adult	No
Offenders(s)	Black	Male	Juvenile	No
Mediation No. 8				
Victim(s)	White	Male	Adult	No
Offenders(s)	White	Female	Adult	No
	White	Male	Juvenile	No
Mediation No. 9				
Victim(s)	White	Female	Adult	Manager
Offenders(s)	Black (5)	Male (5)	Juvenile (5)	Consumer (5)
Mediation No. 10				
Victim(s)	Black	Male	Adult	Administrator ^a
Offenders(s)	Black	Male	Juvenile	Student
Mediation No. 11				
Victim(s)	Black	Female	Adult	Mother ^a
Offenders(s)	Interracial	Males	Juvenile	Family friend
Mediation No. 12				
Victim(s)	White	Female	Adult	Mother
Offenders(s)	White	Male	Juvenile	Son
Mediation No. 13				
Victim(s)	Black	Female	Adult	Mother ^a
Offenders(s)	Black	Female	Juvenile	Daughter
Mediation No. 14				
Victim(s)	White	Male	Adult	Neighbor/owner
Offenders(s)	White	Male	Juvenile	Neighbor
	White	Male	Juvenile	Neighbor

a. Indicates lecturing present in the mediation and is placed by the individual who lectured.

There were adult victims and juvenile offenders in 11 of the 14 mediated cases. Furthermore, the victim and offenders had a previous relationship in that the victim held a superior position over the offender in four of the cases. Males were the offenders in all but two cases although there was much greater variation among the victims. The victim was a female in nine of the mediated cases, and males were the victims in seven.

Appendix D

High Participation

Those individuals identified as having a high level of participation demonstrated conscious participation in the mediation by making and maintaining eye contact with the other participants. They demonstrated focus to the events and questions they were being asked by contributing not only often, but at length in the mediation process. Their contributions included both detail and substance in the mediation process. They responded to questions with direct answers that provided relevant information about the subject of the questions. Above and beyond their level of responsiveness to questions posed, these individuals took an active role in determining the subject and direction of the mediation by initiating conversations.

Medium Participation

Those participants identified as providing medium participation were less attentive in the mediation and in the substance provided. They made eye contact sporadically throughout the mediation, but never consistently. These participants responded with limited detail and were less likely to initiate dialogue if at all. They responded to questions, although they offered little detail and often failed to address the subject of the question posed. These individuals acted almost exclusively in a responsive fashion, speaking only when asked to do so.

Low Participation

Those offenders characterized as having low participation were almost nonparticipatory. Despite their presence in the room, they showed no interest and offered very little in terms of substance to the mediation. These offenders responded only to questions and failed at times to even do this. Their eyes remained fixed on the table for most of the mediation, they doodled on the pads of paper provided, looked out the window, and generally showed a lack of interest in the mediation. When these offenders contributed it was often with one- or two-word answers and they offered very little detail and substance to the mediation.

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