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Graham v. Florida: How the Supreme Court's Rationale Encourages Reform of the Juvenile Justice System Through Alternative Dispute Resolution Strategies

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I. INTRODUCTION

Across the nation, juvenile courts and corrections systems are littered with poorly conceived strategies that increase crime, endanger young people and damage their future prospects, waste billions of taxpayer dollars, and violate our deepest held principles about equal justice under the law. These problematic practices persist even as scholars, advocates, and hands-on juvenile justice practitioners have vastly expanded our understanding of what works (and what doesn't work) in combating delinquency over the past 20 years, as well as how to undertake effective system reform.

On May 17, 2010, the U.S. Supreme Court ruled in a 5-4 decision that the Eighth Amendment prohibits life-without-parole sentences for juveniles convicted of crimes other than homicide.² Child advocates are hopeful that new findings on juvenile brain development, which led to the holding that juveniles were "less deserving of the most severe punishments" due to their "lessened culpability," will encourage a broader conversation about the

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1. *Reform the Nation's Juvenile Justice System*, THE ANNIE E. CASEY FOUNDATION, 1 (Jan. 2009), http://www.aecf.org/~media/PublicationFiles/Juvenile_Justice_issuebrief3.pdf [hereinafter *Reform the Nation's Juvenile Justice System*].

2. See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

effectiveness—or lack thereof—of the juvenile justice system as a whole, and how developing research should dictate system reform.³ This article will trace the history of the juvenile justice system up to this recent decision, analyze *Graham*'s current and possible future impact, and propose a four part alternative dispute resolution-based strategy aimed at preventing and reducing juvenile recidivism rooted in the *Graham* Court's rationale.

II. HISTORY AND BACKGROUND

A. *History of the Juvenile "Justice" System*

As early as 1760, when William Blackstone recorded the common law of England, a distinction was drawn between the law's treatment of juveniles and adults.⁴ Blackstone deemed infants—those under the age of seven—too young to fully understand their actions, and therefore incapable of forming the intent necessary to be found guilty of a felony.⁵ However, children over the age of fourteen, and those between seven and fourteen who were found to understand the difference between right and wrong, were considered adults and punished as such; they even received the death penalty for capital crimes.⁶ During the eighteenth century, juvenile courts and reform schools were created to separate and protect these children from adult courts and adult prisons based on the legal doctrine of *parens patriae*.⁷ *Parens patriae* "authorizes the state to substitute and enforce its judgment about what it believes to be in the best interest of the persons who presumably are unable

3. Joan Biskupic & Martha T. Moore, *Court Limits Harsh Terms for Youths*, USA TODAY (May 18, 2010), http://www.usatoday.com/news/washington/judicial/2010-05-17-supreme-court-jvenile-sentences_N.htm. In response to the *Graham* opinion, Bryan Stevenson of the Equal Justice Initiative said "'The politics of fear and anger make it very difficult for legislatures to turn around' on juvenile punishments 'I hope that this case will encourage a broader conversation about the nature of sentencing in this country.'" *Id.*

4. See Dialogue on Youth and Justice, *The History of Juvenile Justice*, ABA DIVISION FOR PUBLIC EDUCATION, 4 (2007), available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJfull.authcheckdam.pdf> [hereinafter *History of Juvenile Justice*]. This distinction was made at the point in each individual's development when "one could underst[an]d one's actions." *Id.*

5. *Id.*

6. *Id.*

7. See Sasha Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1308 (2000). The *parens patriae* doctrine forms the rationale for the entire child welfare system, and provides the basis for state laws that protect, rather than punish citizens. See *id.* "This concept generally refers to the role of the state as the custodian of persons who suffer from some form of legal disability." *Id.*

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to take care of themselves.”⁸ These entities focused on the best interests of the child and rehabilitation rather than punishment.⁹

Beginning in 1966, the U.S. Supreme Court considered a number of cases which have defined the due process rights of juveniles and appropriate consequences for offenders.¹⁰ Although juvenile courts emphasize an informal, nonadversarial, and flexible civil approach, these proceedings did not afford juveniles the due process rights guaranteed under the Fifth and Fourteenth Amendments where sentencing included a deprivation of life, liberty, or property.¹¹ In 1966, *Kent v. United States* held that where jurisdiction is waived to a criminal court, the juvenile is entitled to a hearing and a statement of the juvenile court’s reason for waiving jurisdiction.¹² In his opinion, Justice Fortas was concerned that in this situation, “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment

8. See *id.* at 1308. See also *History of Juvenile Justice*, *supra* note 4, at 5. The New York House of Refuge was established to house juvenile offenders in 1825, and the Chicago Reform School was established in 1855. *Id.* The first juvenile court was established in Cook County, Illinois in 1899, and within twenty-five years, most states had established a juvenile court system. *Id.*

9. See *History of Juvenile Justice*, *supra* note 4, at 5. Julian Mack, a judge in one of the first juvenile courts, described the goals of the juvenile court:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Id.

10. See *id.* at 6. See generally *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *In re McKiever*, 403 U.S. 528 (1971).

11. See *History of Juvenile Justice*, *supra* note 4, at 6. Rights under the Fifth and Fourteenth Amendments include the right to equal protection, trial by jury, freedom against self-incrimination, and the deprivation of life, liberty, or property without due process of law. See *History of America’s Juvenile Justice System*, LAWYERSHOP.COM, <http://www.lawyershop.com/practice-areas/criminal-law/juvenile-law/history> (last visited January 27, 2012).

12. See *History of Juvenile Justice*, *supra* note 4, at 6. In *Kent*, lawyers for Morris Kent, a fourteen-year-old juvenile suffering from severe psychopathology, opposed waiver to criminal court, but the juvenile court did not respond to the motions and, without a hearing, waived jurisdiction. See generally *Kent v. United States*, 383 U.S. 541 (1966).

postulated for children.”¹³ A year later, *In re Gault* held that juveniles are additionally entitled to many of the other key elements of due process; including, notice of the charges, a right to legal counsel, the right against self-incrimination, and the right to confront and cross-examine witnesses.¹⁴ However, this opinion was not unanimous, the court was divided on whether these due process guarantees were changing the intended nature and goals of juvenile courts back towards the criminal trials social reformers were trying to avoid in the first place.¹⁵ In 1970, *In re Winship* replaced the juvenile court’s preponderance standard with the criminal court’s beyond a reasonable doubt standard, although the court again was troubled with the shift “away from the original idea of juvenile courts as benevolent and less formal institutions equipped to deal flexibly with the unique needs of juvenile offenders.”¹⁶ However, in 1971, *McKiever v. Pennsylvania* slowed this momentum by denying juveniles the right to jury trials.¹⁷

During this time, Congress was similarly effecting change on the juvenile justice system.¹⁸ The Juvenile Delinquency Prevention and Control Act of 1968 provided federal funds for community programs to discourage juvenile delinquency.¹⁹ This was replaced in 1974 by the Juvenile Justice and Delinquency Prevention Act which focused more narrowly on preventing delinquency, deinstitutionalizing youth in the system, and

13. *History of Juvenile Justice*, *supra* note 4, at 6.

14. *See History of Juvenile Justice*, *supra* note 4, at 7. While under a six-month probation term for being with another minor who stole a woman’s wallet, Gerald Gault, age fifteen, was accused of making prank calls to a neighbor. *Id.* at 6. Police took Gerald into custody without notifying his parents and he received no notice of the specific charges against him until his first hearing. *Id.* Although the complaining neighbor was not present, and there were no other witnesses against him, Gerald was committed to the state’s industrial school until the age of twenty-one, even though an adult convicted of the same crime would have received a maximum penalty of \$50 fine and two months imprisonment. *Id.* *See generally In re Gault*, 387 U.S. 1 (1967).

15. *See History of Juvenile Justice*, *supra* note 4, at 7. Justice Stewart argued that the object of juvenile courts was not the “correction of a condition” but to find the reason for and solution to successfully modifying the child’s behavior. *Id.*

16. *See History of Juvenile Justice*, *supra* note 4, at 7-8. Because the minor faced a sentence of six years in a juvenile training school, the majority analogized this loss of liberty to adult imprisonment, requiring due process protections. *Id.* However, proponents of the juvenile court argued that the sentence was not meant to punish, but to rehabilitate, and that where a child is in need of the court’s guidance, “winning” his or her case may not be in the child’s best interest. *Id.* *See generally In re Winship*, 397 U.S. 358 (1970).

17. *See History of Juvenile Justice*, *supra* note 4, at 8. The Court feared that allowing trial by jury would abolish the last significant distinction between juvenile and adult court, rendering the entire system’s existence of no use. *Id.* *See generally In re McKiever*, 403 U.S. 528 (1971).

18. *See History of America’s Juvenile Justice System*, *supra* note 11.

19. *Id.*

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separating juveniles from adults in detention and correctional facilities.²⁰ However, a sharp rise in juvenile crime rates during the late 1980s and early 1990s triggered fear and “get tough” legislation, shifting the system’s priority from rehabilitation to public safety and victims’ rights.²¹ The 1974 Act was amended to include minimum detention standards and an “escape hatch” allowing juveniles to be tried as adults for weapons violations and violent crimes.²² Other policies created presumptions for detaining youth pending trial, removing the protection of confidential proceedings, and requiring juveniles to register in sex-offender databases.²³

Such proposals focus on the gravity of the act and its immediate impact on the victim and society, rather than on the inner disposition and motivations of the youthful perpetrator. Although intention still plays some role in determining the severity of the crime, considerations of the juvenile’s immature judgment, dysfunctional family life, low cognitive function, poor impulse control and other factors relating directly to the minor’s inner disposition are deemed irrelevant.²⁴

Although no state has abandoned rehabilitation as a goal of its juvenile justice system, critics argue that the juvenile justice system “probably suffers the most glaring gaps between best practice and common practice, between what we know works and what our public systems most often do on our behalf.”²⁵

20. *Id.* Before receiving funds, each state was required to separate juvenile and adult offenders and remove all youth from secure detention and correction facilities. *Id.* The Act also created the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the Runaway Youth Program, and The National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP). *Id.*

21. *Id.* Despite supposed judicial and legislative protections, the shift Justice Stewart warned against in 1967 was coming to fruition. *Id.* It is important to note that the threat of and fear surrounding juvenile violence were grossly exaggerated. *Id.* In a 1996 poll, 60% of respondents believed that juveniles committed “most” crime; when in fact, 80% of arrests were of adult offenders. See Lise A. Young, *Suffer the Children*, AMERICA MAGAZINE (Oct. 22, 2001), available at http://www.americamagazine.org/content/article.cfm?article_id=1164. According to the U.S. Census Bureau, youth crime was at its lowest rate in twenty-five years, and youth homicides were down 68% since their peak in 1993. *Id.*

22. See *History of America’s Juvenile Justice System*, *supra* note 11.

23. See Kristin Henning, *What’s Wrong with Victim’s Rights in Juvenile Court: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1113 (2009).

24. Young, *supra* note 21.

25. *Reform the Nation’s Juvenile Justice System*, *supra* note 1. See also Henning, *supra* note 23, at 1119.

B. *Gearing up for Graham v. Florida*

In 1989, the U.S. Supreme Court upheld the death sentence for two juvenile murderers in *Stanford v. Kentucky*.²⁶ However, sixteen years later in 2005, the Court in *Roper v. Simmons* abolished the death penalty for juvenile offenders, endorsing scientific research²⁷ that highlighted differences between the juvenile and adult brain and set forth the Court's belief that "a greater possibility exists that a minor's character deficiencies will be reformed."²⁸ Recently, in 2010, the Court reaffirmed this belief and expanded its application outside of the death penalty context in *Graham v. Florida*, barring life-without-parole sentencing in nonhomicide cases for juveniles.²⁹ Although these protections will guard a small percentage of the most serious juvenile offenders from a declaration that they are incapable of reform at the outset, it is important to apply this same research and rationale to all juveniles in implementing preventative programs, conducting proceedings, and determining appropriate sentences.

C. *Graham v. Florida: The Facts and Procedural History*

In July 2003, at the age of sixteen, Terrance Jamar Graham was arrested for the attempted robbery of a barbecue restaurant.³⁰ Terrance and three other boys drove to the restaurant where Graham and one of his companions entered through an open back door.³¹ Graham's accomplice struck the restaurant owner twice with a metal bar, causing injuries that would later

26. See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989). See also Mark Hansen, *What's the Matter with Kids Today*, A.B.A. J. (July 1, 2010), available at http://www.abajournal.com/magazine/article/whats_the_matter_with_kids_today/.

27. The author of *What's the Matter with Kids Today* provides three examples of the types of experiments and findings the court relied on in *Graham*. Hansen, *supra* note 26. Test subjects, aged ten to thirty, were asked first to solve a puzzle using as few moves as possible, a measure of impulse control. *Id.* Adolescents moved pieces immediately, which resulted in more moves later. *Id.* Adults took more time to consider their first move and could usually solve the puzzle on their first try. *Id.* Second, they were asked to decide between a small, immediate cash reward and a larger, long term reward to measure decision-making abilities. *Id.* Younger subjects settled for a smaller sum in exchange for waiting for the larger as older subjects did. *Id.* Finally, a computerized car simulator was used to test effects of peer pressure. *Id.* Younger subjects took greater risks in the company of friends compared to when driving alone, but older subjects kept consistent driving patterns regardless. *Id.*

28. Henning, *supra* note 23, at 1121.

29. See Hansen, *supra* note 26.

30. *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010).

31. *Id.* One of the boys worked at the restaurant and had left the back door unlocked just before closing time. *Id.*

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require stitches.³² The boys ran as soon as the owner started yelling at them, without taking anything from the restaurant.³³ Graham's prosecutor elected to charge him as an adult with first degree felony for armed robbery with assault and second degree felony for attempted armed robbery.³⁴ These charges authorize a sentence of life imprisonment without the possibility of parole.³⁵ The trial judge withheld adjudication and sentenced Graham to concurrent three year probation terms after reading a letter Graham wrote to the court stating that he had learned his lesson and asking for a second chance.³⁶ Although he was required to serve one year of his probation sentence in jail, he was credited for time served awaiting trial and was released in June 2004.³⁷

Six months later, on December 2, 2004, Graham was again arrested.³⁸ This time, the State alleged that Graham and two accomplices knocked on the door of Carlos Rodriguez's house, forcibly entered the home, and held the owner and his friend at gunpoint while they searched the home for money.³⁹ The State further alleged that Graham and his two friends later attempted a second robbery, during which one of the friends was shot.⁴⁰ Graham—who had borrowed his father's car—dropped the two men off at the hospital; but, as he was driving away, a police officer signaled for him to pull over.⁴¹ Graham fled at high speeds and crashed into a telephone pole.⁴² He then attempted to flee on foot, but was soon caught by police who subsequently found three handguns inside the car.⁴³

32. *Id.*

33. *Id.*

34. *Id.* at 2018. Under Florida law, it is within the prosecutor's discretion whether to charge sixteen- and seventeen-year-olds as adults or juveniles for most felony crimes under then-current section 985.227(1)(b) of the Florida Statutes. *Id.*

35. *Id.* Specifically, the armed burglary with assault or battery charge carried a maximum penalty of life imprisonment without the possibility of parole and the attempted armed robbery charge carried a maximum penalty of fifteen years in prison. *Id.*

36. *Id.* Terrance stated, "[T]his is my first and last time getting in trouble, . . . I've decided to turn my life around. . . . I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 2018-19. Both of Graham's alleged accomplices were twenty-year-old men. *Id.* at 2018.

40. *Id.* at 2019.

41. *Id.*

42. *Id.*

43. *Id.*

Graham denied any involvement in these crimes and maintained that he did not come into contact with his two friends until after the shooting.⁴⁴ He did admit to his previous crimes when detectives asked if he had been involved in any other robberies and also indicated that he understood he had violated his probation conditions by fleeing from the police sergeant at the hospital.⁴⁵ After his probation officer filed an affidavit alleging his probation violation, the court found that Graham had violated his probation by “committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.”⁴⁶ Graham’s attorney requested a sentence of five years, the Florida Department of Corrections recommended four years, and the State asked for thirty years on the armed burglary charge and fifteen on the attempted armed robbery count.⁴⁷ The judge sentenced Graham to the maximum authorized for adults on each charge: life imprisonment for the armed burglary and fifteen years for the attempted armed robbery.⁴⁸ Florida abolished its parole system, therefore Graham faced the grim reality that at the age of nineteen, he would spend the entirety of his life behind bars.⁴⁹ The judge rationalized, “[g]iven your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.”⁵⁰

Graham challenged his sentence under the Eighth Amendment, but the motion was considered denied after the court failed to rule on it within sixty days.⁵¹ The First District Court of Appeal affirmed Graham’s sentence as they did not believe his sentence was grossly disproportionate to his crime.⁵²

44. *Id.* Graham maintained his innocence during both the initial investigation by detectives, and later during trial. *Id.*

45. *Id.*

46. *Id.* It is important to note that Graham spent about six months in custody awaiting adjudication for the July 2003 allegations, and an additional twelve months for the December 2004 allegations. *Id.* at 2018-19.

47. *Id.* at 2019.

48. *Id.* at 2020. This was not the same judge that had withheld adjudication in Graham’s first time before the court. *Id.* at 2019.

49. *Id.* at 2020.

50. *Id.*

51. *Id.* Note that this denial was not for substantive reasons, but rather that the court failed to rule on the motion in the sixty days allowed. *Id.*

52. *Id.* The court took into consideration the seriousness of Graham’s offenses and their violent nature, as well as the fact that Graham was seventeen at the time of the crime and nineteen at the time of sentencing. *Id.*

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Further, the court concluded that Graham was incapable of rehabilitation,⁵³ that although he “was given an unheard of probationary sentence for a felony, . . . wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him,” he “rejected his second chance and chose to continue committing crimes at an escalating pace.”⁵⁴ The Florida Supreme Court denied review, but the U.S. Supreme Court granted certiorari.⁵⁵

D. *Graham Reaches the U.S. Supreme Court*

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵⁶ Although barbaric or torturous punishment is clearly forbidden by the cruel and unusual clause, the Court more often contemplates whether the sentence is extreme or grossly disproportionate to the crime, given the ever “evolving standards of decency.”⁵⁷ For a term-of-years sentence, the Court compares the gravity of the offense to the severity of the sentence.⁵⁸ Where the Court deems the sentence to be grossly disproportionate, the Court will then consider how the sentence at issue compares to other sentences granted in the same jurisdiction as well as sentences for the same crime in other jurisdictions.⁵⁹ The Court also applies a proportionality standard to certain categorical restrictions attached to the death penalty.⁶⁰ In *Graham*, the Court considered the “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” controlling

53. *Id.* However, researchers have found that juveniles are “particularly amenable” to change due to their “considerable plasticity in response to environmental change,” and the “significant and rapid change in their intellectual capabilities.” Henning, *supra* note 23, at 1122. “[M]ost youth will mature out of criminal behavior between the teenage years and young adulthood.” *Id.* In 2005, the Court in *Roper* noted that it would be inappropriate to treat a juvenile as if he were of irretrievably deprived character. *See generally* *Roper v. Simmons*, 543 U.S. 551 (2005).

54. *Graham v. Florida*, 130 S. Ct. 2011, 2020 (2010) (quoting *Graham v. State*, 982 So. 2d 43, 52 (Fla. Dist. Ct. App. 2008)).

55. *Graham*, 130 S. Ct. at 2020.

56. U.S. CONST. amend. VIII (emphasis added). *See also Graham*, 130 S. Ct. at 2021.

57. *Graham*, 130 S. Ct. at 2021.

58. *Id.*

59. *Id.* at 2022. This standard does not require strict proportionality between the crime and the punishment, but rather prohibits extreme sentences that are grossly disproportionate. *Id.* at 2021.

60. *Id.* at 2020. A categorical restriction would include prohibiting certain punishments from certain groups, for example, those under the age of eighteen or those whose intellectual functioning is in a low range. *Id.* at 2022.

precedent, and the Court’s “understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose” to determine whether the punishment violates the Constitution.⁶¹ Graham presented a novel challenge to the Court—a categorical challenge to a term-of-years sentence—and called into question not only his specific sentence, but a sentencing practice applied to a range of different crimes.⁶² Applying the *Roper* analysis, the Court looked to four factors to determine whether the practice was constitutional: (1) national consensus expressed in both legislature and application against the sentencing practice; (2) the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose; (3) whether there is an effective alternative to imposing a categorical rule; and (4) global consensus against the sentencing practice.⁶³ The Court concluded that the

Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.⁶⁴

III. ANALYSIS

In regard to the focus of this article, the most pertinent part of the U.S. Supreme Court *Graham* opinion is the analysis applied to the Eighth Amendment issue. Here, the Court cites to the research first adopted in *Roper* and reinforced by more than a dozen amicus briefs presented to the Court by legal, religious, correctional, human rights, and child advocacy organizations.⁶⁵ Justice Kennedy concludes that juveniles like Graham have a “twice diminished moral culpability.”⁶⁶ First, research in psychology and

61. *Id.* at 2022.

62. *Id.* at 2022-23.

63. *Id.* at 2023-34.

64. *Id.* at 2034. The judgment of the Florida First District Court of Appeal was reversed, and the case was remanded for further proceedings not inconsistent with the opinion. *Id.*

65. See Hansen, *supra* note 26. The American Bar Association, Prison Fellowship Ministries, Amnesty International, the Juvenile Law Center, educators, and members of the juvenile corrections community filed amicus briefs in support of Graham. *Id.* Notably, former U.S. Senator Alan Simpson (Wyoming)—who as a youth had set fire to an abandoned building, fired a rifle at a road grader, and punched a police officer following a bar fight—along with other former juvenile offenders, argued that it is “fundamentally inhumane” to give up on young offenders, and that these youth are able to become productive members of society when given the chance. *Id.* A large number of amicus briefs were filed on behalf of the state, taking the stance that it was necessary for the state to retain the authority of life-without-parole sentences for especially dangerous juvenile offenders, only one of which disputed the scientific research set forth in *Roper*. *Id.*

66. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

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brain science has established fundamental differences between juvenile and adult minds.⁶⁷ Most convincing to the Court was evidence that juveniles have a “‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”⁶⁸ The part of the brain responsible for behavior control, or psychosocial maturity, does not “catch up” to intellectual maturity until around age twenty-eight.⁶⁹ Additionally, juveniles are more capable of change than adults, and “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁷⁰ Second, the sentencing practice applies only to nonhomicide crimes and therefore protects only those youth who did not kill or intend to kill. “It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁷¹

This ruling protects a small number of juveniles who have already committed serious crimes. Taking this rationale into consideration, those who have undertaken the responsibility of “parenting” these vulnerable youths owe it to the next generation to intervene earlier in order to prevent juveniles from entering the system and to rehabilitate them before they arrive at the point of facing a life sentence, or worse, the death penalty. Much research has also focused on common characteristics of these juvenile offenders. “They are frequently from dysfunctional families with issues of domestic violence, substance abuse, physical and/or sexual abuse; they are often truants; and they tend to resort to violence as a means of settling conflict.”⁷² Delinquent behavior occurs most often in the context of economic depravity, chaotic home situations, and among children with poor

67. *Id.* at 2026 (“As petitioner’s amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).

68. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).

69. See Hansen, *supra* note 26.

70. *Graham*, 130 S. Ct. at 2026-27.

71. *Id.* at 2027. *Roper* barred the application of the death penalty to juveniles, but the Court here analogizes the death penalty to a life-without-parole sentence, stating such a judgment “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . , he will remain in prison for the rest of his days.” *Id.*

72. Young, *supra* note 21.

medical histories and learning disabilities.⁷³ Psychologist Kathleen Heide has identified fifteen variables believed to contribute to juvenile delinquency. These variables are grouped into five main categories, including situational factors (child abuse and neglect or the absence of positive parental role models), societal influences (lack of leadership or heroes, and exposure to violence within the community), resource availability (lack of food and other necessities, as well as access to illegal substances and guns), personality characteristics (low self-esteem; lack of problem-solving strategies; and communication skills, and an environment of prejudice or hatred), and the cumulative or interactive effects of the above categories.⁷⁴ In short, these children are often victims of circumstance, poverty, and crime before they enter the juvenile justice system. Graham's sentencing judge notes that Graham had "quite a family structure. [He] had a lot of people who wanted to try and help [him] get [his] life turned around including the court system, and [he] had a judge who took the step to try and give [him] direction through his probation order"⁷⁵ What he does not mention, however, was that Graham was born to drug addicted parents, that he was diagnosed with attention deficit hyperactivity disorder in elementary

73. See Dorothy Ornow Lewis, *Diagnostic Evaluation of the Delinquent Child: Psychiatric, Psychological, Neurological, and Educational Components*, in *CHILD PSYCHIATRY AND THE LAW* 139, 139, 143, 150 (Diane H. Schetky & Elissa Benedek eds., 1980). It is important to note, some argue such behavior is as present in middle class communities, but is handled differently by parents and law enforcement. *Id.*

74. See Coupet, *supra* note 7, at 1333-37.

75. Graham v. Florida, 130 S. Ct. 2011, 2019 (2010). The judge continued,

And I don't know why it is that you threw your life away. . . .

But you did, and that is what is so sad

. . . .

. . . The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . .

. . . .

. . . I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.

Id. at 2019-20.

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school, and that he began drinking alcohol at age nine and smoking marijuana at age thirteen.⁷⁶

Although the U.S. Supreme Court has only recently adopted this research into its understanding and application of the Eighth Amendment, those in the juvenile justice field have been working to identify intervention strategies and program models to reduce delinquency and recidivism over the past few decades.⁷⁷ However, only about 5% of eligible youths take part in these programs, making such research “a waste of human capital and money.”⁷⁸

Before discussing what research has found to be the most effective programs based on alternative dispute resolution strategies, it is helpful to address the effectiveness of “get tough on crime” policies. First, transfer to the adult justice system actually increases criminality, causing both a higher recidivism rate and more serious subsequent crimes than the juvenile jurisdiction.⁷⁹ Second, the threat of serving adult time has not been effective in deterring youth crime.⁸⁰ Third, confining youth with adults is dangerous and counterproductive, as is evidenced by the fact that the suicide rates of minors in adult institutions is eight times that of juvenile institutions, sexual assault is five times that of juvenile institutions, and physical attack rates are double that of juvenile institutions.⁸¹ Finally, transfer to adult court is costly—\$100 million per year for added operating costs due to transfer provisions.⁸²

A study of the juvenile court system in 1967 reported that the heavy volume of cases allowed courts to spend approximately *one minute* on each case, which obviously prevented courts from taking the time necessary to

76. *Id.* at 2018.

77. See Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 JUV. JUST., no. 2, Fall 2008 at 185, available at http://www.futureofchildren.org/futureofchildren/publications/docs/18_02_09.pdf.

78. *Id.* at 185. States often do not implement best practices due to the fact that many policymakers are unaware of such research, or choose politics over evidence to win over constituents who prefer tougher, albeit less effective crime reduction strategies. *Id.*

79. See Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works—and What Doesn't*, AM. YOUTH POL'Y F., 3 (June 14, 2000), available at <http://www.aypf.org/publications/mendel/index.html>.

80. See *id.* at 41.

81. See *id.* at 41-42.

82. *Id.* at 43.

assess each child and provide services.⁸³ Since that time, “the volume of cases has increased dramatically without a corresponding increase in resources” which has created a “triage” system focusing only on the most serious offenders.⁸⁴ Many less serious cases are dismissed or treated with a probation sentence, which are often managed by a probation officer with a caseload too heavy to allow for adequate supervision or intervention where necessary.⁸⁵ One study found that up to 73% of referrals end with no formal services or sanctions.⁸⁶ These youths, receiving the message that they will not be held accountable for their actions or receive services that will enable them to interact with society in a more positive way, often accumulate a long record of crimes.⁸⁷ At best, the child’s criminal record limits future educational and vocational opportunities; at worst, the severity of the child’s crimes escalates until a court is forced to take notice.⁸⁸ Courts were originally authorized to intervene in juvenile cases under the *parens patriae* doctrine, which pledged to act in the best interests of the child.⁸⁹ After looking at the current state of the juvenile justice system and taking into consideration what science has taught us over the past few decades, it is apparent we have a social, moral, and legal responsibility under the Eighth Amendment to intervene in order to prevent and respond to juvenile offenses in more constructive and effective ways.

83. See Edmund F. McGarrell, *Restorative Justice Conferences as an Early Response to Young Offenders*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), Aug. 2001, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/187769.pdf>.

84. *Id.* at 2. Between 2000 and 2009, total federal juvenile justice funding decreased by 60%, and the Office Of Juvenile Justice and Delinquency Prevention’s budget decreased 90%, from \$6.8 million to only \$700,000. See *Reform the Nation’s Juvenile Justice System*, *supra* note 1, at 2.

85. See McGarrell, *supra* note 83, at 2.

86. See Young, *supra* note 21.

87. See McGarrell, *supra* note 83, at 2.

88. “[A]pproximately 60 percent of youth ages 10-12 who are referred to juvenile court subsequently return to court. For youth referred to juvenile court a second time, the odds of returning to court again increase to more than 80 percent.” McGarrell, *supra* note 83. “Because these youth typically have not committed a particularly serious or violent offense, and because children this young usually have not accumulated a long record, they do not generally receive a great deal of attention from juvenile justice officials.” *Id.*

89. See Coupet, *supra* note 7, at 1308-14.

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I. IMPACT

A. *The Role of Alternative Dispute Resolution in Reducing Juvenile Crime and Creating a Generation of Peacemakers: A Four-Part Approach to Reducing Juvenile Delinquency and Recidivism*

1. Prevention

First, a proactive approach is necessary to identify and provide services to at-risk youth before they are caught up in the delinquency system. “It is well documented that it is more effective and less costly to prevent youths from traveling down the path to delinquency than to attempt remediation after the fact.”⁹⁰ While there is no single approach that will prevent crime across all populations, reducing risk factors and increasing protective factors have been found effective in preventing the early onset of problematic behavior.⁹¹ Abraham Maslow’s Hierarchy of Needs Theory provides that until physiological and safety needs⁹² are met, children are not able to explore or develop their need for social relationships, self-esteem, or self-actualization.⁹³

In 2008, the U.S. Department of Health and Human Services Administration on Children, Youth and Families reported that 10.3 out of every 1,000 children under the age of eighteen were found to be victims of neglect or abuse.⁹⁴ Because their physiological and safety needs are not being met, these victims lag even farther behind their peers in psychosocial

90. SNOHOMISH CNTY., JUVENILE DELINQUENCY: PREVENTION/RECIDIVISM REDUCTION 1 (2004), available at http://www.co.snohomish.wa.us/documents/Departments/Human_Services/Community/ChildrenAffairs/CAP_OCA_JuvenileDelinquencyReport.pdf [hereinafter SNOHOMISH REPORT]. See also Greenwood, *supra* note 77, at 185 (“The most successful programs are those that prevent youth from engaging in delinquent behaviors in the first place.”).

91. See SNOHOMISH REPORT, *supra* note 90, at 1.

92. *Maslow’s Hierarchy of Needs*, ABRAHAM-MASLOW.COM, http://www.abraham-maslow.com/m_motivation/Hierarchy_of_Needs.asp (last visited Jan. 31, 2012). Physiological needs include air, water, food, and sleep. *Id.* Safety needs include living in a safe environment and, for children, having someone to take care of them. *Id.*

93. See *id.*

94. *Child Maltreatment 2008*, ADMIN. FOR CHILD. & FAMILIES, ADMIN. ON CHILD., YOUTH & FAMILIES, CHILD. BUREAU (U.S. Dep’t of Health & Human Servs., Wash., D.C.), 2010, at 23, 25, 38, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>.

development, the factor that the U.S. Supreme Court used to determine a lessened culpability for juvenile offenders.⁹⁵ Prevention programs—poverty abatement programs, feeding programs, housing programs, home visits for young first-time mothers, and high quality preschool programs—have all been effective in preventing child abuse, neglect, and antisocial behavior, as well as drug use and arrests among both parents and children.⁹⁶

2. Conflict Resolution Education

Second, conflict resolution education must be implemented to enable youths to independently and constructively resolve conflict and break the pattern of violence. “Delinquency and violence are symptoms of a juvenile’s inability to handle conflict constructively.”⁹⁷ Deterioration in family structure contributes to increased child neglect and abuse.⁹⁸ Busy parents assume these skills will be taught in school. But curriculum—which has, over time, pared down the breadth of skills taught to children to the three R’s⁹⁹ necessary for success on standardized tests—has left a void in children’s social development. Video games, television shows, and movies demonstrate that violence is an acceptable conflict resolution strategy.¹⁰⁰ Although adults are often out of touch with the everyday stressors children confront, minor affronts—teasing, taking a child’s belongings, or peer pressure—have been found to provoke the majority of violent incidents among middle and high school students.¹⁰¹ When asked the reason for their aggressive behavior, many juveniles simply retort “I didn’t think,” while 41% of juveniles surveyed reported that they “could not control anger and

95. See Maslow’s *Hierarchy of Needs*, *supra* note 92.

96. See Greenwood, *supra* note 77, at 196-99.

97. Donni LeBoeuf & Robin V. Delany-Shabazz, *Conflict Resolution, Delinquency, and Violence*, MEDIATE.COM, <http://www.mediate.com/articles/shabazz.cfm> (last visited Jan. 31, 2012).

98. See Andrea J. Sedlak & Diane D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY (1996), <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm> (“Children of single parents were at higher risk of physical abuse and of all types of neglect and were overrepresented among seriously injured, moderately injured, and endangered children.”).

99. The catch phrase “three R’s” refers to the foundational skills of reading, writing, and arithmetic.

100. See Press Release, American Psychological Association, *Violent Video Games Can Increase Aggression* (Apr. 23, 2000), <http://www.apa.org/news/press/releases/2000/04/video-games.aspx>.

101. See Donna K. Crawford & Richard J. Bodine, *Conflict Resolution Education: Preparing Youth for the Future*, 8 JUV. JUST. J. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), no. 1, June 2001, available at https://www.ncjrs.gov/html/ojjdp/jjjjournal_2001_6/jj3.html. Most incidents occur at home or school, among youth who know each other. *Id.*

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would fight” in conflict situations.¹⁰² The surge of school shootings over the past decade shows a pattern: “Like other shy people, these cynically shy people reach out to others, wanting friendship, but lack social skills They often get rejected by their peers, feel hurt, and eventually become cynical and want to retaliate against those who reject them.”¹⁰³

Currently, most schools settle peer conflict or teacher–student conflict with a type of arbitration—a school official intervenes and determines an appropriate solution, and all parties are required to comply.¹⁰⁴ Children observe their parents assuming a similar role at home when sibling conflicts or parent–child conflicts arise. Not only is this process coercive, which many children reject on principle, but more importantly, it removes the opportunity for the child to engage in and practice conflict resolution skills.¹⁰⁵ In contrast, when juveniles take more responsibility for their own behavior and for resolving disputes, teachers are free to focus less on behavior management and more on substantive education, while the juveniles move farther along on the hierarchy of needs into self-actualization.¹⁰⁶ Conflict resolution education provides the skills necessary for youths to resolve disputes independently and peacefully, a skill that they can take back to their families, communities, and future relationships, as well as educational and employment settings.¹⁰⁷ There are three general approaches to conflict resolution education: process curriculum, peer mediation, and peaceable classroom/peaceable school.¹⁰⁸

102. *Id.* See also Amanda Cuda, *Study: Juvenile Mediation Cuts Repeat Offenses*, NEWSTIMES.COM (Jan. 24, 2010, 11:32 PM), <http://www.newstimes.com/default/article/Study-Juvenile-mediation-cuts-repeat-offenses-333715.php>.

103. Kathleen Doheny, *What Triggers School Shooters?*, WEBMD (Aug. 20, 2007), <http://www.webmd.com/mental-health/news/20070820/what-triggers-school-shooters?print=true#>.

104. See Crawford & Bodine, *supra* note 101.

105. See *id.* “Responsible behavior—the hallmark of an emotionally intelligent individual—depends above all else on the absence of coercion. Coercive management deprives the individual of innate motivation, self-esteem, and dignity, while cultivating fear and defensiveness.” *Id.*

106. See *Maslow's Hierarchy of Needs*, *supra* note 92. After a child’s physiological and safety needs are met, they are free to develop their social needs (friendship, belonging, and giving and receiving love), esteem needs (recognition, social status, accomplishment, and self-respect), and finally, self-actualization (truth, justice, wisdom, and meaning). *Id.*

107. See Crawford & Bodine, *supra* note 101.

108. Crawford & Bodine, *supra* note 101; LeBoeuf & Delany-Shabazz, *supra* note 97; U.S. DEP’T OF EDUC., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *CREATING SAFE AND DRUG-FREE SCHOOLS: AN ACTION GUIDE* 73 (Sept. 1996), available at <http://www.ncjrs.gov/pdffiles/safescho.pdf> [hereinafter ACTION GUIDE].

a. *Process Curriculum*

The process curriculum approach requires teachers to provide direct instruction on how to use principled negotiation to achieve goals and resolve disputes.¹⁰⁹ A North Carolina middle school of 700 students found that in-school suspensions decreased 42% and out-of-school suspensions decreased 97% within a single school year after implementing the Fighting Fair Curriculum.¹¹⁰

The skills taught and practiced in conflict resolution education are the same skills law students and lawyers learn from books like *Getting to Yes* and *Getting Past No*.¹¹¹ Children learn to separate people from the problem by sharing feelings and emotions, developing better communication skills, and exploring perceptions.¹¹² Focusing on interests instead of positions helps children identify compatible and conflicting interests, which allows a wider range of more effective solutions than merely focusing on positions.¹¹³ When students learn how to focus on interests, they can then work together to invent options for mutual gain.¹¹⁴ Although these proficiencies seem like lofty goals, that professional adults still struggle with, even very young children are able to grasp and apply the principles when they are presented in a developmentally appropriate context—through lesson plans and curriculum written by child development and education experts readily available to teachers and schools.¹¹⁵ “School based violence prevention programs must begin in early education to allow young students to

109. See ACTION GUIDE, *supra* note 108, at 72.

110. *Id.* at 74. The Fighting Fair Curriculum is based around a set of rules which “provide a framework for appropriate behavior and the associated skills, such as identifying and focusing on the problem; attacking the problem, not the person; listening with an open mind; treating a person’s feelings with respect; and taking responsibility for one’s actions.” Crawford & Bodine, *supra* note 101. Teachers model, teach, coach, encourage, and finally delegate as students master these skills. *Id.*

111. See Crawford & Bodine, *supra* note 101. See generally ROGER FISHER, WILLIAM L. URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1992); ROGER FISHER & WILLIAM L. URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991).

112. Crawford & Bodine, *supra* note 101.

113. *Id.*

114. *Id.*

115. Curriculum and lesson plans are widely available on the internet, including The Program for Young Negotiators based on the Harvard Negotiation Project, and the Peace Foundation’s Fighting Fair Curriculum. As a former teacher, I have personally witnessed the power of the Tribes Learning Community curriculum to transform a kindergarten classroom into a better disciplined, more caring environment, and have seen children as young as four or five talk through conflict instead of tattling or retaliating. See TRIBES LEARNING COMMUNITY, <http://tribes.com/> (last visited Jan. 31, 2012).

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internalize a pattern of peacemaking behaviors prior to becoming adolescents.”¹¹⁶

b. Peer Mediation

The peer mediation approach provides an effective transition for students accustomed to the typical arbitration method used in most homes and schools. In peer mediation, teachers or students refer disputes to specially trained peer mediators.¹¹⁷ Student mediators are trained to listen to both sides of an argument, offer unbiased impressions, and find workable solutions to the parties’ problems.¹¹⁸ The mediation process provides a structured way to resolve disagreements before either party resorts to violence, ideally without either party feeling like he has to give in on his position.¹¹⁹ A Las Vegas school system has implemented a school-based mediation program for 2,500 students at one middle school and three elementary schools.¹²⁰ This program has an 86% success rate in student-mediated conflicts, fewer conflicts and fights on school grounds, and increased mediation skills and self-esteem among students.¹²¹ Similarly, an Albuquerque elementary school reported a 90% decrease in playground fights after implementing the New Mexico Center for Dispute Resolution’s Mediation in the Schools Program.¹²²

c. Peaceable Classroom/Peaceable School

The peaceable classroom and peaceable school approaches incorporate conflict resolution into the daily management of the classroom, or better yet,

116. Crawford & Bodine, *supra* note 101.

117. See LeBoeuf & Delany-Shabazz, *supra* note 97. Guidance counselors, community mediators, or other school officials process, recruit, and train students interested in being teen mediators. *Id.*

118. See National Crime Prevention Council, *Want to Resolve a Dispute? Try Mediation*, YOUTH IN ACTION BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), Mar. 2000, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/178999.pdf>.

119. See *id.* at 1.

120. LeBoeuf & Delany-Shabazz, *supra* note 97.

121. *Id.*

122. ACTION GUIDE, *supra* note 108, at 74. The article further reports that other students within the Albuquerque school district experienced such success with peer mediation that peer mediators “found themselves out of a job.” *Id.*

the entire institution.¹²³ The peaceable school approach integrates cooperative learning, diversity appreciation, and effective communication and involves every member of the school community—students, teachers, administrators, school support staff, and parents.¹²⁴ The peaceable school approach, which incorporates all three other approaches, is most likely to affect long-term change.¹²⁵ The peaceable school approach, through the Resolving Conflict Creatively Program, was instituted in four multiethnic schools throughout New York City.¹²⁶ This resulted in physical violence decreasing by 71%, verbal insults and name calling decreasing by 66%, and a “greater acceptance of differences, increased awareness and articulation of feelings, and a spontaneous use of conflict resolution skills throughout the day in a variety of academic and nonacademic settings.”¹²⁷

3. Targeted Intervention for First Time Offenders

Third, targeted intervention for first time offenders should be utilized to immediately show the child that crime is unacceptable and results in consequences. Brain research experts analogize the teenage brain to a car with a powerful gas pedal but weak brakes.¹²⁸ As the Court noted in *Roper* and *Graham*, psychosocial abilities such as impulse control, judgment, forward thinking, and resistance to peer pressure are much less developed than a juvenile’s cognitive abilities.¹²⁹ Many juvenile crimes are the result of this immaturity gap, which leaves many offenders, and their victims, with no logical explanation for why they acted as they did—a “disconnect which makes wrongdoing easier.”¹³⁰ Targeting first time offenders by promptly addressing the causes and consequences of their behavior, and providing services or support where necessary to prevent recidivism and encouraging positive reintegration into the community, has been found to cut repeat offenses in half and incarceration rates by two-thirds as compared to a

123. See LeBoeuf & Delany-Shabazz, *supra* note 97.

124. See ACTION GUIDE, *supra* note 108, at 75.

125. See Crawford & Bodine, *supra* note 101.

126. ACTION GUIDE, *supra* note 108, at 75.

127. *Id.*

128. See Hansen, *supra* note 26.

129. See *id.* On the maturity index graph provided in this article, intellectual ability peaks at around age sixteen, then dips and begins to rise again at about age twenty. *Id.* Conversely, psychosocial maturity dips from age ten to fourteen, then steadily increases until about age thirty. *Id.*

130. Cuda, *supra* note 102.

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control group.¹³¹ Although the judge presiding over Graham's first trial probably thought he was doing Graham a favor by releasing him on probation, an important learning opportunity was missed. Additionally, like many other offenders, Graham probably did not understand the natural consequences of his actions—the impact on his victim, the victim's family, or community—and therefore saw no need for change.

4. Alternative Dispute Resolution Techniques Effective in Promoting Restorative Justice for All Parties

Finally, innovative alternative dispute resolution techniques such as parent–teen mediation, victim–offender mediation, and teen court should be integrated into the juvenile justice system to promote restorative justice. “[P]eople are generally deterred from committing crime by two informal forms of social control: fear of social disapproval and conscience.”¹³² These three techniques take advantage of and address this fact. Further, juveniles respond particularly well to mediation when it is a voluntary process; because, many teens feel empowered by having a choice when they are otherwise accustomed to having no input in developing home or school rules or punishment.¹³³ Similarly, juveniles also appreciate the involvement of a neutral party and the opportunity to be heard, in comparison to the authoritarian context present in most homes and schools.¹³⁴

a. Parent–Teen Mediation

Parent–teen mediations have been found to be effective in addressing less serious status offenses¹³⁵—such as truancy or curfew violations—before the child engages in more serious criminal behavior, as is often the

131. See Young, *supra* note 21. Experts believe that the most effective interventions take place shortly after the offense takes place, while the memory is still fresh for the juvenile. See Peggy L. Chown & John H. Parham, *Can We Talk? Mediation in Juvenile Criminal Cases*, FBI L. ENFORCEMENT BULL., Nov. 1995, available at <http://www.lectlaw.com/files/cjs08.htm>.

132. McGarrell, *supra* note 83, at 2. He further argues that punishment or reparation are more effective when imposed by family members or friends compared to a legal institution. *Id.*

133. See Suzanne VM Petryshyn, *Parent Teen Mediation—A Family Systems Perspective*, MEDIATE.COM (Dec. 2004), http://www.mediate.com/articles/petryshyn_S1.cfm#.

134. See *id.*

135. A status offense is a “minor’s violation of the juvenile code by doing some act that would not be considered illegal if an adult did it, but that indicates that the minor is beyond parental control.” BLACK’S LAW DICTIONARY 1188 (9th ed. 2009).

pattern.¹³⁶ This type of mediation is especially helpful in parent–child conflicts because neither party has to feel like they are “giving in,” and a neutral party can facilitate communication and model problem-solving strategies, which is likely to generate long-term solutions.¹³⁷ In addition, as many of the factors that lead to juvenile delinquency relate to the child’s home environment, mediators can identify and address some of these issues in the context of the mediation instead of just addressing the juvenile’s behavior, which is the symptom, not the source, of the problem.¹³⁸

b. Victim–Offender Mediation

Victim–offender mediation forces young offenders to address the natural consequences of their offenses. Many juveniles have established the mindset that the system is against them—they are victims in their home lives and bring this mentality into society generally.¹³⁹ Mediation realigns the parties and proceeds from the more abstract “offender v. state” to a more concrete “offender v. victim,” in effect humanizing the crime.¹⁴⁰ Implementing victim–offender mediation is especially effective for juveniles due to the fact that they do not contemplate or understand consequences as maturely as adults, and as the Court noted in *Graham*, they are more capable of change.¹⁴¹ In many delinquency cases, there is no need for treatment; instead, identification of the harm caused and a call for the development of skills and competencies necessary for day to day functioning is the preferable option.¹⁴² Sitting down face to face with the victim allows the juvenile to more completely understand how the offense affected others, giving them an opportunity to make amends, which is a much more constructive means of resolving the conflict.¹⁴³ The offender can now envision himself or herself in a positive role in the community, which combats the lack of foresight present at this stage of brain development.¹⁴⁴

136. *See id.*

137. *See id.*

138. *See id.*

139. *See* Cuda, *supra* note 102.

140. *See* Deborah Kirby Forgays & Lisa DeMilio, *Is Teen Court Effective for Repeat Offenders? A Test of the Restorative Justice Approach*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 107, 109 (2005).

141. *See* *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

142. *See* Jeremy Olson, *Making a Case for Mediation of Juvenile Delinquency*, MEDIATE.COM (Feb. 2009), <http://www.mediate.com/articles/olsonJ1.cfm>.

143. *See* Chown & Parham, *supra* note 131.

144. *See* Forgays & DeMilio, *supra* note 140, at 108.

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c. Teen Court

Teen courts have been created as a voluntary alternative to the traditional juvenile justice system, usually reserved for young, first-time offenders charged with less serious crimes such as shoplifting, vandalism, or disorderly conduct.¹⁴⁵ Teen courts are operated and administered by a variety of different agencies, including the juvenile court or juvenile probation department, community nonprofit organizations, and school districts.¹⁴⁶ Although most programs utilize an adult judge with youth filling the roles of attorneys; jurors; clerks; and bailiffs, others use a youth judge or a panel of youth judges in place of a jury.¹⁴⁷ In the peer jury model, the offender's case is presented directly to a jury without the use of attorneys, and the jury may directly question the defendant.¹⁴⁸ This program takes advantage of the juvenile's desire for peer approval, which is a much more powerful motivator than adult authority.¹⁴⁹ Other potential benefits include increased accountability for minor offenses—which would likely be dismissed in the traditional court system—, a shorter timeline between offense and adjudication, and valuable insight into the court system for all participants.¹⁵⁰ Like mediation programs, teen courts have gained popularity due to the high rate of satisfaction for participants, although differences in specific cases and characteristics of offenders make statistical comparisons for the purpose of analyzing recidivism rates difficult.¹⁵¹ However, in most courts studied, organizers reported a recidivism rate lower than that of the group proceeding through traditional juvenile courts.¹⁵²

145. See Chown & Parham, *supra* note 131. Although it is beneficial for all crimes to be somehow addressed, the number of courts and prosecutors needed to adjudicate every juvenile case, almost two million per year, is unrealistic. *Id.* Status offenses, and less serious crimes mentioned here, account for about 13% of all juvenile cases. *Id.*

146. See *id.*

147. See *id.*

148. See *id.*

149. See Jeffrey A. Butts & Janeen Buck, *Teen Courts: A Focus on Research*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention), Oct. 2000, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/183472.pdf>.

150. See *id.* at 3.

151. See *id.* at 1.

152. See *id.* at 9.

V. CONCLUSION

Roper v. Simmons was a monumental first step in restoring the juvenile justice system to a constitutionally sound process in which goals and practices are in harmony with both the system's original intent and the information research has revealed about the strengths and weaknesses of these human "works in progress." *Graham v. Florida* moves the system another step in the right direction, but each of these children; their potential future victims; and society as a whole, deserves something more. Our current system is failing, and the consequences to all parties involved are catastrophic on a personal, moral, and financial level. As Justice Stevens declares in his concurring *Graham* opinion, "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes."¹⁵³ As a system that purports to care for those who cannot care for themselves and expects participants to learn from their mistakes, we must require more of ourselves in meeting the increasing needs of the next generation. Although it is too late for Christopher Simmons, Terrance Graham, and the 2,500 other juveniles serving life-without-parole sentences,¹⁵⁴ as well as the many victims of these and similarly disturbing and senseless crimes, the tools are available to enable young people to break this cycle of violence, to be productive members of society, and to develop into a generation of peacemakers. Now is the time to use them.

153. *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010).

154. Biskupic & Moore, *supra* note 3 ("An estimated 2,500 juvenile defendants in the USA are serving life-without-parole sentences—the vast majority for homicides.").