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The Effects of Mediation in a Juvenile Incarceration Facility: Reduction of Violence Through Transformation

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THE EFFECTS OF MEDIATION IN A JUVENILE
INCARCERATION FACILITY: REDUCTION OF VIOLENCE
THROUGH TRANSFORMATION

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I. INTRODUCTION

The use of mediation techniques to resolve conflicts among American youth has grown in popularity over the past two decades. Conflict resolution programs have blossomed in school systems,² but there has been a dearth of mediation programs for one of our most violent youth groups: incarcerated juveniles.³ At California Western School of Law, we have sought to address this deficit by initiating a mediation program for residents of Juvenile Hall in San Diego. In this article, we describe and analyze the effects and the potential success of our program through the data we have collected.

Most mediation programs for youth have the following objectives: 1) to resolve disputes; 2) to decrease violence and 3) to teach conflict resolution skills.⁴ We have re-framed the third objective for our own program, using the theory of transformation (hereinafter transformation theory) developed by Robert A. Baruch Bush and Joseph P. Folger in their groundbreaking book, *The Promise of Mediation*.⁵ Our third goal is to transform the way the disputants view themselves and others. Through mediation, we try to cultivate the juveniles' sense of empowerment⁶ and empathy. Thus, our focus is on changing the *behavior* of the juveniles—their

²In just over a decade, between 1984 and 1995, school-based conflict resolution programs in the United States increased in number from 50 to over 5,000. KATHRYN GIRARD & SUSAN J. KOCH, *CONFLICT RESOLUTION IN THE SCHOOLS: A MANUAL FOR EDUCATORS* xxv (1996).

³Our research reveals only two mediation programs currently exist in juvenile facilities in the United States. See *infra* text accompanying notes 10-17. In a report on school-based crime prevention to the United States Congress, it is noted that schools whose populations are urban and poor and are without adequate resources are most in need of prevention and intervention strategies, including mediation. DENISE C. GOTTFREDSON, *SCHOOL-BASED CRIME PREVENTION IN PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS 1* (1998). See DONNA CRAWFORD & RICHARD BODINE, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *CONFLICT RESOLUTION EDUCATION: A GUIDE TO IMPLEMENTING PROGRAMS IN SCHOOLS, YOUTH SERVING ORGANIZATIONS, AND COMMUNITY AND JUVENILE JUSTICE SETTINGS* (1996). Only a few conflict resolution programs for special needs students have been initiated, and continue to proceed with unmeasured results. Tricia S. Jones & Andrea M. Bodtker, *Conflict Education in a Special Needs Population*, 17 *MEDIATION Q.* 109 (1999).

⁴William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 *HARV. NEGOT. L. REV.* 215-17 (1998). Another 1991 program assessment from the Ohio Commission on Dispute Resolution and Conflict Management listed the goal of enlarging [students'] individual and interpersonal skills, which Haft and Weiss affiliate with the third goal, above, of developing dispute resolution skills. *Id.* at 216. The Victim-Offender Mediation Program (VORP) uses recidivism rates to gauge success. David R. McCain, *Victim-Offender Mediation Works: Review of Recidivism Rate Confirms Anecdotal Evidence*, VORP NEWS, Fall 1999, at 1.

⁵ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

⁶There has been some effort by school systems to assess this concept of self-empowerment in terms of teaching students to take responsibility for their actions. Paul Lindsay, *Conflict Resolution and Peer Mediation in Public Schools: What Works?*, 16 *MEDIATION Q.* 85, 92-94 (1998).

individual moral development—by altering their view of themselves and others, rather than on simply expanding the content of their skills.⁷

If we can achieve our third goal of transforming some members of the population in Juvenile Hall, we believe that a decrease in violence and an increase in peaceful resolution of disputes will follow. Using Bush and Folger's transformative framework and psychological theory, our thesis is that mediation can play a role in changing the behavior of, and accordingly, the level of violence among incarcerated juveniles.⁸

We do not believe, however, that a mediation program alone can change the attitudes and behavior of this country's violent juvenile population. Even when successful, small shifts in juveniles' attitudes are clearly not a panacea. This is particularly true when the juveniles' culture or community make it difficult for them to learn permanent conflict resolution skills.⁹ Instead, we are offering our program as one step in the right direction, a step that may influence positive changes in, at best, a few individuals. More importantly, it is our hope that this positive step will inspire further thought and effort in creating additional and more refined rehabilitative processes for troubled youth.

Our article will first describe the objectives and content of our mediation program in Juvenile Hall in San Diego. Relying on sociological and psychological theory in our second section, we will posit that the development of empathy and self-empowerment in disputants through the mediation process can help resolve disputes and reduce violence. Finally, we will assess the effects of our program in transforming its participants by offering data we have gathered thus far. The article will conclude with a critique of our results and suggestions for the future.

⁷See BUSH & FOLGER, *supra* note 5, at 81-82, 230-34 (for a discussion of the potential ability of transformative mediation to encourage moral growth). *But see*, Joseph P. Folger & Robert Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 277 (1996) (explaining that transforming disputants is a potential effect, not a goal of transformation theory). We are not the first to discuss *transformation theory* in the context of youth mediation. *See, e.g.*, Robert J. Beck & A. Marco Turk, *Family Peacemakers: An Extended Family Mediation and Conflict Resolution Skills-Training Program for Youth Offenders During Probation*, 16 *MEDIATION Q.* 51, 59-60 (1998); Lindsay, *supra* note 6, at 94. We are simply more explicit in the adoption of transformative goals as our own.

⁸Our premise is supported by Albert Bandura and R.H. Walter's Social Learning Theory. Bandura and Walter believe that the mind, behavior, and the environment all play an important role in the learning process. Learning can take place through observation and can be facilitated by a mentor. ALBERT BANDURA & R.H. WALTER, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (1963). Our premise is also based on the notion that aggression, which leads to violence is essentially a learned, rather than an innate behavior. For further support for this assumption, as well as a discussion of theories of aggression, *see* MONROE M. LEFKOWITZ ET AL., *GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION* 1-33 (1977). We ground our program in theory before proceeding with assessment, in hopes of overcoming critiques of other programs which have been implemented without a theoretical basis of support. DAVID W. JOHNSON & ROGER T. JOHNSON, *TEACHING STUDENTS TO BE PEACEMAKERS* 1:15 (1995).

⁹*Id.* at 1:7-1:9 (describing communities in which violence is promoted as the appropriate reaction to conflict).

II. OBJECTIVES AND CONTENT OF CALIFORNIA WESTERN'S MEDIATION PROGRAM AT JUVENILE HALL

A. Background and Objectives

Not too long ago, juveniles were incarcerated under brutal and oppressive conditions. It was not unusual for incarcerated juveniles to be subjected to serious mistreatment, including over-medication by tranquilizing drugs, physical abuse¹⁰ and extended solitary confinement.¹¹ A number of courts found that the practices of juvenile detention facilities violated the cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution.¹²

As one court noted,

Practices found by this court to violate the Eighth Amendment were: the widespread practice of beating, slapping, kicking, and otherwise physically abusing juveniles in the absence of any exigent circumstances (citations omitted); the use of tear gas and other chemical crowd-control devices in situations not posing an imminent threat to human life or an imminent and substantial threat to property; the placing of juveniles in solitary confinement or other secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers; the requirement that inmates maintain silence during periods of the day merely for the purpose of punishment; and, the performance of repetitive, nonfunctional, degrading and unnecessary tasks....¹³

More recently, juvenile detention facilities have tried to broaden their outlook on conflict resolution and discipline. In addition to the traditional punitive sanctions of loss of privileges or isolation, some facilities are examining alternative programs. One program, Peacebuilders, in Monterey County Juvenile Hall, seeks to teach juveniles how to think positively and how to prevent violence.¹⁴

Recently, the Los Angeles County Office of Education, which teaches over 60,000 juvenile offenders in Los Angeles County, adopted the Healthy Relationships

¹⁰Nelson v. Heyne, 491 F.2d 352, 354 (7th Cir. 1994), *cert. denied*, 417 U.S. 976 (1974).

¹¹See, e.g., Santana v. Collazo Collazo, 714 F.2d 1172, 1177 (1st Cir. 1983); Mary and Crystal v. Ramsden, 635 F.2d 590, 593-95 (7th Cir. 1980); Morales v. Turman, 562 F.2d 993, 997 (5th Cir. 1977); Nelson v. Heyne, 491 F.2d 352, 354 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); Inmates of the Boys' Training School v. Affleck, 346 F.Supp. 1354 (D. R.I. 1972).

¹²See, e.g., Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980); Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); Inmates of the Boys' Training School v. Affleck, 346 F. Supp. 1354 (D. R.I. 1972).

¹³Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F. 2d 864 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 322 (1977).

¹⁴Sedona Callahan, *Program Seeks to Help Teens Tame Their Anger*, STAR-TRIBUNE, Aug. 6, 1997, available at Westlaw 7576810.

curriculum as a pilot program in two juvenile detention facilities.¹⁵ This curriculum focuses on anger and violence management and teaches responsibility and conflict resolution to young offenders.¹⁶ Additionally, some education programs in conflict resolution, including peer mediation programs, are underway in certain California facilities focused on the rehabilitation of juveniles.¹⁷

Our research, however, has revealed only two mediation programs, other than ours, currently operating in juvenile facilities in the United States: the Burnett-Bayland Home Program in Houston, Texas and the Decker Lake Youth Center Program in West Valley City, Utah.

We had worked with juveniles in our prior law practices, thus we were aware of the need for conflict resolution programs in detention facilities. Our mediation program had already established a field placement in small claims court. We believed that adding a field placement in Juvenile Hall would expose the law students to a different style of mediation—one requiring more facilitative, rather than evaluative, techniques. Moreover, we felt it was important to expose law students to a population with which few, if any, had experienced prior contact. With these general objectives in mind, we established a partnership with Juvenile Hall¹⁸ in the summer of 1998.

B. The Juvenile Hall Mediation Program at California Western School of Law

The Advanced Mediation is a three unit class for upper division students at California Western School of Law. Following an intensive weekend training at the beginning of the semester, the advanced mediation students mediate cases one evening, out of a possible three, at Juvenile Hall. Depending on their availability, the students mediate at the Girls Unit, the Boys Unit, or the Girls Rehabilitation Facility (hereinafter GRF).¹⁹ The students mediate cases at Juvenile Hall for half of

¹⁵E-mail from Anna MacDonald, an employee of the Healthy Relationship Program, to Floralynn Einesman (May 25, 1999) (on file with the author) (She described the program as a “comprehensive holistic approach towards teens teaching the skills, knowledge and attitudes they need to make healthy lifestyle choices.” She said the program was offered in schools, youth centers and juvenile detention centers across North America.)

¹⁶*Id.*

¹⁷CRAWFORD & BODINE, *supra* note 3, at 48.

¹⁸Juvenile Hall is a detention facility in San Diego California that houses juveniles charged with delinquency. For various reasons, including risk of harm to self or others, or risk of flight, the juveniles cannot be released to their parents or to the community pending the adjudication of their delinquency cases. Instead, the juveniles are placed in the custody of the San Diego Probation Department and are committed to Juvenile Hall pending the outcome of their delinquency cases.

¹⁹Juvenile Hall is a detention facility in San Diego, California which houses juveniles charged with delinquency. For various reasons, including risk of harm to self or others, or risk of flight, the juveniles can not be released to their parents or to the community, pending the adjudication of their delinquency cases. Instead, the juveniles are placed in the custody of the San Diego Probation Department and are housed in the Juvenile Hall pending the outcome of their delinquency cases.

The Girl's Rehabilitation Facility is described by its supervisors as an “intensive, highly structured program serving 35 girls between the ages of 11 and 18. The programs offered are designed to meet the personal, emotional and educational needs of the girls placed there by the

the semester, and then transfer to Small Claims Court for the remainder of the semester.

The disputants at Juvenile Hall vary in age from ten to nineteen years. The types of disputes range from name-calling and theft of personal property to more serious gang-related issues. A mediation lasts between twenty minutes and two hours. Although some of the mediations are voluntary—requested by the juveniles—others are mandatory—required by the staff of the unit.

The mediations at Juvenile Hall are conducted in an open room with the staff of the facility present. In GRF, the law students use a private room to conduct the mediations. Staff members wait just outside the room. Law students mediate in pairs, and usually conduct between two and six mediations per evening. A Juvenile Hall staff member is always on site while the students conduct mediations. Staff members may observe mediations, but they do not listen to the content of the discussion. Usually a trained representative from our law school (a student who has successfully completed the course) also attends.

Each week, we meet with the students in a two-hour class to debrief their mediation experiences and to teach them additional mediation techniques. We grade the students on a presentation they make during the course of the semester and on journals they keep throughout the semester. The emphasis is on the students' ability to self-evaluate, as well as their evolving mediation skills.

During the course of the semester, we add certain training components to our mediation program at Juvenile Hall. At the initial weekend training with the law students we also train any interested staff at Juvenile Hall. At one of our sessions, we had twelve staff members in addition to our twelve law students. During our mediation time at Juvenile Hall, the law students introduce the mediation process to the residents and encourage them to continue practicing conflict resolution techniques. At the end of the semester, we discuss with the residents what they have learned during our visits.

We believe that our program has been successful in terms of exposing law students to a population with which they are unfamiliar, at times even uncomfortable, and by providing a consistent placement where law students can hone their mediation skills. Many law students improve their attitudes towards working with juvenile populations, as well as their attitudes toward creative resolution of conflict.²⁰ The question remains as to the effect our program has had on juvenile residents. The next section will address why we believe we can have some effect on juveniles, and finally, the effects we believe we have had on juveniles, as evidenced by our early data.

III. POTENTIAL EFFECTS OF MEDIATION IN JUVENILE INCARCERATION FACILITIES

In school systems, mediation and problem solving curricula have succeeded in accomplishing the objectives of resolving disputes, decreasing violent incidents and

Juvenile Court." Court commitments to the facility range from 90 to 240 days. GIRLS' REHABILITATION FACILITY, FACT SHEET (on file with the authors).

²⁰For example, students have written: "It made me want to make a difference in society. I wanted to help the kids I came in contact with. Practicing law is more than a way to make money; I learned how important communication can be in getting an understanding between people; and it made me realize law isn't the only way to resolve disputes."

teaching conflict resolution skills.²¹ The effects of mediation on the alternative objective we propose—transforming behavior—have yet to be evaluated.²² Using Bush and Folger's transformation theory, a measure of this alternative objective would be the extent to which the mediation experience develops self-empowerment and empathy in our youth.²³

The question remains whether mediation can achieve these behavioral changes, not only in school systems, but also in juvenile incarceration facilities. Our thesis is that mediation can effect small levels of transformation in some residents of a juvenile detention facility, in part through the teaching of empowerment and empathy.²⁴ We further believe that the increase in empowerment and empathy skills that mediation offers will help reduce the violent proclivities of incarcerated youth. Our rationale, rooted in social learning theory, is based on the notion that the aggression that causes violence is primarily a learned characteristic.²⁵

We recognize that any transformative effects of mediation would be more limited in a juvenile incarceration facility than in a public school system. The juvenile population in the former is more transient, more prone to aggression, and has fewer

²¹ Jones & Bodtger, *supra* note 3 at 116-17 (peer mediation and conflict education shown to reduce aggression); JULIA A. LAM, THE IMPACT OF CONFLICT RESOLUTION PROGRAMS ON SCHOOLS: A REVIEW AND SYNTHESIS OF THE EVIDENCE (2d ed. 1989) (peer mediation program favorably affect school climate in that number of fights/violent incidents decrease). For an explanation of why certain mediation programs fail, and what they need to succeed, see JOHNSON & JOHNSON, *supra* note 8, at 1:14-1:15; David W. Johnson & Roger T. Johnson, *Why Violence Prevention Programs Don't Work-and What Does*, EDUC. LEADERSHIP 63 (Feb. 1995).

Social scientists have distinguished conflict-related violence or moralistic violence from violence which occurs during a criminal activity such as a robbery, where motives are based primarily on monetary gain. Mark Cooney, *The Decline of Elite Homicide*, 35 CRIMINOLOGY 381, 399-400 (1997), cited in Marion J. Borg, *Using Violence as Social Control: Applying a Theory of Conflict Management to Juvenile Disputes*, 10 U. FLA. J.L. & PUB. POL'Y 313, 314 n.13 (1999). The former, involving principles of honor, respect, and willingness to defend one's possessions, are frequently the basis of violence in our juvenile population, and hence the subject of mediation. *Id.*

²²Haft & Weiss, *supra* note 4 at 253.

²³BUSH & FOLGER, *supra* note 5.

²⁴The concept of using conflict resolution to create a shift in disputants' attitudes is not a new one. Jeffrey Z. Rubin and George Levinger contrast the concept of a settlement, in which parties reach an agreement, but retain their attitudinal opposition, with a resolution, which entails a change in attitude, such that the disputants adopt new patterns of interaction. Behavior changes, not because another party forces such change, but because the disputants' attitudes have shifted. Consequently, whatever causes led to the conflict initially are now less likely to arise and behavior change is likely to persist. Jeffrey Z. Rubin & George Levinger, *Levels of Analysis: In Search of Generalizable Knowledge*, in CONFLICT, COOPERATION AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 13, 19 (Barbara Benedict Bunker, Jeffrey Z. Rubin & Associates eds., 1995).

²⁵*Supra* note 8.

social skills.²⁶ Additionally, incarcerated youth generally have fewer of the cognitive skills needed for mediation.²⁷ On the other hand, for these same reasons, we believe it is particularly important to introduce the process of mediation to such youth, who are most in need of its transformative potential.

A. The Potential of Mediation to Empower Juveniles

Many juveniles are institutionalized because of their inability to control their responses to conflict. Society often responds to juvenile crime by placing delinquents in a facility where juveniles have little control over their interactions with others. For example, Juvenile Hall in San Diego, confines residents in locked facilities. Their days are strictly scheduled. Their movements, including dialogue with their peers, are very limited.

On the other hand, self determination is a human aspiration.²⁸ This notion of control over one's fate, or empowerment, is a primary tenet of transformation theory in mediation.²⁹ The theory proposes that, through the appropriate facilitative mediation process, disputants can become empowered to handle their own disputes.³⁰ This self-determination and ability to control one's anger, according to certain theorists, leads to greater self-fulfillment and moral development.³¹ We propose that empowering juveniles to manage their own disputes can also reduce their tendencies towards violence.³²

Our thesis—empowering juveniles to manage their own disputes can lead to less violence—is supported by sociologist Marion Borg, who writes:

²⁶Youth in incarceration facilities tend to be more violent, anti-social and self-destructive than behaviorally-challenged youth in regular schools. CRAWFORD & BODINE, *supra* note 3, at 47.

²⁷Many juvenile offenders have deficits in cognitive skills. They tend to be undersocialized and lack the values, attitudes, reasoning abilities and social skills required for positive social interaction. These individuals have not acquired the skills and strategies for constructive relationship-building and problem solving, nor have they bonded with anyone who exhibits these behaviors. CRAWFORD & BODINE, *supra* note 3, at 47; Jones & Bodtker, *supra* note 3, at 116-17 (comparing the effects of conflict education in a normal educational population and in a special needs population).

²⁸Ramashray Roy, *Social Conflicts and Needs Theories: Some Observations*, in CONFLICT: HUMAN NEEDS THEORY 142 (John Burton ed., 1990)

²⁹Bush and Folger describe empowerment as a process of fortifying people's capacity to analyze situations and to make effective decisions for themselves. Folger & Bush, *supra* note 7, at 264.

³⁰*Id.*

³¹In their book, Folger and Bush discuss the concept of transformative mediation potentially leading to moral growth. BUSH & FOLGER, *supra* note 5, at 81-82, 230-34. Human needs theorists believe that, once basic needs, including the need to be responsible for one's actions, are satisfied, humans can become moral persons. For a more detailed discussion of human needs theory, see Roy, *supra* note 28, at 125, 128.

³²We note the difference between empowerment to resolve one's disputes oneself and the concept of total freedom. We do not espouse the latter, only the former, and advocate that it be accomplished at a juvenile incarceration facility through a structured program with a third party authority figure present.

Because one of the principles of mediation is to encourage disputants to resolve their conflicts independently, such programs would be particularly attractive to youth who want to maintain control over how their grievance is handled, but wish to do so in a nonviolent manner.³³

Our theory also draws support from research by sociologist Matthew Silberman, who studied violence as a means of social control in prisons.³⁴ In his study, Silberman found that inmates who feel powerless are significantly more likely to be violent, as compared to those who feel they have some control over their fate.³⁵ He argues that empowering inmates through such methods as mediation reduces both their feelings of alienation and their tendencies toward assaultive behavior.³⁶

Mediation programs have succeeded in reducing aggression in special-needs students.³⁷ Similarly, a mediation program in a juvenile institution could give residents the sense of empowerment over their disputes. The process, which allows students to design their own resolutions to conflict, encourages their perception that they are "the agents of their own destiny."³⁸ By modifying their basis for self-evaluation through allowing them more control over their disputes, changes in juveniles' behavior are possible.³⁹

B. The Ability of Mediation To Teach Empathy

Empathy⁴⁰ is another quality lacking in youth, particularly among the more troubled juvenile population.⁴¹ Numerous studies link empathy to positive social

³³Borg, *supra* note 21, at 338.

³⁴Matthew Silberman, *Violence as Social Control in Prison*, 1 VA. REV. OF SOC. 77 (1992).

³⁵*Id.* at 91-92.

³⁶*Id.* at 93-94.

In an attempt to train prison officials to have empathy for their handcuffed wards, the officials confessed that, when they were restrained, they too became belligerent because they were unable to control a situation. James Rainey, *Probation Cadets See Job From Behind Bars*, LOS ANGELES TIMES, Feb. 8, 2000, at A3, A19.

³⁷Jones & Bodtker, *supra* note 3, at 109-110 (defining "special needs" students as those who have severe emotional disability, learning disability and attention deficit-hyperactivity disorder).

³⁸Pamela S. Lane-Garon, *Developmental Considerations: Encouraging Perspective Taking in Student Mediators*, 16 MEDIATION Q. 201, 203 (1998).

³⁹ALBERT BANDURA, *AGGRESSION: A SOCIAL LEARNING ANALYSIS* (1973). "Some of the most drastic changes in behavior are achieved, in large part by modifying a person's basis for self-evaluation." *Id.* at 49.

⁴⁰"Empathy," as defined by social and developmental psychologists is "the ability or tendency to be vicariously aroused by the affective state of another person." Paul A. Miller & Nancy Eisenberg, *The Relation of Empathy to Aggressive and Externalizing/Antisocial Behavior*, 103 PSYCHOL. BULL. 324, 326 (1988).

We use the term "empathy" rather than the term "recognition," used by Bush and Folger, only because we feel it more aptly describes the quality we are seeking. Bush and Folger define "recognition" the same as we would describe the term "empathy": a party's choice to become more open, attentive, sympathetic, and responsive to the situation of the other party,

behavior and moral development.⁴² In an exhaustive study of the relation of empathy to aggression, psychologists Paul Miller and Nancy Eisenberg found that empathic responsiveness may inhibit aggression.⁴³ Based on their study of the literature on effects of empathy training, they concluded that training in the affective components of empathy may promote a decrease in negative behavior and may improve social interaction.⁴⁴ A well-designed mediation program can successfully teach empathy to its participants.⁴⁵

Currently, pair therapy—a process similar to mediation is being used to develop children's empathy, with the goal of enhancing cognitive development and personal growth.⁴⁶ In pair therapy, children in conflict are encouraged to talk about the conflict openly. Although this therapeutic format lacks the more formal structure of a mediation process, it is based on the similar premise that, through conflict resolution, children can learn to be more sensitive to the needs of others.⁴⁷

Transformative mediation, which encourages the development of empathy by asking disputants to consider the thoughts and feelings of others, may be a strong factor in reducing aggression and incidents of violence in Juvenile Hall. In a review of empirical studies on processes that work best to reduce adolescent violence, authors Patrick Tolan and Nancy Guerra report positive effects on delinquent

thereby expanding [one's] perspective to include an appreciation for another's situation. BUSH & FOLGER, *supra* note 5, at 89.

⁴¹GOTTFREDSON, *supra* note 3, at 1 (listing "taking the perspective of others" as one factor included in early problem behavior and listing additional sources linking the factor with crime); David Russell Lyman & Robert L. Selman, *Peer Conflict in Pair Therapy: Clinical and Developmental Analyses*, in PEER CONFLICT AND PSYCHOLOGICAL GROWTH 85 (Marvin W. Berkowitz ed., 1985). The average troubled child's interpersonal understanding and verbal strategies are less developed than those of an ordinary child; the troubled child's behavior is also more likely to regress, particularly in conflict. *Id.* at 99.

⁴²See, e.g., Charles David Batson & Jay S. Coke, *Empathy: A source of altruistic motivation for helping?*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 167-211 (J. Philippe Rushton & Richard M. Sorrentino eds., 1981); Nancy Eisenberg & Paul A. Miller, *The Relation of Empathy to Prosocial and Related Behaviors*, PSYCHOL. BULL. 91-119 (1987).

⁴³Miller & Eisenberg, *supra* note 40, at 339-40. For a more recent study confirming empathy as an inhibitor of aggression, see Deborah R. Richardson et al., *Empathy as a Cognitive Inhibitor of Interpersonal Aggression*, 20 AGGRESSIVE BEHAV. 275 (1994).

⁴⁴Miller & Eisenberg, *supra* note 40, at 334. In fact, empathy training has been given to juvenile service officials in hopes of improving their interaction with incarcerated youth. Rainey, *supra*, note 36, at A3, A19.

⁴⁵Lane-Garon, *supra* note 38, at 212-14.

⁴⁶"In structured situations, repeated experience of negotiating and coordinating different perspectives can facilitate growth." Lyman & Selman, *supra* note 41, at 91. The authors believe it is a juvenile's level of personal growth that differentiates "troubled" children from others. *Id.* at 99.

⁴⁷*Id.* at 91, 99.

behavior where programs focused on increasing social perspective-taking skills, moral reasoning and social problem-solving skills.⁴⁸

C. Mediation as an Alternative Means of Social Control

Whether or not mediation fully teaches empowerment and empathy in juveniles, at a minimum, it provides an alternative means of social control. In other words, by its presence, mediation helps reduce violence among incarcerated youth. The work of sociologists Donald Black and Marion Borg supports our conclusion.⁴⁹

Sociologist Donald Black theorized that humans' response to conflict is defined and predicted by certain factual variables within the social context, such as the relation of the parties involved, the status structure of the conflict (inferior vs. superior), the involvement of groups, the distance between the parties and the availability of alternative modes of social control.⁵⁰ Mediation as an alternative mode of social control aimed towards alleviating violence is specifically advocated by sociologist Marion Borg.⁵¹ Borg's empirical research on two schools with large populations of potentially violent youth supports Black's theory that the presence of third party authority figures, as one means of alternative social control, reduces the likelihood of violence.⁵² Based on this support, Borg encourages expanding the availability of alternative conflict management strategies among potentially violent youth to include mediation.⁵³ Where alternative conflict management strategies, such as mediation, are available, disputants are more likely to choose less violent means of handling their conflicts, despite their individual proclivity toward violence.⁵⁴

⁴⁸Patrick Tolan & Nancy Guerra, *What Works in Reducing Adolescent Violence: An Empirical Review of the Field*, F-888 CENTER PAPER 001 (Center for the Study and Prevention of Violence/ University of Colorado, Boulder, CO), July 1994, at 19.

⁴⁹See generally, DONALD BLACK, *THE SOCIAL STRUCTURE OF RIGHT AND WRONG*, 17 (1998); Borg, *supra* note 21.

⁵⁰BLACK, *supra* note 49, at 17.

⁵¹Borg, *supra* note 21, at 334, 337-39.

⁵²*Id.*

⁵³*Id.* at 338. Although Borg specifically mentions "peer mediation" (with juveniles as mediators) as an alternative conflict strategy, a mediation program with a third party mediator who is relationally distant from the juveniles may yield even greater results in reducing violence, due to the disputant's perception of the mediator's greater authority. As Borg herself states, "Settings lacking a third party who is higher in status compared to the antagonists seem more prone to violence when conflicts develop." *Id.* at 324 (citing BLACK *supra* note 49, at 95-124). See also BLACK, *supra* note 49, at 98, 108-12 (explaining that non-partisan mediators generally have greater authority than "friendly peacemakers").

⁵⁴For a discussion as to why youth engage in conflict and their limited repertoire of skills to handle interpersonal friction, see Susan Opatow, *Adolescent Peer Conflicts: Implications for Students and for Schools*, 23 EDUC. AND URB. SOC'Y 416, 423-23 (1991). For further discussion of theories of aggression, see MONROE M. LEFKOWITZ ET AL., *GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION* (1977). For further discussion of the positive role played by available therapeutic third parties, see MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 381-88 (1973).

We would like to take the work of Borg one step further to explain how mediation may help control violence. Mediation reduces violence, not only as an alternative means of social control, as Borg and Black might contend, but also because of its ability to alter the behavior of the disputants involved. Our thesis is that juveniles' experiences of both empowerment and empathy during the mediation process can transform the individual by reducing his or her tendency to resort to violence as a means of social control. In the next section we assess the degree to which we achieve such transformation.

IV. ASSESSING OUR SUCCESS

To measure our success, we begin with the most often used measures for mediation programs: 1. Resolution of disputes; 2. Reduction of violence and 3. Learned skills in conflict resolution. Through the preceding sections, we have re-framed our third criteria as "transforming" our disputants and detailed our theoretical framework in the preceding sections. Our processes of assessment and ultimate findings are set forth below.

A. Resolution of Disputes

We have been fortunate enough to have a part-time Program Administrator, Kara Williams, who has maintained detailed records of our student mediations at Juvenile Hall every semester. This data indicates that we have achieved our goal of resolving disputes. Since the time we began during the summer of 1998 through the summer of 2000, our students have completed 759 mediations at Juvenile Hall (including mediations at the Girls' Rehabilitation Facility). Of those 759 disputes we mediated, we resolved 678 or 89%. Consequently, we have had success with the first criteria—resolution of disputes.

B. Decrease in Violence

We have asserted that the availability of the mediation process helps decrease violence. Moreover, the increase in empathy skills and empowerment that the process provides, should help in reducing disputants' tendencies towards violence.

In order to calculate any reduction of violence, we have asked supervisors to maintain statistics on the number of violent incidents during the period we send mediators to Juvenile Hall and on the number of incidents occurring when, between semesters, we are not present. Unfortunately, the record-keeping has been erratic. This is, in part, due to the constant change in supervisors for each unit. In addition, data can be skewed by the presence of one or two juveniles in the unit who are particularly violent.

Nonetheless, one supervisor did submit useful data to us. It showed that, during our presence one semester, there were ten incidents of violence in eight weeks. When we were absent, there were fourteen incidents of violence during a shorter period of time.⁵⁵

Due to our incomplete data on violent incidents, we tried to measure this matter anecdotally over a period of three semesters. We circulated a brief written survey on our mediation program to the staff. The comments of nine staff members indicate

⁵⁵Report of Kim Broderick, Girls' Unit Supervisor (Spring 1999) (on file with the authors).

that our presence reduces the level of tension at Juvenile Hall. They reported the following:

Minors seem less tense.

Creates less stressful environment for the wards.

I believe it has helped temper peer problems within our unit.

Yes, mediation has helped with conflict in the unit.

It [level of conflict] normally changes for the better.

Mediation people take care of what the probation officers don't have time to take care of (when there is a conflict).

It helps eliminate the peer problem that we experience.

From my observation the detainees have a sense of relief to being able to resolve situations which have occurred during their stay.

Two other staff members were more neutral in their comments on mediation's ability to reduce the level of conflict:

The program has little effect on the start of problems.

It helps that specific situation, but it does not eliminate the problem.

C. Transformation of Juveniles

Finally, we attempted to assess any increase in the residents' levels of empathy or sense of empowerment as a result of their participation in mediation. We surveyed fifty-one residents of the Boys Unit, the Girls Unit and GRF through a written form.⁵⁶

1. Empathy

In ascertaining signs of developing empathy in the juveniles, we search for comments indicating an increased level of understanding of themselves as others see them, or an increased level of understanding of the interests and concerns of others.

The following comments by the residents of Juvenile Hall indicated to us an increased self-awareness or awareness of others:

When we asked "What was the biggest thing you learned here today?" the residents responded as follows:

To treat people equally

That I got an attitude without knowing it

People can be stubborn and so can I

Nobody is perfect

Not to make fun of other people's lack of being pretty

Other relevant comments were:

Everyone has problems to work out

Now I know I am not a big shot

It's a way of respect and communication

The person got to know how I feel and now understands maybe it's not right

I learned that a person is always going to bring you down because they were brought down

I think I got some understanding with the other girl

I got out of it that I shouldn't act so tough

⁵⁶We conducted an earlier, more informal written survey, which we will also refer to in the subsequent section.

In an earlier, more informal survey, juveniles reported that:

[I learned] about the point of view of me from another person

[I learned] some people are sensitive and get hurt easily

[Mediation] helped a lot because you get to understand how the other person feels

I got a chance to hear what she was going through

[I learned] to have respect for each other and to learn to listen to each other's problem and to work out the situation

2. Empowerment

Our next goal was to empower the juveniles to resolve their own conflicts. We hoped that by repeatedly exposing the juveniles to mediation, they would learn that they could resolve their conflicts through words, rather than through violence.

To ascertain empowerment, we looked for the residents' comments indicating a sense of increased control over their conflicts. In response to the question, "What was the biggest thing you learned here today?" twenty-one out of the fifty-one responding wrote that they had learned "how to talk things out instead of fighting" or "how to solve problems." One resident wrote, "The biggest thing I learned was to control myself." Another responded, "I find it comes in handy to find out first why I'm angry at this person and find a peaceful manner to settle my situation." Several of the residents also commented that they would use what they had learned in mediation in their lives outside of Juvenile Hall. One resident wrote that he might use the process outside because "it depends on me." Finally, one resident was inspired by the mediator, writing, "... I learned Sean was a lawyer. I want to be that when I'm older."

There were also comments indicating, however, that our presence made no difference, or may have worsened the situation. Some of the residents wrote that they had learned "nothing." Another juvenile commented, "No it was not worth my time. I got anger out of it. Why? Because I couldn't let the real me come out."

We acknowledge the flaws in our process. Many of the juveniles we surveyed have difficulties expressing themselves in writing. Some may have tried to write what they thought we wanted to hear. Others may have feared recording something negative, despite the anonymity of the survey process. Additionally, the form, as well as the process, may have had scientific flaws of which we were unaware.

Nonetheless, we believe that we have instilled greater levels of empowerment and empathy in some of the residents with whom we have had contact. The vast majority of the residents – 76% – responded that they felt the mediation process was worth their time. They greatly appreciated the opportunity to talk things out. As one individual commented, "For my situation it was worth going to. When you're in a facility you don't have time to really sit down and discuss your issues."

V. CURRENT FLAWS AND FUTURE ASPIRATIONS

Both our statistical and our anecdotal evidence demonstrate that mediation can be successful in encouraging juveniles to be less violent. Juvenile Hall staff state that the presence of our mediators reduces the tension in their institution. Juvenile Hall residents indicate transformative moments through their statements of empathic awareness and self-control. Our results are supported by a recent report indicating that programs which enhance cognitive skills by encouraging development in empathy, moral and problem solving, have greater success in reducing juvenile

violence than other techniques, such as psychotherapy, biomedical, and social casework methods.⁵⁷

We concede, however, that mediation programs in juvenile detention facilities are certainly not a panacea. Even those residents who learn how to resolve conflicts more peacefully generally have personal issues that well exceed the capabilities of our mediation program. Moreover, we acknowledge our own program's flaws, both in process and in evaluation, which we are currently striving to address.

In terms of process, we recognize, that the transitory nature of incarcerated juveniles makes it difficult to instill any long-term transformation. To help alleviate this problem, we could focus our work on populations with longer residency periods, such as youth already sentenced, rather than youth awaiting sentencing. What we hope to do in the future is to engage both pre-sentenced and post-sentenced juveniles, thus ensuring that the conflict resolution training and experience are carried over from one state of incarceration to the next.

We concede that the vast majority of incarcerated juveniles may not have the cognitive skills needed to make full use of the mediation process.⁵⁸ Even if they do, peaceful conflict resolution is not part of their home and street cultures, where they return after incarceration. Nor is it always emphasized in their surroundings at Juvenile Hall.⁵⁹ We also realize that our program needs to be more holistic in its implementation. Residents, staff, as well as family and schools, need to be educated in and use processes for peaceful conflict resolution in order for our type of program to be more effective.⁶⁰

We are also painfully aware of our lack of expertise in the fields of adolescent development and violence. Our lack of background in the development and needs of young persons became particularly evident during our course of research.⁶¹ This is

⁵⁷PATRICK TOLAN & NANCY GUERRA, INSTITUTE OF BEHAVIORAL SCIENCE AT THE UNIVERSITY OF COLORADO, WHAT WORKS IN REDUCING, ADOLESCENT VIOLENCE: AN EMPIRICAL REVIEW OF THE FIELD 14-26 (1995).

⁵⁸See Jennie J. Long et al., *Exploring the Cognitive and Affective Capacities of Child Mediators in a "Successful" Inner-City Peer Mediation Program*, 15 MEDIATION Q. 289, 298 (1998) (in peer mediation programs, mediation has little influence on affective traits of children 8th grade and under, due to lack of cognitive development); Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive Development Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 144 (1999) (children prior to the interpersonal stage of development are not able to integrate their own objectives with those of others, and therefore cannot empathize, nor cooperate).

⁵⁹See *supra* note 9 and section IIA.

⁶⁰Robert J. Beck & A Marco Turk, *Family Peacemakers: An Extended Family*, 16 MEDIATION Q. 51 (1998) (describing ecological development theory as a necessary prerequisite to teaching children conflict resolution skills); Jones & Bodtker, *supra* note 3, at 117; Ellen Raider, *Conflict Resolution Training in Schools: Translating Theory into Applied Skills*, in CONFLICT, COOPERATION, & JUSTICE, BARBARA BENEDICT BUNKER 97-100 (Jeffrey A. Rubin & Associates eds., 1995); JOHNSON & JOHNSON, *supra* note 8, at 1:18; Jones & Bodtker, *supra* note 3, at 117; Johnson & Johnson, *supra* note 21, at 63-68.

⁶¹JOHNSON & JOHNSON, *supra* note 8, at 1:15 (citing lack of theoretical knowledge and research in violence, aggression, and conflict resolution by program developers as a reason programs fail); Marilyn Stern et al., *Adolescent Development and Family Dynamics: Delineating a Knowledge Base for Family Mediation*, 9 MEDIATION Q. 307, 314-329 (1992)

an obvious area for further study and collaborative work with experts in the fields of social and psychological research. We have begun such collaboration and hope to expand it. For example, we are currently working with a sociologist in the design and compilation of more data. We are also collaborating with a pediatrician and medical interns to better understand the problems juveniles face.

Finally, we are not always certain that the mediation process our students use is consistently conducive towards transforming juveniles. The occasional student may not recognize transformative moments in the mediation, or they may, in exasperation, resort to lecturing or forcing their own solutions.⁶² Although we have added a skilled mediator to oversee that mediations are conducted appropriately, slippage is inevitable.

In terms of our evaluative component, we realize that we lack the skills necessary to conduct objective statistical evaluations on the success of our program. Evaluating a special needs group can be more difficult than evaluating an ordinary student population. The latter's cognitive skills are likely to be better. They may be more literate and less manipulative. With the special-needs group, there may be obstacles in terms of confidentiality, staff resistance, and data collection processes. For example, we need to develop instruments to eliminate test bias, to allow for follow-up, and to allow for a control group.

Despite these obstacles and necessary corrective measures, we also believe that we have produced positive benefits. We are encouraged by statements of residents, staff, and our own law students. Finally, the personal rewards we gain in working with our law students and the staff and residents of Juvenile Hall inspire us to continue and expand our work.

(explaining adolescent response to conflict through a development framework); Seul, *supra* note 58, at 169-70 (Mediators should be trained in constructive-development theory to be more effective in encouraging a party's moral development through a transformative approach.).

⁶²See Folger & Bush, *supra* note 7, at 264; Erling O. Jorgenson, *Relational Transformation in Mediation: Following Constitutive and Regulative Rules*, 17 *MEDIATION Q.* 295 (2000). For an excellent comparison of Transformative and Problem Solving mediation, see Marc Martin, *How Transformative Is Volunteer Mediation? A Qualitative Study of the Claims of Volunteer Mediators in a Community Justice Program* 18 *MEDIATION Q.* 33, 36 (2000).