

Mandatory Mediation: A Better Way to Address Status Offenses

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I. INTRODUCTION

Katie's teacher pulls her aside to inquire about her slipping grades and distant demeanor in class.¹ Katie confides in her teacher that her mother's boyfriend physically abuses her on a regular basis. She spends the rest of the afternoon with the school counselor, a child advocate, and a police officer. After all of the adults discuss Katie's situation, they tell her that they are going to continue to look into the situation, but for now, she will be sent home. Katie decides then that she will not return home.

As a runaway child, Katie is classified as a status offender² and taken to juvenile court for her "offense." The juvenile court adjudicates Katie a "child in need of supervision" (CHINS)³ and orders her to follow the rules of school and home.⁴ These rules include attending school, obeying her teachers, and

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¹ The described events are hypothetical but are based loosely on a situation observed by the author. The child's name has been changed for anonymity purposes.

² See Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 166 (2004) (explaining that our justice system, reacting to frustrations surrounding runaways, classifies runaways as status offenders). Status offenses are acts that are not considered criminal if committed by an adult. See Howard T. Matthews, Jr., *Status Offenders: Our Children's Constitutional Rights Versus What's Right For Them*, 27 S.U. L. REV. 201, 202 (2000). Conversely, a delinquency adjudication indicates that the child has committed an act considered criminal if done by an adult. *Id.*

³ Different jurisdictions use different labels for status offenses, including Persons, Children, Juveniles, or Minors in need of supervision (PINS, CHINS, JINS, or MINS). See Harry J. Rothgerber, Jr., *The Bootstrapping of Status Offenders: A Vicious Practice*, KY. CHILD. RTS. J., July 1991, at 1.

⁴ See generally Maggie L. Hughey, *Holding a Child in Contempt*, 46 DUKE L.J. 353, 379 (1996) (describing a similar illustrative situation in which a child was adjudicated a CHINS, violated the court's order, and based on that violation the child was found to be delinquent).

following the school's code of conduct. Additionally, Katie's mother requires that she come home immediately from school to the abusive environment she originally sought to escape. If Katie violates the court's order, Katie can be found a juvenile delinquent despite the fact that running away by itself would not support a delinquency adjudication.⁵ Instead of addressing the underlying problem of abuse, the juvenile court system re-victimizes Katie by failing to provide her the assistance she needs and adjudicating her situation through an adversarial process.

The hypothetical above illustrates the need for appropriate and effective intervention with status offenses. Traditionally, status offenses, while themselves non-criminal by definition, have been viewed as a gateway into the juvenile court system⁶ and possibly into criminal behavior.⁷ The juvenile courts intervene when status offenses are committed,⁸ in part because of an escalation theory: status offenses will lead to more serious forms of delinquency.⁹ Early intervention is needed to help children and to prevent

⁵ *Id.* Even if behaviors committed in violation of a valid court order would not necessarily give rise to an adjudication of delinquency, the contempt power of the courts can be used to elevate a status offender who has committed no criminal act into delinquency. *Id.* at 378–79.

⁶ Historically, status offenses have been viewed as an indicator for identifying “troubled youths.” John F. Varin et al., *Mediation Between the Parents and Children: Part of the Twin Falls County Status Offender Program*, ADVOCATE (Idaho State Bar, Boise, Idaho), Nov. 1998, at 10, 10. The juvenile justice system encompasses status offenders in order to reach troubled youths at an early stage. *Id.*

⁷ See Humphrey, *supra* note 2, at 184 (describing status offenses as a gateway into the juvenile justice system and noting that status offenses are a signal that a child needs assistance); Varin, *supra* note 6, at 10 (“Experience indicates that a significant number of status offenders will later engage in more serious criminal behavior.”).

⁸ Juvenile courts generally have jurisdiction over three types of children: children in need of supervision or protection, such as abused or neglected children; children who violate a law which, if violated by an adult, would result in criminal prosecution; and children who commit status offenses. Matthews, *supra* note 2, at 201; see also Humphrey, *supra* note 2, at 168.

⁹ See Susan K. Datesman & Mikel Aickin, *Offense Specialization and Escalation Among Status Offenders*, 75 J. CRIM. L. & CRIMINOLOGY 1246, 1249 (1984).

delinquency.¹⁰ However, the adversarial nature of the court system often fails to address the root cause of a child's behavior.¹¹

Juvenile courts focus on the child's behavior as a status offender rather than the underlying problems that may be present in the home.¹² Public and professional disagreement exists regarding whether the juvenile court should have jurisdiction over status offenses at all,¹³ and if so, what the court's role should be.¹⁴ In contrast to court proceedings that focus on narrow legal issues, mediation allows parties to expand their focus to issues surrounding the dispute.¹⁵ Mediation provides an opportunity to begin a family dialogue and to reach a mutual agreement about how to move forward.¹⁶ Mediation

¹⁰ A 1990 report on status offenders described these children as "most often 'victims, not offenders'" and emphasized the need for prevention and early intervention with status offenders. David J. Steinhart, *Status Offenses*, THE JUVENILE COURT, Winter 1996, at 86, 91, available at http://www.futureofchildren.org/usr_doc/vol6no3ART7.pdf (quoting NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *A New Approach to Runaway, Truant, Substance Abusing and Beyond Control Children* (1990)).

¹¹ See Humphrey, *supra* note 2, at 171 (noting that a runaway or truant child is likely to violate a court order since the root of the original offense has not been addressed); Margaret L. Shaw, *Parent-Child Mediation: An Alternative that Works*, ARB. J., June 1984, at 25, 25 (noting that families often do not receive the help they need after filing a status offense petition).

¹² See Shaw, *supra* note 11, at 25 (noting that courts focus on the child's behavior as opposed to the issues within the family underlying the behavior).

¹³ *Id.* (noting that juvenile court jurisdiction over status offenses has been criticized by "juvenile justice, social service, and other professionals" as inappropriate and ineffective in a large number of cases).

¹⁴ See Steinhart, *supra* note 10, at 86 (describing the public and professional debate regarding the proper role of the juvenile courts in status offense cases).

On one side of the debate are children's advocates and youth service providers who argue that status offenders should receive treatment for family problems and that criminal justice sanctions, particularly incarceration, are not appropriate. On the other side are frustrated parents who want the juvenile court to discipline defiant children, law enforcement officers who want to be able to detain truants and runaways, and juvenile court judges who want incarceration as a sanction to enforce their court orders.

Id. But see *id.* at 91 (noting that not all judges oppose deinstitutionalization of status offenses and some actually recommended that the court be used as a last resort when alternative community services failed).

¹⁵ See Debra Baker, *Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining?*, 27 U. TOL. L. REV. 897, 899 (1996) ("Mediation allows parties to focus on larger issues that go to the core of the dispute, even though they may be outside the scope of the narrow legal issues addressed in the courtroom.").

¹⁶ See generally Shaw, *supra* note 11, at 25.

also offers a superior alternative to the traditional juvenile court system and should be used in status offense cases to better address the root problems¹⁷ of troubled children.

This Note asserts that mediation of status offenses should be mandatory and proposes a model mandatory status offense mediation program. Part II begins by considering status offenses generally and explores the problems with the juvenile court system's current handling of status offenses. In Part III, the focus shifts to the suitability of mediation for status offenses. Finally, Part IV highlights the benefits of moving to a model of mandatory mediation for status offenses and emphasizes the legislative support such a program would require while addressing prospective concerns.

II. STATUS OFFENSES

A. An Overview of Status Offenses

Children classified as "status offenders" fall under the jurisdiction of the juvenile courts because they have committed a non-criminal act that is considered unacceptable solely because of their age.¹⁸ Status offenses typically include "running away, school truancy, curfew violations, and alcohol possession."¹⁹ Most states also include general "catch-all" offenses such as "unruly" behavior,²⁰ "incorrigibility,"²¹ or "disobedience."²² Every

¹⁷ Root problems could include many types of underlying problems. For example, a child may be truant because he or she does not have a winter jacket to wear to school. Alternatively, a child may run away to escape an abusive home environment. *See infra* notes 52–53 and accompanying text.

¹⁸ *See* Matthews, *supra* note 2, at 201–02.

¹⁹ Humphrey, *supra* note 2, at 166.

²⁰ *See, e.g.*, GA. CODE ANN. § 15-11-2 (Michie 2001 & Supp. 2004) (defining status offenses to include unruly behavior and incorrigibility); OHIO REV. CODE ANN. § 2151.022 (West 1994 & Supp. 2003) (defining an "unruly child" as a child who is wayward or habitually disobedient, a child who is a habitual truant, a child who "behaves in a manner as to injure or endanger the child's own health or morals or the health or morals of others," or a child who violates a law applicable only to children). Some state statutes include unruliness, incorrigibility, and disobedient behavior in the definition of a status offense while other statutes use these terms as broad categories that encompass other status offenses. *See id.*

²¹ *See supra* note 20 and accompanying text. *See, e.g.*, ARIZ. REV. STAT. § 8-201 (West 1999 & Supp. 2004) (broadly defining "incorrigible child" to encompass habitual truancy, running away, refusing to obey the reasonable and proper orders of a guardian, habitually behaving in manner "as to injure or endanger the morals or health of self or others," committing an act "constituting an offense that can only be committed by a

state maintains some form of status offense jurisdiction²³ based on the notion that the state has a legitimate interest in protecting the welfare of children.²⁴

While early juvenile court systems treated status offenders the same as juvenile delinquents,²⁵ the juvenile justice system recently distinguished between these two groups.²⁶ The separation of status offenses from delinquency was intended to protect non-criminal status offenders from the stigma associated with a delinquency adjudication²⁷ and to shield non-criminal youths from exposure to juvenile delinquents.²⁸ In the 1960s, the Supreme Court established foundational due process rights for juvenile delinquents,²⁹ further distinguishing status offenses from juvenile

minor and that is not designated as a delinquent act,” and failing to obey a lawful court order).

²² See, e.g., MD. CTS. & JUD. PROC. § 3-8A-01 (Michie 2002) (defining a “Child in need of supervision” in part as a habitually disobedient or ungovernable child); *supra* text accompanying note 20; see also Humphrey, *supra* note 2, at 167 (noting that state statutes that include general offenses such as incorrigibility, disobedience, and unruliness often allow broad discretion in controlling “inappropriate behavior” (quoting Matthews, *supra* note 2, at 205)). Many states label children displaying such inappropriate behavior as “children in need of supervision” (CHINS) or “persons in need of supervision” (PINS). See, e.g., ALA. CODE § 12-15-1 (Michie 1995 & Supp. 2004) (describing a child in need of supervision); N.Y. SOC. SERV. § 371 (West 2003 & Supp. 2005) (describing a person in need of supervision).

²³ Matthews, *supra* note 2, at 202 (stating that “[i]n every state in this nation some form of status offense jurisdiction exists”).

²⁴ *Id.* (noting that an underlying pretense for status offense jurisdiction is that the state, within its sovereign duty, has a legitimate interest in protecting children’s welfare and imposing rehabilitative measures when necessary).

²⁵ *Id.* at 203 (explaining that early juvenile justice systems did not distinguish between status offenders and juvenile delinquents). “Differences between criminal and noncriminal behavior were largely overlooked as courts focused on the task of salvaging young lives from ruin.” Steinhart, *supra* note 10, at 90.

²⁶ See Matthews, *supra* note 2, at 203.

²⁷ See Datesman, *supra* note 9, at 1247. Juvenile court intervention itself may cause youths to think of themselves as delinquents and associate with other delinquents. *Id.* at 1249.

²⁸ *Id.* at 1247.

²⁹ See *In re Gault*, 387 U.S. 1 (1967). In a narrowly tailored decision, the Supreme Court held that a child being adjudicated delinquent was entitled to certain due process rights. *Id.* at 31–57. The Supreme Court expressly limited the grant of due process rights to juvenile delinquency proceedings. *Id.* at 13. The Court acknowledged that the procedural informality and potentially harsh punishments administered by the juvenile court could work to a juvenile’s disadvantage. *Id.* at 27.

delinquency.³⁰ The greater due process protections afforded to juvenile delinquents under *In re Gault*³¹ do not extend to status offenders.³² Instead, status offenders and juvenile delinquents receive considerably different treatment in court: juvenile delinquents enjoy procedural due process rights while status offenders are subject to more flexible and informal procedures under the *parens patriae* notion that juvenile court proceedings should guide and reform troubled children.³³

The differentiation of status offenses from delinquency altered the historical trend of detention of status offenders. In the early 1970s, at least fifty percent of most juvenile detention populations were status offenders.³⁴ In response to the high percentage of detained status offenders, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974, which required that states receiving federal funds for delinquency prevention begin to divert or deinstitutionalize status offenders.³⁵ While the purpose of deinstitutionalization was noble, states circumvented this purpose in various ways:

Although status offenders were removed from secure facilities, their numbers were offset by the incarceration of more young people for minor and petty delinquent acts. Moreover, there is evidence that many status offenders, as well as other troubled children, were propelled into private

³⁰ See Matthews, *supra* note 2, at 202. The rights granted to juvenile delinquents included: "the right to counsel, right to written notice of charges, right to cross examine, privilege against self-incrimination, right to obtain a transcript of the proceedings, and the right to appellate review." Humphrey, *supra* note 2, at 168.

³¹ See *Gault*, 387 U.S. 1.

³² See Matthews, *supra* note 2, at 203; see also Humphrey, *supra* note 2, at 168–69 (noting that the rights juvenile delinquents gained through *In re Gault* were not granted to status offenders).

³³ See Matthews, *supra* note 2, at 203–04. *Parens patriae* descended from English common law that charged the state with the protection of persons with disabilities, including children. *Id.* at 204 n.10. The juvenile court, founded on *parens patriae* notions, has traditionally been granted wide discretion to intervene in children's lives. Datesman, *supra* note 9, at 1246. The Supreme Court described the rights of juveniles under the *parens patriae* doctrine as the right "not to liberty but to custody." *Id.* at 1247 (quoting *Gault*, 387 U.S. at 17).

³⁴ See Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 402 (1991).

³⁵ See Humphrey, *supra* note 2, at 169. Specifically, the JJDPA requires that "juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult . . . shall not be placed in secure detention facilities or secure correctional facilities . . ." 42 U.S.C. § 5633 (a)(11)(A) (2000).

inpatient psychiatric and substance abuse facilities where they were essentially confined against their will with virtually no legal protections.³⁶

Additionally, some states created “semi-secure” facilities to circumvent the JJDPa’s ban on the secure confinement of status offenders.³⁷ Circumvention of the JJDPa resulted in the continued confinement of children who committed non-criminal acts.³⁸

In 1980, amidst objections that the JJDPa limited the court’s ability to handle status offenders who did not comply with court-recommended treatments, legislators amended the JJDPa to authorize the secure detention of status offenders who violated a valid court order.³⁹ Judges have used the

³⁶ Wanda Mohr et al., *Shackled in the Land of Liberty: No Rights for Children*, 564 ANNALS 37, 40 (1999) (citation omitted).

³⁷ See Datesman, *supra* note 9, at 1248; Jan C. Costello, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, 76–77 (examining Washington State’s attempt to circumvent the JJDPa by creating “semi-secure” facilities as a placement for status offenders that would “reasonably assure that youth placed there will not run away.”).

³⁸ See Steinhart, *supra* note 10, at 91 (stating that studies indicate that in reaction to deinstitutionalization laws, children are being relabeled as delinquents so they can be housed in secure detention facilities, or are being involuntarily and inappropriately committed to in-patient treatment facilities and hospitals).

³⁹ See Sweet, *supra* note 34, at 408 (explaining that some legislators believed that the JJDPa excessively limited the courts capacity to handle status offenders who repeatedly refused to accept court recommended treatment); 42 U.S.C. § 5633 (a)(11)(A)(ii) (2000). The JJDPa also creates two other exceptions to the prohibition against secure detention of status offenders:

[J]uveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding

- (i) juveniles who are charged with or who have committed a violation of section 922(x)(2) of title 18, United States Code, or of a similar State law;
- (ii) juveniles who are charged with or who have committed a violation of a valid court order; and
- (iii) juveniles who are held in accordance with the Interstate Compact on Juveniles as enacted by the State;

shall not be placed in secure detention facilities or secure correctional facilities

42 U.S.C. § 5633 (a)(11)(A) (2000). See also *In re Jennifer G.*, 695 N.Y.S.2d 871, 877 (N.Y. Fam. Ct. 1999) (where a judge described his frustration with the court’s lack of authority to hold status offenders in secure detention, stating: “In depriving society through its Family Court of the power to utilize secure detention when appropriate to protect and advance the welfare and to meet the needs of the PINS child, the Legislature,

valid court order amendment as another way to circumvent deinstitutionalization by “bootstrapping”⁴⁰ status offenders into delinquency and placing them in secure confinement.⁴¹ Because of this bootstrapping technique, children may be detained in secure facilities for non-criminal behavior that would not support a delinquency adjudication.⁴²

Status offenders face other unique challenges, including a potential lack of parental and legal support. Many status offenses, such as incorrigibility and running away, put children at a disadvantage because a parent typically reports the child’s behavior,⁴³ leaving the child without parental assistance and in a seemingly adversarial position with their parent.⁴⁴ Moreover, status offense cases rarely involve attorneys, further disadvantaging children

insofar as PINS children are concerned, has amputated the right hand of the Lady of Justice.”).

⁴⁰ “Bootstrapping” refers to the judicial practice of placing a status offender in secure detention for violating a valid court order. *See* Humphrey, *supra* note 2, at 170. Another method of “bootstrapping” includes “relabeling” the child’s offense as a criminal offense in order to detain a child. *Id.* State courts vary as to whether judicial bootstrapping is permitted or not. *See, e.g., In re Doe*, 30 P.3d 269, 275 (Haw. 2001) (affirming the lower court’s adjudication of a status offender as a law violator and the resulting secure detention for violating a valid court order); *In re Michael G. v. Superior Court of Fresno County*, 747 P.2d 1152, 1154 (Cal. 1988) (concluding that the juvenile court retained “authority, pursuant to its contempt power, to order the secure, non-school hours confinement” of a contemptuous status offender); *Minnesota ex rel. L.E.A. v. Hammergren*, 294 N.W.2d 705, 706–07 (Minn. 1980) (holding that juvenile courts have the authority to find a juvenile in contempt and impose sanctions but emphasizing that the juvenile court should not confine status offenders in secure detention unless “they first find specifically that there is no less restrictive alternative which could accomplish the court’s purpose.”). *But see In re S.S.*, 842 A.2d 904, 905 (N.J. Super. Ct. App. Div. 2004) (reversing the delinquency adjudication of a status offender for violating a court order to “obey the rules’ of home and school”); *Commonwealth v. Florence F.*, 709 N.E.2d 418, 419 (Mass. 1999) (concluding that the juvenile court does not have contempt power in status offense cases and urging the legislature to address this issue).

⁴¹ *See* Hughey, *supra* note 4, at 378; Humphrey, *supra* note 2, at 170.

⁴² *See generally* Hughey, *supra* note 4, at 379.

⁴³ Shaw, *supra* note 11, at 25 (noting that in most states a parent can bring a child into family court by initiating a PINS or comparable petition against the child).

⁴⁴ *See* Humphrey, *supra* note 2, at 172 (“[T]he child is often left to obtain an attorney by him or herself without assistance from his or her parent.”). Further, the parent and child are likely in a conflicted relationship making it unlikely that the child will receive assistance from the parent. *Id.*

charged with a status offense.⁴⁵ Theoretically, there is little need for an attorney since the JJDPa prohibits secure detention of status offenders and due process protections are not involved.⁴⁶ However, since the legal system often circumvents the JJDPa,⁴⁷ the lack of legal representation can harm status offenders. Status offenders are therefore disadvantaged in the juvenile justice system because they are not afforded procedural protections, they often lack parental and legal support, and the court system fails to address the root cause of their behavior.⁴⁸

B. *Concerns with the Juvenile Justice System's Handling of Status Offenses*

The juvenile justice system's original rehabilitative purpose has failed in relation to status offenses. The juvenile court process proves ineffective in a large portion of status offense cases:

The court's focus is on the child's behavior, rather than on the problems within the family that caused it. There is also very little a court can do other than to place a child in a nonsecure facility, from which a child is free to abscond. As a result, these cases are often a source of frustration for those in the court system; they distract from the handling of more serious and violent offenders; and the families who petition the court for help in controlling their children often do not receive the kind of help they need.⁴⁹

Status offense cases frustrate courts that have limited options for dealing with a status offender's behavior.⁵⁰ As the hypothetical in the introduction illustrated, many children commit status offenses because of an underlying problem which the juvenile court system is not equipped to address.⁵¹ Research indicates that children from abusive homes are more likely to

⁴⁵ *Id.* at 171–72 (citing one study which found that only 28% of status offenders were represented by counsel). Because status offenses are non-criminal, attorneys are not typically appointed by the court. *Id.* at 172.

⁴⁶ *Id.* at 171–72.

⁴⁷ See *supra* notes 36–42 and accompanying text.

⁴⁸ Humphrey, *supra* note 2, at 172 (noting that status offenders are afforded few due process protections).

⁴⁹ Shaw, *supra* note 11, at 25.

⁵⁰ See *id.*

⁵¹ See *id.*

commit status offenses,⁵² such as running away.⁵³ The juvenile justice system fails to adequately address the potential familial problems underlying status offenses by focusing solely on the child's behavior.

The juvenile courts' frustration with status offenses combined with the valid court order amendment to the JJDPA puts status offenders at risk for being held in secure detention. The JJDPA sought to reinforce the notion that status offenses were not criminal and therefore should not be punishable by secure detention.⁵⁴ However, the valid court order language added to the JJDPA effectively gives status offenders, whose behavior is non-criminal by definition, "one bite out of the apple" before treating them as delinquents.⁵⁵ Courts use bootstrapping to elevate status offenses to delinquency and effectively avoid the limitations that the JJDPA sets for status offenders, specifically the prohibition of secure detention.⁵⁶

The lack of due process rights is another major concern in the juvenile justice system's treatment of status offenders. While the Supreme Court granted juvenile delinquents due process rights in *In re Gault*, these rights only apply in the delinquency context.⁵⁷ Status offenders have not been afforded additional rights and protections; instead the courts have highlighted the distinctions between status offenders and delinquents.⁵⁸ One commentator highlighted the injustice in status offense jurisprudence, stating: "Status offenders are treated like adults because they can be punished through deprivation of their liberty, but they are treated like children because

⁵² See Humphrey, *supra* note 2, at 176 ("[S]tudies indicate that 70% of the girls in the juvenile justice system have histories of physical abuse.").

⁵³ See *id.* at 176-77 (citing a study of runaways that found 38% of males and 73% of females had been sexually abused and 73% of these runaways reported being physically abused) (citation omitted).

⁵⁴ See Steinhart, *supra* note 10, at 90 (noting that the JJDPA contained "a strong federal policy against placing non-criminal minors in secure institutions."). The JJDPA encouraged referring status offenders to programs in nonsecure environments, including counseling and treatment programs. *Id.*

⁵⁵ W. Don Reader, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Laws of Unintended Results*, 29 AKRON L. REV. 477, 483 (1996).

⁵⁶ See Hughey, *supra* note 4, at 378.

⁵⁷ See *In re Gault*, 387 U.S. 1 (1967).

⁵⁸ See Humphrey, *supra* note 2, at 168. "A classic example of this is *In re Spaulding*, where the court denied Spaulding from asserting her privilege against self-incrimination because she was not charged with something that would be a crime if committed by an adult. She was, however, found in need of supervision and committed to an institution for treatment." *Id.* at 168-69.

they are deprived of due process rights.”⁵⁹ While the juvenile justice system was created to protect children, the system actually fails children who commit status offenses by treating them as accused criminals instead of effectively addressing their needs. Mediation provides a more effective means for addressing status offenses.

III. THE MEDIATION OF STATUS OFFENSES

A. *Mediation and Status Offenses*

Mediation has been utilized in various juvenile justice contexts, including parent–child conflicts related to status offenses, student conflicts, and certain delinquency cases.⁶⁰ In parent–child mediation of status offenses, a mediator’s role is to “help the parent and child communicate with each other, identify overlapping areas of interest, and come to their own written agreements on specific behavior in problem areas.”⁶¹ Mediation is a voluntary process where a neutral third party helps participants reach a mutual agreement.⁶² A mediator may not impose a solution,⁶³ and instead attempts to empower individuals to reach an agreement.⁶⁴ Some mediation programs are voluntary, meaning that program planners determine which cases are appropriate for mediation,⁶⁵ while other mediation programs are mandatory, meaning that program planners may choose to refer all cases of a

⁵⁹ Humphrey, *supra* note 2, at 169.

⁶⁰ Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 993, 2026 (1993).

⁶¹ Shaw, *supra* note 11, at 25.

⁶² Glenda L. Cottam, *Mediation and Young People: A Look at How Far We Have Come*, 29 CREIGHTON L. REV. 1517, 1518 (1996); *see also* JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 5 (1987) (describing mediation as a “process whereby a neutral intervenor helps people involved in a dispute develop solutions that are acceptable to them”). Three essential features of mediation include: “first, a mediator has no preference for what the parties’ settlement terms shall be; second, a mediator has no authority to impose a binding decision on the parties; and third, parties do not reach complete agreement in mediation unless each party accepts every settlement term.” JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1 (2001).

⁶³ ALFINI ET AL., *supra* note 62, at 1 (noting that a mediator lacks that authority to impose a solution). Mediation can instead be seen as a process of identifying issues, generating options, with the aspiration of reaching a final agreement between parties. *Id.*

⁶⁴ *Id.*

⁶⁵ NANCY H. ROGERS, CRAIG A. MCEWEN & SARAH R. COLE, *MEDIATION: LAW, POLICY, PRACTICE* 6-5 (2d ed. 1994).

particular type to mediation⁶⁶ or provide judges or officials the authority to assign cases to mediation.⁶⁷

Diverting status offenses from the juvenile courts will benefit children and their families. While some states have status offense mediation programs or other diversion programs, many jurisdictions still handle status offenses in the juvenile courts.⁶⁸ The adversarial nature of court proceedings may escalate rather than alleviate the issues presented in a status offense case.⁶⁹ The parents and children may perceive themselves as pitted against one another⁷⁰ and communication between family members may deteriorate further.⁷¹

Mediation employs a more therapeutic approach than the judgment-focused juvenile court.⁷² Mediation focuses on reaching a mutually acceptable agreement,⁷³ not on making a determination of right or wrong.⁷⁴ Additionally, mediation suits parent-child disputes well.⁷⁵ Parent-child conflicts are unique because they often involve a history of conflict.⁷⁶ Parents and children may have long histories of poor communication habits⁷⁷

⁶⁶ *Id.*

⁶⁷ *Id.* Numerous variables affect the success of mediation, including "past and/or continuing relationships between the parties, polycentric problems (problems for which there are many possible solutions and no legally principled way to decide among them), disputes in which particular negotiation barriers are likely or present, cases involving more than two parties and cases involving multiple issues." *Id.* at 6-5, 6-6 (citations omitted).

⁶⁸ See Matthew Kogan, Note, *The Problems and Benefits of Adopting Family Group Conferencing for PINS (CHINS) Children*, 39 FAM. CT. REV. 207, 209 (2001) (noting that "few juvenile courts have embraced the benefits of mediating juvenile status offenses"). The Note proposes that the United States consider adopting Family Group Conferencing, a facilitated mediation program that originated in New Zealand, as a possible model for PINS or status offense cases. *Id.* at 207.

⁶⁹ See Cottam, *supra* note 62, at 1526.

⁷⁰ See Shaw, *supra* note 11, at 25.

⁷¹ *Id.* (noting that fact finding is not essential in the mediation process).

⁷² See Marianne McConnell, *Mediation—An Alternative Approach for the New Jersey Juvenile Justice System?*, 20 SETON HALL LEGIS. J. 433, 454 (1996).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (noting that mediation is especially well suited for parent-child conflicts); Shaw, *supra* note 11, at 29 (describing a New York status offense mediation program as "very effective in parent-child disputes").

⁷⁶ See Shaw, *supra* note 11, at 26.

⁷⁷ See generally Cottam, *supra* note 62, at 1526-27 ("[M]ediation may provide a needed forum for resolving family communication and understanding malfunctions.").

or family patterns that tend to encourage conflict.⁷⁸ An evaluation of one status offense mediation program found that mediation taught participants more socially acceptable ways of handling disputes.⁷⁹ Strong familial ties provide motivation for the resolution of conflicts through mediation.⁸⁰ Although familial bonds can play an important role in motivating parties in status offense mediation, inherent power disparities also arise in familial relationships which must be considered in relation to mediation.

B. Power Disparities in Parent–Child Mediations

The unique power dynamics in parent–child mediation must be considered to ensure fairness in the mediation process. Mediation between parents and children is distinctive because of the inherent power disparity that exists and the history that the parties share.⁸¹ When a parent refers their child to juvenile court, they may appear powerful because of “the parents’ ability to refer their child to court for misbehavior.”⁸² However, the parent’s power may actually be relatively low as they need the intervention of outside authority to control their child’s behavior.⁸³ Conversely, parents typically retain significant power over their children who are dependent on them for basic care.⁸⁴ Children generally maintain an unequal bargaining position because of their age, their limited education, and their lack of life experience.⁸⁵ They are also subordinate to their parents, who maintain “economic, educational, and physical control” over their children.⁸⁶ Power

⁷⁸ *Id.* at 1527–28 (describing two patterns from which family conflict typically stems, including (1) authoritative parents who believe that children owe a duty of obedience to their parents and see their children as rebellious; and (2) parents who were lenient when their children were young and now find themselves unable to control independent teenagers.).

⁷⁹ See McConnell, *supra* note 72, at 454.

⁸⁰ See Cottam, *supra* note 62, at 1527 (explaining that where family bonds motivate parties in mediation, conflicts may be resolved through effective communication).

⁸¹ See Shaw, *supra* note 11, at 25–26.

⁸² Cottam, *supra* note 62, at 1527.

⁸³ *Id.*

⁸⁴ See generally Baker, *supra* note 15, at 913.

⁸⁵ See *id.* (describing the power imbalance between children and parents in mediation in terms of contracts principles, noting the unequal bargaining power that children face).

⁸⁶ See *id.* (describing the power difference between parents and children as a “gross inequality”).

imbalances may hinder the mediation process and could result in unfair mediation agreements.⁸⁷

Because of this imbalance, children may “lack meaningful choice” as they know that “they face court action if they do not arrive at some form of agreement.”⁸⁸ Although status offenses are unlawful solely because of the actor’s age, children against whom charges are filed will probably feel like an accused criminal who must face the court system if they do not comply with mediation.⁸⁹ Additionally, children may perceive an alliance between the mediator and their parents because the mediator is an adult.⁹⁰ The child’s perception may cause distrust or disinterest in the mediation process, undermining the likelihood of meaningful participation in the mediation process or of reaching a balanced agreement.⁹¹ If participants view themselves as disadvantaged, they may respond by agreeing to terms without any expectation of complying with the terms.⁹² Further, if a child feels overwhelmed or threatened by the mediation process, they may attempt to manipulate the mediation to end the process.⁹³ To ensure meaningful participation, the mediator must remain aware of power disparities.

In mediations involving children, the mediator must also be aware of the cognitive abilities of the child. The child’s level of understanding and capacity, which is most likely less than that of the parents, should be carefully considered throughout the mediation process.⁹⁴ Minors who enter into mediation may lack experience with the court system and be unable to differentiate between an official court proceeding and mediation.⁹⁵ Courts

⁸⁷ Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353, 374 (1997) (noting that one of the common disadvantages of court-ordered mediation was the inability of the mediator to address power imbalances which could lead to, among other things, unfair agreements).

⁸⁸ Baker, *supra* note 15, at 913. Minors entering mediation prior to the filing of a complaint are faced with either negotiating and abiding by an agreement or facing formal charges in court. *Id.* Alternatively, children ordered into mediation as part of a hearing based on a complaint face court sanctions if they are unable to negotiate and abide by a mediation agreement. *Id.*

⁸⁹ *Id.*; see also *supra* note 1 and accompanying text.

⁹⁰ See Cottam, *supra* note 62, at 1529.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (noting that if a child was overwhelmed or threatened by the mediation process they may respond with silence for the process to end).

⁹⁴ *Id.* at 1530.

⁹⁵ See Baker, *supra* note 15, at 912.

generally intervene and nullify contracts negotiated by minors based on the infancy doctrine and the notion that juveniles lack the capacity to contract.⁹⁶ The court system's protective stance related to minors' capacity highlights the importance of recognizing the capacity issue in mediation and assuring the minor understands each part of the mediation process.⁹⁷

In parent-child mediation, parents may perceive the mediator as aligned with the child, raising another potential concern. As previously noted, the mediator must be attentive to the child's capacity and the child's possible distrust of the adult-run mediation process.⁹⁸ Parents may view this continued attentiveness as a bias in favor of the child.⁹⁹ Therefore, the mediator risks and must be cautious of "losing the appearance of impartiality, alienating the parents or the child, or depriving the disputants of the opportunity to achieve a self-determined resolution."¹⁰⁰ In order to successfully mediate in light of the possible power disparity and distrust, the mediator must afford parents and children equal input in reaching the agreement and resolving the conflict.¹⁰¹

While most courts under-utilize or fail to utilize mediation in the status offense context, mediation of delinquency cases is more common.¹⁰² A common form of delinquency mediation is victim-offender mediation.¹⁰³

⁹⁶ *Id.* at 911-12. At least one commentator argues that mediation agreements involving minors are unenforceable because of the infancy doctrine and a minor's lack of capacity. *Id.*

⁹⁷ See Cottam, *supra* note 62, at 1530 (arguing that a child's diminished capacity should lead mediators to "feel obliged to carefully ascertain the child's level of understanding and capacity to consent at each stage of the mediation").

⁹⁸ See *id.* at 1529-30.

⁹⁹ *Id.* at 1530 (explaining that the mediator's attentiveness to a child's capacity may be perceived by the parents as "showing special solicitude for the child" and "may lead the parents to believe the mediator is biased in favor of the child").

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 1528.

¹⁰² Kogan, *supra* note 68, at 209 (stating that while few juvenile courts utilize mediation for status offenses, mediation is utilized more in juvenile delinquency cases).

¹⁰³ In the United States, there are more than one hundred victim-offender mediation programs. Cottam, *supra* note 62, at 1536. Victim-offender mediation brings the offender and the victim together with a trained mediator on a voluntary basis to empower victims and to humanize the impact of crimes to the offenders. Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1375 (2001). Victim-offender mediation is "designed to restore power to the parties affected by crime—the offenders, the victims, and members of the community—instead of leaving the disposition of offenders solely in the hands of juvenile justice authorities." *Id.* at 1374.

Research indicates high levels of satisfaction with mediation for victims and juvenile offenders alike.¹⁰⁴ Mediation helps child offenders understand the impact of their actions¹⁰⁵ and allows victims to express how the crime affected them.¹⁰⁶ Some research indicates that victim-offender mediation participants have lower offense rates after mediation than non-participants.¹⁰⁷ The successes found with victim-offender mediation could be translated and expanded by mandating mediation for status offenses.

C. Promising Results from Three Status Offense Mediation Programs and the Mediation Models Used

Juvenile dispute resolution programs take many forms and address a range of problems, including family conflicts,¹⁰⁸ school disputes,¹⁰⁹ and criminal offenses.¹¹⁰ These programs have shared a common trend of a higher degree of success than court programs.¹¹¹ One study examined a program designed to take young offenders out of the juvenile court system and into mediation.¹¹² The multi-year study found that the program helped participants avoid being re-arrested. Specifically, the study considered a sample of juvenile offenders from 1999 to 2003 and found that nearly seventy percent had not been re-arrested.¹¹³ This study indicates that

¹⁰⁴ See Cottam, *supra* note 62, at 1536. Victim-offender mediation is not appropriate in every situation but is suitable for less serious offenses such as property damage or minor personal assaults. *Id.*

¹⁰⁵ *Id.* at 1537-38. Through victim-offender mediation the offender "learns that the victim is not a nameless, faceless object whose property he or she has affected in some way. This face-to-face meeting will hopefully instill a sense of empathy for the victim, thus making it more difficult for the offender to repeat his or her crime." *Id.* at 1537.

¹⁰⁶ *Id.* at 1538.

¹⁰⁷ *Id.* at 1539-40.

¹⁰⁸ See McConnell, *supra* note 72, at 462.

¹⁰⁹ *Id.*; see also Cottam, *supra* note 62, at 1522-24 (discussing various school mediation programs, ranging from programs that teach conflict management skills to programs that utilize mediation to resolve school conflicts).

¹¹⁰ See McConnell, *supra* note 72.

¹¹¹ *Id.* at 462.

¹¹² See Jeff Coen, *Helping Youths Stay Out of Jail: Mediation Linked to Lower Rate of Teen Rearrests*, CHI. TRIB., Aug. 2, 2004, at CN3.

¹¹³ *Id.* The study sampled 386 juvenile offenders, 157 of whom completed the mediation program. *Id.* Juvenile cases were screened before being diverted to mediation, and cases typically sent to mediation involved first or second offenses and non-violent crimes. *Id.*

diversion to mediation may reduce recidivism rates among young offenders.¹¹⁴

Unlike the traditional court system, mediation considers the situation holistically and can better address underlying familial concerns. Mediation can be an educational process that helps families learn to better deal with conflict.¹¹⁵ One study found that nearly one third of families who had participated in status offense mediation reported that family communication had improved as a result of mediation.¹¹⁶ The New York PINS Mediation Project, the Twin Falls County Status Offender Program, and the Ohio Truancy Prevention Through Mediation Program reflect the promise of mediation with status offenses.

The Children's Aid Society in New York offers PINS Mediation as an alternative for parents and children in conflict and handles approximately 500 to 600 referrals annually.¹¹⁷ The PINS program mediators are community volunteers who are screened and trained extensively.¹¹⁸ The New York PINS program employs a four-session model which includes a strong social services component to assure that the family's needs uncovered during mediation are addressed.¹¹⁹ The program acknowledges the power disparity between adults and children, but does not attempt to rebalance the power in the relationship itself.¹²⁰ The parent's role as an authoritative figure is acknowledged, but both the parent and child are given equal dignity throughout the mediation process.¹²¹

¹¹⁴ *Id.* (noting that the study indicated mediation could significantly reduce recidivism).

¹¹⁵ Cottam, *supra* note 62, at 1527.

¹¹⁶ *Id.*; *see also* Shaw, *supra* note 11, at 29. The research was conducted two months after the participants' last mediation session and nearly one third of the people contacted mentioned that family communication had improved as a result of the mediation. *Id.*

¹¹⁷ *See* Shaw, *supra* note 11, at 25. Referrals are accepted from the Department of Probation before a petition has been filed or, if the court process has already begun, by a parent's or child's attorney. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 26–27 (noting that parent–child disputes are not like other disputes that may be mediated in one session). Unlike other disputes, families often have a long history of conflict. *Id.* at 26. Additionally, children are most successful when asked to focus on a limited amount of things at one time. *Id.*

¹²⁰ *Id.* at 25–26 (noting that the parent's role as an authority figure is not brought into question in the mediation).

¹²¹ *Id.* at 25–26 (explaining that both the parents and the child are given equal input into the resolution of the conflict).

In a study of 153 families referred to the PINS mediation program, researchers found that a strong majority (77.3 percent) of the families who participated in mediation were moderately or highly successful.¹²² “Success” depended on multiple factors, including whether another PINS complaint had been filed with the court within two months of the final mediation session.¹²³ Additionally, the research reflected that families diverted to mediation before a petition was filed with the court were “significantly more likely to report satisfaction with mediation than those diverted at the post petition stage.”¹²⁴ This finding indicates that conflicts may be exacerbated by the adversarial court system and mediation may not be as effective after the family enters the court system.¹²⁵ Some theorists hypothesize that juvenile court intervention causes “escalation by encouraging youths to think of themselves as delinquent, and to associate with others who have been similarly identified.”¹²⁶ This “labeling” hypothesis could help explain the finding that families are more likely to report satisfaction before a formal court petition has been filed.¹²⁷

The Twin Falls County Status Offender Program is another program that creates alternatives, including parent-child mediation, to the traditional justice system for the status offenses of incorrigibility, running away, truancy, and curfew violations.¹²⁸ Status offenders are initially screened and their cases are either sent to mediation, the prosecutor, or to counselors if mental health or other similar issues are involved.¹²⁹ The trained mediators in the Twin Falls program followed a five-step mediation model to help the family develop a plan to address the offending behavior.¹³⁰ The Twin Falls

¹²² *Id.* at 28–29. The study found that 55.5% of families who participated in mediation were moderately successful and 21.8% were highly successful. *Id.* at 29. The New York PINS mediation study examined how families were doing two months after mediation and considered whether (1) the parent thought mediation was helpful; (2) the parent thought the child was more manageable; (3) the presenting problems were resolved; (4) the family completed the mediation sessions; and (5) the child returned to court on a new PINS charge. *Id.*

¹²³ *Id.* at 29.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Datesman, *supra* note 9, at 1249.

¹²⁷ *See generally* Datesman, *supra* note 9, at 1249.

¹²⁸ *See* Varin, *supra* note 6, at 10.

¹²⁹ *Id.*

¹³⁰ *Id.* at 10, 12. The five-step model includes: (1) an introduction and explanation of ground rules; (2) the parties give opening statements; (3) mediator identifies issues and

program also noted the power imbalance present between parents and children but found that this imbalance was not a hindrance to the mediation process.¹³¹

The Twin Falls County Status Offender Mediation Program showed promising results. In a study examining thirty mediated status offense cases, Twin Falls experienced a 73 percent success rate.¹³² The success rate accounted for multiple factors, including whether the conditions of the mediation agreement were being fulfilled and whether an additional offense had occurred within three months of the mediation session.¹³³ The study included primarily incorrigibility cases (sixteen), but also included running away (six), truancy (five), and curfew violations (three).¹³⁴

While status offender mediation often focuses on the parent-child relationship, status offender mediation may include other parties.¹³⁵ One example of this is the Truancy Prevention Through Mediation Program in Ohio.¹³⁶ The Truancy Prevention Through Mediation Program is a state program that local school districts can request and implement.¹³⁷ Lay people from the community receive mediation training and serve as mediators.¹³⁸

interests; (4) parties generate options; (5) if an agreement is reached, it is put into writing. *Id.* at 12-13.

¹³¹ *Id.* at 13.

¹³² *Id.* at 10-11. The Twin Fall mediation program defined success as:

1. the status offender and parent(s) have reached (and signed) a Memorandum of Understanding during mediation which includes an agreement by the child not to repeat the offense; and
2. the parents and child have completed the responsibilities defined in the Memorandum, [sic] 3. the child has not committed another offense within three (3) months of mediation.

Id. at 10.

¹³³ *Id.*

¹³⁴ *Id.* at 11.

¹³⁵ For example, truancy mediation may include the parent, a teacher or other school official, and the child. Interview with Edward Krauss, Director of Community and Court Programs, The Ohio Commission on Dispute Resolution and Conflict Management, in Columbus, Ohio (Jan. 6, 2005).

¹³⁶ See Ohio Commission on Dispute Resolution and Conflict Management, Truancy Prevention Through Mediation Program, <http://disputeresolution.ohio.gov/Brochures/truancybrochure.htm> (last visited Feb. 20, 2006) [hereinafter Truancy Prevention]; Krauss, *supra* note 135.

¹³⁷ Krauss, *supra* note 135.

¹³⁸ *Id.* For a truancy mediator to reach a level considered competent, they are required to pursue both classroom training and mediation experience. ENSURING

The truancy mediation occurs before the family appears in court for a status offense.¹³⁹ The program focuses on helping parents, teachers, and children find a workable solution to truancy problems.¹⁴⁰

The Ohio Truancy Prevention Through Mediation Program differs from both the New York PINS program and the Twin Falls program in its focus on early intervention: The Truancy Prevention Through Mediation Program intervenes before a status offense is filed in an effort to prevent the truancy from reaching a level that would warrant court involvement.¹⁴¹ Research indicates that this early intervention successfully addresses truancy issues.¹⁴² As with the other mediation programs, the truancy mediation program enjoys a high success rate. During the 2003–2004 school year, 3,000 mediations were conducted through Ohio’s Truancy Prevention Program.¹⁴³ Research found that “in all but one of the counties submitting post-mediation data, statistically significant reductions in the number of absences or tardies was demonstrated for those students and families that participated in the program.”¹⁴⁴

The significant success of these three status offense mediation programs indicates that the use of mediation with status offenses should be expanded. Research indicates that mediation programs can decrease recidivism and

COMPETENCE AND QUALITY STANDARDS OF PRACTICE FOR TRUANCY MEDIATION 4, <http://www.disputeresolution.ohio.gov/cc/competence.pdf> (last visited Feb. 20, 2006).

¹³⁹ See Truancy Prevention, *supra* note 136; Krauss, *supra* note 135.

¹⁴⁰ Krauss, *supra* note 135. If the truant child is younger (normally elementary school aged), then the mediation is primarily conducted between the parent and the teacher or school administrator. *Id.* In this type of mediation, the child might be brought in at the end of the mediation to hear about the agreement. *Id.*

¹⁴¹ The Truancy Prevention Program typically intervenes when a student has approximately three to five unexcused absences, before a truancy petition would be filed. *Id.*

¹⁴² See Ohio Commission on Dispute Resolution and Conflict Management, Court and Community, <http://disputeresolution.ohio.gov/courtcommunity.htm> (last visited Feb. 20, 2006) (noting that multiple years of studies demonstrate the success of the truancy mediation program).

¹⁴³ See TRUANCY MEDIATION’S CONTINUING BENEFITS, <http://www.disputeresolution.ohio.gov/cc%5Ctmlong.pdf> (last visited Feb. 20, 2006).

¹⁴⁴ *Id.* Significant differences were quantified by tracking the number of tardies and absences before and after mediation. *Id.* For example, one participating county reported an average of approximately fifteen absences for participating students before mediation. *Id.* After mediation, the average number of absences dropped to between one and two absences. *Id.* The survey results reflect attendance figures both immediately after mediation as well as the year following mediation. *Id.*

foster better family communication.¹⁴⁵ Further, early diversion from a formal court setting would decriminalize status offenses, contributing to the positive effects of mediation.¹⁴⁶ The promise of these juvenile mediation programs encourages the widespread use of mediation for status offenses.

IV. MANDATORY MEDIATION: A BETTER MODEL FOR HANDLING STATUS OFFENSES

A. *Benefits of Mandatory Status Offense Mediation*

1. *Mandatory Mediation Generally*

Mediation programs may be voluntary or mandatory.¹⁴⁷ Civil litigation matters and family disputes are often ordered to mediation.¹⁴⁸ Some jurisdictions grant courts the authority to order mediation on a case-by-case basis, while other jurisdictions mandate mediation for particular categories of cases.¹⁴⁹ Contested divorce matters are a common example of mandatory mediation for a category of cases.¹⁵⁰ While the concept of mandatory mediation seems at odds with the voluntary nature of mediation, the mediation process itself remains voluntary, as parties may choose to decline or accept the settlement terms.¹⁵¹ Additionally, state statutes that mandate participation typically include opt-out provisions.¹⁵² Research indicates that

¹⁴⁵ See *supra* notes 113–14, 116 and accompanying text.

¹⁴⁶ See *infra* note 169 and accompanying text; see also *infra* Part IV.C. The New York PINS Mediation Program found that as families proceeded further in the formal court system, reconciliation through mediation became increasingly difficult. See Shaw, *supra* note 11, at 29.

¹⁴⁷ See ROGERS ET AL., *supra* note 65, at 6–16.

¹⁴⁸ *Id.* at 7–4, 7–5.

¹⁴⁹ *Id.* at 7–6; see also ALASKA STAT. § 25.24.060 (2004) (authorizing local courts to mandate mediation).

¹⁵⁰ See ROGERS ET AL., *supra* note 65, at 7–6; ME. REV. STAT. ANN. 19-A §§ 251, 1653 (1998).

¹⁵¹ See David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water. . . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 188–89 (1996). “Mandatory mediation may seem to be something of an oxymoron because mediation is fundamentally a voluntary process. . . . As long as a settlement is entered into voluntarily by the parties, the process is mediation.” *Id.*

¹⁵² ROGERS ET AL., *supra* note 65, at 6–16. Opt-out provisions may be included because of concerns about unfairness or the potential burdens of participation. *Id.*

“settlement rates and party perceptions of fairness are often comparable in mandatory and voluntary programs.”¹⁵³

Mandatory mediation is advantageous to parties because (1) mandatory mediation may expedite the settlement process;¹⁵⁴ (2) initially hostile parties may benefit from mediation and decrease costs;¹⁵⁵ (3) mandating the process overcomes apparent weaknesses sometimes associated with mediation;¹⁵⁶ and (4) mandatory mediation will increase parties’ familiarity with the mediation process as an alternative to litigation.¹⁵⁷ While mandatory mediation has many advantages, legislatures often fail to clearly define what constitutes satisfactory participation in mandatory mediation.¹⁵⁸ A few states define the necessary level of participation in terms of a “good faith” standard.¹⁵⁹ Commentators alternatively suggest a “meaningful participation” standard¹⁶⁰ or an objective standard.¹⁶¹ Despite the need to define the level of

¹⁵³ *Id.* at 6-16, 6-17.

¹⁵⁴ See Winston, *supra* note 151, at 190 (contrasting mandatory mediation, which requires parties to think about settlement at an earlier stage, with the litigation process, which places “the greatest impetus for settlement at the end of the dispute process”). *Id.*

¹⁵⁵ *Id.* at 191 (noting that parties often benefit from mediation even if their participation is the result of a court order).

¹⁵⁶ *Id.* at 192 (discussing that mandatory mediation can help overcome the lingering perception that mediation is an indication of a weak case or a weak party).

¹⁵⁷ *Id.* at 193 (commenting that voluntary rates of mediation may be low because parties or attorneys are accustomed to the litigation process). Despite these advantages, critics argue that mandatory mediation “may be an exercise in futility if one of the parties enters the mediation determined not to settle,” thereby making mediation a mere obstacle to overcome before litigation can proceed and possibly increasing the parties’ costs. *Id.* at 190.

¹⁵⁸ *Id.* at 193. “Beyond filing a mediation request, and presumably attending a mediation hearing, the requirements of participation for the parties are ambiguous.” *Id.* at 194.

¹⁵⁹ *Id.* at 197 (explaining that some state statutes compel participants to make a “good faith” effort to resolve their dispute). See e.g. ME. REV. STAT. ANN. Tit. 19-A § 251 (1998) (requiring the court to make a determination that “the parties made a good faith effort to mediate the issue before proceeding with a hearing”). Dispute resolution scholars have provided further comment on good faith standards and participation in mediation. See, e.g., Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997, at 9, 9–13; Edward F. Sherman, “*Good Faith*” Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 14, 14–16.

¹⁶⁰ See Winston, *supra* note 151, at 198–99 (describing a suggested mandatory mediation standard, “meaningful participation,” which raises concerns about the subjectivity of the standard).

participation required for mandatory mediation, the process offers numerous advantages and could be beneficial if utilized with status offenses.¹⁶²

2. The Benefits of Implementing a Mandatory Mediation Model with Status Offenses

Mandatory mediation programs confer numerous benefits, including potential increased efficiency¹⁶³ and the greater community value of resolving conflicts:

The mandatory participation may be necessary to establish sufficient case volume for a mediation program to run efficiently and for it to have any impact on the workload of the court. It may be essential to overcome some parties' reluctance to take the strategic risks to enter mediation or to balance the resistance of one of two parties to serious settlement discussion and thus increase the efficiency of settlement for parties. Mandatory programs can promote voluntary use by educating lawyers and parties about the potential of mediation. Required participation can promote societal values about consensual dispute resolution in selected areas of conflict or promote more generally the public value on reconciliation.¹⁶⁴

Pragmatically, mandatory mediation helps establish a regular case flow for mediation programs.¹⁶⁵ Additionally, mandatory participation eliminates strategic concerns that parties may have about entering mediation.¹⁶⁶ Finally, mandatory mediation would promote reconciliation within families, a societal value reflected in the JJDPa's attempt to deinstitutionalize and decriminalize status offenders.¹⁶⁷

¹⁶¹ See *id.* at 201–05 (proposing an objective standard that would include a requirement that the parties attend mediation and a requirement that both parties submit a position paper outlining their position in the dispute).

¹⁶² See discussion *infra* Part IV.A.2.

¹⁶³ ROGERS ET AL., *supra* note 65, at 6-17.

¹⁶⁴ *Id.* at 6-17, 6-18. Conversely, those who advocate for voluntary mediation are concerned with the pressure to settle, the use of mediation in inappropriate cases, and overregulation. *Id.* at 6-18.

¹⁶⁵ See *id.* at 6-17, 6-18.

¹⁶⁶ See *id.*; see also Winston, *supra* note 151, at 192 (explaining that mandatory mediation can overcome the perception that agreeing to mediate indicates weakness in a party's case).

¹⁶⁷ See generally Steinhart, *supra* note 10, at 90; see also *infra* note 169 and accompanying text.

Mandatory mediation of status offenses offers various benefits, including empowering the parties and deinstitutionalizing and decriminalizing status offenses. Mediation enables parties to communicate and find a mutually beneficial agreement, whereas litigation “is more likely to reinforce hostilities and deepen the parties’ anger into even more polarized positions.”¹⁶⁸ Further, mediation removes status offenders from the juvenile justice system, which decriminalizes the conflict and decreases the likelihood of institutionalization under the guise of contempt.¹⁶⁹ By addressing status offenses in mediation, the juvenile is less likely to be bootstrapped into delinquency.¹⁷⁰

The mediation process has endured criticism because of the perceived lack of procedural due process.¹⁷¹ Critics point out that parties in mediation are often not accompanied by attorneys and the mediation process lacks formalized evidentiary rules.¹⁷² Despite this criticism, mediation generally does include basic due process rights, including notice and an opportunity to be heard.¹⁷³ As previously noted, status offenders are not afforded the same due process rights as juvenile delinquents.¹⁷⁴ Unlike adults, who have full due process rights in the traditional court system, status offenders may actually gain more due process protection by entering mediation and having an opportunity to be heard.

Overall, mediation better addresses the root cause of status offenders’ undesirable behavior and is “quicker, less costly, more likely to preserve parties’ ongoing relationships, and more likely to preserve privacy”¹⁷⁵ Increasing the use of mediation with status offenses will also reduce the burden on overcrowded juvenile court dockets and allow juvenile courts to

¹⁶⁸ See Cottam, *supra* note 62, at 1518.

¹⁶⁹ See Steinhart, *supra* note 10, at 96 n.1 (“Deinstitutionalization describes a policy of removing noncriminal juveniles from locked institutions. Decriminalization refers to a policy of removing jurisdiction over status offenders from the juvenile court.”).

¹⁷⁰ See Varin, *supra* note 6, at 12.

¹⁷¹ See Diane E. Hoffmann, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821, 855 (1994).

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ See *supra* notes 29–30, 48 and accompanying text.

¹⁷⁵ Varin, *supra* note 6, at 12; see also McConnell, *supra* note 72, at 458 (citing one court where the costs associated with a juvenile who proceeds through the court system averaged \$1,200, while the cost for a juvenile who participated in a mediation program was \$300).

focus on more serious offenses.¹⁷⁶ Additionally, studies suggest that contact with the juvenile justice system increases the likelihood of additional undesirable behavior.¹⁷⁷ Mandatory mediation would decrease status offenders' detrimental contact with the juvenile justice system while benefiting both the parties involved in the conflict and the courts.

B. *The Need for Legislative Support and a Transfer of Power*

To successfully implement a mandatory status offender mediation program, legislative support is needed. Successful mediation programs are dependent upon legislative support.¹⁷⁸ Legislative support in the form of statutory language ensures long-term success of mediation programs by providing guidelines for mediators and securing funding for mediation programs.¹⁷⁹ Additionally, statutory support helps to remove institutional barriers to mediation.¹⁸⁰

Legislative support of mediation programs must advocate an actual transfer of power to mediation programs if mediation programs are to be seen as a possible replacement or supplement to the juvenile justice system. In discussing the transfer of authority to diversion programs, one commentator noted:

¹⁷⁶ See generally Baker, *supra* note 15, at 898. "[T]he workload of juvenile and family courts shows few signs of abating as the family remains in crisis, its economic status declines, social support becomes steadily more difficult to find, and the formal service system does not fill the gaps left by disruption of natural support networks." Melton, *supra* note 60, at 2004–05. In 1993, U.S. courts received approximately 111,200 status offense petitions. Steinhart, *supra* note 10, at 88.

¹⁷⁷ See Jane Rutherford, *The End of Adolescence: Juvenile Justice Caught Between the Exorcist and A Clockwork Orange*, 51 DEPAUL L. REV. 715, 739 (2002). Some argue that a punitive system is necessary to protect society from juvenile crime. *Id.* at 726. Deterrence, a primary motivator for punishment, is arguably less effective with juveniles. *Id.* at 741. The effectiveness of deterrence and punishment diminishes with children, and specifically adolescents, because they "lack the responsibility, perspective, impulse control, and judgment that adults have" and they "tend to overvalue short-term benefits, undervalue long-term costs, react more to peer pressure, and foresee fewer consequences of their actions." *Id.* In discussing deterrence, a largely criminal concept, it is important to again note that status offenses are non-criminal behaviors that are prohibited only because of the actor's age. See *supra* note 2 and accompanying text.

¹⁷⁸ See McConnell, *supra* note 72, at 436.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

These [voluntary diversion] programs all have merit simply by diverting people from our abominably formal juvenile court system. Some make an affirmative contribution to the growing trend toward mediation of family problems. But precisely because of their voluntary nature they will never be viewed seriously as potential replacements for all or any major part of the juvenile courts. Rightly or wrongly, without *power* these programs are considered interesting frills. There must be a real transfer of power.¹⁸¹

While mediations themselves are voluntary, for mediation programs to be taken more seriously they should be legislatively mandated, transferring authority to the mediation program before the status offender is required to go to court. This transfer of power is necessary to implement widespread and long-term mediation programs.

C. Proposed Mandatory Mediation Program for Status Offenders

The various status offense mediation programs previously discussed¹⁸² offer a helpful guide in determining the critical elements of a successful mandatory mediation program for status offenders. The proposed mandatory status offense mediation program would include automatic, mandatory diversion to mediation at the intake stage, before a formal petition is filed with the court, a mediation program focused on the unique dynamic of the parent-child relationship often involved with status offenses, and the option to participate in multiple mediation sessions if needed.¹⁸³ Additionally, the

¹⁸¹ William S. Geimer, *Ready to Take the High Road? The Case for Importing Scotland's Juvenile Justice System*, 35 CATH. U. L. REV. 385, 428 (1986) (noting that a condition of the grant of authority should be the submission of plans and rules).

¹⁸² See *supra* Part III.C.

¹⁸³ One commentator has proposed a family group conferencing model for status offenses. See Kogan, *supra* note 68, at 208-09. The proposed mandatory mediation model differs from the family group conferencing model in a number of critical ways. *Id.* First, the proposed family group conferencing model calls for legislation to grant courts the authority to refer cases to family group counseling, while the mandatory mediation model contemplates automatic, mandatory diversion of status offenses as a class. Second, the family group conferencing model separates parties initially to learn the issues, while the mandatory mediation model focuses on party communication and does not require or recommend initially separating the parties. Third, the family group conferencing model includes follow-up consultations for a year, while the mandatory mediation program allows parties to return to mediation for additional sessions if they desire but does not contemplate a long-term follow-up schedule. Finally, the family group conferencing model allows for community involvement, while mandatory mediation allows for involvement of concerned parties, typically the parent and child. *Id.* at 214-15.

status offense mediation program would rely on legislative initiatives to ensure widespread implementation.

The early diversion element of the program furthers the goals of deinstitutionalizing and decriminalizing status offenses.¹⁸⁴ Automatically diverting status offenses decreases the risk of courts trying to circumvent the JJDP's mandate against secure detention for status offenders. Further, status offenders will be diverted to the less formal process of mediation and will only be introduced into the juvenile court system if mediation fails, thereby decriminalizing the status offense. To effectuate this automatic diversion, states should enact legislation requiring mediation for all status offenses.¹⁸⁵ The study of the New York PINS mediation program highlighted the need for early intervention, noting that families diverted to mediation before a petition was filed with the court were more likely to report satisfaction than those diverted at a later stage.¹⁸⁶ Further, the strong success rates of the Truancy Prevention Through Mediation Program emphasize the importance of early intervention.¹⁸⁷

The mandatory status offense mediation program should also focus on the unique dynamic of the child–parent or child–adult relationship involved in status offense mediation. Mediators should be screened and trained extensively with a focus on encouraging parent–child communication and recognizing the inherent power imbalances between children and adults.¹⁸⁸ Additionally, the mediator should be aware of community resources¹⁸⁹ and be able to address any needs that may be uncovered through mediation.¹⁹⁰

¹⁸⁴ See *supra* note 169 and accompanying text.

¹⁸⁵ California state law requires that the court “shall” set all contested custody or visitation matters for mediation. CAL. FAM. CODE § 3170 (West 2004). Similar language could be used to require that courts shall set all status offense cases for mediation.

¹⁸⁶ See Shaw, *supra* note 11, at 29.

¹⁸⁷ See *supra* notes 142–43 and accompanying text.

¹⁸⁸ See Shaw, *supra* note 11, at 25 (noting that mediators should be trained extensively and that mediation between parents and children is unique because of the inherent power imbalance); Varin, *supra* note 6, at 10 (noting that although there is an obvious power disparity between children and adults, the imbalance has not impeded the mediation process). A mediator need not attempt to rebalance the power of the parent–child relationship as the parental role is one of authority. See Shaw, *supra* note 11, at 25–26. However, special attention should be given to according the child and parent equal dignity within the mediation process. *Id.* at 26.

¹⁸⁹ Community social services, such as counseling, are often scarce. See Melton, *supra* note 60, at 2000–01. Further, families and children may bring numerous problems to mediation which will not be easily solved by “fifty minutes a week with a counselor.” *Id.* at 2000. While availability and effectiveness of resources would have to be considered, mediation can make families aware of resources and can incorporate a

Finally, the mandatory status offense mediation program should allow for multiple mediation sessions if desired by the parties. Mediation may uncover a long history of conflict that cannot be addressed in a single mediation session.¹⁹¹ Further, younger children may be unable to focus for long amounts of time or on multiple issues.¹⁹² Therefore, multiple sessions may be advantageous and should be available in the mandatory status offense mediation program.

Some critics may see the more rehabilitative focus of juvenile mediation programs as soft on crime and unable to deter “youthful predators.”¹⁹³ The media often describes current juvenile crime as out of control and endorses a “get tough” methodology to handle juvenile offenders.¹⁹⁴ Contrary to critics’ concerns, studies of mediation programs indicate that mediation can reduce recidivism.¹⁹⁵ Further, children who fail to comply with mediation agreements could face court action.¹⁹⁶ Mandatory mediation would not fail to address status offenses; rather, mandatory mediation promises to more effectively address status offenses.

While making parents aware of community resources and allowing for multiple mediation sessions will contribute to the success of a mandatory status offense mediation program, mediation is “not designed to provide the in-depth family counseling necessary to modify chronic behavior, heal emotional problems, or change personality patterns.”¹⁹⁷ Some family problems may appear so complex that conducting a mediation session seems like an exercise in futility.¹⁹⁸ However, mediation offers, even for the most complex matters, the opportunity for dialogue and the potential for improved communication between parties. Overall, the proposed mandatory mediation program empowers all parties involved in the conflict by giving them the opportunity to reach a mutually acceptable agreement.

commitment to obtain services in the mediation agreement. *See Shaw, supra* note 11, at 27. For example, the New York PINS Mediation Program includes social workers to offer “short-term counseling, advocacy, or referral for mental health or medical services, recreation and educational programs, or other supportive services.” *Id.*

¹⁹⁰ *See generally* Shaw, *supra* note 11, at 26–27.

¹⁹¹ *Id.* at 26.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See* Lucas, *supra* note 103, at 1365.

¹⁹⁵ *See supra* notes 112–114 and accompanying text.

¹⁹⁶ *See supra* note 88 and accompanying text.

¹⁹⁷ Cottam, *supra* note 62, at 1526. Mediation may be helpful with more transitional or situational family issues. *Id.*

¹⁹⁸ *See* Melton, *supra* note 60, at 2027.

In order for the mandatory status offender mediation program to flourish, the program must have strong legislative support.¹⁹⁹ The JJDPA sparked reform of status offender laws as states eagerly sought federal funding.²⁰⁰ Despite the federal policy of deinstitutionalization set forth in the JJDPA, states have circumvented the deinstitutionalization mandate through various means.²⁰¹ In order to meet the goal of deinstitutionalization and to meet the needs of status offenders, the JJDPA should be amended to provide federal funding for states who implement mandatory mediation programs for status offenders. Such an amendment would encourage legislative reform at the state level, which would lead to programs better tailored to address the non-criminal behavior of status offenders.

V. CONCLUSION

Status offenses are non-criminal acts that subject youths to the juvenile court's jurisdiction simply because of their age. The law's history of treating status offenders as juvenile delinquents continues despite the efforts of the legislature to decriminalize and deinstitutionalize status offenses through the JJDPA. Despite the ban on detaining status offenders set forth in the JJDPA, status offenders are still held in secure detention under various pretenses and are not afforded the due process rights that have been granted to juveniles in the delinquency context. Further, the juvenile justice system is not equipped to handle the family related issues that underlie many status offenses such as truancy, incorrigibility, or running away.

Status offenses can be viewed as an early warning sign from a troubled child who may be seeking attention or trying to escape a bad situation. Mediation programs could help identify the underlying issue related to the offense and provide the child or the family with needed services. Mediation can give children, often voiceless in the juvenile justice system, the

¹⁹⁹ See *supra* Part IV.B.

²⁰⁰ See Steinhart, *supra* note 10, at 90 (stating that "JJDPA set off a tidal wave of status offender reform laws in states eager to sign up for federal program dollars"). The initial result of the reforms was a significant drop in the detention of status offenders. *Id.* By 1988, the 50 states participating in the JJDPA reduced status offender detention by 95%. *Id.*

²⁰¹ *Id.* at 86 (discussing relabeling status offenders as delinquents and involuntarily committing status offenders in mental institutions). Various states also challenged the JJDPA. *Id.* at 91-92. For example, Washington State enacted the Becca Bill, which allows the secure detention of runaways for five days. *Id.* at 92. In 1996, state officials asked Congress to dilute or eliminate the status offender deinstitutionalization mandate in the JJDPA and allow states broader discretion. *Id.*

opportunity to be heard and empowered by allowing them to help shape a mediation agreement. Instead of re-victimizing non-criminal children, legislators should utilize mediation to address the underlying issues behind the child's behavior and to protect children in need of assistance.