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Scrapping the Plea-Bargain

*Mandatory mediation of criminal cases
would further justice, at a lower social cost*

By Jennifer Smith

Despite increased use of ADR in civil cases and in limited areas of juvenile and minor criminal law, ADR is rarely used to resolve disputes involving major criminal charges against adults. In this article, I outline a proposal for using ADR in the mainstream criminal justice system as a routine substitute for the current dual system of plea-bargaining and trial. This new dispute resolution system would modify plea-bargaining by mandating participation in mediation sessions, and would result in trial only infrequently. ADR would give prosecutors the power to create personally tailored and thus more effective punishments for criminals, give defendants a buffer against currently extensive prosecutorial discretion, and give the public at large a more reliable and accountable justice system.



ADR in
Criminal Cases

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Before describing the proposed system in detail, I should note some of the issues that have influenced this effort to apply ADR to criminal law. First, although the lack of formal ADR in criminal cases suggests that many people consider major crimes and ADR to be fundamentally incompatible, plea-bargaining has already made negotiation an intrinsic part of the criminal justice system. When we encounter objections to the proposed mediation system, we should consider whether it would be an improvement over the

current system of unsupervised negotiation. Indeed, many criminal cases are ideal ADR candidates because they are legally routine but involve complex human factors that would benefit from individualized solutions.

Second, the plea-bargaining system is largely unregulated due to prosecutors' expansive discretion to decide whom to charge and with what offense, and whether to trade leniency for guilty pleas and informant testimony. This

Objections to ADR in criminal law

It is not difficult to identify a number of possible reasons for the infrequent use of ADR in major criminal cases. After all, ADR preaches that arguing about interests is better than arguing about who is right and who is wrong. But when it comes to criminals who have robbed, or assaulted or perhaps even murdered innocent citizens, the ADR ethos eliminates all the elements we *want* in our criminal justice system. Criminal law is

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discretion is highly controversial, and official records of these private negotiations are inadequate to enable the public to determine whether the benefits of enhanced law enforcement outweigh the risks of potential discrimination and abuse.

Third, the public's interests are not necessarily adequately represented in the power struggle between prosecution and defense. Prosecutors have an interest in advocating for a dispute resolution system that facilitates the most convictions, and defense attorneys have an interest in advocating for the dispute resolution system that facilitates the most acquittals. But the general public's interest lies in balancing benefits and costs in order to achieve the system that maximizes the justice purchased by each dollar spent and minimizes the cost in violent crime for each civil liberty protected.

precisely about determining who is right, and how much the person who is wrong should be punished. However, many disputes that involve a strong element of moral disapproval are resolved effectively through ADR, including hostage crises and environmental pollution cases. Moral judgment and a desire to punish thus do not act as per se bars to resolving major crimes through ADR methods.

There are other potential objections. Public trials serve a number of important purposes, including the need for visible evidence of predictable consequences to criminal behavior, the guarantees of fairness that accompany publicity and open proceedings, the value of precedent in the rule of law, and the need to express sanctions against people who violate community standards. Trials also provide criminal defendants with many procedural protections that might be

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compromised in mediation.

Also, any dispute resolution system that modifies the prosecutor's ability to plea-bargain is bound to be controversial. To some, prosecutorial discretion is beneficial. To others, discretion equals discrimination. These critics claim that prosecutors protect police officers who violate civil liberties and turn a blind eye to informant perjury. Claims of selective prosecution, which have been substantiated by extensive statistical studies, have failed to persuade courts to pierce the powerful veil of prosecutorial discretion.¹ On the other hand, prosecutors often use their leverage to make the justice system operate more cheaply and efficiently, and to save innocent people from imminent bodily harm. The challenge is therefore to design an ADR system that addresses these competing concerns better than existing alternatives.

Under mandatory mediation, parties could achieve a wide variety of custom-made solutions, including child support agreements, victim restitution, prison sentences, drug rehab, mental health services and job training.

Mandatory mediation proposal

I propose a system of mandatory mediation. The prosecution and the defense would each submit a confidential brief to the mediator outlining the major issues surrounding the case, describing any special circumstances as the party sees them, and suggesting terms of settlement. There would be no penalties for failing to settle, but each party would be required to listen to a brief presentation (up to 30 minutes) by the opposing side describing and defending settlement.

Neutrals would be selected at random from a panel of qualified mediators chosen by an American Bar Association panel of prosecutors and defense attorneys. That panel would also determine quality-control standards and training requirements. Mediators would be facilitative, taking no responsibility for substantive fairness and making no effort to affect the substantive

outcome of the mediation.

All statements within the negotiation would be confidential unless publicized as part of the final plea agreement. The neutral would maintain written records of the discussion and outcome that could be accessed in the event of appeal and for statistical purposes. To ensure that race, class or other impermissible discrimination did not distort substantive results, county, state and national statistics would be tracked. If prosecutors sought the death penalty more often in election years, for example, that distortion would show up in the statistical record. By contrast, the mediator's description of the discussion would be sealed unless one party appealed the settlement, in which case the description could be used to void that agreement but would not be admissible in any further proceedings.

Attorneys would represent both

government and defendant. Constitutional protections that could not be waived at trial could not be waived at mediation. Any settlement involving an admission of guilt or legal liability would require a brief court appearance in which a judge would ensure that the defendant had knowingly waived his statutory and constitutional rights, and would impress upon the defendant the legal consequences of his decision to admit guilt. Not all defendants would necessarily plead guilty. For example, a teenage runaway caught shoplifting might escape prosecution entirely if she agreed to complete a drug rehab program. In another case, a murder suspect might plead guilty and be required to state the facts of his crime before a judge as part of the settlement.

The rules of evidence would be suspended during the mediation, but any evidence that would have been inadmissible at trial would remain inadmissible

whether or not the evidence was used in mediation. This provision would encourage broad-based settlement discussions without compromising the defendant's constitutional trial rights, should she choose to exercise them.

The parties would be entitled to discovery to the same extent that they would have been during trial, although they might decide to forego formal discovery by mutual agreement.² Although the defendant could maintain her silence by invoking her Fifth Amendment privilege against self-incrimination, either party could include a clause voiding the settlement if the opposing party had misrepresented a material fact. For example, the prosecutor might request a provision that the settlement be voided by evidence showing that the defendant was not the getaway driver, but the triggerman.

Judicial review would differ depending on the terms of the settlement. The agreement could be appealed in court by either side on claims of procedural error or violation of the settlement terms. The defendant would retain the right to appeal the agreement based on statistical evidence of systemic impropriety, constitutional violations such as ineffective assistance of counsel or new evidence that establishes innocence of the crime charged.

The proposal uses mediation rather than arbitration because mediation would insert a buffer between prosecutor and defendant without either decreasing the prosecutor's legitimate discretionary power or upsetting the constitutional requirements for appointing judges and holding jury trials. The neutral would not intrude upon the prosecutor's ability to decide what plea offers would be offered or accepted. However, she could aid communication between the parties, help them overcome destructive negotiating tactics, and explore in individual caucuses the potential for speedy settlement.

The presence of a neutral third party would also reduce the possibility that either side would act unethically. It would be more difficult to threaten or blackmail, belittle or intimidate an opponent with someone else watching. Negotiating positions would have to

pass a straight-face test or be withdrawn. If claims of impropriety were made after the mediation concluded, the mediator's individual report or the aggregate statistics could be used to support or refute allegations of selective prosecution or deception. Valid claims would succeed more often, and invalid claims would be dismissed more quickly.

Mandatory mediation benefits

Plea negotiations take place in secret. In contrast, under this proposal the general public would be better informed about the mediation process and could better decide whether it supports the positions taken and values expressed in the public's name. The public may not be aware of the frequency or nature of plea-bargains in the current system, or the extent to which they encourage criminal defendants to give false testimony against others in return for more lenient sentences for themselves. Although confidentiality rules would bar mediators from disclosing the contents of any specific mediation, neutrals could make general recommendations for improving the system as a whole.

One of the strongest benefits of mediation over trial would be the parties' ability to tailor creative responses to criminal behavior. Right now, judges and juries who decide guilt and impose sentences make choices among strictly regulated options. Those decisions often involve long prison sentences that have unintended side effects for the defendant, his family, and his community (e.g., the social effects on children and economies caused by high rates of black male conviction and incarceration). In mediation, parties could include a wide variety of custom-made solutions, including child support agreements, victim restitution, severe prison sentences, drug rehab, mental health services and job training.

Pilot project needed

It is impossible to predict the effects this proposal might have on the criminal justice system if implemented, and the sheer number of interested parties and other variables make large-scale introduction unlikely and probably unwise.

However, considering the potential benefits to be gained from mandatory mediation, I would recommend that this proposal be tested through a pilot project in an innovative county or state.

To that end, it is worth taking a few moments to speculate about the possible advantages and disadvantages such a pilot project might encounter, and some of the issues that its implementers might wish to monitor. I would hope that system efficiency would increase under my proposal, as tailored punishments reduced the prison population, crime rates, recidivism and need for expensive

bomb. This conflict is real, and my proposed system would force society to openly debate such questions and make the tough decisions about where to draw the line between public safety and civil liberties.

In short, this proposal would bring plea-bargaining into the light and would minimize the use of that most time-consuming, cumbersome, expensive and unpredictable of institutions, the jury trial. It would add a minimum of extra procedure in exchange for a large improvement in accountability. For the first time, we would be able to examine our

Our justice system would change from a mechanism for mere punishment through fine, imprisonment or execution, into a flexible mechanism for dispensing appropriate responses to inappropriate behavior — while also deterring individual recidivism, reducing crime and helping achieve the goal of a safer society.

trials. Intangible benefits might include increased fairness and accuracy, healthier families and communities through reduced crime and incarceration of young men, and increased accountability to the public. These savings would need to offset the extra costs incurred by paying neutrals and the extra drain on social services caused by creative sentencing. Also, channeling major crimes through mediation would be less expensive than trial, but channeling very minor crimes through mediation might actually be more expensive than the informal deal making that presently occurs.

Among the major stakeholders, I expect prosecutors to be the most resistant to mediation of major crimes. In theory, this proposal does not reduce the prosecutor's power in any way, nor do prosecutors personally bear the financial cost if formal mediations lead to increased workloads. The district attorney represents the public and has no legitimate right to any intimidation or other unethical tactic that might require secrecy. But prosecutors may value the ability to bend or break the rules to fight organized crime, save a kidnapping victim's life, or discover the location of a

entire justice system to determine whether it is one of the last bastions of race and class discrimination, or an essential tool in achieving the greatest amount of justice for the greatest number at the lowest cost. We would also change our justice system from a mechanism for indiscriminate punishment through fine, imprisonment, or execution, into a flexible mechanism for dispensing appropriate responses to inappropriate behavior in a manner that deters individual recidivism, reduces crime, and helps us achieve our goal of a safer society.

Endnotes

¹ See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (refusing to overturn the sentence in the absence of evidence of discriminatory intent, even where the Baldus study demonstrated that prosecutorial discretion had a discriminatory effect).

² In the teenage runaway example, discussed above, the parties could decide that the facts of the crime were irrelevant because both agreed that the best settlement would involve getting the teenager off the streets so she no longer needed to steal.