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New Strategies for Prisoner Rehabilitation in the American Criminal Justice System: Prisoner Facilitated Mediation

Erratum

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NEW STRATEGIES FOR PRISONER REHABILITATION IN THE AMERICAN CRIMINAL JUSTICE SYSTEM: PRISONER FACILITATED MEDIATION

JEREMY COYLEWRIGHT*

INTRODUCTION

Across the country our families and our communities are in danger. Hundreds of thousands of prisoners are being released into our states and into our neighborhoods every year with little or no rehabilitation. Our families and communities are in danger because these prisoners are being released not only with limited occupational skills and education, but also without the ability to use rational judgment to solve their problems, without the patience needed to settle disputes lawfully, and without adequate care or concern for the safety of others.

The rehabilitative framework of the American criminal justice system must adopt new strategies to address the inability of prisoners to reintegrate into free society upon release. While the importance of occupational and educational training programs should not be underestimated,¹ utilizing such strategies in isolation is insufficient; they lack the necessary focus on the emotional development and decision-making skills of inmates. Without the coping and problem-solving abilities that are necessary to be productive members of society, prisoners are not able to make the transformation from incarcerated criminal to successful citizen.

Providing prisoners with dispute resolution skills in innovative peer mediation programs provides one strategy to aid prisoners in their transition from the penitentiary setting to the community setting. A model of Prisoner Facilitated Mediation allows community mediators access to the prison administration and the prisoners themselves in order to facilitate the training of prisoners as mediators

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1. Prisoners tend to suffer at the lowest levels of educational and occupational performance, therefore these areas need to be strengthened in order to develop their human capital and provide a greater opportunity for successful reintegration upon release.

and problem-solvers. Following intensive training, prison mediators partner with community mediators and prison officials to solve prison disputes and help maintain security and order within the prison setting.

Potentially even more powerful than mediation within prison walls is the possible transition of prisoner mediators into the role of community mediators, helping to solve disputes and build the strength of their home communities. This transition would provide two clear benefits: reduced recidivism and more peaceful communities. Prisoner Facilitated Mediation will empower inmates with strategies to foster peace, giving them a useful tool that they can bring back to their communities to solve problems and resolve disputes. In addition, mediation will serve to engender partnerships between the ex-offenders and their home communities, allowing prisoners to make an immediate contribution upon return to their community and to more effectively reintegrate into mainstream society. In this way, the prison experience empowers not only the prisoners themselves, but also the communities to which they return.

Parts I and II of this comment offer an overview of the characteristics of today's prison population and a description of the current rehabilitative framework for the American criminal justice system. Part III discusses Prisoner Facilitated Mediation and details the powerful role of Transformative Mediation² in this innovative rehabilitative process. Lastly, Part IV highlights the promise of expanding this type of Prisoner Facilitated Mediation program into a national pilot study to allow for more effective prisoner rehabilitation and statistical evaluation.

PART I: THE CURRENT STATE OF INCARCERATION IN AMERICA

The current state of incarceration paints a dismal picture in America. The sheer volume of incarcerated citizens and the vast number of prison releases that hit the streets every year is extremely troubling.³ The combination of this massive volume with ex-prisoners' economic instability, educational insufficiency, poor health status and high rates of mental illness and addiction, creates an extremely distressful and precarious situation not only for the American criminal justice system, but also for our society as a whole.⁴

2. For more information regarding transformative mediation, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

3. See *infra* notes 5-17 and accompanying text.

4. See *infra* notes 18-38 and accompanying text.

The Sheer Volume of Incarcerated Citizens in America

The United States has the highest rate of incarceration in the world.⁵ In the past 30 years, the American prison population has faced an unprecedented growth of 700%.⁶ Between 1980 and 1999 alone, the prison population increased from 330,000 to over 1.3 million.⁷ Today over two million citizens are currently behind bars in our prisons, jails and other detainment facilities,⁸ most of whom are serving time for non-violent offenses.⁹ Demographic characteristics of these inmates show that rates of incarceration fall most heavily on people of color in our society, with approximately 1 in every 29 black males, 1 in every 82 Hispanic males, and 1 in every 223 white males serving time in a correctional institution.¹⁰ Each of these prisoners spends an average of almost 4.5 years under correctional supervision.¹¹

Prison Releases

The number of inmates being released from the American correctional setting is similarly stunning. In 2002, over 600,000 inmates were released from our state and federal prisons, representing over 1,600 individuals a day.¹² The

5. The United States surpassed the former leader of per capita incarceration, Russia, with a current rate of incarceration of 702 per 100,000 citizens. (Russia now imprisons approximately 628 per 100,000). THE SENTENCING PROJECT, U.S. PRISON POPULATIONS—TRENDS AND IMPLICATIONS (2003), available at <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited June 19, 2004).

6. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 13 (2003).

7. See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE, CORRECTIONAL POPULATIONS (2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last visited June 19, 2004).

8. Press Release, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Nation's Prison and Jail Population Exceeds 2 Million Inmates For First Time (Apr. 6, 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/press/pjim02pr.htm>. (last visited June 19, 2004).

9. Nonviolent offenders accounted for 77% of the intake growth in US state and federal prisons in the period between 1978 and 1996. See PETERSILIA, *supra* note 6, at 30.

10. See PETERSILIA, *supra* note 6, at 21; see also, MARC MAUER, U.S. COMM'N ON CIVIL RIGHTS, THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM 3 (1999) (noting that a Black male born in 1991 has a 29% chance of spending time in prison during his lifetime as compared with Hispanics born in the same year who have a 16% chance, and whites who have a 4% chance), available at <http://www.sentencingproject.org/pdfs/5022.pdf> (last visited June 19, 2004).

11. The average prisoner spends about 5 months in jail, 29 months in prison and 19 months on parole. Prisoners serving lengthy mandatory drug sentences and sentences for violent crimes obviously will spend a much longer time in the prison setting. PETERSILIA, *supra* note 6 at 93. See also, MAUER, *supra* note 10, at 8-11 (noting that people of color in the American criminal justice system tend to receive longer sentences, especially for drug related offenses.) See generally, DOUGLAS C. McDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-1990 (1993) (examining sentencing guidelines and how implementation of those guidelines results in sentencing disparities between different races and ethnic groups).

12. PETERSILIA, *supra* note 6, at 3.

characteristics of these releasees show that they are mostly unskilled men of color.¹³ They are more likely to be involved in gang activity and drug dealing, and at the same time, most of them are attempting to cope as parents of young children.¹⁴ One of the most alarming aspects of the prison release statistics is that nearly one-half of releasees were previously incarcerated at least once,¹⁵ and that nearly two-thirds of these releasees are expected to be rearrested for another felony or serious misdemeanor within 3 years of their release date.¹⁶ This high rate of recidivism among released prisoners highlights the inadequacy of current prisoner reintegration strategies and the lack of decision-making and problem-solving skills possessed by prison releasees. Admittedly facing some of the most challenging social obstacles that our society has to offer, the simple fact remains that prisoners are not making wise, safe, legal and lawful decisions upon release.¹⁷ Before describing the innovative Prisoner Facilitated Mediation strategy that will empower prisoners and positively alter their decision-making process, the major challenges facing prison populations will be discussed. Looking at their educational and economic status, the health and disease of the population, the level of addiction present and the conflicts that exist in the interpersonal and family relationships of prisoners, it is clear that this population suffers many of our worst social ills.

Educational and Economic Characteristics of the American Prison Population

A deeper probing into the American prison population reveals that prisoners are some of the least empowered and most disadvantaged members of our society. Only one-half of all inmates have high school diplomas (compared with three-quarters of the general population),¹⁸ and approximately forty percent of all prisoners are functionally illiterate.¹⁹ This may be a reflection of the fact that

13. PETERSILIA, *supra* note 6, at 21.

14. PETERSILIA, *supra* note 6, at 21.

15. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 3 (2002).

16. *Id.*

17. The aforementioned rates of recidivism for felonies or serious misdemeanors make this simple fact painfully obvious. Prisoners, however, increasingly make unwise and unsafe decisions in other areas of life as well. See *e.g.* NATIONAL AIDS TREATMENT ADVOCACY PROJECT, UNSAFE SEX IS COMMON AMONG HIV-INFECTED PRISONERS SHORTLY AFTER RELEASE (2003), available at http://www.natap.org/2003/feb/022003_4.htm (last visited June 19, 2004).

18. SARAH LAWRENCE ET AL., URBAN INST., THE PRACTICE AND PROMISE OF PRISON PROGRAMMING 2 (2002); See generally NAT'L CTR. FOR EDUC. STATISTICS, NATIONAL ADULT LITERACY SURVEY, LITERACY BEHIND PRISON WALLS xviii (1994) (reporting that 70% of prisoners perform at the lowest literacy levels).

19. PETERSILIA, *supra* note 6, at 32.

inmates are three times more likely to suffer from some form of learning disability.²⁰

Inmates also tend to be disadvantaged economically, typically representing the lowest economic classes, and frequently suffering unemployment prior to incarceration.²¹ Upon release, ex-prisoners find it extremely difficult to obtain employment due to their limited education and occupational skills, coupled with their criminal record.²² Most employers are reluctant to hire individuals recently released from a correctional facility (especially those with a violent criminal record), and many employers conduct extensive criminal background checks before hiring new employees.²³ In addition, prisoners of color face significant barriers to the labor market due to disparate hiring practices and other forms of employment discrimination.²⁴

Health Indicators in the American Criminal Justice System

From infectious disease to mental illness, the health of the American prisoner is extremely poor.²⁵ Inmates are disproportionately afflicted by the most deadly infectious diseases in our nation.²⁶ Studies from the late 1990s showed that nearly one-quarter of the HIV and AIDS cases, one-third of the Hepatitis C cases, and one-third of the Tuberculosis cases in our country were experienced by inmate releasees.²⁷ This represents rates of infection up to ten times that experienced by the general population.²⁸ Mental illness is also prevalent, with nearly one in six

20. See PETERSILIA, *supra* note 6, at 4.

21. Thirty-one percent of state inmates and twenty-seven percent of federal inmates reported being unemployed prior to their arrest. PETERSILIA, *supra* note 6, at 40.

22. Studies show that employers were willing to fill their most recent employment vacancy with a welfare recipient 90% of the time. Employers were willing to fill these positions with ex-offenders only 40% of the time. HARRY J. HOLZER ET AL., URBAN INST. REENTRY ROUNDTABLE, EMPLOYMENT DIMENSIONS OF REENTRY: UNDERSTANDING THE NEXUS BETWEEN PRISONER REENTRY AND WORK, EMPLOYMENT BARRIERS FACING EX-OFFENDERS 9-11 (2003), available at http://www.urban.org/UploadedPDF/410855_holzer.pdf (last visited June 19, 2004) [hereinafter EMPLOYMENT BARRIERS]; see also HARRY J. HOLZER ET AL., URBAN INST., EMPLOYER DEMAND FOR EX-OFFENDERS: RECENT EVIDENCE FROM LOS ANGELES 6, 8 (2003), available at http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf (last visited June 19, 2004) [hereinafter EMPLOYER DEMAND].

23. EMPLOYMENT BARRIERS, *supra* note 22, at 11; see also EMPLOYER DEMAND, *supra* note 22, at 12-13.

24. EMPLOYMENT BARRIERS, *supra* note 22, at 11-12 (discussing the findings of an audit study conducted by Devah Pager of employers in Milwaukee, Wisconsin).

25. See generally, JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 11 (2001) (discussing the prevalence of mental disorders and chronic and infectious diseases among the prison population).

26. *Id.*

27. *Id.*

28. *Id.* at 12.

prisoners suffering from some form of mental impairment.²⁹ In addition, addiction is rampant; nearly 80 percent of state inmates report a history of alcohol or drug abuse, and more than one-half of state prisoners reported being under the influence of drugs or alcohol at the time they committed the offense that led to their incarceration.³⁰ The high levels of addiction, infectious disease, and mental illness that prisoners experience is likely a reflection of the fact that prisoners tend to be drawn from poor communities suffering from insufficient health care and an inadequate public health infrastructure.³¹

Lack of Social Network

Inmates have few opportunities for positive social interaction and family support tends to be lacking.³² Inmates typically have strained marital and familial relationships, and have greater emotional detachment from their family and other social networks.³³ These trends appear quite problematic when considering that in 1999, more than 1.5 million minor children had at least one parent in prison, and more than 10 million children will have at least one parent incarcerated in their lifetime.³⁴ Incarceration disrupts the ability of children and parents to foster supporting and loving bonds and places increased demands on schools, state foster care services, and extended family members.³⁵

29. *Id.*

30. *Id.* at 25.

31. LOIS DAVIS, URBAN INST. REENTRY ROUNDTABLE, THE PUBLIC HEALTH DIMENSIONS OF PRISONER REENTRY: ADDRESSING THE HEALTH NEEDS AND RISKS OF RETURNING PRISONERS AND THEIR FAMILIES 4 (2002) available at http://www.urban.org/UploadedPDF/410920_public_health_roundtable.pdf (last visited June 19, 2004).

32. See PETERSILIA, *supra* note 6, at 42. While some states recognize the importance of inmates having positive family support, other states have taken steps that effectively reduce the likelihood of developing or sustaining such relationships. "In terms of reentry, limiting family visits has significant implications for cutting the very contacts the inmate needs to succeed on the outside." See PETERSILIA, *supra* note 6, at 42.

33. See ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 290-91 (2d ed. 1996); Demetra Smith Nightingale & Harold Watts, *Adding it Up: The Economic Impact of Incarceration on Individuals, Families, and Communities*, in THE UNINTENDED CONSEQUENCES OF INCARCERATION 95 (1996).

34. JEREMY TRAVIS ET AL., URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 2 (2003), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf (last visited June 19, 2004) [hereinafter FAMILIES LEFT BEHIND]. One-half of male inmates and two-thirds of female inmates are parents. *Id.* at 1; CTR. FOR CHILDREN OF INCARCERATED PARENTS, HOW MANY CHILDREN OF INCARCERATED PARENTS ARE THERE? (2001).

35. FAMILIES LEFT BEHIND, *supra* note 34, at 1-4.

With So Many Criminals Locked Up, What Do We Have to Fear?

The future of those serving time in America's prisons appears grim. If prisoners were locked up and the key thrown away, our neighborhoods and communities would potentially have less to fear.³⁶ This is not the case, however; the U.S. Department of Justice estimates that nearly 95% of the inmates in our prison system will be released.³⁷ This figure is alarming in light of the health and social problems just described. It is in an environment of interpersonal underdevelopment, limited educational and economic abilities, and poor health status that an effective means of prisoner rehabilitation must be provided to prepare inmates for release and reintegration into society. Rehabilitative failure means reintegrative failure. A failure to effectively reintegrate the growing number of ex-prisoners will not only generate high rates of recidivism, but it will also likely result in an increasingly dangerous and volatile situation for our society.³⁸ The next section provides background on the rehabilitative strategies that are currently pursued in our criminal justice system. While contemporary strategies seek to improve the educational and occupational opportunities of the prison population, they fail to positively impact the decision-making abilities of prisoners and do little to encourage inmates' recognition of their own personal values or those of others.

36. Though at some "tipping point," further incarceration in some communities leaves them devastated and in want of cohesive family and community [and male] presence. TRAVIS ET AL., *supra* note 25, at 42. The fear associated with this fact has been an issue of discussion throughout the 20th and 21st centuries. In a 1938 speech, Homer Cummings, former U.S. Attorney General, stated emphatically that the growing prison population must be dealt with.

They all come out.... Yes, they come out – back to live in your neighborhood, to walk beside you on the street, even to join your church. Their children will associate with your children, their families will be a part of your community. . . . We cannot escape it and we simply must face it.

Homer Cummings, *They All Come Out*, 67 FED. PROBATION 9, 9 (2003).

37. PETERSILIA, *supra* note 6, at 3; TIMOTHY HUGHES & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES, *available at* <http://www.ojp.gov/bjs/pub/pdf/reentry.pdf> (last revised Aug. 20, 2003).

38. JOHNSON, *supra* note 33, at 293.

Prisoners spend their sentences apart from the community, but the notion that we can forget prisoners – put them out of sight and out of mind – is an illusion. In a subtle but important sense, prisoners are always with us, and we with them. Society penetrates prison walls, shaping many aspects of prison life and adjustment; virtually all offenders return to the community, bringing a little bit of prison life with them in the process. . . . Debts must be paid, to be sure, and prisoners, through their suffering, pay dearly for their crimes. But so too must new lives commence, both in prison and, on release, in the free world.

JOHNSON, *supra* note 33, at 293.

PART II: THE CURRENT STATE OF REHABILITATION IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

The current rehabilitative regime in the American criminal justice system is not working. While high rates of recidivism³⁹ reveal the ineffectiveness of the current rehabilitative framework in America's prisons, the low rates of rehabilitative programming received by prisoners suggests a lack of rehabilitative commitment by prison officials and legislators.⁴⁰ Participation in prisoner rehabilitation programming is declining.⁴¹ Only one-quarter of prisoners receive vocational training and only one-third receive any educational training prior to release, with an even smaller share of prisoners (one in ten) receiving some form of pre-release programming (such as housing assistance, health and nutrition development, or personal finance training).⁴² Despite participation in such programs, prisoners still experience problems integrating into society upon release; they simply do not have the necessary coping skills or the necessary decision-making and problem-solving skills that every citizen needs to survive.⁴³ Even those who manage to pick up some limited education or job skills training find their home communities unstable and economically unable to provide them with employment or living wages.⁴⁴ Without stable employment and increasingly isolated from their families due to their incarceration experience, released prisoners

39. LANGAN & LEVIN, *supra* note 15, at 3. The rates of recidivism reflect the failure of the current rehabilitative structure. Approximately 30 percent of released prisoners are rearrested for a felony or serious misdemeanor within six months of release, 40 percent within the first year and 67.5 percent within three years of their release date. LANGAN & LEVIN, *supra* note 15, at 3.

40. See JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS., PUB. NO. NCJ 172211, STATE PRISON EXPENDITURES 1996, 3, 9 (1999) (reporting that, despite spending upwards of 90 percent of their correctional budget on operation costs, most states only spend a small fraction (5.9 percent) of that budget on prisoner rehabilitation).

41. In 1997, 27 percent of soon-to-be-released inmates reported participation in vocational programs and 35 percent stated that they participated in educational programs; a decrease from 31 percent and 43 percent, respectively in 1991. JAMES P. LYNCH & WILLIAM J. SOBOL, URBAN INST, PRISONER REENTRY IN PERSPECTIVE 11 (2001). In relation to pre-release programming, 13 percent of prisoners receive such programming in federal prisons and 8 percent in state prisons. PETERSILIA, *supra* note 6, at 95.

42. LYNCH & SOBOL, *supra* note 41, at 11.

43. This is reflected in the high rates of recidivism. See *supra* notes 15-17 and accompanying text. In addition, these programs fail to address the negative characteristics that are so destructive to the prisoners themselves and to greater society. See *supra* notes 66-70 and accompanying text.

44. See EMPLOYMENT BARRIERS, *supra* note 22, at 3, discussing the sparse data available regarding employment rates of previously incarcerated males of about 60% in the 1980's (45% for young black men). Some recent state studies report that the average quarterly earnings of ex-offenders ranges from about \$1,000 to \$2,000, certainly not a living wage. EMPLOYMENT BARRIERS, *supra* note 22, at 3. It is clear, however, that funding for educational and occupational programs needs to be increased, to allow for a greater number of willing inmates to take advantage of these programs. (Access to drug treatment and psychological counseling programs needs to be grossly expanded as well.) Even in the presence of budget crisis, civic leaders need to be clear on the expense of not providing these services to inmates desiring them.

often have nothing to offer their home communities.⁴⁵ Thus, prison officials must deal with repeat offenders continuing to make bad decisions, and increasingly languishing with poor education and economic outlook, limited job skills, high rates of drug addiction and disease, few safety nets and little tangible support. While the importance of addressing deficiencies in human capital (lack of education and job skills), and physical and physiological defect (addiction, mental illness, and disease) cannot be overstated,⁴⁶ it is clear that there is much to overcome in prisoner rehabilitation in the area of problem solving, communication and dispute resolution.

Educational Rehabilitation Programming

Historically, prisoner reentry⁴⁷ programs have consisted primarily of educational programs and occupational training programs, with substance abuse treatment programming enjoying a recent emergence.⁴⁸ Research shows an inverse relationship between rates of recidivism and level of education; thus the higher the education level, the less likely the person is to be rearrested or imprisoned.⁴⁹ Educational programs have been shown to reduce rates of recidivism by nearly 25 percent and at least one study has shown that every dollar spent on education yields more than 2 dollars in savings from avoiding reincarceration alone.⁵⁰ This is significant in an era of state budget pressures,⁵¹ when our national (state and federal) corrections budget consumes more than \$50 billion a year.⁵²

Despite the potential for successful rehabilitation through the utilization of prison educational programs, many such programs are under-funded due to state budget constraints and correctional policy.⁵³ In 1994, federal laws restricted

45. "The majority of inmates leave prison with no savings, no immediate entitlement to unemployment benefits, and few employment prospects. One year after release, as many as 60% of former inmates are not employed in the regular labor market...." Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 FED PROBATION 3, 5 (2000).

46. Although programs that address these shortcomings of the American prison population have shown only modest success in reducing recidivism, these programs pay for themselves in terms of future criminal justice expenditures avoided in their absence. PETERSILIA, *supra* note 6, at 17.

47. "Prisoner reentry" is defined as all the activities and programming conducted to prepare prisoners to return safely to the community and live as law-abiding citizens. PETERSILIA, *supra* note 6, at 3.

48. See PETERSILIA, *supra* note 6, at 94. The Violent Crime Control and Law Enforcement Act of 1994, § 32001, 18 U.S.C.A. § 3621 (c) (1994), required all Federal Bureau of Prisons facilities to provide substance abuse treatment or drug education to every eligible inmate.

49. PETERSILIA, *supra* note 6, at 32-33.

50. PETERSILIA, *supra* note 6, at 34.

51. See generally NAT'L CONFERENCE OF STATE LEGISLATURES, STATE BUDGET UPDATE: APRIL 2003 (2003).

52. PETERSILIA, *supra* note 6, at 4.

53. See generally STEPHAN, *supra* note 40 (discussing limited budget allocations).

prisoner access to Pell Grants, and in the absence of these funds, college and other higher education programs in the penitentiary setting have disappeared.⁵⁴ Similar *Tough on Crime* legislation by the states has required prisoners to fund part of their own education in the prison setting, even for such purposes as obtaining a GED.⁵⁵ Even states without self-funding requirements have long waiting lists for educational programs,⁵⁶ leaving many inmates to face release without having the opportunity to improve their poor educational (and thus economic) outlook.

Occupational Rehabilitation Programming

Occupational training programs have fared even worse. While suffering the same budgetary cutbacks and constraints, job-training programs have shown less success in reducing rates of recidivism.⁵⁷ Some programs require participants to obtain a diploma or GED, or require higher-level skills for participation.⁵⁸ Other programs are tailored only to prison industries that strive to make the prison itself self-sufficient (through the production of license plates, laundry and food services, textiles, etc.), but ignore the fact that such skills do not make the released prisoner any more attractive to employers in the free market.⁵⁹ Many prisoners are aware of the employment discrimination that ex-convicts face, and this knowledge contributes to a lack of necessary motivation for participation in programs that yield questionable results in the market upon release.⁶⁰ In addition, ex-convicts face fewer opportunities for employment due to economic depression, competition from labor-seekers leaving the welfare rolls, and racial discrimination.⁶¹

54. PETERSILIA, *supra* note 6, at 5. Federal Pell grants paid for the tuition for college courses taken while incarcerated. The Violent Crime Control and Law Enforcement Act of 1994, § 20411, 20 U.S.C.A. § 1070a (1994).

55. LAWRENCE ET AL., *supra* note 18, at 13.

56. PETERSILIA, *supra* note 6, at 6.

57. *See* PETERSILIA, *supra* note 6, at 41.

58. LAWRENCE ET AL., *supra* note 18, at 16.

59. LAWRENCE ET AL., *supra* note 18, at 15; For a more comprehensive analysis of the barriers to employment for released prisoners, *see generally* EMPLOYMENT BARRIERS, *supra* note 22 and EMPLOYER DEMAND, *supra* note 22 (analyzing the results of a survey concerning the hiring of ex-offenders in Los Angeles, CA in 2001).

60. PETERSILIA, *supra* note 6, at 41; *See also* EMPLOYER DEMAND, *supra* note 22, at 7-19 (describing the results of an employer survey in 2001 finding that most employers do have a bias against hiring ex-offenders).

61. LYNCH & SOBOL, *supra* note 41, at 18; EMPLOYER DEMAND, *supra* note 22 at 7-8.

Substance Abuse and Mental Health Rehabilitation Programming

Many prisoners suffer from mental health issues, including drug addiction, which may preclude their effective participation in educational or job training programs. Despite an estimated three-quarters of inmates needing substance abuse programming, less than one-quarter of those inmates receive it.⁶² Effective psychotherapy is essentially non-existent for the individual prisoner, as group therapy is the most prevalent form of treatment in the prison setting.⁶³ However, group therapy often fails due to inmates' fear of being preyed upon for revealing too much personal information, or for being too cooperative with the prison administrators running such programs.⁶⁴ In addition, while our criminal justice system has recognized a duty to treat prisoners suffering from physical disease, the duty is less clear in cases of psychological illness or drug addiction.⁶⁵

The Problem-Solving and Decision-Making Failure of Current Rehabilitation Strategies

While our current rehabilitative framework seeks to improve the human capital of prisoners (by educating them and trying to provide them with job skills to become more successful in the labor market), it fails in these measures because it ignores many of the character flaws that brought these individuals to prison in the first place.

[Prisoners] are impulsive, and tend to act before they think. When they do stop to think, they think poorly. They blame others, and fail to see their own impact on others. Their thought processes are variously described as 'simplistic and illogical' and 'exceptionally shallow, narrow and rigid.' They are egocentric, unable to see the world as others see it or indeed to see others as full-blooded human beings. Insensitive to others, they misread social situations. They fail to

62. PETERSILIA, *supra* note 6, at 93; TRAVIS ET AL., *supra* note 25, at 26-7.

63. JOHNSON, *supra* note 33, at 269.

64. JOHNSON, *supra* note 33, at 269.

65. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976) (explicitly recognizing for the first time a prisoner's right to a minimally adequate standard of health care in the prison setting). We must capitalize on the therapeutic opportunity that presents itself in the prison setting not only for chronic and infectious disease, but also for drug addiction and mental health issues. For additional case law discussing the minimum level of mental health provision necessary in the prison setting, see Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (striking down a legal distinction between the right of a prisoner to medical care for physical and mental disease); Young v. City of Augusta, 59 F.3d 1160 (11th Cir. 1995) (upholding a Constitutional challenge to the level of mental health staffing and mental health staff training at jail facility).

anticipate problems, and are unable to foresee solutions. They cannot, if you will, think their way through to a solution of a social problem.⁶⁶

Thus effective rehabilitation strategies must focus on improving the problem-solving, communication, and thinking skills of inmates. Rehabilitative frameworks must empower prisoners not only with an education and a trade, but also with the ability to cope and interact with society in a rational, peaceful, and lawful manner.

We cannot seek to create only “more literate mugger[s] or . . . robber[s] who [are] also . . . handy[men],”⁶⁷ but we must work on the emotional maturity of the prisoner as well. Prisoners need to be taught how to solve problems, how to settle disputes, how to communicate more effectively, and how to take responsibility for themselves and their actions. Successful inmate rehabilitation requires that programs “enhance the prisoner’s capacity to cope maturely with life’s stresses, both now in prison and later in the free world.”⁶⁸

This comment argues that rehabilitative programs seeking to improve the decision-making abilities of prisoners will allow inmates to function more effectively in society. Such programs will ensure that prisoners understand the range of options available to them and the impact that their choices have on themselves and others.⁶⁹ This not only serves to empower prisoners, but also provides them with the possibility of shared empathy with those around them.⁷⁰ Such programs will also likely enable prisoners to better understand and control their impulses, and capitalize on the benefits provided by improved educational and occupational skills. Prison releasees will then be able to make wiser decisions with respect to substance abuse, employment, interpersonal relationships and the law.

Part III describes Prisoner Facilitated Mediation, a promising supplement to the current rehabilitative regime that will allow prisoners to return to their home communities healthier, more educated, more skilled and (as utopian as it may sound) ready to serve as positive catalysts of change.

66. JOHNSON, *supra* note 33, at 274 (quoting E.A. FABIANO ET AL., COORECTIONAL SERV. OF CANADA, A PRELIMINARY ASSESSMENT OF THE COGNITIVE SKILLS TRAINING PROGRAM: A COMPONENT OF LIVING SKILLS PROGRAMMING (1991).

67. JOHNSON, *supra* note 33, at 268-69.

68. JOHNSON, *supra* note 33, at 268.

69. This is one of the many characteristics of ‘mature coping.’ See JOHNSON, *supra* note 33, at 97-124.

70. JOHNSON, *supra* note 33 at 97-124.

PART III: NEW AVENUES IN PRISONER REHABILITATION: PRISONER FACILITATED
MEDIATION

The enhancement of prisoners' problem-solving capabilities is vital to their success in rehabilitation and reintegration into society. Such capabilities impact their ability to think rationally, control impulses, solve problems and interact with each other (and greater society) in a positive manner.⁷¹ The use of Transformative Mediation presents a model for the development of emotional maturity in the settlement of disputes and has great potential for use in the prison setting.⁷² Prisoner Facilitated Mediation programming is unique, however, in that it seeks to train prisoners to serve as mediators in dispute settlement in the prison setting. With the mentoring and assistance of experienced (non-inmate) community mediators, prison inmate-mediators take responsibility for the creation of a peaceful prison environment where inmates can solve problems and settle disputes in a rational and constructive manner without extensive administrative assistance. Gaining valuable experience solving problems and settling disputes in the prison setting, prisoners can take their mediation skills back to their home communities upon release, providing them with a useful strategy for reintegration into society. In this respect, Prisoner Facilitated Mediation programs provide an exciting and innovative strategy for effective prisoner rehabilitation. The development of Prisoner Facilitated Mediation programs will provide numerous benefits to the prison setting and the current rehabilitative framework of the American criminal justice system.⁷³

*Enhancing Problem-Solving Capabilities: A Necessary Prong of Effective
Rehabilitation Programming*

The ultimate goal of prison reform is to produce mature adults who can live in society and cope with the daily problems of life without harming others. Ideally, mature adults also have the capacity to enter into constructive relationships with their fellows. Mature adults honor the minimal obligations of citizenship by not preying upon others. They also strive to be productive citizens, willing and able to work for their keep and to take some responsibility for the well-being of others in the human community. A prison that allows inmates to live within its walls

71. See JOHNSON, *supra* note 33, at 97-124.

72. See generally BUSH & FOLGER, *supra* note 2.

73. See *infra* notes 74-108 and accompanying text.

as citizens, and ideally as productive and even caring citizens, provides a rehearsal for mature living in the free world.⁷⁴

Prisoners must not only be provided with education and job skills, they must also be empowered with the ability and confidence to solve problems, communicate with others, and take responsibility for their own actions. Researchers have suggested that effective rehabilitative programs would include training on “problem recognition, problem analysis, and the weighing and choosing of effective coping alternatives.”⁷⁵ Transformative mediation seeks to provide this healthy problem-solving framework while at the same time seeking to develop the participants’ personal confidence, emotional maturity and empathy for others.⁷⁶

Transformative Mediation and Prisoner Rehabilitation

Training prisoners in the use of Transformative Mediation is an ideal strategy to foster improved problem-solving and decision-making skills, while offering an opportunity to enhance the compassion that inmates feel for each other and those in greater society. In the Power of Mediation, Bush and Folger offer a moving vision of the role of Transformative Mediation in creating a “better world.”⁷⁷ “[T]ransformation does not mean institutional restructuring but rather a change or refinement in the *consciousness and character of individual human beings*.”⁷⁸

One may ask, then, what an alternative form of dispute settlement has to do with prison rehabilitation or a change in emotional consciousness. No one may question the presence of conflict or dispute in the prison setting; conflicts erupt on a daily basis in prison, as they do in greater society.⁷⁹ Changing how prisoners deal with this conflict is where the rehabilitation comes in; improving the capacity of prisoners to deal with conflict and solve their own problems lawfully is precisely where prison rehabilitation programs need to focus.

74. JOHNSON, *supra* note 33, at 255 (citations omitted).

75. JOHNSON, *supra* note 33, at 273 (citing research by Zamble and Porporino (1990)).

76. *See infra* notes 77-80 and accompanying text.

77. BUSH & FOLGER, *supra* note 2, at 29.

78. BUSH & FOLGER, *supra* note 2, at 24 (emphasis in original). Such a change in consciousness has been cited anecdotally in many prison rehabilitation success stories. *See* SOLOMON ET AL., URBAN INST. SUMMARY OF FOCUS GROUP WITH EX-PRISONERS IN THE DISTRICT 4 (2001) (stating the small sample of successfully reintegrated inmates all cited a change of consciousness as the starting point for their own personal rehabilitation and success).

79. For the types of conflicts that generally occur in the prison setting, *see generally* JOHNSON, *supra* note 33

Transformative Mediation is especially well-suited to help inmates make this rehabilitative change. Transformative Mediation attempts to transform people by engendering moral growth through an empowerment element and a (compassionate) recognition element.⁸⁰ It seeks to empower individuals with “a sense of their own value and strength and their own capacity to handle life’s problems,”⁸¹ and it seeks to “evok[e] in individuals [an] acknowledgement and empathy for the situation and problems of others.”⁸² Bush and Folger describe the two key dimensions of transformative mediation:

[M]ediation...support[s] the parties’ exercise of self-determination in deciding how, or even whether, to settle a dispute, and it can help the parties mobilize their own resources to address problems and achieve their goalsParticipants in mediation have gained a greater sense of self-respect, self-reliance, and self-confidence. This has been called the *empowerment* dimension of the mediation process....

...[P]arties often discover that they can feel and express some degree of understanding and concern for one another despite their disagreement [They] strengthen their inherent capacity for relating with concern to the problems of others. Mediation has thus engendered, even between parties who start out as fierce adversaries, acknowledgment and concern for each other as fellow human beings. This has been called the *recognition* dimension of the mediation process.⁸³

When both dimensions are realized, and personal empowerment and the compassionate recognition of others come together, participants in the process are said to have developed their “compassionate strength.”⁸⁴ Under the transformative rehabilitative framework, disputes are “viewed not as problems at all, but as opportunities for moral growth and transformation.”⁸⁵ With this view in mind, “conflict affords people the opportunity to develop and exercise both self-determination and self-reliance,”⁸⁶ as well as “an opportunity for acknowledging the perspectives of others.”⁸⁷ “It means encouraging and helping the parties to use the conflict to realize and actualize their inherent capacities both for strength of self and for relating to others... [it] helps transform individuals from fearful,

80. BUSH & FOLGER, *supra* note 2, at 2.

81. BUSH & FOLGER, *supra* note 2, at 2.

82. BUSH & FOLGER, *supra* note 2, at 2.

83. BUSH & FOLGER, *supra* note 2, at 20 (emphasis in original); Appendix I (Empowerment and Recognition Under a Transformative Rehabilitative Approach).

84. BUSH & FOLGER, *supra* note 2, at 230.

85. BUSH & FOLGER, *supra* note 2, at 81.

86. BUSH & FOLGER, *supra* note 2, at 82.

87. BUSH & FOLGER, *supra* note 2, at 82.

defensive, or self-centered beings into confident, responsive and caring ones, ultimately transforming society as well.”⁸⁸

The Power of Prisoner Facilitated Mediation

Transformative mediation in the prison setting would seek to develop the *compassionate strength* of inmates, a population that is amongst the least empowered in our society, and one that has demonstrated the least amount of compassion for others (given the commission of the criminal actions that brought them into the prison setting). It seems obvious that if there is any population that needs a healthy dose of *compassionate strength*, it is the prison population.

Transformative rehabilitation should not stop merely at utilizing mediation for solving prison disputes, however. To maximize the potential of Transformative Mediation as a rehabilitative tool in the prison setting, prisoners must also be trained as mediators in Prisoner Facilitated Mediation programs. Experienced community mediators should be brought in to help develop the abilities of inmates to solve problems for themselves. This allows for an expansion of the empowerment dimension for the prison population and will provide prisoners a useful tool that will help them with their own personal rehabilitation and that of their home communities.

Prisoner Facilitated Mediation vs. Administrative Problem Solving

Clearly prison administrators could adjudicate, arbitrate or use some other form of administrative decision-making process to solve (or attempt to solve) every prison dispute. However, these administrative solutions disempower the prisoners by taking the control over problem-solving out of their hands and forcing their reliance on the administrative structure to settle every dispute. This is counterproductive to the rehabilitative ideal. Prisoners must learn to solve their own problems and must be equipped with working models to do so. Adjudication, arbitration or administrative decision-making

probably do as good a job as mediation, or even better, in satisfying needs and ensuring fairness. But, by the very nature of their operation, those other processes are far less capable than mediation (if at all) of fostering in disputing parties greater strength and compassion, and thus of achieving moral growth and transformation.⁸⁹

88. BUSH & FOLGER, *supra* note 2, at 82-83.

89. BUSH & FOLGER, *supra* note 2, at 30.

Allowing prisoners to participate in the mediation process as mediators themselves increases their responsibility for solving problems in the prison setting. It would allow for an increased number of opportunities for prisoners to interact with one another in positive, non-adversarial ways. It will allow "inmates...to carve out niches in which to shelter themselves from the violence and exploitation that thrives on the prison yard and in other public areas of the prison."⁹⁰ In the transformative environment where prisoners enjoy more personal power and have a heightened sense of compassion for others, trust may be established and prisoners may feel secure enough to develop their communication and problem-solving skills. Prison mediators could be placed in a position to serve as "helpful colleagues rather than cagey adversaries."⁹¹ Emotional maturity in problem-solving and interaction could then become the norm.

Prisoner Facilitated Mediation, Stable Communities and Mentoring Partnerships

Most significantly, prison mediators could be equipped with a valuable tool to bring back to their home communities. Many prisoners come from the same neighborhoods, where social problems and criminal activity abound.⁹² A lack of constructive problem-solving strategies in these environments is prevalent.⁹³ Bringing the skills of highly-trained and practiced transformative mediators to this setting would serve to provide models for others who need guidance in the decision-making and problem-solving process. It is not just in prison that a healthy dose of compassionate strength is needed, but also in the communities and on the neighborhood blocks from which prisoners are drawn. Furthermore, the usefulness of such a tool would not depend on the health of the job market like the trade skills that an inmate may be taught in the traditional prison setting. Communities may also seek to capitalize on this unique commodity in innovative community restoration strategies.⁹⁴

Using Prisoner Facilitated Mediation as a rehabilitation strategy will also facilitate the creation of valuable mentoring opportunities, so important to sustained rehabilitative efforts.⁹⁵ Not only will community mediators serve as mentors to prison mediators (both during mediation training and during the

90. JOHNSON, *supra* note 33, at 255.

91. JOHNSON, *supra* note 33, at 270.

92. TRAVIS ET AL., *supra* note 25, at 41.

93. JOHNSON, *supra* note 33, at 97-124.

94. Innovative new ideas have been proposed that seek to "mobilize people returning home from prison as agents of community restoration," building schools, parks, hospitals, etc. in a kind of job program called a Civic Justice Corps. Susan B. Tucker & Eric Cadora, *Justice Reinvestment*, 3 IDEAS FOR AN OPEN SOCIETY 2, 5 (2003).

95. See SOLOMON ET AL., *supra* note 78, at 4.

mediations themselves), but trained prison mediators will also serve as mentors to new prisoners, still lacking the rational means to solve problems and understand the impact their actions have on others.⁹⁶ Researchers have highlighted the role that successful ex-offenders can play as a resource to help the newly released,⁹⁷ and the same mentoring opportunities could be created within the prison system itself.⁹⁸

Using transformative mediation to establish rehabilitative mentoring opportunities will also address a crucial problem traditionally experienced in the rehabilitative efforts of our criminal justice system. Too often, the prison professionals teaching others how to reform and rehabilitate themselves have not 'been there,' and do not share the common ground necessary to establish their credibility with the inmates.⁹⁹ In addition, there is an obvious power differential between the professionals (employed by the state) and the inmates (incarcerated by the state) receiving the training. Thus prisoners are reluctant to cooperate with these individuals who lack experiential credibility and are perceived to be a part of the prison administration.¹⁰⁰ In addition, released prison mediators could carry their credibility to the streets, where they could serve as active facilitators of peaceful problem-solving strategies.

Prisoner Facilitated Mediation and the Reduction of Institutional Violence

Prisoner Facilitated Mediation will foster greater responsibility, autonomy and peace amongst prisoners. Inmates dependent on the prison administration to solve every dispute remain powerless and frustrated by the absolute control under which they are placed. Traditionally, the warden and prison guard retain strict administrative control over prison conditions.¹⁰¹ Under this framework, dispute settlement usually relies on the personal policy preferences of the warden, local budgetary constraints, and the surrounding political and beaurocratic environment.¹⁰² With such top-down decision-making, prisoner disputes may be left unsettled or ignored, a frequent and common source of "both individual and collective violence."¹⁰³

96. Early mentoring between prisoners with mediation experience and new prisoners provides a valuable introduction for the new prisoners to what will likely be their first exposure to transformative mediation.

97. *E.g.* SOLOMON ET AL., *supra* note 78, at 4.

98. SOLOMON ET AL., *supra* note 78, at 10.

99. JOHNSON, *supra* note 33, at 269.

100. JOHNSON, *supra* note 33, at 269.

101. For a historical analysis *see generally*, JAMES JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977).

102. JAMESON DOIG, CRIMINAL CORRECTIONS: IDEALS AND REALITIES 141 (1983).

103. *Id.*

Prisoner Facilitated Mediation offers prisoners an alternative forum for dispute resolution, one that they have a great deal of responsibility over. This poses an attractive alternative for inmates skeptical of cooperation with prison administration. While such flexibility would likely ease tension for prisoners who had little faith in administrative resolution, administrative remedies for those inmates dissatisfied with the Prisoner Facilitated Mediation process would still be available (potentially serving as a body of review for resolution of the dispute.)

Economic and Other Tangible Benefits of Prisoner Facilitated Mediation

Prisoner mediation programs would also free prison administrative resources. Minor disputes between prisoners would no longer be dealt with at the administrative level and escalations of administratively unrecognized disputes would decrease if this alternative problem-solving forum were utilized. As unresolved disputes often lead to violence in the prison setting,¹⁰⁴ a safer environment for prisoners and correctional officials would result. It is also important to remember that even if the dispute is not settled and administrative action is necessary, progress would still be made toward the development of the compassionate strength of the inmates involved in the transformative mediation process.

Training prisoners as mediators will produce additional tangible results. By improving their ability to communicate and demonstrate an ability to solve problems in a rational and peaceful manner, prison mediators will be more likely to be successful in the workplace. Focusing on their communication and mediation skills will make prisoners more articulate and desirable to employers.¹⁰⁵ Thus skills acquired in mediation training will enhance the skills acquired in the educational and occupational skills' components of prison rehabilitation programming. Improving the decision-making abilities and occupational outlooks for ex-prisoners will hopefully also increase their chances of staying drug-free.

This type of program justifies itself not only in terms of improving the lives of the prisoners themselves and their respective communities, but also in terms of real dollars. As successful community drug treatment programs, cognitive behavior programs for sex offenders, adult basic education and vocational training programs have shown, these rehabilitative programs pay for themselves in the reduction of future prison expenditures.¹⁰⁶ Successful graduation from these types

104. *Id.*, at 141.

105. Better decisions regarding employment and more developed communication and problem solving skills will likely make ex-prisoners appear more job-ready to employers; see EMPLOYMENT BARRIERS, *supra* note 22, at 3-7.

106. PETERSILIA, *supra* note 6, at 17; see e.g. STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME 5-8 (May 2001), available at <http://www.wsipp.wa.gov/rptfiles/costbenefit.pdf> (last visited June 19, 2004).

of programs produces a reduction in the rate of recidivism.¹⁰⁷ Graduation from prisoner facilitated mediation programs would not only enhance the effectiveness of the educational, occupational and other rehabilitative programming, it would also be likely to improve overall rates of recidivism for inmates.

What Will Prisoners Bring to Society Upon Release?

“[V]irtually all offenders return to the community, bringing a little bit of prison life with them in the process.”¹⁰⁸ How dangerous or productive a returning prisoner will be in our communities depends on what happens while incarcerated. We must take advantage of the rehabilitative opportunity the prison setting presents and not only utilize this time for retribution and punishment. Convicts who have served their time should and will always remember their incarceration experience. Something more than lock up and release is necessary, however. The fact that so many prisoners are re-arrested shortly after their release demonstrates that they lack problem-solving and decision-making skills. Successful rehabilitative programs must address the emotional maturity of inmates in addition to their weaknesses in the educational and occupational realms. Integrating Prisoner Facilitated Mediation programs into the current rehabilitative framework of our criminal justice system provides one possible means of improving the problem-solving abilities of prisoners before they are released, and ensures that they are effectively reintegrated into their home communities.

As the next section will explain, the training of prisoners as mediators is not purely hypothetical. Training prisoners as mediators has shown a great deal of rehabilitative promise in one maximum-security facility in Washington State. A gross expansion of this rehabilitative method and an independent statistical analysis will be required, however, in order to confirm the potential for its wide-scale replication in the American criminal justice system.

PART IV: DEMONSTRATING PROMISE THROUGH EXPANSION

Training prisoners as mediators allows inmates to take greater responsibility for fostering peace and making decisions in their own lives; it relieves some of the heavy burden prison administrators face in solving prison disputes and offers prisoners a vital tool that they can bring back to their communities upon release. This creates opportunities for prisoners to experience positive change in their lives and plays a vital role in community restoration. It has the potential not only to generate pride for a new breed of problem-solvers and community leaders who will

107. PETERSILIA, *supra* note 6, at 17.

108. JOHNSON, *supra* note 33, at 293.

have paid their debt to society upon release, but also to allow prisoners to experience a new sense of independence and compassion for those with whom they interact. This will serve to produce a significant positive change in the rate at which ex-prisoners return to the penitentiary setting.

This is not all conjecture, for the use of transformative mediation in prison rehabilitation has been tried and has shown a great measure of early success. The use of mediation in the prison setting has proven successful in Washington State under the guidance of Dr. Charles A. Kerr II, Ph.D, a certified mediator and volunteer at the Dispute Resolution Center of Snohomish and Island Counties in Everett, Washington.¹⁰⁹ Prisoners at the Monroe Reformatory¹¹⁰ sought out mediation training in 1993, after meeting with Dr. Kerr and informing the prison administration's Community Involvement Program Coordinator¹¹¹ of their interest in being trained as mediators.¹¹² The focus of the prison mediation program was to provide a release for the frustration and anger that inmates experienced relying solely on the prison administration to settle all of their disputes.¹¹³ Dr. Kerr also stated that the inmates saw mediation training as an opportunity for individual and collective empowerment.¹¹⁴ Being trained as a mediator not only empowers individual inmates with a valuable skill, but having the ability as a prison population to solve their own problems provides a collective empowerment for a population resistant to work with prison officials.

It was with the prison administration that the biggest hurdles for the prison mediation program's implementation occurred.¹¹⁵ Prison officials were uncertain about relinquishing dispute settlement responsibilities, especially to the prisoners themselves (despite the fact that community mediators would be overseeing all disputes settled).¹¹⁶ The administration was particularly fearful about the topics

109. After spending a lifetime working in corrections, Dr. Kerr retired and became involved in mediation at the Dispute Resolution Center. Telephone Interview with Dr. Charles A. Kerr II, Ph.D, Mediator & Volunteer, Dispute Resolution Center of Snohomish and Island Counties (July 10, 2003); See also WASH. STATE REFORMATORY, DISPUTE RESOLUTION CTR., THE INSIDE MEDIATION PROGRAM; Letter from Dr. Charles A. Kerr II, Mediator & Volunteer, Dispute Resolution Center of Snohomish and Island Counties, to author (July 16, 2003) (on file with the Journal of Health Care Law and Policy).

110. Monroe Reformatory is an 800 man correctional facility that is part of a larger 2,400 inmate maximum security prison. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

111. In 1993, this individual was Jim Newman. Today, Mike Williams fills this position. Telephone Interview with Mike Williams, Community Involvement Program Coordinator, Monroe Reformatory (July 10, 2003).

112. Mieke H. Bomann, *Prison Tensions Cool When Inmates Seek Training as Mediators*, available at <http://Mediate.com/articles/prison.cfm> (last visited June 19, 2004).

113. Dr. Kerr testified to the tension and feelings of repression amongst inmates dealing with the warden and correctional officers as the default (and sole) problem solvers in the prison setting. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

114. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

115. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

116. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

that would be discussed in the (often) confidential mediations.¹¹⁷ For example, administrators expressed concern over the potential of using the mediation setting to discuss illegal activities in the prison setting.¹¹⁸ They disliked being uninformed of what was being discussed between prisoners in an active dispute and feared that the forum would be used to discuss plans for escape, violent attack, drug trade, prostitution, and other illegal behavior.¹¹⁹ Lastly, administrators questioned the effectiveness of such an untried and unproven program.¹²⁰

Despite these reservations, the Monroe prison administration demonstrated their flexibility and willingness to work with mediation advocates and the prisoners themselves.¹²¹ Both mediation advocates and prison officials were willing to make concessions in order to realize the program's potential for reducing prison violence and enhancing prisoner rehabilitation.¹²² Prison administrators agreed not only to allow the space, time and prisoner access required for mediation training, but they also agreed to relinquish some of their traditional dominance over dispute resolution in the penitentiary setting.¹²³

Mediation advocates agreed to allow limitations to be placed on the types of disputes being mediated.¹²⁴ Prisoner Facilitated Mediation was not allowed in disputes involving infractible behavior in the prison setting.¹²⁵ This includes situations where prisoners may be involved in drug trafficking, extortion, prostitution, escape attempts, illegal gang activity, or cases where inmates may be in immediate physical danger (rape, assault or other physical attack).¹²⁶ In addition

117. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109; Telephone interview with Mike Williams, *supra* note 111.

118. Telephone Interview with Mike Williams, *supra* note 111. ("Prison administrators like to be in charge," and they expressed fear of confidential inmate meetings. "Administrators would not want to create a safe place for inmates to meet to discuss illegal activities.").

119. Telephone Interview with Mike Williams, *supra* note 111.

120. Telephone Interview with Mike Williams, *supra* note 111.

121. "[P]rison administrators readily acknowledge that their top priority is maintaining control of the prison environment to maximize safety of the guards and prisoners. In an era of prison expansion and constraints on prison budgets, allocating space and resources for correctional programs is not the top priority for correctional managers." LAWRENCE ET AL., *supra* note 18, at 7. It is notable that the Monroe Reformatory administrators were under no obligation to take the steps that were taken to allow such a program to be instituted, demonstrating their administrative flexibility and innovation.

122. Telephone Interview with Mike Williams, *supra* note 111; Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

123. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109. Administrators also agreed not to ask for any kind of report on the inside mediation program that would breach the confidential nature of the mediations, any information about specific mediations conducted, the names of any individual inmates in a dispute, or any specific details concerning any of the mediations.

124. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

125. Mediation is also not utilized when prisoners have been deemed by prison officials and mediators to be suffering from mental illness, a highly charged emotional state, or to be lacking good faith in the process. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

126. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

mediators (both inmate and community) assumed a duty to cease mediations in these cases and report directly to prison officials when these topics arose in the mediations themselves.¹²⁷ Lastly, the administration retained the ability to grant prison-mediator accreditation to potential prison-mediators.¹²⁸

With these conditions in place, the *Inside Mediation*¹²⁹ Program was started; 45 prisoners were allowed to go through the 40 hours of training required by the state of Washington to be certified as a mediator.¹³⁰ Of these 45 prisoners, 20 continued on with the fulfillment of a rigorous one-year mediation practicum experience consisting of mock mediations and other training under the guidance of community mediation mentors from the Snohomish Dispute Resolution Center.¹³¹ After almost two years of training, nine inmates were certified as accredited prison mediators.¹³² According to Dr. Kerr, these nine inmates represented individuals who were able to obtain the respect and credibility not only of their fellow inmates, but also earn the trust of the prison administration in the responsibility being granted.¹³³

To date this team of mediators has conducted approximately 30 mediations with the assistance and supervision of their community mediator mentors.¹³⁴ Dispute topics range from arguments over radio-noise to complaints over work scheduling, competition over inmate job or recreation positions, disputes in inmate organizations or in the mess hall, and conflicts over broken and borrowed items.¹³⁵ Twenty-eight mediation summary and settlement contracts (not required by the transformative mediation process) were produced in mediation; no evidence of breach of any of these contracts between disputing inmates exists today.¹³⁶ Prison mediators have also reportedly conducted over 100 informal conciliations in the prison yard or elsewhere within the correctional facility, thereby preventing the escalation of minor inmate disputes into more serious incidents.¹³⁷

127. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

128. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

129. *Inside Mediation* is the name of the Prisoner Facilitated Mediation program at the Washington State Reformatory.

130. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109; WASH. MEDIATION ASS'N, HOW TO CERTIFY: THE WASHINGTON MEDIATION ASSOCIATION'S MEDIATOR CERTIFICATION PROGRAM FOR WM MEMBERS, at <http://www.washingtonmediation.org/howtocertify.html> (last visited June 19, 2004); see also Wash. Rev. Code § 7.75.020 (1997).

131. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

132. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

133. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

134. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

135. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

136. The mediation settlement agreements remain confidential and are on file at the Snohomish Dispute Resolution Center with Dr. Kerr. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

137. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

While the *Inside Mediation* program has been very effective in resolving conflicts on a small scale, the effectiveness of widescale implementation for purposes of prisoner rehabilitation remains unproven. Studies are needed to statistically evaluate this type of rehabilitative program in the prison setting, and the reintegration outcomes for the prisoners trained as mediators need to be followed. More troubling, only three prison mediators remain at the Monroe Reformatory (the other six were either released or transferred) and no plans are in place to conduct future prisoner mediation trainings.¹³⁸ Prison administrative turnover has resulted in an unclear future for the program, as each set of administrators maintains their own philosophies about prisoner conduct and rehabilitation.¹³⁹

Multifaceted studies are clearly needed to determine the effects of prison mediation programs on prison security, the willingness of inmates to participate in mediation programs, inmate satisfaction with the transformative mediation process, and the effectiveness of training prisoners as transformative mediators in engendering personal rehabilitative growth and developing the *compassionate strength* of inmates. Studying the potential role and impact of prison mediators on their home communities is also warranted.

The preliminary success in Washington State demands that the use of Prisoner Facilitated Mediation be expanded for study as a rehabilitative tool in America's prisons. The potential for effective transformative rehabilitation coupled with the useful role of the prison-mediator in the home communities of the prison population is too great to ignore. Careful planning and statistical evaluation is vital, and a representative cross section of the American prison population (urban, rural, violent, non-violent, male, female, white, black, Hispanic, etc) must be exposed to this new strategy of rehabilitation. Intensive research into this innovative form of rehabilitation will provide a great deal of information about rehabilitating prisoners generally and how to improve the effectiveness of transformative rehabilitation in the prison setting. "[W]ithout careful program design, implementation and monitoring, it is impossible to know whether or how programs are effective. The best programs typically involve researchers at all stages of development, relying on both process and outcome evaluations to improve program design and operations."¹⁴⁰

The anecdotal evidence from Washington State suggests that prisoners may be interested in utilizing alternative forms of dispute resolution in the prison setting, as there is a natural animosity between the inmate population and the prison administration.¹⁴¹ Given the demonstrated flexibility of mediation

138. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

139. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

140. LAWRENCE ET AL., *supra* note 18, at 10.

141. Telephone Interview with Dr. Charles A. Kerr II, *supra* note 109.

advocates and prison administrators in Washington State, it seems likely that such an innovative program can be conducted without adversely affecting the safety and security of guards and inmates. While rates of prison violence and post-release recidivism will be the likely measures of the program's rehabilitative effectiveness, novel research modalities will have to be created to measure the impact that prison-mediators have on the safety of the penitentiary setting and the health of released inmate-mediators' home neighborhoods and communities.

The potential for the rehabilitative empowerment of prisoners through transformative mediation must be evaluated. Federal and state pilot programs need to be implemented. In many states, the money for implementation already exists. In 2002, many states were awarded millions of dollars in grants from the U.S. Department of Justice, Office of Justice Programs, as part of the federal government's Going Home Program, which supports reentry initiatives nationwide.¹⁴² In his recent State of the Union Address, President Bush committed \$300 million more toward such efforts.¹⁴³

The use of transformative mediation in the prison setting could be expanded into other areas as well, such as in the mediation of prisoner-guard disputes. Furthermore, it could be utilized between prisoners and the victims of their crimes in helping to fulfill the goals of the emerging restorative justice initiatives common in the juvenile correctional setting.¹⁴⁴ Finally, prison mediators and transformative mediation could also be used as a means to improve the family relations of prisoners prior to their release, so that a stronger safety net exists for prisoners and their parents, children, and other family members.

Without a doubt, the use of transformative mediation and training prisoners themselves as mediators is only one of the many forms of rehabilitation that should be undertaken in the prison setting. There is no one program that will be suitable for every inmate. Adult education, occupational training, drug treatment, and mental health therapy all belong along side of innovative rehabilitation programs like Prisoner Facilitated Mediation.

142. For example, Maryland received 2 million dollars over three years. URBAN INST. RESEARCH REPORT, NANCY G. LAVIGNE ET AL, A PORTRAIT OF PRISONER REENTRY IN MARYLAND, (Mar. 18, 2003), available at http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf (last visited June 19, 2004). Most states have received grants from the Office of Justice Programs' Serious and Violent Offender Initiative to help implement prisoner reentry programs. See U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE: STATE ACTIVITIES AND RESOURCES at <http://www.ojp.usdoj.gov/reentry/sar/welcome.html> (last visited June 19, 2004).

143. President George W. Bush, State of the Union Address (Jan. 20, 2004) available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited June 19, 2004).

144. MARK S. UMBREIT ET AL, CTR. FOR RESTORATIVE JUSTICE AND PEACEMAKING, LEGISLATIVE STATUTES ON VICTIM OFFENDER MEDIATION: A NATIONAL REVIEW 2 (May 2001) available at <http://ssw.che.umn.edu/rjp/Resources/Documents/National%20Review%20Legislative%20Statutes.pdf> (last visited June 19, 2004)..

Many of the services inmates receive—drug treatment, mental health counseling, educational or vocational training—provide a foundation upon which successful reentry can be facilitated. But taken alone, they are likely to be insufficient, especially given that there are additional issues inmates face during the transition into society, including difficulties finding housing or obtaining medical or health services. For this reason, a range of treatment and services provided during and after reentry into society can assist offenders to maintain or increase their progress and the likelihood of sustained employment and reduced recidivism.¹⁴⁵

In addition, programs of rehabilitation and support must not cease upon prisoner release. Stable mentoring opportunities and healthy social networks must be provided for inmates once they return to their home communities. Programs like the Prisoner Facilitated Mediation program that establish these sustainable mentoring opportunities are vital to the released inmate's successful reintegration into free society.¹⁴⁶ With the continued support of released prisoners and a healthy dose of *compassionate strength*, the churning cycle of incarceration can be broken.

CONCLUSION

As evidenced by the high rates of recidivism amongst prison releaseses, the current system of rehabilitation in our criminal justice system is failing. No amount of educational or occupational skills training will improve the problem posed by the reentry of prisoners without the capacity to make reasoned decisions and to solve disputes in a peaceful and lawful manner.

As we demand that prisoners make good decisions, act in peaceful and lawful ways, and solve their disputes rationally, we must provide them with the necessary tools to do so. While penitentiaries often harbor collections of individuals who are amongst the least empowered members of society, and who have shown, through their actions, the least amount of empathy for the world, it is in this setting that the greatest potential for transformation exists. Coupling the training of prisoners as mediators in the process of transformative rehabilitation with the current educational and occupational rehabilitation regime provides a promising means of securing effective inmate rehabilitation.

Prison mediation will empower inmates with improved decision-making and problem-solving abilities and will seek to encourage the development of their compassion for others. Prison mediators taking a healthy dose of *compassionate strength* and the skills of a trained mediator with them to their home communities

145. LAWRENCE ET AL., *supra* note 18, at 10.

146. See SOLOMON ET AL., *supra* note 78, at 4.

will give ex-prisoners a source of pride and an honorable purpose in life, regardless of the economic conditions or other social obstacles present in their living environment.

Those resistant to change and innovation in the current prisoner rehabilitation regime must remember that “the doors of prisons swing both ways.”¹⁴⁷ Every year, more and more inmates are being released into our neighborhoods and communities, and as we fail these prisoners by turning them in and out of a prison warehouse without any constructive forms of rehabilitation, we will only continue to endanger our entire society in the process.

147. PETERSILIA, *supra* note 6, at 20 (quoting Mary Belle Harris, 1st female federal prison warden in the U.S. in 1936).

Appendix 1**Empowerment and Recognition Under a Transformative
Rehabilitative Approach****A prisoner may be empowered with:**

1. A clearer realization of what is important to them. (“Empowerment as to Goals”)
2. An awareness of the options available to them with a realization that they have some control over those choices. (“Empowerment as to Options”)
3. The skills to resolve conflicts. (“Empowerment as to Skills”)
4. An awareness of the available resources. (“Empowerment as to Resources”)
5. An awareness of the ability to deliberate and make conscious decisions. (“Empowerment as to Decision Making”)

Note that empowerment is “independent of any particular outcome of the mediation” and has a “spillover effect” that will positively affect any future interaction.

A prisoner learns to give recognition of others when:

1. He realizes that “beyond possessing strength to deal with his own situation, he possesses the capacity to reflect about, consider and acknowledge in some way the situation of the other party.” “[H]e realizes that he feels secure enough to stop thinking exclusively about his own situation and to focus to some degree on what the other party is going through.” (“Consideration of Giving Recognition”)
2. He realizes that he may have a desire to give such an acknowledgement. (“Desire for Giving Recognition”)
3. He realizes that “what seemed to be opportunistic or exploitative behavior directed against him was instead the product of the other party’s understandable attempt to deal with real and severe pressures placed on him by their own constrained circumstances and so forth... [and] that he does not have to view the other so harshly and negatively.” (“Giving Recognition in Thought”)
4. He openly acknowledges a statement of new understanding (which may include an apology), and addresses his own conduct. (“Giving Recognition in Words”)
5. He makes an accommodation or expresses a genuine regret that “his own circumstances are so constrained that an accommodation to settle the matter cannot be found.” (“Giving Recognition in Actions”)

The “spillover effects” of recognition include an expansion of “parties ability and willingness, on an ongoing basis, to relate to others with more understanding and consideration...,” “more ability and willingness to relate to others less defensively, more respectfully and more empathetically; to be less judgmental of others; to give others the benefit of the doubt; to find elements of common experience and common concern with others; [and] to be more tolerant of others with diverse experience and concerns.”

Adapted from Bush and Folger, *supra* note 2, at 85-93.