

EASING THE BURDEN:  
MEDIATING MISDEMEANOR CRIMINAL COMPLAINTS

I. INTRODUCTION

In 2004, the Massachusetts Supreme Judicial Court ordered a county sheriff to free dozens of indigent criminal defendants awaiting trial because the state was unable to provide them with lawyers due to an absence of public defenders to represent the defendants at critical stages of their cases.<sup>1</sup> This anecdotal evidence is one of many small signals of a clear, systemic problem: the American criminal justice system is failing because courts are unable to keep up with their caseloads.<sup>2</sup> Some jurisdictions have begun to actively consider alternative approaches to lessen this burden, and a trend is growing to aid the courts in easing their dockets: some jurisdictions are developing mediation programs by which courts divert criminal cases away from traditional prosecution and allow a victim-offender mediation to occur as an alternative to trials for alleged criminal acts.<sup>3</sup> The new model is beginning to work and annually more

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<sup>1</sup> See *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004) (ordering release of defendants because of unavailability of attorneys to represent their constitutionally guaranteed rights).

<sup>2</sup> See generally Rodney J. Uphoff, "The Criminal Defense Lawyer As Effective Negotiator: A Systemic Approach," 2 CLINICAL L. REV. 73 (1995) (*recognizing overburdened criminal justice system and necessity for alternative approaches*).

<sup>3</sup> Some jurisdictions have passed laws to encourage the practice of referring criminal cases to mediation. See CAL. PEN. CODE § 14152 (2004) (allowing mediation referrals for cases involving conduct which could be charged as a

than nine thousand cases are referred out of district courts by district attorneys and judges to dispute settlement centers; over seven thousand more are resolved prior to possible court involvement, and mediation is helping as an alternative to courtroom trials.<sup>4</sup>

Mediation and other forms of alternative dispute resolution (“ADR”) are not foreign to criminal law in the United States, but historically American jurisdictions have not used mediation to help in the adjudication of criminal cases after charges have been filed, but before trial. Several jurisdictions have mediation programs that intervene before any criminal charges have been filed in the form of “community mediation.” Others use restorative mediation to bring victims and offenders face-to-face after a criminal charge’s adjudication. Finally, all jurisdictions allow plea bargaining to take place as a form of ADR to avoid trials, but typically plea bargaining involves adversarial meetings between prosecutors and defendants and not a neutral third-party as does mediation. Mediation could be better used to solve privately filed complaints by allowing the parties to control

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misdemeanor). Other states have no specific statutory law regarding the referral of criminal cases to mediation, but have created programs as part of local government-sponsored mediation organizations. *See, e.g.* “Community Misdemeanor Mediation Service,” *available at*:

<http://www.cdsusa.org/community.html>; Florida’s “State Attorney-Referred Mediation,” *available at*:

[www.17th.flcourts.org/mediation\\_\\_\\_arbitration.html#CitizenDispute](http://www.17th.flcourts.org/mediation___arbitration.html#CitizenDispute) (last visited November 19, 2004).

<sup>4</sup> *See* “Courts, Law Enforcement, and Victims of Crime,” Mediation Network of North Carolina, *available at* <http://www.mnnc.org/pg10.cfm>.

the charges and should be encouraged by courts to take stress off of their personnel who are increasingly incapable of maintaining pace with the court's docket.

This project will discuss the advantages and pitfalls of mediation to adjudicate misdemeanor crimes after the formal process of criminal law has begun but before the guilt of the defendant has been determined.<sup>5</sup> It will do so by discussing how a misdemeanor complaint comes into the system; how different jurisdictions are using mediation in criminal cases; the philosophical, legal and mediation-specific issues this raises; and finally, will synthesize the theory of mediation with the current practice in the field of pre-trial criminal mediation. Finally this project will synthesize mediation theory, current usage and suggest practical solutions to the use of mediation in criminal matters.

## II. BACKGROUND: COMPLAINTS BROUGHT BY CIVILIANS AGAINST CIVILIANS

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<sup>5</sup> This analysis will focus on matters after arrest because presumably those cases in which the criminal justice system has not yet become involved could easily be heard in traditional community mediation programs. Furthermore, in matters in which the government has not yet become involved, there are fewer interesting legal issues related to the tension between private justice and the philosophical importance of punishing and rehabilitating a criminal defendant on behalf of society as a whole. *See infra*, Section III, and accompanying notes for an in-depth discussion of the philosophical issues of criminal mediation. Likewise, the analysis here will avoid discussions of post-conviction victim-offender mediation because in that model, the criminal case has already been adjudicated.

Typically, a criminal case begins after law enforcement officer has probable cause of criminal conduct and arrests a person. However, some jurisdictions also allow private citizens to bring a complaint against another private citizen if the police do not arrest that person, or the police make an arrest and the local district attorney elects not to prosecute the case. It is precisely these matters that are most appropriate for mediation because they are often premised on personal problems between the parties better suited for a private resolution other than a criminal trial. Traditionally, courts maintain this procedure by allowing civilians to apply with a neutral court officer to apply for their own criminal charges, which are called “private complaints.” In Massachusetts, a civilian has the right to seek a private complaint against a person they believe has committed a crime.

Procedurally, the private complaint process begins when the person that believes they are the victim, known as a complainant, applies to the court through a clerk-magistrate for a complaint.<sup>6</sup> The clerk-magistrate then schedules the matter for a show cause hearing to determine if the complainant can show probable cause exists for the court to issue a criminal complaint.<sup>7</sup> The clerk-magistrate can not refuse to act on the application.<sup>8</sup> However, show-cause hearings are an arena in which an advocate may make a significant difference on

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<sup>6</sup> See *Massachusetts Superior Court Criminal Practice Manual* § 1.2 (2000).

<sup>7</sup> See *Mass. Gen. L. c. 218, § 35A* (2004).

<sup>8</sup> See *Victory Distributors, Inc. Vs. Ayer District Court*, 435 Mass. 136 (2001) (holding private party's rights with respect to the criminal complaint process limited to filing of application; clerk-magistrate must act)

behalf of his or her client by using negotiation techniques.<sup>9</sup> Between the time the clerk-magistrate receive the application and the time of the show-cause hearing, clerks may consider alternative dispositions, including applying resolutions through informal negotiation between the parties.<sup>10</sup> Without any agreement between the parties to dismiss the private complaint, the show cause hearing goes forward.<sup>11</sup>

The clerk can encourage resolution prior to deciding if probable cause was shown by the complainant by continuing the matter for a period of time and encouraging communication between the parties.<sup>12</sup> Private complaints are often simple dispute between neighbors, a fight where no one is clearly at fault, or a traffic dispute. The party against whom the application is brought often applies for a cross-complaint, either in good-faith or in hopes of it having had the effect of canceling out the original complaint. In the event of a cross-complaint, in a traditional adversarial criminal model, the court will be burdened with not one, but two criminal matters it is required to adjudicate. Mediation of these matters poses a possible solution beneficial to both the parties and the system.

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<sup>9</sup> See *Massachusetts Superior Court Criminal Practice Manual* § 1.2 (2000).

<sup>10</sup> See *id.* at §1.2.3.

<sup>11</sup> See *Massachusetts Superior Court Criminal Practice Manual* § 1.2 (2000).

<sup>12</sup> See *Massachusetts Superior Court Criminal Practice Manual* § 1.2 (2000) see also *Bradford v. Knights*, 427 Mass. 748, 751 (1998). (stating “[a] show cause hearing pursuant to MASS. GEN. L.c. 218, § 35A, will often be used by a clerk - magistrate in an effort to bring about an informal settlement of grievances, typically relating to minor matters involving "the frictions and altercations of daily life.").

The main goal of private criminal mediation is the same as classic mediations: to bring together parties to voluntarily work together to create a resolution that adds value to both positions. One of the most important values added by criminal mediation is that it allows for an exchange of explanations between the complainant and defendant.<sup>13</sup> The victim can explain their suffering to the offender in a way that expresses and tries to communicate anger and that condemns the crime as a wrong.<sup>14</sup> The victim will also have a chance to come to understand, without condoning, the offender's action from their perspective.<sup>15</sup> The offender will be vividly confronted, through his victim's voice, with his crime and will also have a chance to explain himself.<sup>16</sup> The alternative is both inefficient and unsatisfying:

Consider a typical offender--a vandal, maybe, or a low-level drug dealer, or a thief--in a typical small criminal case. From the time of arrest to sentencing, criminal procedure pays little heed to his expressions of contrition. Beginning with arrest, he enters an adversarial system in which two lawyers, not the defendant and the victim, are the main actors. Often operating under staggering

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<sup>13</sup> Stephanos Bibas and Richard A. Bierschbach, "Integrating Remorse And Apology Into Criminal Procedure," 114 YALE L. J. 85, n. 216 (2004), *citng* R.A. Duff, PUNISHMENT, COMMUNICATION, AND COMMUNITY 93-99 (2001) (describing value of criminal mediation).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

caseloads, the lawyers are concerned with negotiating just and speedy dispositions. In most cases, this means cutting deals on charges, pleas, and sentences. In the few cases headed toward trial, it means investigating, planning pretrial and trial strategy, and dealing with motions, trial dates, and the like. In either situation, much negotiation is informal and takes place between the two repeat players, out of the defendant's presence.<sup>17</sup>

In light of the alternative of prosecution, criminal mediation provides an opportunity for the victim to feel justice has been done, for the offender to make amends and for an overburdened system to avoid further strain.

### III. PHILOSOPHICAL ISSUES WITH CRIMINAL MEDIATION: *Whose Rights Are Being Mediated?*

A critique of mediation for criminal cases involves a seeming shift in the theory underlying criminal justice, which necessarily calls on the courts to defend society's collective safety from wrongdoers and exercise their collective rights to retribution through criminal penalties. Alternatively, criminal mediation seems to favor an individual victim's rights, regardless of the benefit to society.

Even in Massachusetts, a state with a statute specifically allow a private citizen to apply for a criminal complaint, in 1991, the state's highest court seemed

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<sup>17</sup> Stephanos Bibas and Richard A. Bierschbach, "Integrating Remorse And Apology Into Criminal Procedure," 114 YALE L. J. 85, 96-97 (2004) (summarizing criminal process in minor criminal cases)

to deal a blow to victim's rights when it held in *Taylor v. Newton Div. of the Dist. Court Dep't.*<sup>18</sup> "a private citizen has no judicially cognizable interest in the prosecution of another. The rights which the plaintiff seeks to enforce criminally are not private but in fact are lodged in the Commonwealth, though he has rights to proceed in a civil action."<sup>19</sup> The *Taylor* decision calls into question the right of the private complainant to a prosecution of an alleged offender. *Taylor*, however, did not concern a private criminal complaint. Rather, the issue in *Taylor* involved a citizen's claim under the so-called Massachusetts victim' bill of rights, which guarantees a prompt disposition through sentencing of any case in which they are the victim. Therefore, the *Taylor* case is distinguishable because the statute it interpreted did not affect the right to bring a private action, which remains explicitly allowed by statute, instead affecting the absence of a right of a private citizen to influence prosecutors to promptly sentence offenders the state has convicted.

The *Taylor* case raises a second issue relevant to private criminal complaints related to if the proper forum for a victim is criminal court. Seemingly many of the issues raised in private criminal complaints have parallel claims that the victim could bring in civil court. In some matters, for example: battery, the victim has a remedy under the law of tort, but by taking part in a criminal

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<sup>18</sup> 416 Mass. 1006 (1991).

<sup>19</sup> See *Taylor v. Newton Div. of the Dist. Court Dep't*, 416 Mass. at 1006 (holding private citizens have no interest in criminal complaint); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (stating "[i]n American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.").

prosecution is represented indirectly as a member of society as a whole. For example, if a person is attacked by a mugger and injured, two systems will go into effect: the criminal system, which will seek to, if guilty, punish and rehabilitate the offender on behalf of society; and the civil system, which allows the person directly injured to seek their own personal compensation and, in the case of intentional torts, punitive damages.

The tension of private justice weighed against social benefit, as well as the problematic merger of criminal and tort law is not a new issue, and certainly poses questions as to how our court system should adjudicate such parallel matters.<sup>20</sup> However, so long as statutory schemes like the one in Massachusetts allow private citizens to file and maintain control over filed criminal complaints, it is necessary that we accept the consequences of the enactment of the laws and work to deal efficiently with the legal reality. By swallowing the conceptual problem, our system can benefit society as a whole by using mediation.

#### IV. EVEN IF LEGAL & ENFORCEABLE, IS MEDIATION APPROPRIATE?

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<sup>20</sup> The merger of tort and criminal law, which apparently characterized the whole history of primate and ancient legal regimes. See "American Criminal Law Review: Winter, 2001" 38 Am. Crim. L. Rev. 111, n. 42 (2001) *citing* A.S. Diamond, *PRIMITIVE LAW, PAST AND PRESENT* 191-95 (1971) (discussing early civilization's concept of offence to all and offence to an individual). The classic example of this is the Babylonian *Code of Hammurabi*, which is utterly replete with provisions for private prosecutions, private administration of "criminal" punishments, and, in some cases, a private, quasi-contractual method for establishing the criminal law. *Id.*

Jurisdictions considering institution of mediation programs for private criminal complaints, even if their laws allow it to exist, face a host of issues that could make mediation problematic. For a mediation to properly work, it requires negotiation between equals.<sup>21</sup> Because offenders and victims of crime are likely starting from unequal positions, mediators must be sensitive to issues that could arise. Two major issues revolve around the idea that cases suited for mediation often involve violence, as in the case of simple assault cases; or power imbalances, as in criminal proceedings between a landlord and tenant. Therefore, even if courts and lawmakers opt to create laws or otherwise act to encourage criminal mediations, they must consider situations where the facts surrounding the case make it difficult to solve the dispute using this technique.

*A. Violence*

Some jurisdictions explicitly disallow mediation when threats of violence or actual violence are involved.<sup>22</sup> Although this issue has not been analyzed in the

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<sup>21</sup> See Lydia Belzer, "Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process," 5 LOY. J. PUB. INT. L. 37, 49 (2003) (suggesting processes to improve mediation between individuals involved in abusive relationships)

<sup>22</sup> See ALASKA STAT. ANN. § 18.66.130(c) (2004). Alaska law states "[a] court may not order parties into mediation or refer them to mediation for resolution of the issues arising from a petition for a protective order..."; see also CAL. PEN. CODE § 14152(a) (2004); HAW. REV. STAT. § 580 41.5 (2004) (forbidding mediation where restraining order of history of child abuse exists between victim and offender). Still other jurisdictions have legislated additional specific rules on mediations involving a history of violence: for example, Pennsylvania permits

context of criminal mediation, many commentators have researched the significance of a history of violence as affecting other types of mediation, especially domestic relations and divorce mediation. Research and analysis applied to divorce mediation can be applied to criminal mediation where violence is involved because victims of violence all share the common factor in mediation of negotiating with an opposing party that is will to use force as a form of coercion.

Commentators differ on their view of the affect of violence on the mediation process but commonly believe mediation should not be ruled out just because a history of violence exists. By suggesting a set of procedures where violence is at issue, mediators can help to still create a successful resolution the problem at hand. One solution is by allowing mediation, but requiring mediators

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courts to mandate parties to attend mediation orientation sessions and, should both parties consent to mediation, the court may then enter an order of mediation. See Alexandria Zylstra, "Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators." 2001 J. DISP. RESOL. 253, 263 (2001). However, state statute prohibits courts from mandating even the orientation session if either party or a child has been a victim of violence or abuse within twenty-four months prior to the filing of the action. *Id.* In Texas, if a party requests exclusion from mediation based on an allegation of domestic violence, but a judge determines the allegation is not supported by a preponderance of the evidence, the judge may refer the case to mediation but must include in the order that the parties not be required to have face-to-face contact. *Id.*

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to follow a procedure using pre-screening, information to the parties, and providing the parties awareness of their legal rights.<sup>23</sup>

In many cases, it will be clear that the parties have a violent history (e.g. a criminal mediation to resolve an assault), but even if violence is not an obvious sub-text of the mediation, a successful program will interview the parties beforehand to discover if any such issue exists. If evidence of violence is found, in some jurisdictions, the mediation can proceed only if the mediation was requested by the victim of the violence, the mediator has been trained in dealing with victims of, and the victim is allowed to have a supporting person at the mediation.<sup>24</sup>

The victim of violence should explicitly and clearly be informed of their right to opt-out of the mediation for two reasons: first, because mediation is by definition a voluntary procedure in which either party should be able to opt-out, and secondly because the victim of violence is acting against their own interest if they continue to mediate with someone they feel has a power advantage because of their willingness to use violence. If, after recognizing a violent history, the victim still wishes to go forward, the mediator or court could inquire as to why the victim wishes to go to mediation to ascertain that the reasons are not based on pressure from the perpetrator of violence.

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<sup>23</sup> See Lydia Belzer, "Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process," 5 LOY. J. PUB. INT. L. 37, 49 (2003).

<sup>24</sup> "Alabama Section: Survey Of 1996 Alabama Legislation," 48A LA. L. REV. 769, 780 (1997) (describing changes to Alabama mediation law).

Before a victim makes their final decision whether or not to utilize mediation, it is especially important that they be aware of their legal rights. The court could do so by providing some source of information to each party, including a trained person who can answer questions. This would make parties aware of the legal implications of some of the matters that could come up in mediation and serve to assure them that even if the opposing party puts pressure on them during the mediation, they are not legally obligated to sign an agreement and allay the fear that “lack of cooperation” will not cut off their legal remedies.

*B. Power Imbalance*

In some criminal complaints, power imbalances are bound to be present between the victim and offender. For example, a tenant could bring a complaint against a landlord who has control over their living environment for criminal neglect of basic living necessities the law requires a landlord to maintain.<sup>25</sup> The landlord has great power in this scenario to make conditions even worse (e.g. shutting off the electricity or refusing to make any repairs), while the tenant’s power is limited. Especially if such a situation is acrimonious, there exists a great power imbalance and raises questions whether it is appropriate at all to mediate because where the parties are unevenly matched, the “stronger” party may be able to impose lopsided settlement terms.<sup>26</sup>

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<sup>25</sup> See *Wright v. Brockett*, *supra* note \_\_\_ and accompanying text (describing facts of landlord-tenant dispute leading to cross criminal complaints).

<sup>26</sup> See “Commentary on Suitability for Mediation,” CPR Institute for Dispute Resolution (1998).

However, this imbalance is not necessarily a reason to reject mediation. The imbalance could be offset by allowing an attorney to represent the parties to help balance their weakness. Additionally, whether or not the parties are represented by counsel, courts could require that a judge or magistrate review the parties' agreement before accepting it. While a mediation with an imbalance might not be preferable, by using safeguards like allowing or requiring a representative to accompany the parties and the court's approval, the settlement through may be more desirable for even a "weak" party than the alternatives of direct negotiation or litigation with its "win-lose" outcome.<sup>27</sup>

## V. LEGAL ISSUES UNIQUE TO CRIMINAL MEDIATION

### A. *Confidentiality and Evidence*

Confidentiality agreements are a common practice during traditional family, community and business mediations and the confidentiality of the mediator is in some instances statutorily created.<sup>28</sup> The *Uniform Mediation Act* dictates that information discussed during the mediation of a criminal misdemeanor could be subject to disclosure in a trial if no resolution is reached.<sup>29</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> MASS. GEN. L. c. 233, § 23C (2004).

<sup>29</sup> *See Uniform Mediation Act* §6(7)(b) (defining limits of mediator confidentiality). The Act states "the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality,

Any jurisdiction following the *Uniform Mediation Act* as its statutory scheme would have to either amend it, or would risk creating an ineffective system that would have a negative affect on the parties if they were unable to resolve their dispute using mediation. The *Uniform Mediation Act's* allowance of disclosure for use in criminal proceedings would create an especially grave risk for defendants in criminal mediations because their agreement to take part in mediation could lead to information that would not otherwise enter into evidence against them if they opted for a trial.

Programs specifically designed to handle criminal mediation have used guidelines other than those proposed by the *Uniform Mediation Act* that are more protective to the defendant. The Washington, D.C. U.S. Attorney's Office makes the entire criminal mediation proceedings confidential. The parties and mediator sign an agreement that the parties or the prosecutors can not use statements made during the mediation. The mediator also agrees that he or she will not voluntarily reveal any information disclosed during the mediation without all parties' written consent except for information relating to domestic violence, child abuse or a credible threat of violence. Finally, in the Washington, D.C. program the parties also agree not to call the mediator as a witness in any court proceeding and agree not to subpoena documents or information that may be retained in any files of the mediator.

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and that the mediation communication is sought or offered in...a court proceeding involving a felony or misdemeanor.” *Id.*

*B. Legality and Enforceability*

It is illegal in many jurisdictions for a person who has brought their own criminal complaint to agree not to prosecute the offender in return for receiving a benefit.<sup>30</sup> A reasonable basis for such statutes is to prevent defendants from perverting justice by bribing or coercing witnesses or victims. Because mediation in the pre-trial contexts could involve an exchange of something of value for an agreement not to prosecute, a question arises as to if it is legal to offer or accept valuable consideration in mediate criminal cases.

A 1991 Supreme Court of New York case, *Wright v. Brockett*<sup>31</sup> addressed the issue of accepting value for relinquishing a private criminal complaint.<sup>32</sup> The

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<sup>30</sup> See e.g., CAL. PEN. CODE § 153 (2004); See N.Y. PEN. CODE § 215.45 (2004); 720 ILL. ST. ANN. 5/32-1 (2004) (making offering or transferring consideration for agreeing not to prosecute or aid in prosecuting crime). The New York statute makes it illegal to solicit, confer and *accept* value in exchange for not prosecuting a crime, which would appear on its face to make both offender and victim guilty of a crime for bargaining for value during a criminal mediation. *Id.*

<sup>31</sup> 571 N.Y.S.2d 660 (1991).

<sup>32</sup> See *id.* at 661. For nearly twenty years, the defendant rented an illegal basement apartment in plaintiffs' two-family house. *Id.* Relations between the parties degenerated and the plaintiff moved the court to eject the defendant. The defendants filed their own criminal court claim contending that plaintiffs had turned off the heat and committed other acts amounting to reckless endangerment and other crimes. *Id.* The plaintiff-landlords then cross-complained for criminal harassment. *Id.* The parties were referred to the local dispute resolution center where they resolved their dispute, each agreeing to give value for dropping their cross-complaints. *Id.*

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New York court held: “[a] mediated agreement attained in a controversy pending in the criminal courts which was referred to mediation-arbitration...is not void as an agreement to compromise a criminal case within the meaning of [New York law] and is subject to enforcement as a contract. Their reasoning was that “the Legislature specifically intended for the parties to resolve their disputes through mediation-arbitration and to abandon pending or threatened criminal prosecution. This newly declared public policy supersedes the common law rule codified in [the law forbidding accepting or offering consideration for not prosecuting a criminal matter].”

## VI. SYNTHESIS: SETTING WORKING GUIDELINES

Jurisdictions considering taking steps to encourage mediation of private criminal complaints have several issues to consider before deciding the form their procedure will take. To decide if private mediation of crime is appropriate, they must weigh the philosophical question of if a private settlement is more beneficial to their system than requiring a formal criminal adjudication on behalf of all citizens of the jurisdiction. To answer this question, they can look to appellate cases weighing if under their statutes and case law, private citizens have a right to control the criminal process. Next, assuming the individual state’s laws allow for mediation in this context, they will need to decide which cases are appropriate for mediation. They will need to determine if victims of violence or those subject to power imbalances are capable of voluntarily participating in mediation.

There are some existing models from which states can get an idea of how best to approach criminal mediation. The *California Misdemeanor Mediation Statute* requires a referring district attorney to consider the nature of the conduct in question; the nature of the relationship between the alleged victim and the person alleged to have committed the conduct; and whether referral to the community conflict resolution program is likely to help resolve underlying issues which are likely to result in additional conduct which could be the subject of criminal charges.<sup>33</sup> The statute specifically forbids mediation "...where there has been a history of child abuse, sexual assault, or domestic violence [as defined by California statute] between the alleged victim and the person alleged to have committed the conduct, or where a protective order, as defined [by California law], is in effect."<sup>34</sup>

The Washington, D.C. program has devised a similar screening system to limit the field of crimes available for mediation to minor misdemeanors, and avoiding mediation for felonies, abuse and any case with a serious power imbalance making a person incapable of taking part in mediation.<sup>35</sup> The staff also screens to consider other concurrent or related cases involving the parties in the case being reviewed; relevant criminal history including prior convictions; and

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<sup>33</sup> See CAL. PEN. CODE § 14152(a) (2004) (defining considerations District Attorney must undertake before referring matter to mediation)

<sup>34</sup> *Id.*

<sup>35</sup> See Remarks of Steven P. Dinkin, Community Dispute Resolution Center, "Community Dispute Resolution Linked with the United States Attorney's Office and Community Prosecution in the Nation's Capital," January, 2001, *available at*: <http://www.ojp.usdoj.gov/prosecution/dc-cdr.htm>

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prior record of abiding to mediation agreements reached through the USAO mediation program.<sup>36</sup>

The California statute and Washington, D.C. policies both successfully answers questions important to mediation. By their enactment as law, the California legislature answered that private remedies gained through criminal mediation can outweigh the societal importance of a public trial. By requiring referring district attorneys to consider the nature of the crime, they are building in a safeguard that would allow prosecutors to not refer cases that they believe would be more appropriately handled in criminal court. The explicit language forbidding mediation when there has been abuse, California demonstrated a policy of disallowing mediation where abuse, which holds with it the specter of more serious crimes, violent crime and a power imbalance exists. The California statute provides further protection by requiring prosecutors to consider the relationship between the parties, which allows them to use their judgment in all cases to determine the existence of a violent history, strong power imbalance, or other factor that would make mediation unfair. Finally, the California statute wisely requires prosecutors to consider if the use of mediation is likely to repair the underlying issues. This requirement goes to the general effectiveness of mediation: by reviewing the underlying issues, it allows the district attorney to determine if the mediation will be truly effective, or if additional means of dispute resolution would better suit the issue to create a lasting resolution.

## V. SUCCESS OF EXISTING PROGRAMS

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<sup>36</sup> *Id.*

Empirical evidence shows that mediation is an effective too in clearing court dockets and lessening burdens on prosecutors and police officers.<sup>37</sup> In 2002, shortly after implementing the Washington D.C. misdemeanor mediation program, a representative of the Washington, D.C. U.S. Attorney's Office testified before Congress: "We have recently started a misdemeanor mediation project aimed at resolving, short of a trial, recurring problems. This removes a number of other cases from the criminal calendar..."<sup>38</sup> The Washington, D.C. program report that approximately 80% of their cases are resolve through mediation and diverted from prosecution.<sup>39</sup> A Colorado district court that began a similar program reported that 89% of the cases resolved, and found the program so successful that they were considering expanding.<sup>40</sup>

While the limited statistics available evidencing successes of the criminal mediation programs are indicative of the growing use of this form of alternative dispute resolution, only with anecdotal evidence can one see the real and positive effects on the lives of the participants. One commentator reports a

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<sup>37</sup> See *supra*, note 2 and accompanying text.

<sup>38</sup> See Remarks of Linda A. Cinciotta, Director, Office of Dispute Resolution, U.S. Department of Justice in speech "Alternative Dispute Resolution Comes of Age in the Federal Government," October 28, 2003, *available at*: <http://www.usdoj.gov/odr/aatllegalcenter102803.htm>.

<sup>39</sup> See *supra*, note 32, "Community Dispute Resolution Linked with the United States Attorney's Office and Community Prosecution in the Nation's Capital."

<sup>40</sup> Justin Kelly, "Unique Criminal Mediation Pilot Program Set to Expand" *ADRWorld.com*, Nov. 10, 2004, *available at* <http://www.adrworld.com/opendocument.asp>.

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criminal mediation of a neighborhood vandalism, in which nine families became involved in restoring damage done to the victim's home.<sup>41</sup> Each child involved apologized to the homeowner and explained the details of the damage he had caused.<sup>42</sup> Then each child paid twenty-eight dollars that he, not his parents, earned in order to pay for repairs and agreed not to retaliate against the homeowner's son.<sup>43</sup>

This case of neighborhood vandalism could have resulted in criminal convictions of the children involved causing a lifelong negative impact on them, could have hurt neighborhood relations between the victim and the children's parents for being involved in the children's punishment, taken a lengthy time and caused the government to expend its limited money and resources to prosecute this matter. Instead, the payments reimbursed the victim for the damage; the promises restored the homeowner's sense of security in the neighborhood; and the apology vindicated the homeowner's sense of moral indignation while his forgiveness reconciled the neighbors.

## VI. CONCLUSION

Both empirical and anecdotal evidence demonstrate that mediation is an appropriate and helpful option in mediating minor criminal matters. Because few

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<sup>41</sup> Deborah L. Levi, "The Role of Apology in Mediation," 72 N.Y.U. L. REV. 1165, 1202 (1997) (sharing anecdote demonstrating success of mediation in minor criminal matter).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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states have statutes explicitly creating guidelines for criminal mediation, those jurisdictions building programs will have to consider many issues, both legal and ethical before proceeding with criminal mediation. Challenges clearly remain, but by taking the opportunity to try criminal mediation as an alternative to trials, our society can benefit through the same principle that underlie mediation by creating a voluntarily system in which victim and offenders can come together to air their grievances, allowing our legal system and society as a whole can create a more just and efficient criminal justice system.