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## REDUCING INCARCERATION FOR YOUTHFUL OFFENDERS WITH A DEVELOPMENTAL APPROACH TO SENTENCING

*Samantha Buckingham\**

*Current sentencing practices have proven to be an ineffective method of rehabilitating criminal defendants. Such practices are unresponsive to developmental science breakthroughs, fail to promote rehabilitation, and drain society's limited resources. These deficiencies are most acute when dealing with youthful offenders. Incarcerating youthful offenders, who are amenable to rehabilitative efforts, under current sentencing practices only serves to ensure such individuals will never become productive members of society. Drawing on the author's experiences as a federal public defender, studies in developmental psychology and neuroscience, and the Supreme Court's recent line of cases that acknowledge youthful offenders' biological differences from adult offenders, the author proposes a restorative-justice approach to replace current sentencing practices. This solution includes tailoring a*

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\* Samantha Buckingham is a clinical professor and codirector of the Juvenile Justice Clinic at the Center for Juvenile Law and Policy (CJLP) at Loyola Law School, Los Angeles. She supervises students who represent juvenile clients in delinquency courts in Los Angeles, and she teaches courses in the areas of Criminal Law, Trial Advocacy, and Juvenile Law. Prior to joining the faculty at Loyola Law School in 2008, Ms. Buckingham advocated on behalf of indigent clients for five years as a trial attorney at the Public Defender Service for the District of Columbia (PDS). Prior to that, she taught high school at the Maya Angelou School, a Washington, D.C., charter high school for adjudicated and at-risk youth. She is especially grateful to all of her clients and would like to acknowledge what an honor and privilege it has been to work for them. In particular, she is grateful to the real Marcus and the real Ben, who both first inspired her to write this Article, along with the amazing couple in Marcus's story whose open hearts and minds she admires and respects. She wishes to thank her research assistants Heidi Seo, Bryan Rhie, Elaine Kwak, Stephanie Cao, Seth Weiner, and Carolyn Tan. She would also like to thank Randy Hertz and the Clinical Writers Workshop at New York University Law School; colleagues at CJLP who have discussed this Article with her, especially Jojo Liu; colleagues at Loyola who have read this Article and provided valuable feedback, including Kevin Lapp, Michael Waterstone, Marcy Strauss, and Scott Wood; colleagues in criminal defense who have helped along the way, including Andrew Ferguson, Allison Chan, and Violeta Chapin; experts who have consulted with her, especially Laurence Steinberg and Michael Livermore; Chris McKee who first suggested she look into restorative justice when she told him about Marcus's case; and Tim Curry, who was her law clerk at PDS when she represented Marcus.

*youthful offender's sentence to his or her developmental level and requiring a community-based mediation between victims and offenders. The proposal counteracts a major deficiency of current sentencing practices—the failure to offer youthful offenders an opportunity to truly understand their crimes. Only by doing so will a youthful offender be in a position to rehabilitate. This Article responds to possible critiques of the proposal, including concerns about the ability to accurately measure the success of a restorative-justice sentencing model, the fear of implicating the offender's Fifth Amendment right against self incrimination, and the cost of implementing mediation-based efforts. Ultimately, this Article determines that a developmentally appropriate, community-based sentencing scheme—with restorative justice overtones—best addresses the unique situation youthful offenders find themselves in. A sentence for a youthful offender should—indeed, must—present meaningful opportunities for the youthful offender to rehabilitate, and age-appropriate sentences grounded in restorative-justice principles will do this effectively.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	805
II. CRITIQUE OF THE CURRENT SENTENCING APPROACH FOR YOUTHFUL OFFENDERS .....	814
A. Rethinking Incarceration as a Response to Youthful Offending .....	814
1. The Fiscal Cost of Incarceration .....	817
2. Incarceration Is Particularly Ineffective when Recidivism Outcomes and Far-Reaching Social Costs Are Considered .....	820
B. Conundrum at Sentencing Phase: The False Sorting Problem .....	827
III. DEVELOPMENTAL PSYCHOLOGY AND BRAIN DEVELOPMENT EXPLAIN HOW ADOLESCENTS THINK AND BEHAVE	832
A. Overview .....	832
B. Developmental Psychology: Cognitive, Psychosocial, and Identity Development .....	833
C. Neuroscience: Structural and Functional Brain Development .....	837
D. Line-Drawing and the Supreme Court's Recognition of Scientific Findings of Youthful Offenders' Immaturity .....	842
E. Penological Justifications Apply with Lesser or No Force to Youthful Offenders .....	847
F. Limitations of Developmental Science .....	850
IV. THE PROMISE OF RESTORATIVE JUSTICE: A DEVELOPMENTALLY APPROPRIATE APPROACH TO THE SENTENCING OF YOUTHFUL OFFENDERS .....	851
A. Age-Appropriate Sentencing .....	852
B. How Restorative Justice Responds to Youthful Thinking .....	854
1. Restorative Justice Generally .....	854
2. Restorative Justice as an Alternative to Punishment .....	855
3. Youthful Offenders and Restorative Justice .....	857
C. Proposal for a Specific Developmentally Appropriate, Community-Based Sentence Incorporating Restorative Justice Programming .....	859

1. Marcus's Story .....	859
2. Proposal for a Developmentally Responsive Community-Based Sentence Incorporating Restorative Justice Programming .....	865
3. Restorative Justice in Practice: Lessons from Marcus's Story .....	869
V. RESPONDING TO SKEPTICS .....	873
A. Skeptics' Concerns About Effectiveness and Risk .....	873
B. Defense Concerns .....	876
C. Implementation Issues .....	878
VI. CONCLUSION .....	882

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“Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.”<sup>1</sup>

## I. INTRODUCTION

### *Ben’s Story*<sup>2</sup>

*In 2008, I was a public defender in Washington, D.C., and I represented a sixteen-year-old boy named Ben. Charged as an adult in criminal court, Ben was detained prior to trial at the D.C. adult jail. This was Ben’s first arrest. He was charged with multiple armed robberies, and each robbery carried a mandatory minimum sentence of five years in prison.*

*Ben committed the robberies with other teenagers.<sup>3</sup> When Ben was arrested, he was in a car with those other teens. While the others all managed to run away from the police, Ben was left alone in the car with a sawed-off shotgun that had just been used in a robbery that the teens had committed together. At this time, Ben was living in the backseat of his mother’s car, and needed money for food. Ben was depressed and clinically obese, weighing over 300 pounds.*

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1. *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

2. At the end of the day, the criminal justice system impacts real people. It can destroy lives and communities, or it can help to rebuild them. Ben’s story is one of several that I will share to humanize otherwise abstract policy arguments. Although Ben is not his real name, every detail of this story is real and unchanged.

3. Youthful offending is often characterized by susceptibility to peer pressure. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2462 (2012); *Jackson v. Hobbs*, 132 S. Ct. 2455, 2461 (2012); *Graham*, 130 S. Ct. at 2018; Brief for the Am. Med. Ass’n et al. as *Amici Curiae* in Support of Neither Party, *Miller*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter Brief for the AMA et al., *Miller*]; Brief for the Am. Med. Ass’n et al. as *Amici Curiae* in Support of Neither Party, *Graham*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter Brief for the AMA et al., *Graham*]; Brief for the Am. Psychol. Ass’n et al. as *Amici Curiae* Supporting Petitioners, *Graham*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter Brief for the APA et al., *Graham*].

*While I was representing Ben, my pocketbook was stolen. When Ben found out that I was the victim of a theft,<sup>4</sup> he was extremely distressed and worried about me.<sup>5</sup> Ben was distraught over the thought that someone could have threatened me with a gun and that I may have been hurt. For Ben, this moment when he imagined me being robbed at gunpoint was the moment when it all made sense. He said to me that he could not believe that he had robbed other people, strangers about whom he knew nothing, and that he could have robbed someone like me.<sup>6</sup> Ben said it hurt him to imagine that someone could rob me and not know what a nice person I was or that I was the kind of person who helped other people, people like him. Ben felt terrible for the effect his actions had on his victims.<sup>7</sup> He imagined how they must have felt scared. He understood that no one deserved to feel that way. Ben could also identify with a sense of anger the victims must have felt, for he too felt angry at whomever had robbed me.<sup>8</sup>*

*Ben demonstrated to me that he was quite capable of reflecting on his behavior from a perspective of empathy for his victims,*

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4. It was through pure coincidence that Ben learned that I had been the victim of a theft.

5. This is also a story about resources and access to justice. I was a public defender at PDS, a well-resourced office with caseload limits that enabled me to visit Ben regularly and develop a relationship with him. Thus, Ben felt connected to me. This might not have happened in a system where attorneys do not regularly visit clients to develop relationships of trust. Nonetheless, an external catalyst prompted Ben's reflections about the wrongfulness of his conduct and created the space for Ben to consider the impact of his behavior on his victims.

6. Robbery is a property offense motivated by a desire to obtain money or goods and, though robbery has a clear victim, it is not aimed at a person. One of the elements of robbery is that the property must be taken from a victim by force or fear. When Ben made the connection between what happened to me and what he had done to his victims, this made the robberies personal for Ben. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 117 (2004) (discussing the significance of restorative justice when defendant tells victim that the crime was not personal and that defendant is sorry); see also *id.* at 133–34 (noting that “mediation seems to work even better to reduce violent crimes than property crimes” since “stronger emotions” may “produce more powerful remorse and empathy”).

7. This is the feeling of guilt. See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1810–11 (1999) (arguing that “guilt is the appropriate—the virtuous or morally decent—response to one’s wrongdoing” (footnote omitted)).

8. See *id.* at 1822–23 (arguing that in an ideal community an offender will identify with a victim in his community, and because that victim likely feels anger, the offender will feel anger at himself; “[t]his self-directed anger is guilt”).

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*internalizing the experience of his victims,<sup>9</sup> experiencing remorse,<sup>10</sup> and realizing how destructive his choices were. Ben's potential was obvious to me at the time; however, his potential was never realized through the regular course of the criminal process.*

In the years that I worked with young people accused of crimes—first as a teacher at a high school for adjudicated and criminally at-risk teenagers in the District of Columbia and then as a public defender in D.C.—I constantly felt that my youthful students and clients did not fully grasp the consequences of their actions, neither when they committed an offense nor when they participated in the juvenile or criminal court process. Subsequently, as a clinical law professor who supervises students in a juvenile justice clinic, I have had the opportunity to reflect on the nature of my current and former interactions with youthful offenders and to consider the possible implications of developmental science. I have come to think that there is a much more effective way to address youthful offending than incarceration, even when offenses are considered serious and violent. A more effective response will foster opportunities for young people in the juvenile and criminal courts in a way that allows them to experience *the* moment that Ben experienced and to learn from it just as Ben learned from it. By harnessing the opportunity for learning, the justice system has the power to rehabilitate valuable and promising young people.

The goal of this Article is to offer a solution to a problem. Broadly defined, the problem is that incarceration is ineffective at rehabilitating community members who have violated the laws of our society. In particular, there is a significant number of youthful

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9. See Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1163 (2009) (arguing that by “delaying apologies until after the child receives counseling, education, or mediation, the child has more time to appreciate the victims’ experiences and internalize moral lessons,” thereby creating “a greater chance that apologies will be meaningful and sincere”).

10. Bibas & Bierschbach, *supra* note 6, at 125–26 (stating that remorse involves an acknowledgement and understanding of social norms and a recognition by the offender that his conduct violated social norms); *id.* at 94–95 (arguing that judges also seem to value a demonstration of offender remorse because they believe it captures an offender’s capacity for future change).

offenders, like Ben, who will face a substantial period of incarceration under the current approach to sentencing before they return to society. That period of incarceration is not serving youthful offenders well, and it is not serving society's ultimate goal of reducing recidivism. Many of those youthful offenders who are incarcerated for a period of time in their formative years will return to society ill equipped to succeed. Ultimately, they will wind up back behind bars throughout their adult lives. In essence, the wrong approach to youthful offending can lead to a lifetime spent mostly incarcerated—a lifetime wasted for the individual, her family, her community, and all of society.

The category of youthful offenders who are the focus of this Article includes those both under and over the age of eighteen, regardless of whether their cases are processed in the juvenile or adult criminal justice system. For the purpose of clarity, this Article will refer to *adolescents* as those under the age of eighteen. Reference to the *juvenile system* means the juvenile delinquency system, which in most (but not all) states handles matters for individuals who are under eighteen *unless those individuals are removed from juvenile court jurisdiction*. This Article will refer to *emerging adults*, a phrase borrowed from scholar Terry A. Maroney,<sup>11</sup> to refer to those over the age of eighteen and up to their mid-twenties. This Article will refer to *fully matured adults* as those who have reached about age twenty-five.<sup>12</sup> References to the *criminal justice system* mean the adult criminal courts, which handle matters for criminal defendants aged eighteen and over, as well as for those who have been transferred from juvenile delinquency to adult criminal court.

This Article provides a critique of the current system for sentencing youthful offenders in Part II. While the ineffectiveness of incarceration as a response to crime is a well-covered topic, incarceration has a uniquely detrimental impact on the specific category of youthful offenders whom this Article proposes to redirect

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11. Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 769–70 (2011).

12. Twenty-five is the age at which this Article chooses to define maturity because it is the age that science informs us that an individual's brain is fully developed.

to community-based sentences rather than incarceration. Incarceration is not responsive to developmental science, it does not promote rehabilitation, and it is costly. Incarceration is simply the incorrect approach for community members who may outgrow their offending behavior and are amenable to rehabilitation in the community.

Part III sets forth what is known about the developmental psychology and neuroscience of both adolescents and emerging adults. A sophisticated understanding of such science is necessary to understand how incorporating restorative justice as a part of sentencing is more responsive and developmentally appropriate than incarceration, not just for juvenile offenders but for all youthful offenders. While scholars may differ on the exact age of total brain maturation, they agree that it is past the age of eighteen and into the twenties.<sup>13</sup>

Though perhaps not immediately obvious, this Article explains the connection between what developmental science tells us about how young people think and behave and the restorative justice approach to criminal justice.

Part IV explores the promise of restorative justice and sets out a unique proposal for a developmentally appropriate, community-based sentence for youthful offenders.<sup>14</sup> Broadly defined, restorative

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13. See Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 39 (2009) (citing Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens through the Twenties*, 55 AM. PSYCHOL. 469, 474–75 (2000)) (describing a distinct developmental phase of “emerging adulthood,” from eighteen to twenty-five, during which much identity formation occurs and certain high-risk behaviors are at their peak); Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOL. 583, 590–91 figs.1 & 2 (2009) (presenting research findings suggesting that, while cognitive maturation levels off by approximately sixteen, psychosocial maturation, which affects individuals’ impulse control and sensation-seeking behavior, as well as their ability to resist peer pressure and consider future consequences, continues through the twenties); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 (2009) (“Developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen. Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.”). Steinberg defines “psycho-social maturation” as involving (1) sensation-seeking; (2) capacity to resist peer pressure; and (3) future orientation. Steinberg et al., *supra*, at 588–89.

14. When this Article refers to a *community-based sentence*, it refers to a sentence of probation where an offender is supervised in the community, rather than a sentence of incarceration where an offender is removed from the community.

justice is a lens through which one may view the relationship between crime, punishment, healing, violence, humanity, causation, and consequence. The term *restorative justice* has been used with different, sometimes even contradictory, meanings. The type of restorative justice to which I refer is conferencing or mediation. It is the bringing together of victims and offenders in a process that enables each to consider the other's plight and to come to a greater shared sense of understanding of the event as well as of their shared humanity. A restorative justice response to youthful offending addresses the specialized thinking deficiencies and developmental needs of these offenders because restorative conferencing, when done correctly, focuses on the participants' understanding of the underlying reasons for a crime and its consequences, something that developing brains struggle to grasp otherwise.

Part V addresses skeptics of the proposal and problems with implementation. Skeptics may have concerns about effectiveness, the risk posed by offenders remaining in the community, and offender sincerity. There are concerns about defendants' rights and confidentiality. Finally, there are systemic concerns about cost, timing, and implementation.

Science has enlightened even the U.S. Supreme Court regarding how young people have biologically limited thinking and planning capabilities.<sup>15</sup> They are highly susceptible to pressure.<sup>16</sup> They act impulsively, without maturely thinking about or contemplating the consequences of their actions and without properly weighing the costs and benefits associated with a particular course of action.<sup>17</sup> With an understanding of the implications of developmental science, in recent years the Court has carved out limitations on the most extreme sentences for juvenile offenders. In *Roper v. Simmons*,<sup>18</sup> the Court eliminated the death penalty for juvenile offenders.<sup>19</sup> In *Graham v. Florida*<sup>20</sup> and *Miller v. Alabama*,<sup>21</sup> the Court significantly

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15. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 n.5 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

16. *Roper*, 543 U.S. at 569.

17. *Miller*, 132 S. Ct. at 2464 (citing *Roper*, 543 U.S. at 569).

18. 543 U.S. 551 (2005).

19. *Id.* at 578.

20. 130 S. Ct. 2011 (2010).

21. 132 S. Ct. 2455 (2012).

limited the imposition of life without the possibility of parole for juvenile offenders.<sup>22</sup> Further, the Court has instructed that penological justifications apply with lesser, and, in some instances, no force to adolescents.<sup>23</sup> This Article takes the Supreme Court's holdings one step further and applies the underlying developmental science to propose reducing sentences of incarceration in instances beyond only the most extreme sentences of the death penalty and life without the possibility of parole.

Targeting youthful offenders and diverting them from incarceration when they have the potential for growth and rehabilitation provides the best opportunity to educate the offenders, reduce incarceration,<sup>24</sup> and achieve the goal of reducing recidivism outcomes. Providing prosocial education to youthful offenders through developmentally appropriate and effective sentencing practices is a much more promising approach<sup>25</sup> because they are still developing in ways that make them an ideal population to practice restorative justice mediations.<sup>26</sup>

Restorative justice practices have been used in the United States and internationally for centuries. In the United States, these practices have predominantly been used either in a way that is totally unrelated to court processes to promote healing<sup>27</sup> or in a way sanctioned by the

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22. *Miller*, 132 S. Ct. at 2475; *Graham*, 130 S. Ct. at 2034.

23. *See Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 130 S. Ct. at 2026); *Roper*, 543 U.S. at 569–70.

24. *See generally* MARK MAUER & THE SENTENCING PROJECT, RACE TO INCARCERATE (1999) (discussing increasing incarceration rates of U.S. prisons). America imprisons 1 percent of its adult population. *See* PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008). For instance, one in nine black males between the ages of twenty and thirty-four is incarcerated, and one in every fifteen black males aged eighteen or older is in prison or jail. *Id.* at 6–7.

25. *See* Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 496–97 (2009) (reviewing ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008)).

26. *See* David E. Arredondo, Child Development, *Children's Mental Health, and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 21 (2003) (describing how, from a developmental perspective, restorative justice mediations that bring the offender face-to-face with their victim are "one of the most potent tools" the justice system has at its disposal). Arredondo states: "It teaches empathy, accountability, and compassion while allowing the full impact of the pain of guilt and shame to mold future behavior. It personalizes the system and humanizes society for the children whom the system is seeking to socialize." *Id.*

27. There are programs where there is face-to-face mediation, such as between prisoners and victims, which takes place while inmates are serving their sentences. Bibas & Bierschbach, *supra*

justice system only as a means of diverting low-level offenders away from the traditional court process.<sup>28</sup>

A specific proposal for a developmentally appropriate, community-based sentence for armed robbery offenders will be described by drawing upon restorative justice practices. This Article examines this approach for those offenders who have committed armed robbery because they demonstrate the hallmarks of immature thinking and because robbery offenses have clear victims. Although the approach may have much broader applicability—for instance to offenses such as felony murder—robbery offenses are a good place to start.<sup>29</sup> Robbery offenders are an ideal group to target; these offenders are currently subjected to lengthy sentences of incarceration and experience high rates of recidivism and re-incarceration. By identifying a greater number of youthful offenders who are receptive to intervention in the community, communities can divert many offenders from incarceration and improve recidivism outcomes.<sup>30</sup>

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note 6, at 123; *see also Restorative Justice Project*, U. OF WIS. LAW SCH., <http://law.wisc.edu/fjr/rjp/> (last visited Feb. 21, 2013) (describing the Wisconsin program); *History of Victim and Restorative Justice Programs*, IOWA DEP'T OF CORR., <http://www.doc.state.ia.us/VictimHistory.asp> (last visited Feb. 20, 2013) (describing the Iowa program); *Sample Restorative Justice Practices in Minnesota*, MINN. DEP'T OF CORR. (Aug. 22, 2006), <http://www.doc.state.mn.us/rj/publications/samples.htm> (providing a list of programs in Minnesota). When programs are unrelated to the court process, the offender participates without any tangible benefit in terms of his sentence. Such practices are primarily concerned with the psychic healing of the victim and the offender purely for the sake of the healing.

28. In some places, diversionary programs implement restorative justice pretrial so that the offender who successfully participates will never have been in the courtroom and tried or adjudicated. Bibas & Bierschbach, *supra* note 6, at 122. These diversion programs tend to exist where the offenses are minor. *See id.* at 129.

29. While this approach could have broad applicability, it may not be appropriate for every type of crime or for every youthful offender. Some scholars argue that there is no evidence that “the crime of murder, in and of itself, is an indicator of depravity for juveniles.” Robert Johnson & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders*, 12 U. MD. L.J. RACE RELIG., GENDER & CLASS 101, 122 (2012). That said, there are certain crimes—like sex offenses—that jump out as presenting unique challenges. This is particularly true because most sex offenders have themselves been the victims of sexual violence and have been exposed at a young age to sexual examples far more sophisticated than those that they are able to comprehend.

30. These offenses—armed robbery and felony murder—are useful examples because both the juvenile and criminal systems currently and overwhelmingly respond to these offenses with secure confinement sentences, such as prison, jail, and juvenile commitment to detention facilities. Incarceration, however, leads to high recidivism rates of around 50 percent in various states across the country. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUV.

There will necessarily be a selection process for offenders who should participate. When implemented as a condition of probation, the Proposal calls for a preparation phase for all parties, a victim-offender conference guided by a trained mediator, and a postconference debriefing phase where offenders have the opportunity to learn from their conferencing experience. Should they fail on probation—by failing to participate in the restorative justice process, failing to follow any of the terms and conditions of their probation, or reoffending—offenders would face the original term of incarceration. Throughout this process, if further information is gleaned about the offender's underlying challenges,<sup>31</sup> the offender can be referred to services to meet those challenges in the community. By so doing, youth crime can be more effectively addressed in order to reform the offender, correct the behavior, and reduce recidivism.

This Proposal is unique for three reasons. First, it explores harnessing the educational potential of restorative justice as a developmentally appropriate and rehabilitative tool.<sup>32</sup> Second, it

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JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 234 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (showing, for example, juvenile re-arrest rates of 55 percent in Florida, New York, and Virginia during a one-year period following release). One way to improve the recidivism rate is to find alternatives to incarceration for as many receptive adolescent offenders as possible. See *OJJDP Model Programs Guide, Aftercare*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <http://www.ojjdp.gov/mpg/progTypesAftercare.aspx> (last visited Feb. 23, 2013) (citing Howard N. Snyder and Melissa Sickmund for the proposition that, “[t]hrough there is no national recidivism rate for juveniles, state studies have shown that rearrest rates for youth within 1 year of release from an institution average 55 percent, while reincarceration and reconfinement rates during the same timeframe average 24 percent,” and concluding that “[t]here is a definite need to provide systemic aftercare services that are designed to address reentry issues, including reoffending, that may affect a juvenile offender's reintegration back into society”).

31. *Underlying challenges* refers to root causes of the offender's problems with the criminal justice or the juvenile justice system, which include (but are not limited to) abuse or neglect, various education issues, mental health problems, or substance abuse.

32. This Article fully explores how restorative justice can be used as a developmentally appropriate sentence. Scholar Emily Buss acknowledged that restorative justice may be a promising developmentally appropriate practice. See Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 52 (2003) (“Dissatisfaction with traditional juvenile court proceedings have led many countries, including the United States, to experiment with a form of restorative justice known as ‘family group conferencing,’ which brings together victim, offender, their two communities of support, and law enforcement to discuss the offense and its consequences, and to develop a plan for restitution. These proceedings, stripped of conventional due process protections, have proven highly successful in achieving the due process aims of meaningful participation, and, relatedly, respectful treatment. Offenders who play an active role

seeks to incorporate restorative justice into our court system by focusing on *a concrete proposal tailored to the sentencing phase*.<sup>33</sup> Third, and most notably, it focuses on restorative justice as a means of reducing incarceration for a significant category of youthful offenders who have been adjudicated or convicted of armed robbery, though this approach may also be applied to other serious offenses.

## II. CRITIQUE OF THE CURRENT SENTENCING APPROACH FOR YOUTHFUL OFFENDERS

### A. *Rethinking Incarceration as a Response to Youthful Offending*

This Article's Proposal offers an alternative to incarceration.<sup>34</sup> The offense that this Article focuses on—armed robbery—is considered serious and violent. Because it is serious and violent, society responds with significant sentences of incarceration.<sup>35</sup>

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in the decisionmaking process report a high degree of satisfaction with the process and demonstrate their commitment to the process by fulfilling their conference-imposed obligations in a large percentage of cases.”); *see also* Arredondo, *supra* note 26, at 21 (describing restorative justice mediations as a “developmentally constructive sanction” because “[a]dolescents, often thoughtless and impulsive, will perpetrate a crime or prank without considering its impact on others. When a human face is put on the damage and suffering they have caused, they often feel both regret and remorse. . . . Whether they admit it or not, there often arises a genuine desire to make things better. . . . From a developmental point of view, this is one of the most potent tools in the hands of decision-makers.”)

33. Few programs implement restorative justice in one phase of the criminal process. Bibas & Bierschbach, *supra* note 6, at 122–24. For instance, Vermont offers an example of such a system with widespread restorative justice infused in the process. *Id.* at 122. In Vermont, there are two tracts: the traditional criminal justice model and a model that is the same through adjudication, at which point restorative justice is implemented at sentencing. *Id.*

34. This Proposal and incarceration are not necessarily mutually exclusive as a response to youthful offenders. Another way of incorporating restorative justice with offender sentences is to implement restorative justice during a sentence of incarceration. Such an approach is at odds with my Proposal because it is about reformation of the penal system and does not avoid many of the negative consequences of incarceration.

35. The punishment currently doled out to emerging adult offenders is incarceration. According to the Bureau of Justice Statistics (BJS), nearly 420,000 inmates as of midyear of 2009 in the United States were between the ages of eighteen and twenty-four. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009 - STATISTICAL TABLES 20 (2010). In 2001, close to a million people were convicted of felonies in the state courts, and two-thirds of those convicted of state felonies were incarcerated, averaging more than three years in prison or jail. *See* Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 1 (2003). In fact, it was estimated in 2008 that only 38.2 percent of all inmates in all federal and state prisons were there for violent offenses. *See* JOHN

Incarceration of youthful offenders is particularly problematic because these offenders will serve substantial time in prison during their formative years and then reenter mainstream society ill-prepared for a successful life. But incarceration simply does not work very well, especially with youthful offenders. Incarceration is not a developmentally appropriate sentence for youthful offenders.<sup>36</sup> The deprivation and lack of stimulation associated with the time spent incarcerated will hinder rather than promote a youthful offender's development.<sup>37</sup>

The major benefit to incarceration is that offenders are incapacitated during the time that they are locked up.<sup>38</sup> When it comes to young people, the benefit of a period of incapacitation is small, especially when compared to the relative harm that incarceration creates.<sup>39</sup> Incarceration is expensive.<sup>40</sup> It is harmful to

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SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 9 tbl.3 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. Although this article does not define *violent offense*, because BJS data was used, it can be assumed that violent offenses includes murder, non-negligent manslaughter, manslaughter rape, other sexual assault, robbery, assault, and other violent offenses. In 1997, the average sentence to be served in federal prison for adult (over eighteen) offenders convicted of any violent offenses (excluding those sentenced to life in prison or death) was 76.1 months and for those convicted of robbery was 82.6 months. WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TIME SERVED IN PRISON BY FEDERAL OFFENDERS, 1986-97 5 tbl.2 (June 1999). The report does not define what constitutes a *violent or property offense*.

36. See Johnson & Miller, *supra* note 29, at 109.

37. See Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J. 1, 6 (2004) ("The neural pathways strengthened in an abusive or neglectful environment are those that will prepare the child to cope in that negative environment, which necessarily curtails their ability to function in a positive environment.").

38. Without a doubt, incarceration does incapacitate some offenders. For a sophisticated analysis estimating the number of crimes that may be averted by incarceration, see AVINASH SINGH BHATI, URBAN INST. JUSTICE POLICY CTR., AN INFORMATION THEORETIC METHOD FOR ESTIMATING THE NUMBER OF CRIMES AVERTED BY INCAPACITATION (2007), available at [http://www.urban.org/uploadedpdf/411478\\_crimes\\_averted.pdf](http://www.urban.org/uploadedpdf/411478_crimes_averted.pdf).

39. See Arredondo, *supra* note 26, at 17 n.22 (discussing the importance of taking the "potential harm done" by particular sanctions when choosing a developmentally appropriate response to children's misbehavior).

40. Those proponents of a cost-benefit approach to criminal justice programs offer some insight into the efficacy of incarceration as compared to community interventions. Historically, decisions about criminal justice policies have been motivated by "political and ideological interests, and unscientific speculation over the causes and effects of crime." JENNIFER ROSENBERG & SARA MARK, INST. FOR POLICY INTEGRITY N.Y. UNIV. SCH. OF LAW, BALANCED JUSTICE: COST BENEFIT ANALYSIS & CRIMINAL JUSTICE POLICY 2 (2011), available at [http://policyintegrity.org/files/publications/Balanced\\_Justice.pdf](http://policyintegrity.org/files/publications/Balanced_Justice.pdf). In addition to providing a

offenders because it is ineffective when recidivism outcomes are considered.<sup>41</sup> Incarceration disproportionately impacts racial minorities and lower socioeconomic groups.<sup>42</sup> It also extols a number of indirect human costs on offenders, their families, and their communities.<sup>43</sup> There must be successful interventions with youthful offenders when they are young because otherwise they will enter into

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framework for assessing alternatives of incarceration versus community interventions like my Proposal, cost-benefit proponents point to a need for more research on effectiveness and impacts of various approaches.

41. Luna, *supra* note 35, at 2 n.9 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE 2001 506 tbl.6.42, 507 tbl.6.43 (Kathleen Maguire & Ann L. Pastore eds., 2002)).

42. *See id.* at 3; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 57 (2010) (noting that of the over 2 million prisoners now behind bars, the overwhelming majority are men of color, nearly half Black men and 19 percent Latino men); Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 138 (Marc Mauer & Meda Chesney-Lind, eds., 2002) [hereinafter INVISIBLE PUNISHMENT] (noting that by the late 1990s two-thirds of incarcerated women were women of color); Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> ("We must also confront the reality that—once they're in that system—people of color often face harsher punishments than their peers. One deeply troubling report, released in February, indicates that—in recent years—black male offenders have received sentences nearly 20 percent longer than those imposed on white males convicted of similar crimes. This isn't just unacceptable—it is shameful.").

43. *See* Todd R. Clear, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 73, 138, 173, 182, 191–92 (2007) (describing how reduced social order related to incarceration can result in the removal of valuable assets in the form of wage-earners, weaker labor markets, higher crime rates and less positive informal social controls, a lack of trust in law enforcement as a formal social control and other civic institutions, increased delinquency, decreased family, social and residential stability, a reduced ability for a community to function collectively as a community, and numerous emotional costs to families and communities); George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746 (2012) (linking housing and employment discrimination with incarceration and the impact on women of color as part of a vicious cycle of poverty, employment discrimination, housing discrimination, criminalization, and incarceration); Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing-Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT, *supra* note 42, at 37, 45 (looking at the crumbling of social networks of formerly incarcerated people and their relations due to excessive policing in public housing, and the harsh 1992 welfare reform laws that resulted); Jessica Dixon Weaver, *African-American Grandmothers: Does the Gender-Entrapment Theory Apply? Essay Response to Professor Beth Richie*, 37 WASH. U. J.L. & POL'Y 153 (2011) (looking at the impact of incarceration on African-American grandmothers, who are left caring for the children of their incarcerated sons and daughters, often at great personal expense and sacrifice).

the adult system and perpetuate the cycle of re-offending and all of the associated costs of recidivism.<sup>44</sup>

### 1. The Fiscal Cost of Incarceration

The majority of the offenders who commit robbery are young. According to statistics provided by the FBI, 64.2 percent of all offenders in the United States arrested for robbery were under the age of twenty-five in 2010.<sup>45</sup> In 2007, 34,500 juveniles in the United States were arrested for robbery.<sup>46</sup> Statistics do not differentiate when these robbery offenses are considered “armed.”<sup>47</sup>

Incarceration has become an increasingly standard response to crime in the United States. Since the 1970s, U.S. rates of incarceration have quadrupled.<sup>48</sup> Today, the United States incarcerates more people than any other country in the world: approximately 1 percent of the U.S. adult population is in prison.<sup>49</sup> According to the most recent census data, there are 70,792 juveniles

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44. Statistics from 1999 reveal that it cost \$146.6 billion in one year to support our current criminal justice process for offenders—from arrest to incarceration. That meant it cost every single American \$521 per year to sustain the system. Luna, *supra* note 35, at 2.

45. CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES tbl.41 (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl41.xls>. In addition, individuals under the age of twenty-five comprised 37.2 percent of offenders arrested for aggravated assaults; 58 percent of offenders arrested for burglaries; 52.7 percent of offenders arrested for larcenies (theft); 53.8 percent of offenders arrested for motor vehicle thefts; 43.1 percent of offenders arrested for arson as a violent crime; and 40.2 percent of offenders arrested for other assaults. *Id.*

46. *Graham v. Florida*, 130 S. Ct. 2011, 2025 (2010).

47. CRIMINAL JUSTICE INFO. SERVS. DIV., *supra* note 45, at tbl.41.

48. MAUER & THE SENTENCING PROJECT, *supra* note 24, at 20 fig.2-2.

49. See PEW CTR. ON THE STATES, *supra* note 24, at 27 (stating that for every 100,000 U.S. adult residents, 1,009 of them are incarcerated). As of June 2009, the total number of prisoners nationwide under the jurisdiction of state and federal correctional authorities was 1,617,478, with 206,577 prisoners under federal custody and 1,410,901 under state custody. WEST, *supra* note 35, at 4. For example, in 2000, California had 163,001 prisoners; Texas had 166,719 prisoners; New York had 70,199 prisoners; and Vermont had 1,697 prisoners. *Id.* at 5. California and Texas had the most prisoners out of all the states. *Id.*

imprisoned in secure confinement across the United States.<sup>50</sup> Of those 70,792, a total of 6,996 were imprisoned for a robbery.<sup>51</sup>

Incarceration is expensive, regardless of whether an offender is housed in a juvenile facility or an adult one. The average cost to incarcerate a juvenile in a juvenile facility varies by jurisdiction and by state. The statistics available for New York are particularly salient. In 2009, a total of 1,468 youth under the age of twenty-one were admitted to the custody of the New York Office of Children and Family Services.<sup>52</sup> Of those 1,468 youth, 256 were convicted of robbery.<sup>53</sup> The average length of stay for all offenders admitted to custody was 16.6 months.<sup>54</sup> In 2007, New York City's Department of Juvenile Justice spent an annual average of \$201,115 per youth in secure detention.<sup>55</sup> In contrast, the annual average cost for a student in a New York City public high school was \$11,844.<sup>56</sup>

Taking a look at spending on juvenile incarceration across the entire United States, in 2007, the fifty states spent about \$5.7 billion to imprison 64,558 youth committed to residential facilities.<sup>57</sup> Currently, approximately 93,000 juveniles are held in juvenile justice

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50. Melissa Sickmund et al., *The Census of Juveniles in Residential Placement: 1997–2010* (2013), [http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Age\\_Sex.asp](http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Age_Sex.asp) (stating that of those 70,792, 61,358 were males and 9,434 were females).

51. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 2010 ANNUAL REPORT 85 (2010), available at <http://www.ojjdp.gov/pubs/237051.pdf> (reflecting a population of 6,576 male robbery offenders and 420 female robbery offenders).

52. DAVID A. PATERSON & GLADYS CARRIÓN, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., 2009 ANNUAL REPORT: YOUTH PLACED IN OCFS CUSTODY tbl.1 (2009), available at <http://ocfs.ny.gov/main/reports/asr09.pdf>.

53. *Id.* In addition to the 256 juveniles convicted of robbery admitted to the Office of Children and Family Services, 249 were convicted of assault, and 101 were convicted of burglary. *Id.* at 1–2. Further, in 2004, less than half of the youth in detention were charged with violent offenses. CORR. ASS'N OF N.Y., JUVENILE DETENTION IN NEW YORK CITY 2 (2007), available at [http://www.prisonpolicy.org/scans/detention\\_fact\\_2007.pdf](http://www.prisonpolicy.org/scans/detention_fact_2007.pdf).

54. PATERSON & CARRIÓN, *supra* note 52, at tbl.7.

55. CORR. ASS'N OF N.Y., *supra* note 53, at 1. New York spends approximately \$170 million in a year on its twenty-one juvenile facilities. Editorial, *Two Words: Wasteful and Ineffective*, N.Y. TIMES, Oct. 10, 2010, at A22.

56. CORR. ASS'N OF N.Y., *supra* note 53, at 1.

57. RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 19–20 (2011), available at [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf); JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 1 (2009), available at [http://www.justicepolicy.org/images/upload/09\\_05\\_REP\\_CostsofConfinement\\_JJ\\_PS.pdf](http://www.justicepolicy.org/images/upload/09_05_REP_CostsofConfinement_JJ_PS.pdf).

facilities throughout the United States.<sup>58</sup> Some juveniles are detained pretrial, and about 70 percent of these juveniles are held in state-funded, post-adjudication, residential facilities.<sup>59</sup> According to 2008 data from the American Correctional Association, it cost about \$240.99 per day, or about \$88,000 per year, to incarcerate a juvenile in a residential facility.<sup>60</sup> Some states report costs as high as \$726 per day, or about \$265,000, per year to incarcerate a juvenile in a residential facility.<sup>61</sup>

Adult incarceration is also expensive. Indeed, this Proposal also targets adolescents charged as adults or currently in the category of emerging adult offenders. Because they are processed through the adult system and are housed in adult prisons and jails, examining the costs of adult incarceration is thus necessary. Further, adult statistics are important because this Proposal seeks to deter offenders from being incarcerated when they are young. If sentenced to terms of incarceration at this age, these offenders will be far more likely to recidivate and face high rates of re-incarceration as adults.

The average cost to incarcerate an adult in prison or jail varies by jurisdiction, with differences among states as well as between state and federal facilities. In the 2009 fiscal year, the average cost of incarcerating a federal inmate was \$25,251.<sup>62</sup> The average adult robbery offender sentenced to robbery in the federal system was sixty-nine months in 2003.<sup>63</sup> That reflects a cost of \$1.7 million for the duration of the sentence per prisoner in the federal system. In

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58. JUSTICE POLICY INST., *supra* note 57, at 1.

59. *Id.*; MENDEL, *supra* note 57, at 19–20.

60. ANNIE BALCK, NAT'L JUVENILE JUSTICE NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 13 (2010), available at [http://www.modelsforchange.net/publications/270/The\\_Real\\_Costs\\_and\\_Benefits\\_of\\_Change\\_Finding\\_Opportunities\\_for\\_Reform\\_During\\_Difficult\\_Fiscal\\_Times.pdf](http://www.modelsforchange.net/publications/270/The_Real_Costs_and_Benefits_of_Change_Finding_Opportunities_for_Reform_During_Difficult_Fiscal_Times.pdf).

61. *Id.* at 13 n.81. In California, for instance, there are 8,955 juvenile offenders in custody in secure confinement. JUSTICE POLICY INST., *supra* note 57, at 4. The per diem daily cost of locking up one young person in a California juvenile facility starts at \$67.51 compared to \$24.44 in Wyoming and \$726 in Connecticut. *Id.* Therefore, based on the total population of juveniles confined, California taxpayers are spending \$604,552.05 per day on juveniles in detention. *Id.*

62. Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 6161 (Feb. 3, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-02-03/pdf/2011-2363.pdf>; Luna, *supra* note 35, at 2.

63. U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 110 (2005), available at <http://bjs.gov/content/pub/pdf/cfjs03.pdf>. The report does not define what constitutes a *violent* or *property* offense.

2009, 21,332 inmates were convicted of robbery in California.<sup>64</sup> In 2010, adults sentenced in California adult court served an average of 55.1 months for robbery offenses.<sup>65</sup> It costs approximately \$47,000 per year to incarcerate an inmate in California.<sup>66</sup> It thus costs, on average, \$215,808.33 to incarcerate a prisoner convicted of robbery in California for his or her sentence. On the whole, incarceration is a very expensive policy and, as an examination of its harmful impacts reveals, it is not effective.

## 2. Incarceration Is Particularly Ineffective when Recidivism Outcomes and Far-Reaching Social Costs Are Considered

Recidivism outcomes for juveniles reentering the community after a period of detention in a securely confined juvenile facility are poor. Most juveniles who have been released from secure facilities had been previously arrested and detained for a previous offense.<sup>67</sup> The severity of the new offenses, for the most part, remains consistent with that of previous offenses: “[a]mong youth who were previously in custody and released and subsequently reoffended, 18 [percent] committed offenses that were more serious than their previous offense, 40 [percent] committed offenses at the same

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64. CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2009 16 tbl.8 (2010), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Annual/CalPris/CALPRISd2009.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/CalPris/CALPRISd2009.pdf).

65. CAL. DEP'T OF CORR. & REHAB., TIME SERVED ON PRISON SENTENCE: FELONS FIRST RELEASED TO PAROLE BY OFFENSE CALENDAR YEAR 2010 2 tbl.1 (2011), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Annual/TIME6/TIME6d2010.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/TIME6/TIME6d2010.pdf).

66. *California Criminal Justice FAQ: How Much Does It Cost to Incarcerate an Inmate?*, CAL. LEGISLATIVE ANALYST'S OFFICE, [http://www.lao.ca.gov/laoapp/laomenus/sections/crim\\_justice/6\\_cj\\_inmatecost.aspx?catid=3](http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3) (last visited Mar. 27, 2013) (based on data from 2008–09).

67. SNYDER & SICKMUND, *supra* note 30, at 232 (stating that according to 2003 surveys of youth who were reentering the community after some period of detention in a secure facility, “youth reentry candidates said they had at least one prior commitment (62 [percent]). When asked about prior convictions and prior custody experiences, about a quarter (23 [percent]) said they had been convicted of an offense but had not been in custody before their current placement. Some had been in custody before, but had not been convicted before (6 [percent]) and some said that they had not been convicted or in custody before (8 [percent]). Among those who had been in custody before, 2 in 10 said they had been in custody only once before, 4 in 10 said they had been held 2–4 times, and 4 in 10 said they had been held 5 or more times before.”).

severity level, and 24 [percent] committed offenses that were less serious than their prior offense.”<sup>68</sup> There is no national statistic for the juvenile offender recidivism rate.<sup>69</sup>

The simple, bleak, and immutable fact is that most adult offenders who spend time in jail and prison return to prison. In California, former prisoners experience a particularly high recidivism rate—as high as 75 percent for adult former prisoners over a one-year period.<sup>70</sup> Between 2004 and 2007, over 567,000 people across the United States were released from adult state prisons.<sup>71</sup> Over 43 percent of those 567,000 released prisoners found themselves back behind bars within that three year time period.<sup>72</sup>

Recidivism rates can be measured in different ways. They can be measured by who is re-arrested, who violates probation or parole, whose re-arrest results in a conviction, or who is re-incarcerated. It is frightening that over 43 percent of people released from jail or prison are re-incarcerated. In effect, this means that almost half of our population of offenders nationwide is failing in the community to such an incredible extent that we *must* re-examine the efficacy and ubiquity of U.S. incarceration policies. The best way to reduce recidivism for this high percentage of offenders<sup>73</sup> is to keep them out of prison and jail in the first place.

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68. *Id.*

69. For a state-by-state comparison of recidivism rates, see *id.* at 234–35.

70. CAL. DEP'T OF CORR. & REHAB., 2011 ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 13 (2011), available at [http://www.cdcr.ca.gov/adult\\_research\\_branch/Research\\_Documents/ARB\\_FY\\_0607\\_Recidivism\\_Report\\_\(11-23-11\).pdf](http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0607_Recidivism_Report_(11-23-11).pdf). Additionally, there is an overall 65.1 percent recidivism rate for adult former prisoners in California over a three-year period. *Id.* at 12. In response to a 67 percent recidivism rate in California, the state adopted a three strikes law, which required courts to impose a twenty-five-years-to-life sentence on *any* offender convicted of *any* felony if the offender has two prior *serious* or *violent* offenses. *Ewing v. California*, 538 U.S. 11, 26 (2003). On his third strike, Mr. Ewing stole about \$1,200 worth of golf clubs. *Id.* at 28. The law functioned such that Mr. Ewing was incarcerated for twenty-five years to life. The Court upheld the challenge brought under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Id.* at 30–31. In 2012, California voters passed a referendum to limit the applicability of third strike sentencing enhancements to serious and violent offenses. See Jack Leonard, *Prop. 36 Seeks to Ease California's Three-Strikes Law*, L.A. TIMES, Oct. 27, 2012, <http://articles.latimes.com/2012/oct/27/local/la-me-prop36-3strikes-20121028>.

71. PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 exhibit 1 (2011).

72. *Id.*

73. In 2009, a total of 730,860 individuals were admitted into prison—56,153 were admitted in federal prisons and 674,707 were admitted in state prisons. HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009 4 tbl.2 (2010). As of 2009,

There are a number of reasons why offenders who have spent time in prison and jail recidivate. Of the many factors that contribute to recidivism, some are by-products of incarceration, and others are by-products of the environments from which offenders came and to which they later return.<sup>74</sup> In prison and jail, inmates either do not have access to, or have limited access to, services such as counseling, mental health treatment, substance abuse therapy, vocational development, and education.<sup>75</sup> When released, many former inmates have undiagnosed or untreated mental health conditions.<sup>76</sup> Insufficient treatment raises the risk that an offender will return to criminal behavior upon his or her release.<sup>77</sup>

While incarcerated, inmates do not learn to live by the rules that they are expected to abide by in a harmonious and peaceful

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Texas had 171,219 prisoners under its jurisdiction; California had 171,215 prisoners; New York had 58,681; and Vermont had 2,220. *Id.* at 16 app. tbl.1.

74. See CATHY S. WIDOM & MICHAEL G. MAXFIELD, U.S. DEP'T OF JUSTICE, RESEARCH IN BRIEF: AN UPDATE ON THE "CYCLE OF VIOLENCE" 1 (2001). For instance, there is a connection between recidivism and the cycle of violence. A series of ongoing studies (sponsored by the National Institute of Justice, the National Institute of Alcohol Abuse and Alcoholism, and the National Institute of Mental Health) examine the lives of 1,575 child victims of abuse and neglect identified in court cases of abuse and neglect dating from 1967 to 1971. *Id.* at 2. This study looked at offenders in their twenties and thirties. *Id.* By 1994, almost half of the victims (most of whom were then in their late twenties and early thirties) had been arrested for some type of non-traffic offense. *Id.* at 7. Eighteen percent had been arrested for a violent crime—an increase of 4 percent in the six years since arrest records were first checked. *Id.* at 3. Rates of arrest were at least 25 percent higher among black victims. *Id.* at 4–5. Another key finding was that neglected children's rates of arrest for violence were almost as high as physically abused children's. *Id.* at 5. Neglect was defined in the study as an excessive failure by caregivers to provide food, clothing, shelter, and medical attention. *Id.* at 3.

75. *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (affirming the lower court's ruling in two long-running cases in which the medical and mental health care provided in California's prisons was found to be so deficient that it endangers the lives of prisoners and violates the Eighth Amendment prohibition against cruel and unusual punishment); see also ROSENBERG & MARK, *supra* note 40, at 7 (noting that traditional incarceration may not adequately address and treat an offender's substance abuse problems).

76. See, e.g., JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 38 (2006) (stating that every year, more than 1.5 million people are released from jail and prison with a life-threatening contagious disease, and at least 350,000 prisoners have serious mental illness); Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 157 (2007) (discussing a study of the risk of death for former Washington State prison inmates, which found, during their first two weeks of release, former inmates had a risk of death that was 12.7 percent higher than other Washington State residents—the leading causes of inmate deaths were drug overdose, cardiovascular disease, homicide, and suicide).

77. ROSENBERG & MARK, *supra* note 40, at 7.

community; rather, they are forced to live in a prison society whose rules are as close to the polar opposite of mainstream America's.<sup>78</sup> Prisoners are not treated as anyone would want valued members of our society to be treated—at best prisoners are subjected to extreme overcrowding,<sup>79</sup> suffer inadequate medical and mental health care,<sup>80</sup> and receive the discouraging message that they are not valued as individuals.<sup>81</sup> At worst, they are likely to be victims of physical and sexual violence, they are likely to witness violence, and they have a higher rate of suicide and other acts of self-harm while incarcerated.<sup>82</sup> Even correctional guards charged with the duty of keeping facilities safe have allowed or instigated extreme fighting between inmates.<sup>83</sup> This type of inhumane treatment promotes feelings of isolation from the community in prisoners and contributes to the failure of American jails and prisons to treat the root causes of offending. Further, the harm of incarceration disproportionately

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78. See CRAIG HANEY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 17 (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf> (“[T]he less like a prison, and the more like the freeworld, the better”).

79. See *Brown*, 131 S. Ct. at 1947; Luna, *supra* note 35, at 2. Over the last thirty years, California's prisoner population has increased by a factor of eight while there has been no comparable increase in funds. HANEY, *supra* note 78, at 3. In Texas and California, federal courts have found that prison systems have failed to provide adequate treatment services for prisoners who have suffered the most extreme psychological effects of confinement in deteriorated and overcrowded conditions. *Id.*

80. HANEY, *supra* note 78, at 3–4 (referencing that psychological and physical isolation from the surrounding community, compromised visitation programs, and scarce resources result in greater psychological distress and potential dysfunction of inmates).

81. See *id.* at 9.

82. See *Brown*, 131 S. Ct. at 1924.

83. See *Plair v. City of New York*, 789 F. Supp. 2d 459, 461–63 (S.D.N.Y. 2011) (discussing allegations that officers at Rikers Island Detention Center repeatedly attacked inmates and encouraged gang violence); see also HANEY, *supra* note 78, at 4 (explaining that the overcrowding due to the massive increase in the population of prisoners has led to staff shortages and a “de-skilling” of some correctional staff members who then use extreme prison discipline, which causes increased fear and danger for inmates); Luna, *supra* note 35, at 4 n.20 (discussing the staging of prisoner fights by guards); Colin Moynihan, *Two Officers Sentenced in Rikers Island Assault Case*, N.Y. TIMES, Jan. 18, 2012, at A17 (discussing two officers charged, among a group of fifteen people involved, with assaulting youth inmates); Isolde Raftery, *6-Year Sentence for Guard in Rikers Island Beatings*, N.Y. TIMES, Aug. 7, 2010, at A14 (discussing a guard sentenced to six years imprisonment for beating youth inmates).

impacts already vulnerable and marginalized groups like the poor or racial and ethnic minorities.<sup>84</sup>

Inmates subsisting in such environments cannot be expected to leave incarceration better suited for life in mainstream America than they were at the beginning of their term of incarceration. Time in prison may increase an offender's exposure to more sophisticated criminal knowledge and a criminal network.<sup>85</sup> It may also lead to a greater propensity for violence.<sup>86</sup> Years of separation strain family ties, the strength of which is a strong indicator that one will not recidivate.<sup>87</sup> Former inmates are challenged by inadequate support during the reentry process, few legitimate job prospects as a convict with a record, and a society that has changed and grown without them.<sup>88</sup>

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84. The American criminal justice system treats offenders of different races and socioeconomic statuses differently. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 209–48 (2010). As a result, American prisons and jails are disproportionately filled with African Americans, Latinos, and the poor. WEST, *supra* note 35, at 19 tbl.16; Luna, *supra* note 35, at 2 n.8. In 2009, 39 percent of the inmates in state and federal prison were black, and 21 percent were Hispanic. WEST, *supra* note 35, at 21 tbl.18. In addition, 61 percent of the Hispanics and 49 percent of the blacks in the United States are likely to be low-income. *Id.* Perhaps one of the most stark statistics is that one in three African American males in America today is under some form of court supervision—whether that is incarceration in prison or jail, probation, or parole. ALEXANDER, *supra*, at 9; see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1294, 1300 (2004) (noting that entire neighborhoods associated with crime and incarceration may also suffer employment discrimination or reduced economic opportunity, and affirming three main harms of mass incarceration to Black communities: damage to social networks, distortion of social norms, and destruction of social citizenship, leaving them disenfranchised and unable to contest unjust policies).

85. ROSENBERG & MARK, *supra* note 40, at 7 n.29.

86. *Id.* at 7 n.30.

87. JAMES AUSTIN, ET AL., U.S. DEP'T OF JUSTICE, *ALTERNATIVES TO SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS* 2–3 (2005), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>; BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 2 (2006), available at [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf); Carl S. Taylor, *Growing Up Behind Bars: Confinement, Youth Development, and Crime*, J. OKLA. CRIM. JUST. RES., Aug. 1996, at 29, 35–36, available at <http://www.doc.state.ok.us/offenders/ocjrc/96/Growing%20Up%20Behind%20Bars.pdf>; see also Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT.*, *supra* note 42, at 117, 121, 128, 129–31, 133, 135 (explaining how absences due to incarceration break social bonds of extended kinship and friendship networks, which make up communities and reduce family stability, and how families and communities are burdened with the “stigma of criminality”).

88. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–62 (2003); see also Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal*

Often these individuals have difficulty finding legitimate work when released back into the community.<sup>89</sup> Those who cannot obtain and maintain employment are at greater risk of winding up back behind bars.<sup>90</sup> Former inmates are sometimes—but not always—offered reentry programs.<sup>91</sup> Unfortunately, there is no indication that these reentry programs work to reduce recidivism.<sup>92</sup> The better tactic is to provide pre-entry services—services provided before an offender ever enters jail or prison in the first place—to as many offenders as possible.

The harm of incarceration reaches beyond those who are incarcerated. It has ripple effects that permeate society—children grow up without their fathers, communities lose role models, workforces become debilitated, and a group of poor people of color becomes disenfranchised, disempowered, and ostracized.<sup>93</sup> Many former inmates are released back into their communities with children who have been growing up without their fathers and

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*Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 839, 841 (2003) (discussing “social disorganization in already troubled neighborhoods” as a consequence of long-term incarceration for communities of color and observing that ex-felons who return to their communities are further penalized by government restrictions on their ability to vote and receive financial aid and welfare assistance for their children or public housing).

89. Pager, *supra* note 88, at 939.

90. In 2003, unemployed offenders under the supervision of the U.S. Probation and Pretrial Services System had their probation revoked “at a rate that was more than 500 percent higher than that for those who were employed.” John Rakis, *Improving the Employment Rates of Ex-Prisoners Under Parole*, FED. PROBATION, June 2005, at 7, available at <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2005-06/employment.html>.

91. In California, where inmates are being released early due to realignment, some inmates are not receiving post-release support in the form of probation or parole supervision. See *Frequently Asked Questions*, CALREALIGNMENT.ORG, <http://www.calrealignment.org/site-feeds.html> (last visited July 31, 2013). In 1983 Florida effectively abolished all parole and any form of supervised release upon termination of a prison sentence. See *Parole*, Florida Parole Commission, <https://fpc.state.fl.us/Parole.htm> (last visited July 31, 2013).

92. Shelley Johnson Listwan et al., *How to Prevent Prisoner Re-Entry Programs from Failing: Insights from Evidence-Based Corrections*, FED. PROBATION, Dec. 2006, at 19, 20, available at [http://www.uc.edu/content/dam/uc/ccjr/docs/articles/reentry\\_from\\_failing\\_fed\\_prob.pdf](http://www.uc.edu/content/dam/uc/ccjr/docs/articles/reentry_from_failing_fed_prob.pdf) (“We still know relatively little about the overall effectiveness of parole, and even less about the effectiveness of the ‘newer’ re-entry programs.”).

93. Indeed, the purpose of crime control policies generally should be to “reintegrate offenders into society rather than shame them in an unproductive and alienating fashion.” Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1352 (2001).

mothers.<sup>94</sup> Though the former inmates may want to support their families, be with their families, and “do the right thing,” they face obstacles to achieving those goals. The difficulty that former inmates experience readjusting to society is felt not only by them as individuals but also by their families. Children and spouses of offenders suffer psychosocial effects from missing a parent or spouse.<sup>95</sup> For example, “Parental imprisonment . . . increases dramatically the likelihood that children will develop antisocial-delinquent behavior.”<sup>96</sup> In one study, children whose parents had a history of incarceration had a 340 percent higher chance of delinquent behavior as compared to children whose parents had no history of incarceration.<sup>97</sup>

There is also a financial impact on children and families of incarcerated offenders. Over half of adult prisoners are the parents of minor children.<sup>98</sup> A 2003 survey on juvenile reentry candidates found that one in eleven juveniles had children of their own.<sup>99</sup> Fathers and mothers cannot support their children financially while they are serving time in jail,<sup>100</sup> and they have a hard time finding work after release because they face the job market with a criminal record.<sup>101</sup> Thus, the harm of incarceration as a punishment does not just impact the offender: it also impacts children, families, and communities,

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94. MARK LEVIN, CTR. FOR EFFECTIVE JUSTICE, TEX. PUB. POLICY FOUND., POLICY PERSPECTIVE: TREATING TEXAS CRIME VICTIMS AS CONSUMERS OF JUSTICE 1 (2010), available at <http://www.texaspolicy.com/sites/default/files/documents/2010-03-PP03-victimsconsumers-ml.pdf>.

95. ROSENBERG & MARK, *supra* note 40, at 7–8.

96. *Id.* at 15 n.33.

97. *Id.*

98. “An estimated 809,800 prisoners of the 1,518,535 held in the nation’s prisons at midyear 2007 were parents of minor children, or children under age 18.” LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

99. SNYDER & SICKMUND, *supra* note 30, at 233.

100. Prisoners are very poorly paid for work, and thus prison work is not a good source of income to meet financial obligations like child support. *Section III: The Prison Economy*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/prisonindex/prisonlabor.html> (last visited Mar. 16, 2013) (noting the pay scale for federal prisoners who work outside of UNICOR in prison maintenance, in dollars per hour: \$0.12–\$0.40); *see also* LEVIN, *supra* note 94, at 1 (“[T]he average [Texas] inmate who leaves prison owing child support is more than \$16,000 in arrears, making these children secondary victims of crime and an overreliance on incarceration.”).

101. Pager, *supra* note 88, at 943.

perpetuating the cycle of poverty and violence.<sup>102</sup> Not surprisingly, these impacts are greater on the poor and minority populations.<sup>103</sup> Certainly, communities who see their members arrested and incarcerated at high rates may perceive a lack of fairness in the application of our laws, develop a diminished respect for the law, and sense ulterior motives of law enforcement because of the disproportionate impact on the poor and minorities.<sup>104</sup> Further, children in these communities may not have the hopes and visions for their futures that society would ideally like to instill because they were robbed of role models.

The ineffectiveness of incarceration at reducing recidivism, addressing the underlying challenges of offenders, and preparing inmates to succeed in mainstream society, as well as the high cost and the negative impact on families and communities, all weigh in favor of avoiding incarceration as a response to youthful offending. The way to improve outcomes is to find alternatives to incarceration early and for as many offenders who are receptive.

#### *B. Conundrum at Sentencing Phase: The False Sorting Problem*

Inmates are incarcerated when they are held in jail pretrial and when they serve prison sentences after a conviction. Unfortunately, the sentencing process is flawed. It is often focused, mistakenly so, on the task of sorting offenders into two groups: (1) those who will not reoffend, and thus should remain in the community; and (2) those who are likely to reoffend, and thus should be incarcerated.<sup>105</sup>

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102. See ROSENBERG & MARK, *supra* note 40, at 8; RICHARD J. BONNIE, ET AL., NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2-11 (2012) ("[P]ublic safety and the reduction of crime continue to be critically important policy objectives, but policy makers increasingly believe that incarceration may not be an effective means of accomplishing these goals with many youth.").

103. See ROSENBERG & MARK, *supra* note 40, at 9.

104. See Buss, *supra* note 13, at 62-64.

105. Sentencing practices are highly influenced by a judge's subjective view of how remorseful an offender is. Bibas & Bierschbach, *supra* note 6, at 91, 104-07 (calling our system a "punishment assembly line"). The flaw in sorting is that judges cannot accurately gauge sincerity and depth of expression of remorse contained in an apology. *Id.* at 105 n.74. Yet, remorse is related to how an offender is viewed by a sentencer: an offender who demonstrates remorse is not viewed as lost. Rather, he is deemed to have the capacity for self-transformation and deserving of lesser punishment. *Id.* at 94. The more remorseful an offender appears, the more amenable to rehabilitation he is perceived to be, *id.* at 94 n.26, and thus deserving of a lesser punishment. *Id.*

Discussing juvenile life without the possibility of parole (JLWOP) in *Graham*, Justice Kennedy wrote about what may be termed a sorting problem and acknowledged how difficult it is to divine a juvenile offender's potential for future growth and redemption *at the time of sentencing*.<sup>106</sup> “[I]t does not follow,” said Justice Kennedy, “that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”<sup>107</sup>

In *Roper*, Justice Kennedy offered a similar statement: “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>108</sup> Indeed, research bears out that “the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.”<sup>109</sup>

The sorting problem Justice Kennedy describes in the context of extreme sentences of JLWOP and the death penalty is not unique to those punishments. Indeed, this sorting problem is ubiquitous, appearing in every court where a youthful offender is sentenced. In particular, judges have difficulty reconciling what we now know about adolescent development and brain maturation *generally* with

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at 95. Indeed, an apology is often viewed as a proxy for how bad an individual offender is. *Id.* at 88.

106. The term *juvenile* is used here because that is what Justice Kennedy uses to refer to those under the age of eighteen. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

107. *Id.* at 2032.

108. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). The court goes on to finish the thought as related to medical diagnosis: “As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.” *Id.*

109. Brief for the APA et al., *Graham*, *supra* note 3, at 4; see TONY WARD & SHADD MARUNA, REHABILITATION 13 (2007) (stating that over 85 percent of people stop committing crimes by the age of twenty-eight); see also MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 124–25 (1990) (describing this pattern of desisting from criminal activity by the late twenties as an age-crime curve and that criminologists have found that this pattern has remained relatively unchanged for over 150 years).

the behavior and actions of each *individual* youthful offender who comes before them for sentencing.<sup>110</sup>

As a general matter, science has informed the actors in criminal and juvenile courts that youthful offenders have greater potential for growth *and* that their mistakes may be the result of an evolving identity rather than an intrinsically bad character.<sup>111</sup> Sentencers constantly grapple with determining what portion of blame should be attributed to the offender's state of development and what portion should be attributable to the offender's personal, immutable characteristics. It is indeed a difficult, if not impossible, analysis in practice, and it is made even more challenging by limited data points.

In addition to having incomplete information, the judges who impose sentences are human, fallible, and of differing personal views on the general capacity of all humans to grow and change. They are also presented with information from opposing viewpoints. Defense attorneys comb through their clients' lives looking for demonstrations of remorse, potential for rehabilitation, connections to the community, and past personal tragedies that can provide context to a poor decision as an aberration rather than a demonstration of a character flaw. Prosecutors try to fairly represent the interests of the victim and the community as a whole when they do not know the defendant aside from a criminal history score or rap sheet listing a litany of the defendant's past misdeeds. What results in court at sentencing is a contest: the defense wants the judge to see the defendant as redeemable, and the prosecution wants the judge to see the defendant as irredeemable. The judge then attempts to sort. The judge, like the prosecutor, does not know the defendant and is concerned about being held responsible if a defendant re-offends. All too often, because of these limitations and pressures, a judge is tempted to err on the side of incarceration. While incarceration may be a short-term fix to incapacitate a defendant and prevent re-

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110. Maroney, *supra* note 13, at 94 (arguing that science at sentencing supports only probabilistic generalizations). Indeed, Emily Buss also argues that one of the limitations or drawbacks of science is the "elusive promise of perfectly described and coherently applied capacities," when really these are just generalizations. Buss, *supra* note 13, at 15.

111. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *Graham*, 130 S. Ct. at 2026–27; *Roper*, 543 U.S. at 569–70, 573; SCOTT & STEINBERG, *supra* note 25, at 38, 44–50, 52.

offense, in the long-term, it seems to be a contributing factor to, if not a leading outright cause of, recidivism.

At sentencing, there are three main obstacles to fashioning a sentence that can accurately take into account a given offender's potential: (1) timing; (2) lack of procedural opportunities for offender education and reflection; and (3) lack of realistic promise of the system's guidance in procuring redemption.<sup>112</sup>

First, sentencing occurs some time after the actual offense. If little time has passed between an offense and the offender's sentencing, there has not been much time for an offender to grow or demonstrate growth. On the other hand, if a significant period of time has passed, the offender seems more grown up and sophisticated at sentencing than she or he actually was when the offense occurred.<sup>113</sup> With youthful offenders, time may have more of a significant impact. For children who are facing transfers to adult court, the impact of time is evident. Children grow quickly and often in spurts. If the offender was fourteen at the time of an offense, she or he may look and seem much older if the sentencing hearing is one year later when she or he is fifteen.<sup>114</sup> For children transferred to the adult system, a significant lapse of time between the offense and the ultimate sentence is common.<sup>115</sup> It may be harder for a sentencing judge to appreciate one year later just how young the offender was at the time of the offense<sup>116</sup>—this difficulty is compounded if the

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112. Certainly there are other challenges at sentencing that lead to imperfect sentences. Judges tend to reward guilty pleas with lesser sentences. Bibas & Bierschbach, *supra* note 6, at 142. Judges are influenced by the wishes of victims. *See id.* at 136–40. In juvenile court, victims also influence judges in their sentencing decisions. Henning, *supra* note 9, at 1139–40.

113. The typical time period from arrest to sentencing is 265 days for felons; 505 days for murderers; and 348 days for those convicted of sexual assault. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 - STATISTICAL TABLES (2009), available at <http://bjs.gov/content/pub/ascii/fssc06st.txt>. For the typical time period from arrest to sentencing for all different types of crimes committed, see UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 453 (2003), available at <http://www.albany.edu/sourcebook/pdf/t550.pdf>.

114. For example, at the time of the crime in 1999, Jackson was fourteen years old. Because Jackson's transfer to adult court was appealed before a jury heard the case, three years had passed before it reached the Court of Appeals of Arkansas. *See Jackson v. State*, No. CA 02-535, 2003 WL 193412, at \*1 (Ark. Ct. App. Jan. 29, 2003).

115. *See* UNIV. AT ALBANY, *supra* note 113, at 453 tbl.5.50.

116. For an incredible demonstration of this challenge, see Kate Zernike, *Man, 52, Is Convicted as a Juvenile in a 1976 Murder, Creating a Legal Tangle*, N.Y. TIMES, Dec. 22, 2012, at A19.

offense involves youthful characteristics such as peer pressure, impulsive thinking, and lack of forethought to appreciate and weigh risks.

Second, the criminal justice system's procedures lack systemic opportunities in the time period *between the offense and sentencing* to promote offender self-reflection, education, or treatment. While the criminal justice system expects and, at times, rewards an offender's demonstration of remorse and maturity at sentencing,<sup>117</sup> the process does not, by design or in function, promote opportunities for the development of offender remorse and reflection. Further, offenders are at a disadvantage when it comes to accurately expressing themselves at a sentencing hearing.<sup>118</sup> The first two obstacles result in a hearing in which the sentencing court has an inaccurate picture of the offender's future potential.

Third, speaking realistically, no sentencer can be confident that an offender sentenced to some term of incarceration will be provided the tools, treatment, opportunity, and environment necessary to redeem him or herself.<sup>119</sup> The third obstacle is the problem with

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117. See Henning, *supra* note 9, at 1148.

118. Indeed, the justice system, and court hearings in particular, do not promote offender reflection or expression of remorse. This can be a challenge especially at sentencing hearings. *Id.* at 1150.

Physical and procedural barriers in the courtroom further impede meaningful expression and experiences of remorse and apology. The courtroom, for example, is rarely set up to facilitate true eye-to-eye contact between the offender and the victim and does not provide the child with a safe space in which to explore or experience remorse. The parties, who generally speak to the judge instead of each other, are constrained by the limits of the court's time and have little or no meaningful opportunity to understand the other's plight and emotions. The offending child may also feel embarrassed, humiliated, or ostracized in court under the intimidating gaze and judgment of the prosecutor, judge, victim, and even his own family.

*Id.* (footnote omitted); accord Bibas & Bierschbach, *supra* note 6, at 98 (discussing likely emotions of defendants at sentencing); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1176 (2002) (discussing subjective costs associated with apology).

119. U.S. jails and prisons are short on services. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (affirming the lower court's ruling in two long-running cases in which the medical and mental health care provided in California's prisons was found to be so deficient that it endangered the lives of prisoners and violated the Eighth Amendment prohibition against cruel and unusual punishment); see also ROSENBERG & MARK, *supra* note 40, at 7 (discussing how traditional incarceration may not adequately address and treat an offender's substance abuse problems). Indeed, the purpose of crime control policies generally should be to "reintegrate offenders into society rather than shame them in an unproductive, alienating fashion." Brown,

incarceration as it exists today in the United States. Even if an offender's potential could be accurately gleaned through the sentencing process, the state of American incarceration undermines the confidence of any sentencer that a sentence could be tailored to address that individual offender's potential for growth.

This Article proposes a shift in sentencing's focus *away* from sorting and *towards* practices focused on an offender's potential for change and growth based upon information gleaned from developmental psychology and neuroscience. The Proposal reflects both a concern to treat youthful offenders fairly and society's commitment to help its youngest members grow into thoughtful, mature, and law-abiding adult citizens.

### III. DEVELOPMENTAL PSYCHOLOGY AND BRAIN DEVELOPMENT EXPLAIN HOW ADOLESCENTS THINK AND BEHAVE

#### A. Overview

The phrase *adolescent development* refers to the psychosocial science discipline of understanding norms in adolescent behavior and thinking. Adolescent development describes what milestones in thinking and behavior are associated with a particular age group.<sup>120</sup> Developmental psychology informs an understanding of typical or normative teenage thinking and behavior and takes into account differences in cognitive ability (thinking and planning), psychosocial (emotional and social) development, and identity development.<sup>121</sup> The phrase *brain development* refers to the neuroscientific study of how a typical brain matures over time.<sup>122</sup> Specifically, brain development has two important components: structure and

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*supra* note 93, at 1352. Two authors call our system a "punishment assembly line." Bibas & Bierschbach, *supra* note 6, at 125.

120. Maroney, *supra* note 13, at 95–96; see Nicholas Hobbs & Sally Robinson, *Adolescent Development and Public Policy*, 37 AM. PSYCHOLOGIST 212, 213–16 (1982) (explaining how researchers believed that "by the adolescent years, it is too late to make any difference" in the cognitive development of young people); *id.* at 217–18; ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 128–35 (1968); BÄRBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING: FROM CHILDHOOD TO ADOLESCENCE* 344–50 (Anne Parsons & Stanley Milgram trans., 8th ed. 1958); LAWRENCE KOHLBERG & ELLIOT TURIEL, *MORAL DEVELOPMENT AND MORAL EDUCATION* (G. Lesser ed., 1971).

121. See Maroney, *supra* note 13, at 95–102.

122. See *id.* at 92–93.

function.<sup>123</sup> These two components interrelate to explain the full picture of brain maturation. Brain development is not always linear, which means that at some points in the brain's growth, even as an individual is aging, his or her brain will be prone to greater deficiencies than it was at an even younger age.<sup>124</sup> Moreover, adolescent development and brain science make the most sense when understood in an integrated discussion, as the findings in one discipline are complementary to and corroborative of the findings in the other.

*B. Developmental Psychology: Cognitive, Psychosocial, and Identity Development*

By mid-adolescence, at about age sixteen, most individuals have developed logical reasoning skills and can apply those skills to decision making.<sup>125</sup> However, those skills are not refined. Renowned psychologist Laurence Steinberg analogized that teenage thinking capacity and application are similar to “starting the engines without a skilled driver behind the wheel.”<sup>126</sup> With regard to identity, adolescents go through a phase where they emphasize “separation” from their parents: they experiment and try on different behaviors to see what best suits them.<sup>127</sup> The *Roper* Court acknowledged that

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123. *Id.* at 90 n.1; Maroney, *supra* note 11, at 766.

124. See David N. Kennedy et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002) (noting linear increases in white matter between the ages of four and twenty and nonlinear changes in cortical gray matter); Maroney, *supra* note 13, at 95–100.

125. See Brief for the APA et al., *Graham*, *supra* note 3, at 14–15; Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 743–45 (2000); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 APPLIED DEVELOPMENTAL PSYCHOL. 257, 264–71 (2001) (describing analyses of age differences in the consideration of multiple decision-making elements); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 55–59 (2008) (discussing differences between adolescent cognitive and psychological development).

126. See Brief for the AMA et al., *Miller*, *supra* note 3, at 36 (citing Steinberg, *supra* note 125, at 54); see also Arredondo, *supra* note 26, at 21 (describing why restorative justice mediations are a “potent tool” in juvenile justice because “offenders lack . . . experience, not the capacity for empathy”).

127. See Brief for the APA et al., *Graham*, *supra* note 3, at 19–20; see, e.g., Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON

adolescent identity is evolving when it said that “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed,”<sup>128</sup> and it is not until late adolescence or early adulthood that their values and behavior become relatively stable.<sup>129</sup>

From a psychosocial perspective, taking into account emotional and social maturity, juveniles are more vulnerable to peer pressure, more emotional, more attracted to risk, and less able to resist impulses than fully matured adults.<sup>130</sup> Peer pressure, stress, and emotions are powerful forces driving the behavior of adolescents and emerging adults. Peer pressure is powerful because it “can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and result in actions taken without full consideration or appreciation of the consequences.”<sup>131</sup> Stress further complicates any given situation because it “affects the ability to effectively regulate behavior as well as the ability to weigh costs and benefits and override impulses with rational thought.”<sup>132</sup> Stress also impacts

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TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[M]ost identity development takes place during the late teens and early twenties.”); Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEVELOPMENTAL PSYCHOL. 341, 355 (1982) (“The most extensive advances in identity formation occur during the time spent in college.”).

128. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

129. Buss, *supra* note 25, at 496; SCOTT & STEINBERG, *supra* note 25, at 52; *see also* BONNIE ET AL., *supra* note 102, at 4-2 (“Research indicates that, for most youth, the period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood. Thus, it is not possible to predict enduring antisocial traits on the basis of risky behavior during adolescence.” (citations omitted)).

130. *See Roper*, 543 U.S. at 569-70; Brief for AMA et al., *Miller*, *supra* note 3, at 6-7; Brief for the APA et al., *Graham*, *supra* note 3, at 8-9; Lucy C. Ferguson, *The Implications of Developmental Cognitive Research on “Evolving Standards of Decency” and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 458 (2004); BONNIE ET AL., *supra* note 102, at 4-2 (“Current empirical evidence from the behavioral sciences suggests that adolescents differ from adults and children in three important ways that lead to differences in behavior.”).

131. Brief for the AMA et al., *Miller*, *supra* note 3, at 12; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007) (analyzing the resistance to peer pressure for different adolescent age groups and concluding that resistance declines during ages fourteen to seventeen).

132. Brief for the AMA et al., *Miller*, *supra* note 3, at 13; *see also* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 423 (2000) (arguing adolescents may perform worse in stressful situations based upon scientific studies).

hormones and hormone-driven emotional responses; therefore, adolescents and emerging adults experience greater volatility and range in their emotional responses than do mature adults.<sup>133</sup>

In the decision-making process, while adolescents and emerging adults are capable of viewing and assessing both risks and rewards, science reveals that both of these groups weigh risks and rewards *differently* than mature adults: they tend to over-value the potential benefits of a risky course of action, under-appreciate the risks, and are less able to envision the future.<sup>134</sup> Specifically, adolescents and emerging adults are less able to predict the consequences of their actions.<sup>135</sup> As compared to mature adults, adolescents and emerging adults are less able to accurately predict the impact of their behavior, exercise self-restraint, and maturely weigh costs and benefits.<sup>136</sup> One study reveals that adolescents at age seventeen are less able than adults to gauge, understand, and account for the perspectives of

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133. Brief for the AMA et al., *Miller*, *supra* note 3, at 13–14; *see also* Spear, *supra* note 132, at 429 (discussing stress triggers unique to teens and their effect on teens' moods); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011–13 (2003) (indicating that adolescents have more rapid and more extreme mood swings than do adults and thus, adolescents tend to act more impulsively than adults).

134. Brief for the APA et al., *Graham*, *supra* note 3, at 8–9; *see also* Buss, *supra* note 25, at 495 (stating that adolescents are psychosocially immature, which makes them lack the ability to control their emotions and more likely to be attracted to risky behavior); Ferguson, *supra* note 130, at 458 (stating that adolescents are more “susceptib[le] to peer influence when making decisions and conducting cost-benefit analyses, lack realistic risk-assessment abilities, and are not as future-oriented as are adults”); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005) (discussing study finding that peer influence has a much greater effect on the risky behavior of adolescents and young adults than it does on mature adults).

135. Brief for the APA et al., *Graham*, *supra* note 3, at 11–12; *see also* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 28–29 (1991) (discussing studies that show the tendency to think and plan for the future increases as adolescents get older); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 30, 35–36 fig.2 (2009) (showing that those from the age of sixteen to seventeen and eighteen to twenty-one have lower scores in anticipation of consequences than do those from the ages of twenty-two to twenty-five and twenty-six to thirty).

136. Brief for the APA et al., *Graham*, *supra* note 3, at 8–9, 11–12; *see also* Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 204 (2010) (discussing study showing that adolescents are less able to weigh choices and make better decisions).

others in the decision-making process.<sup>137</sup> Adolescents and emerging adults are not able to reliably and consistently reflect before they act.<sup>138</sup> The adolescent's identity and psychosocial immaturity are interrelated: for instance, the desire to separate from one's parents relates to the high value placed on one's peers.<sup>139</sup> Further, adolescents and emerging adults have little life experience that requires them to practice their decision-making skills.<sup>140</sup>

In sum, adolescents and emerging adults are "less able . . . to self-regulate, or 'cognitively' control, their behavior."<sup>141</sup> Cognitive control reflects an ability to choose to act in furtherance of a goal, even in the presence of competing, goal-inappropriate urges.<sup>142</sup> Indeed, adolescents experience difficulty suppressing appealing, yet goal-inappropriate responses.<sup>143</sup> This lack of impulse control results in decisions where reflexive responses to enticing goal-inappropriate

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137. Brief for the APA et al., *Graham*, *supra* note 3, at 12; see Cauffman & Steinberg, *supra* note 125, at 746, 748, 754 tbl.4, 756 (outlining study of the physiological maturity of adults compared to adolescents and concluding that psychological maturity impacts decision making and has the greatest development from age sixteen to nineteen).

138. Brief for the AMA et al., *Miller*, *supra* note 3, at 11; Steinberg et al., *supra* note 135, at 28–29, 38–40 (stating that adolescents are less oriented to the future than are adults); see also Steinberg, *supra* note 125, at 57 (stating that "[o]ver the course of adolescence and into young adulthood, individuals become more future oriented").

139. SCOTT & STEINBERG, *supra* note 25, at 50–51.

140. Brief for the APA et al., *Graham*, *supra* note 3, at 11–12; see also Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 351–53 (1992) (discussing how adolescents' egocentrism leads them to believe they are excluded from situations, and referring to an earlier study by Finn and Bragg where younger drivers, between the ages of eighteen and twenty-four, estimated their likelihood of getting into an accident to be lower than did older drivers between the ages of thirty-eight and fifty); Nurmi, *supra* note 135, at 28–29 (discussing studies showing that "levels of planning, realization, and knowledge concerning the future increase with age").

141. Brief for the AMA et al., *Miller*, *supra* note 3, at 6; see also Beatriz Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 249, 251 (Francisco Aboitiz & Diego Cosmelli eds., 2009) (describing briefly cognitive control and the cognitive maturation process); Steinberg et al., *supra* note 135, at 40–41 (comparing the ability of adolescents and adults to cognitively and behaviorally self-control); Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253–54 (2007) (outlining different medical tests of brains showing adolescents have lesser ability to plan or reason).

142. Brief for the AMA et al., *Miller*, *supra* note 3, at 6–7; see also Steinberg et al., *supra* note 135, at 40–41 (explaining cognitive control and discussing a study showing adolescents have less cognitive control and instead choose immediate rewards); Yurgelun-Todd, *supra* note 141, at 253 (discussing the development of the prefrontal cortex that controls planning and reasoning functions).

143. Brief for the AMA et al., *Miller*, *supra* note 3, at 10–11.

responses override a goal-directed response.<sup>144</sup> Scholars argue that some level of antisocial, risky, and criminal behavior, which may land youth in juvenile and criminal courts, is indeed *normative* adolescent behavior.<sup>145</sup>

### C. Neuroscience: Structural and Functional Brain Development

Advances in magnetic resonance imaging (MRI) technology have greatly added to the body of knowledge about the growth and capabilities of the human brain.<sup>146</sup> These studies reveal data about brain development, which corroborate and further inform findings in the field of psychological development. For both age groups—adolescents and emerging adults—the structure of the brain *and* the way in which it functions are not fully developed compared to the

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144. Brief for the AMA et al., *Miller*, *supra* note 3, at 10; B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 64 (2008); *see also* Luna, *supra* note 141, at 251 (describing briefly cognitive control and the cognitive maturation process).

145. Brief for the AMA et al., *Miller*, *supra* note 3, at 6; *see also* Brief for the APA et al., *Graham*, *supra* note 3, at 11 (discussing a study showing adolescents weigh risks and rewards differently than adults and therefore are more likely to engage in risky behavior); Arnett, *supra* note 140, at 343–44 (stating that reckless behavior is a normative part of adolescent actions); Casey et al., *supra* note 144, at 65 (discussing the increased risk taking and impulsive behavior among young adolescents due to underdeveloped parts of the brain); Spear, *supra* note 132, at 421–23 (arguing adolescents are greater risk takers and discussing studies supporting the theory).

146. Brief for the AMA et al., *Miller*, *supra* note 3, at 14–15; *see also* Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989) (“MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the earth’s. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth.”); David Dobbs, *Teenage Brains*, NAT'L GEOGRAPHIC, Oct. 2011, *available at* <http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text> (“[R]esearchers developed brain-imaging technology that enabled them to see the teen brain in enough detail to track both its physical development and its patterns of activity.”); Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (giving an overview of MRI studies of brain development in childhood and adolescence); Yurgelun-Todd, *supra* note 141, at 251–52 (“[S]tructural MRI and functional MRI (fMRI) . . . have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of the neurobiological changes and functional abilities associated with brain maturation.”); Claudia Wallis, *What Makes Teens Tick*, TIME, Sept. 26, 2008, *available at* <http://www.time.com/time/magazine/article/0,9171,994126,00.html>. (“MRI studies have cracked open a window on the developing brain.”).

brain of a mature adults.<sup>147</sup> Indeed, human brains are still maturing and *not fully developed until the mid-twenties*.<sup>148</sup> The particular area of the brain that is the last to mature is the prefrontal cortex, which controls what are called executive functions—“response inhibition, emotional regulation, planning and organization.”<sup>149</sup> Significantly, the prefrontal cortex is responsible for impulse control, risk assessment, evaluation of reward and punishment, voluntary behavior control (i.e., choosing a goal-directed response), judgment of future consequences, responses to criticism and affirmation (i.e.,

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147. Brief for the AMA et al., *Miller*, *supra* note 3, at 6; see BONNIE ET AL., *supra* note 102, at 4–6 (“[W]hat distinguishes adolescents from children and adults is an imbalance among developing brain systems.”); Cauffman et al., *supra* note 136, at 206; Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F1–F2 (2011); Fulton Crews et al., *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189, 190 (2007); see also Durston et al., *supra* note 146, at 1012 (reviewing results of MRI studies of brain development in childhood and adolescence); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual System Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1776 (2008) (linking lack of impulse control to sensation-seeking behaviors and noting that sensation seeking behaviors and lack of impulse control is greatest from age ten to fifteen). See generally Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT’L ACAD. SCI. 8174, 8177 (2004) (discussing the development process of the brain and its correlation to milestones in cognitive and functional development of adolescents).

148. Maroney, *supra* note 13, at 152.

149. Brief for the AMA et al., *Miller*, *supra* note 3, at 17, 19; see Casey et al., *supra* note 144, at 68; Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 DEVELOPMENTAL SCI. 55, 56 (2009) (“Neuropsychological and neuroimaging studies have shown that prefrontal cortex (PFC) is strongly implicated in relational reasoning.”); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999); see also MICHAEL S. GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 75 (2d ed. 2002) (describing the function of the frontal lobe of the brain); B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000) (describing the maturation process of the brain and concluding that the prefrontal cortex is one of the last areas to develop); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) (discussing study of the stages of development of the adolescent brain); Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360–61 (2004) (comparing the correlation between frontal lobe development in adolescents and response inhibition and social anxiety levels). See generally Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002) (arguing that studies of adolescent and adult brains show adolescents have lesser ability to resist risk taking because areas of their brains are underdeveloped).

susceptibility to peer pressure), and moral reasoning.<sup>150</sup> This is a very scientific way of saying that adolescents and emerging adults tend to act more impulsively than adults because of the stage of their development.

While the brain's prefrontal cortex and its connections to the rest of the brain are slow to develop, adolescents and emerging adults experience greater relative development in their motivational system.<sup>151</sup> The motivational system, which incentivizes "risky and reward-seeking behavior," develops earlier than the cognitive prefrontal cortex, which functions to counteract the impulsivity of the motivational system.<sup>152</sup> Prior to the full development of the prefrontal cortex, adolescents and emerging adults primarily rely upon the amygdala, which is known for emotional impulsivity and violent behavior.<sup>153</sup> The amygdala is a neural system that perceives

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150. Brief for the AMA et al., *Miller*, *supra* note 3, at 17–19; *see also* GAZZANIGA ET AL., *supra* note 149, at 75 (describing the function of the frontal lobe of the brain); Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 *BRAIN* 2189, 2198–99 (2000) (describing a study of those with prefrontal cortex damage and concluding it has led to those patients having difficulty comprehending the consequences of their actions); Casey et al., *supra* note 149, at 244 (describing tasks normally associated with prefrontal cortex); Crone et al., *supra* note 149, at 56 (stating that "[n]europsychological and neuroimaging studies have shown that prefrontal cortex (PFC) is strongly implicated in relational reasoning"); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 *ARQ NEUROPSIQUIATR* 657 (2001) (discussing a study showing that moral judgments are made using the frontopolar cortex of the brain); John O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 *NATURE NEUROSCIENCE* 95 (2001) (explaining research showing emotional responses are guided by the orbitofrontal cortex of the brain); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 *J. NEUROSCIENCE* 9029, 9029 (1999) (concluding that studies show the orbital prefrontal cortex is linked to decision making and risk-reward comprehension); Rosso, *supra* note 149, at 360–61 (comparing the correlation between frontal lobe development in adolescents and response inhibition and social anxiety levels); Yurgelun-Todd, *supra* note 141, at 253 (discussing the development of the prefrontal cortex that controls planning and reasoning functions). *See generally* Bunge et al., *supra* note 149 (arguing that studies of adolescent and adult brains show adolescents have lesser ability to resist risk taking because areas of their brains are underdeveloped).

151. Brief for the AMA et al., *Miller*, *supra* note 3, at 29–30.

152. *Id.*

153. *See id.* at 30; *see also* GAZZANIGA ET AL., *supra* note 149, at 553–73 (describing the amygdala and its connection to learned emotional responses); ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND* 31 (2001) (describing the function of the amygdala); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 *CURRENT OPINION IN NEUROBIOLOGY* 169 (2002) (discussing the neural structures necessary for perceiving

danger and processes emotional responses to that danger in a rapid, automatic fashion.<sup>154</sup> This reliance on the amygdala, together with the relative dominance of the motivational system overall, impacts and correlates with the difficulty experienced by adolescents and emerging adults in overcoming impulses and predicting the long-term consequences of their actions.<sup>155</sup> It also explains why they do not engage in mature cost-benefit analyses.<sup>156</sup>

Until the early to mid-twenties, the human brain undergoes two processes that directly impact cognitive control of behavior.<sup>157</sup> First, there is the process of myelination, which involves the coating of the neural fibers in the brain (called *axons*) with a white fatty substance (called *myelin*) that facilitates communication between various parts of the brain, making the transmission of information faster and more reliable.<sup>158</sup> Second, the brain is undergoing “synaptic pruning,”

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emotions); Hans C. Breiter et al., *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996) (discussing research showing the amygdala is related to emotional responses to facial expressions); Richard D. Lane et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997) (discussing findings that the amygdala was stimulated during unpleasant emotions); K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002) (stating that fear is connected to the amygdala); Steinberg et al., *supra* note 135, at 40 (discussing young adolescents' impulsivity and disposition for instant gratification). *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCIENCE 10274 (2003) (reporting the results of a study on amygdala damage and its effect on emotions).

154. Brief for the AMA et al., *Miller*, *supra* note 3, at 31; *see* GOLDBERG, *supra* note 153, at 31 (describing briefly the function of the amygdala as a “fight or flight” reactor); Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 338 (2008) (stating that the amygdala is essential to survival impulses); *see also* William D.S. Killgore & Deborah A. Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004) (reporting on a study on the effect of sad and happy facial expressions on the amygdala); Phan et al., *supra* note 153, at 336 (analyzing the relationship between the emotion of fear and the function of the amygdala).

155. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 515 (2003).

156. *See id.*

157. Brief for the AMA et al., *Miller*, *supra* note 3, at 20; Brief for the APA et al., *Graham*, *supra* note 3, at 25.

158. Brief for the AMA et al., *Miller*, *supra* note 3, at 23–24; Brief for the APA et al., *Graham*, *supra* note 3, at 25–27; Feld, *supra* note 155, at 517; *see also* GOLDBERG, *supra* note 153, at 144 (describing the development of the brain including myelination in the context of society's development); Zoltan Nagy et al., *Maturation of White Matter Is Associated with the Development of Cognitive Functions During Childhood*, 16 J. COGNITIVE NEUROSCIENCE 1227,

which involves a reduction in the amount of gray matter in the brain.<sup>159</sup> Pruning is the process of eliminating unused and burdensome neural connections so that the brain can function more efficiently.<sup>160</sup> Pruning permits the reasoning areas of the brain, for example, the frontal lobe, to develop and fully function.<sup>161</sup> The presence of gray matter and the process of pruning are not linear,<sup>162</sup> as gray matter is pruned during one phase beginning at infancy and again later in childhood, reaching its peak from ages ten to twenty.<sup>163</sup> The prefrontal cortex is the last region of the brain to be pruned for peak performance, which means that a person's ability to process complex information related to risk assessment, impulse control, decision-making, planning, and emotional regulation is not fully mature until he or she reaches his or her mid-twenties.<sup>164</sup> Until myelination and pruning are complete, adolescents and emerging adults control their behavior by relying upon the amygdala, which is known for emotional impulsivity, rather than the prefrontal cortex,

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1231–32 (2004) (stating that “the physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed,” which could “improve functionality by providing faster information transfer, and allowing a more precise timing in the communication between cortical areas”).

159. Brief for the AMA et al., *Miller*, *supra* note 3, at 21; *see also* Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826 (2001) (describing their study's findings that gray matter reduction leads to more brain growth in adolescence).

160. Brief for the AMA et al., *Miller*, *supra* note 3, at 21; *see* Giedd, *supra* note 154, at 337; Gogtay et al., *supra* note 147, at 8174; Sowell et al., *supra* note 159, at 8828.

161. *See* Brief for the AMA et al., *Miller*, *supra* note 3, at 21–22; Brief for the APA et al., *Graham*, *supra* note 3, at 26; Gogtay et al., *supra* note 147, at 8174 (noting in a ten-year study of gray matter loss, results showed continuous gray matter loss until adulthood).

162. Gogtay et al., *supra* note 147, at 8174.

163. Brief for the AMA et al., *Miller*, *supra* note 3, at 22–23; *see* Durston et al., *supra* note 146, at 1014; *see also* Giedd, *supra* note 154, at 339 (discussing age-related changes in the brain); Giedd et al., *supra* note 149, at 861–62 (noting the linear increase of white matter with the increase in age); Kennedy et al., *supra* note 124, at 274 (“[Studies] demonstrate[d] nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.”); Yurgelun-Todd, *supra* note 141, at 252 (describing the development of the brain from decreasing gray matter to linear increasing white matter with age).

164. *See* Brief for the AMA et al., *Miller*, *supra* note 3, at 22–23; Yurgelun-Todd, *supra* note 141, at 253.

which is responsible for impulse control, risk assessment, and moral reasoning.<sup>165</sup>

Thus, there are physiological and biological reasons explaining why youthful offenders, like Ben, make risky decisions. Youthful offenders have an organic impairment that impacts their ability to plan, organize their thoughts, and make rational decisions.<sup>166</sup> They respond instinctively in stressful situations and act upon gut reactions rather than making conscious, thought-out decisions.<sup>167</sup> Because of this, the sentencing process for adolescents and young adults should take into consideration the unique developmental features of an adolescent or young adult's thought process and behavior.

*D. Line-Drawing and the Supreme Court's Recognition of Scientific Findings of Youthful Offenders' Immaturity*

Panic about juvenile crime reached its height in the 1980s and 1990s,<sup>168</sup> and states increasingly decided to transfer juveniles accused of crimes committed before the age of eighteen to adult court.<sup>169</sup> When it comes to criminality, both adolescents and emerging adults do not function the way that fully mature adults do, and they should not receive consequences that are the same as those given to fully mature adults. Scholar Emily Buss asserts that legislative policy that changes the way that juvenile crime is treated reflects a developmental message: "In the eyes of the law, criminal conduct turned minors into adults."<sup>170</sup>

This Article proposes that legislators should be urged to view the complexities of development and brain maturation together, while at the same time crafting developmentally appropriate

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165. See Brief for the AMA et al., *Miller*, *supra* note 3, at 25, 30–32.

166. See Brief for the APA et al., *Graham*, *supra* note 3, at 27.

167. See Brief for the AMA et al., *Miller*, *supra* note 3, at 31–32.

168. Buss, *supra* note 13, at 33 (evidencing the prevalence of the super-predator image); Henning, *supra* note 9, at 1113.

169. Henning, *supra* note 9, at 1113; Matthew Kauffman, *A Troubled System for Troubling Children: Lawmakers Aim to Fix Juvenile Justice System*, HARTFORD COURANT, Apr. 23, 1995, [http://articles.courant.com/1995-04-23/news/9504230117\\_1\\_juvenile-justice-system-young-offenders-troubled-children](http://articles.courant.com/1995-04-23/news/9504230117_1_juvenile-justice-system-young-offenders-troubled-children).

170. Buss, *supra* note 13, at 33 ("The public enthusiasm for this get-tough trend was captured in the refrain 'adult time for adult crime.'" (citations omitted)).

sentencing practices, be they for juvenile or adult court proceedings. Scholars, child development researchers, and even the Court have acknowledged that the age of eighteen is the line that has been chosen and held as a compromise of practical necessity.<sup>171</sup> And, indeed, some state law recognizes that emerging adults are distinct from mature adults by treating certain emerging adults more leniently.<sup>172</sup>

While lawmakers have yet to integrate the science of development and maturation with developmentally appropriate sentencing procedures, in *Roper*, *Graham*, and *Miller*, the U.S. Supreme Court applied scientific findings to limit the imposition of the harshest sentences on offenders whose offenses were committed as juveniles (under eighteen)—specifically capital punishment and life without the possibility of parole. In each of the aforementioned cases, juvenile offenders were removed from the juvenile system and treated as adults in the criminal justice system.

In 2005, the Supreme Court recognized advances in science when it outlawed the imposition of the death penalty for juveniles in *Roper*.<sup>173</sup> The *Roper* Court frequently cited recent scientific developments in the understanding of psychosocial and brain development of adolescents.<sup>174</sup> The Court described three general

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171. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach . . . . [H]owever, a line must be drawn . . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.”) construed in *Buss*, *supra* note 13, at 40 (stating that “at this point in the opinion, the Court retreats to conventional language about the inaccuracy, but practical necessity, of bright line rules”).

172. See, e.g., Youth Rehabilitation Act, D.C. CODE §§ 24-901–24-907 (2001) (aiming to separate youthful adult offenders from more experienced adult offenders by giving the qualified youthful offender an opportunity to receive a more favorable treatment; per section (f) of the Act’s regulations, 28 C.F.R. § 2.106(f) (2012), the youthful parolee may even receive unconditional discharge from supervision based on a number of factors, including prior criminal history, seriousness of offense, and stability of residence and family); *Wells v. Golden*, 785 A.2d 641, 646 (D.C. 2001) (“In the context of the YRA’s emphasis on treatment and rehabilitation, the ‘appropriateness’ of release under D.C. Code § 24-904(a) must depend, at least in part, on a consideration of such factors. The Board of Parole is therefore obliged to make its parole decisions in light of the youthful offender’s *potential or actual progress*, or lack thereof, in his program of treatment.” (emphasis added)).

173. *Roper*, 543 U.S. at 569–71.

174. *Id.*

differences between juveniles under eighteen and adults, all of which are relevant beyond the context of the death penalty: (1) children lack maturity, do not feel the same sense of responsibility, and, thus, often act impetuously and without careful consideration for the consequences of their actions;<sup>175</sup> (2) children are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and are also “susceptible to influence and to psychological damage;”<sup>176</sup> and (3) a child’s character “is not as well formed as that of an adult”<sup>177</sup> because their “personality traits . . . are more transitory, less fixed.”<sup>178</sup> The Court did acknowledge, however, that it is impossible to determine which juveniles will outgrow their offending behavior.<sup>179</sup>

The Supreme Court expanded its recognition of the uniqueness of youthful development in its decisions in *Graham* and *Miller*. In *Graham* and *Miller*, the Court extended the rationale for differential treatment of juveniles at sentencing beyond the context of the death penalty and applied its rationale to limit sentences of JLWOP. In *Graham*, the Court outlawed the imposition of a life sentence without the possibility of parole for juveniles convicted of

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175. *Id.* at 569.

176. *Id.* (internal quotation marks omitted). The Court went on to explain that this has a particular impact on children who may find themselves trapped in a toxic environment: “[J]uveniles have less control, or less experience with control, over their own environment.” *Id.* “[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting[.]” *Id.* (quoting Steinberg & Scott, *supra* note 133, at 1014). “Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” *Id.* at 570. Adults are supposed to avoid negative influences, while children, who are biologically susceptible to negative influences, cannot choose to get away from those influences; therefore, children are more likely to make bad choices because of their environments. *Id.* at 569–70.

177. *Id.* at 570.

178. *Id.*

179. *Id.* at 573.

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.

*Id.* (internal citation omitted).

nonhomicide offenses.<sup>180</sup> Following a guilty plea, Graham was convicted of robbery at age sixteen.<sup>181</sup> He was tried in a Florida criminal court and ultimately sentenced as an adult.<sup>182</sup> After serving a year in prison, Graham was released and then re-arrested for burglary at age seventeen.<sup>183</sup> When Graham's probation for his previous robbery conviction was revoked, he faced a suspended sentence.<sup>184</sup> The trial court judge chose to sentence Graham for the robbery to the draconian maximum penalty of JLWOP.<sup>185</sup> The Court then held that sentencing a juvenile offender to LWOP is unconstitutional for a crime not involving homicide.<sup>186</sup>

In *Miller*, the Court combined the two cases of Evan Miller and Kuntrell Jackson, both fourteen at the time they committed their offenses.<sup>187</sup> Both juveniles were charged with murder,<sup>188</sup> though Kuntrell Jackson was charged with felony murder.<sup>189</sup> Both juveniles were charged in adult criminal court, and both received sentences of LWOP.<sup>190</sup> The *Miller* Court held that juveniles sentenced to LWOP must have some "meaningful opportunity" for review of their sentences.<sup>191</sup>

In between *Graham* and *Miller*, the Court decided *J.D.B. v. North Carolina*.<sup>192</sup> In *J.D.B.*, the Court held that courts must take age into account when determining the custody prong of *Miranda*.<sup>193</sup> J.D.B. was thirteen years old when he was taken to the principal's office and interrogated.<sup>194</sup> No one read J.D.B. his *Miranda* warnings, and thus, he did not have an opportunity to waive his rights.<sup>195</sup> Prior

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

181. *Id.* at 2018.

182. *Id.*

183. *Id.* at 2018–19.

184. *Id.* at 2019.

185. *Id.* at 2020.

186. *Id.* at 2034.

187. *Miller v. Alabama*, 132 S. Ct. 2455, 2460–62 (2012).

188. *Id.* at 2460.

189. *Id.* at 2461.

190. *Id.* at 2461, 2463.

191. *Id.* at 2469. What exactly "meaningful opportunity" would look like and when it must occur was left undefined by the Court in *Miller*.

192. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

193. *Id.* at 2402–03.

194. *Id.* at 2399.

195. *Id.*

to *J.D.B.*, custody was evaluated using an objective standard that was applied to adults in the same way that it was applied to children.<sup>196</sup> To determine whether a suspect was in custody was determined by resolving whether a reasonable person would feel that she or he was not free to go and that his or her freedom was restrained in such a manner that was consistent with a formal arrest.<sup>197</sup> The *J.D.B.* Court said that what may not feel like custody to an adult may, in fact, feel like custody to a child; therefore, the age of a child suspect must be taken into account when determining whether a reasonable person in that child's position would have felt like she or he was in custody.<sup>198</sup> The rationale for the Court's decision rested *not on science*, but instead on common sense: kids are kids, and kids are different than adults.<sup>199</sup>

In all four of these cases—*Roper*, *Graham*, *Miller*, and *J.D.B.*—the Court held that offenders under the age of eighteen had a *right* to be treated differently than adults. The Court re-affirmed in each case that adolescents are biologically immature, making them categorically less culpable, more vulnerable and susceptible to influence, and necessarily imbued with the potential to outgrow abhorrent behavior. The Court relied heavily on science that applied to both adolescents *and* emerging adults. Taken all together, these holdings announced the principle that the relative immaturity of juveniles *is* a basis to treat them differently than adults, not only at sentencing but also at other stages of criminal procedure.<sup>200</sup>

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196. *Miranda v. Arizona*, 384 U.S. 436 (1966).

197. *Id.* at 444.

198. *J.D.B.*, 131 S. Ct. at 2402–03.

199. *Id.* at 2403.

200. Recognizing the rehabilitative purpose of juvenile courts, some scholars have argued that due process concerns demand a different approach to the sentencing of young people. For an example of the codification of rehabilitative purpose, see CAL. WELF. & INST. CODE § 202 (Deering 2006). For a discussion of a juvenile due process right, see Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 103 (2010) (arguing that *Graham* should be interpreted to afford juveniles a right to rehabilitation); see also Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, at 492, 499 (stating that juveniles have a due process right to differential treatment by the justice system, and in particular, they have a due process right to individualized and age-appropriate sentencing); Henning, *supra* note 9, at 1119 & n.57 (stating that states have made a commitment to rehabilitation through state statutes, including in D.C., which is held accountable by statute to rehabilitate juveniles).

*E. Penological Justifications Apply with Lesser or No Force to Youthful Offenders*

To measure the efficacy of incarceration as a punishment, one must assess whether any of the five overarching justifications for punishment are furthered by its use.<sup>201</sup> The five justifications are (1) rehabilitation; (2) deterrence (both *general deterrence* to the wider community and *specific deterrence* to that particular offender); (3) incapacitation; (4) retribution; and (5) restitution.<sup>202</sup> The first four justifications are the typically invoked penological justifications.<sup>203</sup>

First, simply, rehabilitation is furthered by access to programs and education in the community.<sup>204</sup> Significantly, while it is not the only goal of juvenile delinquency court, rehabilitation is an overarching purpose of juvenile courts<sup>205</sup> because youth are more amenable to rehabilitation, as they do not yet have fully formed personalities and are therefore inherently malleable.<sup>206</sup> Youth are open to positive as well as negative influences; role models, socialization, and education will help to shape offenders, positively or negatively, into the person they will grow to become.<sup>207</sup> Simply put, a youthful offender who comes of age behind bars has not been socialized, prepared, educated, equipped, and nurtured to become a productive, law-abiding citizen. This is not a recipe for success, and restorative justice programs in the community show more promise at achieving rehabilitative goals and reducing recidivism.<sup>208</sup>

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201. *E.g.*, Timothy Cone, *Double Jeopardy, Post-Blakely*, 41 AM. CRIM. L. REV. 1373, 1381 (2004).

202. *E.g., id.*

203. *See* Johnson & Miller, *supra* note 29, at 102.

204. Community programs work better than incarceration, and data on the rehabilitative impact of restorative justice programs is promising. Bibas & Bierschbach, *supra* note 6, at 117. Rehabilitation could be promoted by (1) reducing incarceration; (2) dealing with community programs; and (3) using restorative justice programs in the community. *See* BONNIE ET AL., *supra* note 102, at 6-5 (“[R]isk of reoffending . . . might be lowered by particular interventions, monitoring in the community, or changes in life situation.”).

205. *See* Henning, *supra* note 9, at 1119 (emphasizing rehabilitation as an overarching goal of juvenile courts).

206. *See* SCOTT & STEINBERG, *supra* note 25, at 53; Steinberg & Scott, *supra* note 133, at 1016.

207. *See* SCOTT & STEINBERG, *supra* note 25, at 56-57.

208. *See* Bibas & Bierschbach, *supra* note 6, at 117 & n.153.

Second, deterrence does not justify youth incarceration. As a group, youthful offenders do not think through the consequences of their actions before they act<sup>209</sup> because they act impulsively and cannot recognize consequences and weigh those consequences before acting.<sup>210</sup> Thus, whether examining specific or general deterrence of youthful offenders, the offenders are not likely to be deterred because, *even if they knew about the potential prison sentence that they might face*, they are unlikely to factor it into a decision.<sup>211</sup> Further, in my experience, the young clients I represented were dumfounded by the mandatory minimums they faced. In order to deter or argue with any legitimacy that deterrence has any force, the United States would have to air commercials on mandatory minimums during cartoons.

Third, the Court has recognized that incapacitation does not justify incarceration for all juvenile offenders.<sup>212</sup> Incapacitation is limited in that it may justify punishment for juveniles only in instances where the juvenile is determined to be a threat to society. The Court has cautioned that predicting future dangerousness of juveniles must be tempered by the understanding that the qualities of youth are temporary.<sup>213</sup> In explaining why JLWOP cannot be justified on the basis of incapacitation, the Court elaborated: “Deciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but ‘incorrigibility is inconsistent with youth.’”<sup>214</sup>

The fourth penological justification is retribution—the proposition that an “offender should be punished ‘because and only

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209. Steinberg & Scott, *supra* note 133, at 1016–17.

210. Brief for the Am. Med. Ass’n et al. as Amici Curiae Supporting Respondent at 12–15, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); *see* Brief for the Am. Bar Ass’n as Amicus Curiae Supporting Petitioners at 18, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646 and 10-9647); Brief for the Am. Bar Ass’n as Amicus Curiae Supporting Petitioners at 11–13, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412 and 08-7621) (supporting the idea that deterrence would not be served by punishing juveniles so harshly); *see also* *Miller v. Alabama*, 132 S. Ct. 2455, 2565 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2016 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005) (all adopting this rationale as one of the bases for the Court’s decision).

211. *See* Steinberg & Scott, *supra* note 133, at 1012. Lack of knowledge of the sentence they would face is an issue for adults as well as youth.

212. *See Miller*, 132 S. Ct at 2465.

213. *Id.*

214. *Id.* (quoting *Graham*, 130 S. Ct. at 2029).

because, [he] deserves it.”<sup>215</sup> Retribution embraces the notion of society needing to get even with an offender for the harm she or he inflicted. Society is less justified in “the sense of rage and moral indignity” it feels for youthful offenders.<sup>216</sup> When it comes to retribution, the *Roper*, *Graham*, and *Miller* Courts have recognized that children have a reduced culpability making it less justifiable to impose the harshest of punishments on them.<sup>217</sup> Writing for the *Miller* Court, Justice Kagan explained that “[b]ecause [t]he heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult.”<sup>218</sup>

Finally, the fifth rationale used to justify incarceration is restitution.<sup>219</sup> An inmate’s ability to make financial restitution, or to pay back a victim in order to compensate for losses suffered, is not furthered by access to jail jobs with jail pay because the pay is extremely minimal.<sup>220</sup> Instead, chances of making financial restitution are furthered by a community-based sentence where an offender has access to minimum pay jobs at the very least.<sup>221</sup>

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215. Bibas & Bierschbach, *supra* note 6, at 107 & n.86 (quoting Michael S. Moore and referencing Immanuel Kant). “[T]he appropriate amount of punishment is commensurate with the objective moral seriousness of the offense.” *Id.* at 107. “[C]haracter retributivism” stands for the proposition that an offender should be punished not just because of his bad conduct, but also for his bad character. *Id.* (citation omitted).

216. Johnson & Miller, *supra* note 29, at 117 (discussing this as related strictly to juveniles and JLWOP).

217. To deserve punishment, an offender must be culpable. See *Miller*, 132 S. Ct. at 2464; *Graham*, 130 S. Ct. at 2016; *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

218. *Miller*, 132 S. Ct. at 2465 (internal quotation marks omitted). Further, one scholar has proposed that in fact, retribution is more accurately captured by a distributive theory of punishment—that victims and society seek retribution as a part of the criminal justice system to distribute pain and suffering equally. The offender has inflicted pain and suffering on a victim, and now the court system and the victim can inflict pain and suffering back onto the offender. Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 5 (2010) (describing a distributive theory of punishment where harm, pain, and suffering is transferred from crime victims to offenders).

219. Restitution was neither addressed by the Court in *Roper*, *Graham*, or *Miller*, nor in the briefs, because it is generally not considered a penological justification.

220. LEVIN, *supra* note 94, at 1 (“In 2008, Texas prison inmates paid a mere \$501,000 in total victim restitution, fines, fees and court costs, an average of only \$3.21 per inmate. Parolees did better, paying \$1.2 million solely in victim restitution, an average of \$15.18 per parolee. Parolees typically have a lower educational level and income than probationers and face many challenges in readjusting to society.” (footnote omitted)).

221. While offenders will have greater access to paying jobs in the community, their access will still be limited by their arrest record, and it will be impacted further by a conviction, especially if they have suffered a felony conviction. Pager, *supra* note 88, at 960–62.

*F. Limitations of Developmental Science*

There are several valid criticisms of and caveats to the use of developmental science. Fundamentally, the science provides *general* information about how most individuals develop. There are, of course, going to be individual differences in development and maturity. General conclusions cannot provide precise differentiation for each individual.<sup>222</sup> It is not practical for each individual to have a brain scan and battery of psychological tests to determine at sentencing just how “mature” and “culpable” that individual is in order to dole out a punishment that is precisely tailored to that individual’s stage of development and future potential.<sup>223</sup> Further, each individual has been impacted by environmental factors that will vary from neighborhood to neighborhood and family to family. Some offenders may have brains and psychosocial development that lag even further behind norms for peers in the same age group, especially when they have been subject to trauma, abuse, or neglect.<sup>224</sup> Moreover, individuals who suffer from mental illness or a learning disability may function at levels that are less mature than what their brain scans alone may present. Drug exposure in utero or substance use during childhood and adolescence could further hinder

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222. See *Roper*, 543 U.S. at 574 (discussing drawing the line at eighteen years of age); Buss, *supra* note 13, at 39–40; Maroney, *supra* note 13, at 94.

223. While not every defendant may have the opportunity to undergo such tests, the tests have been found helpful in determining culpability. Benedict Carey, *Study of Judges Finds Evidence from Brain Scans Led to Lighter Sentences*, N.Y. TIMES, Aug. 17, 2012, at A12.

224. Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J. 1, 7 (2004) (providing data indicating that children are more susceptible to influence and psychological damage). Chronic stress and repeated traumas can cause someone to over-use fear as an instinctual survival response. *Id.* “Attention, impulse control, quality of sleep, and fine motor control can all be impacted by chronic activation of the centers of the brain that deal with the fear response . . .” *Id.* Trauma experienced early in life can also interfere with subcortical and limbic system development, leading to anxiety, depression, and reaction attachment disorders. *Id.* at 9–10. “Not only can hyper-aroused children react anxiously or aggressively to non-verbal cues that their memory says are threats, they may actually provoke threatening behavior from others so that they have some control over what happens next: A bully in middle school or high school fits this profile.” *Id.* at 7 (citation omitted). For those cases that may be mitigated by aspects of self-defense or when offenders themselves have suffered from PTSD, studies show that trauma causes actual scarring on the brain that we can see. *Id.* at 9–10. Offenders who have suffered abuse are more likely to develop depression and PTSD. *Id.* at 10; see also *Roper*, 543 U.S. at 569–70 (discussing three general differences between juveniles under eighteen and adults that affect culpability).

“normal” development. There are also findings that some groups mature more quickly than others. For example, when examined by gender, as a general matter, girls mature more quickly than boys.<sup>225</sup>

In light of these limitations, some scholars caution that actors in the criminal justice system must apply the science carefully.<sup>226</sup> The science has implications for not only adolescents in juvenile court but also for emerging adults in adult criminal courts. To be faithful to the scientific findings and consistent, criminal justice actors must apply the findings to both groups.<sup>227</sup> My Proposal is informed by general truisms for the population of youthful offenders as a whole. Differences in the functioning of individuals do not mean that policies should abandon knowledge gleaned from advances in developmental science. Any perceived dangers of applying general findings in developmental science are outweighed by the anticipated benefits of a developmentally informed sentence for youthful offenders.

#### IV. THE PROMISE OF RESTORATIVE JUSTICE: A DEVELOPMENTALLY APPROPRIATE APPROACH TO THE SENTENCING OF YOUTHFUL OFFENDERS

Our ever expanding knowledge about youthful thinking and behavior logically requires a new, developmentally based approach to the sentencing of youthful offenders. The focus such sentencing should be how a court can help the offender grow into a thoughtful, mature, and law-abiding adult. Adolescents *and* emerging adults think and behave differently from mature adults, and the Supreme Court has acknowledged that those differences must be considered at the sentencing phase for juveniles.<sup>228</sup> Science informs that a community-based alternative to incarceration is a developmentally appropriate sentence for young offenders, even when those offenders are accused of crimes classified as serious and violent.

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225. Cauffman & Steinberg, *supra* note 125, at 753.

226. Buss, *supra* note 13, at 14.

227. *See id.* at 42.

228. *Miller v. Alabama*, 132 S. Ct. 2455, 2464–69 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Roper*, 543 U.S. at 569–70.

This Article asserts that adolescents *and* emerging adults should receive age appropriate sentences because of their biological immaturity. As Justice Sotomayer said in *J.D.B.*, and as Justice Kagan referenced in *Miller*, “Our history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.”<sup>229</sup> The restorative justice model is a step in the right direction towards fostering developmentally appropriate sentencing for youthful offenders.

A. Age-Appropriate Sentencing

“[A] sentencer misses too much if he treats every child as an adult.”<sup>230</sup>

Historically, juvenile delinquency courts were created with the mission and purpose of helping children become “productive, law-abiding” citizens.<sup>231</sup> There has always been a special acknowledgement that children as a group are “open to positive influence” and are “amenable to change.”<sup>232</sup> Our judicial system should communicate developmentally appropriate messages to children with the developmentally targeted goal of shaping children into the type of responsible adults that society wants them to become.<sup>233</sup>

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229. *Miller*, 132 S. Ct. at 2470 (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011)).

230. *Miller*, 132 S. Ct. at 2468.

231. Buss, *supra* note 13, at 21.

232. *Id.* Long before *Roper*, laws created by society and by the courts have taken child development—capabilities, vulnerabilities, and potential—into consideration in the assigning of children’s rights, culpability, and responsibilities. *See generally id.* at 21–22 (discussing the importance of the consideration of children’s capacities in determining their rights and responsibilities). Now, social science and neuroscience data offer a more nuanced understanding of developmental capacities at various ages—an understanding that can be connected to relevant legal contexts of youthful decision making. *Id.* at 31 n.88.

233. For this group of children, their experience with the court system may be one of the few opportunities that they have to participate in a deliberative process alongside adults in positions of authority, and that participation will help them to shape their sense of self in relation to the community and government. *Id.* at 63. For this cohort, their experiences with law enforcement and the court system will impact their sense of the fairness and legitimacy of government and the rule of law. *Id.* Thus, fair treatment by law enforcement and engagement in the process will impact their respect for laws, government, and the political process. *See id.* at 64. Further, this may have greater implications for children when issues of race are taken into account. For instance, do children in disproportionately poor and minority neighborhoods have less respect for

Science should impact the courts' treatment of juvenile offenders by focusing on what the justice process—especially the designing of age-appropriate consequences and treatment opportunities—can do for juvenile development.<sup>234</sup> Courts can communicate clearly that certain behavior is wrong while addressing the offending behavior with consequences other than incarceration.<sup>235</sup> Just because behavior is deemed wrong, and an offender culpable, it does not follow that incarceration should be the automatic response. The courts can simultaneously condemn unlawful conduct *and* respond with developmentally sound sentences that offer learning opportunities for *all* youthful offenders.<sup>236</sup>

Age-appropriate sentences for youthful offenders should provide opportunities for those offenders to understand the consequences of their behavior and to hone prosocial thinking habits. Such sentences would recognize that youthful offenders have growth potential in response to environmental change,<sup>237</sup> that incarceration has a negative impact on development of youthful offenders,<sup>238</sup> and that

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the law because they feel singled out in the attention of law enforcement, or unfairly treated by law enforcement, and cannot see judges and attorneys in the system who look like they do? They will be more likely to follow the law if they had a meaningful and positive experience with the legal system. *See id.* at 63–64 nn.181–84 (citing studies on perceived fairness). According to scholar Emily Buss, “giving young people experience taking responsibility and exercising decision-making authority can enhance their social, emotional, and cognitive development in ways that help prepare them to assume positions of responsibility in adulthood.” *Id.* at 64.

234. *Id.* at 14–15.

235. Buss argues for a decoupling of culpability and “‘full’ (adult-style) punishment.” *Id.* at 47.

236. *Id.* at 61–62. For instance, for a juvenile who has been found involved in “tagging”—slang for graffiti vandalism—one developmentally sound response to the offense is participation in a graffiti removal program. The offender then learns about the consequences of his behavior by having to see first-hand the work involved in repairing the damage he or she caused. See Henning, *supra* note 9, at 1151–53, for examples of successful community-based programs, both with juveniles and adults.

237. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 *FED. PROBATION* 52, 53 (1999). Steinberg and Cauffman reference juveniles, but this Article uses the term *youthful offenders* because the science relates back to youthful offenders.

238. *See, e.g.,* HANEY, *supra* note 78, at 5–6 (discussing that negative psychological impacts of incarceration include “institutionalism” and “prisonization,” meaning that inmates may incorporate the “norms of prison life into [] habits of thinking, feeling, and acting”); *see also id.* at 6–7 (younger inmates become institutionalized quicker and easier than adults, and “have little in the way of already developed independent judgment, so they have little if anything to revert to or rely upon” when they are removed from the institution); *id.* at 7–8 (negative psychological impacts of incarceration include “[h]ypervigilance, interpersonal distrust, and suspicion.”

youthful offenders “mature out of criminal behavior.”<sup>239</sup> Age-appropriate sentencing procedures should therefore nurture an offender’s potential.<sup>240</sup>

*B. How Restorative Justice Responds to Youthful Thinking*

1. Restorative Justice Generally

Places like South Africa, famous for its Truth and Reconciliation hearings,<sup>241</sup> come foremost to one’s mind when thinking of restorative justice. Restorative justice has been described as being “concerned with healing victims’ wounds, restoring offenders to law-abiding lives, and repairing the harm done to relationships and the community.”<sup>242</sup> Restorative justice refers to the bringing together of offenders and victims to mediate, explain, apologize, forgive, and

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meaning that younger prisoners are more likely to display aggressive behavior as a strategy to encourage other prisoners to avoid them in order to avoid being dominated, exploited, and victimized); *id.* at 11 (negative psychological impacts of incarceration include “[p]ost-traumatic stress reactions to the pains of imprisonment,” meaning the experience of childhood traumas may be re-experienced through the form of “re-traumatization” due to the harsh and uncaring conditions of incarceration); Johnson & Miller, *supra* note 29, at 109 (“For a juvenile who serves long years of confinement as a lifer, prison becomes life as they know it, making it almost certain that they will fail to develop into adults ‘with a mature understanding of their own humanity.’”).

239. Henning, *supra* note 9, at 1122. Frank Zimring proposes that the best response to juvenile crime is to let adolescents grow up and grow out of it. Franklin E. Zimring, William G. Simon Professor of Law and Wolfen Distinguished Scholar, Univ. of Cal. at Berkeley Sch. of Law, Address at the Loyola Law School Symposium: Juveniles and the Supreme Court (Oct. 12, 2012). See generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982).

240. See Buss, *supra* note 13, at 47, 51.

241. Ishaan Tharoor, *South Africa’s Truth and Reconciliation Commission, Top 10 Trials That Shook the World*, TIME (Apr. 08, 2011), [http://www.time.com/time/specials/packages/article/0,28804,2064099\\_2064107\\_2064426,00.html](http://www.time.com/time/specials/packages/article/0,28804,2064099_2064107_2064426,00.html).

242. Conflict Info. Consortium, Univ. of Colo. at Boulder, *Restorative Justice*, THE CONFLICT RESOLUTION INFO. SOURCE, <http://www.crinfo.org/bi-essay/restorative-justice> (last visited Feb. 20, 2013). John Braithwaite, the leading scholar in the field, believes the “most acceptable working definition” of restorative justice offered at the Working Party on Restorative Justice of the Alliance of Nongovernmental Organizations (NGOs) on Crime Prevention and Criminal Justice in 1997 by Tony Marshall, is “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST.: A REV. OF RES. 1, 5 (quoting definition of restorative justice formulated by Tony Marshall) (internal quotation marks omitted). It should be noted that Braithwaite felt the definition was limited, stating “it does not tell us who or what is to be restored . . . [and] does not define core values of restorative justice.” *Id.* at 6.

heal.<sup>243</sup> There are many different models, and variations on those models.<sup>244</sup> When I refer to *restorative justice* in this Article, I am referring to mediation or conferencing, a restorative justice process in which an offender meets his victim face-to-face, and they talk about what happened in an attempt to understand one another's perspectives and to appreciate a common humanity.<sup>245</sup> Often, today's criminal defendant was yesterday's—and will be tomorrow's—victim. Victims of crimes are often from the same community as the perpetrators and have frequently been offenders in the past.<sup>246</sup>

## 2. Restorative Justice as an Alternative to Punishment

The pure view of restorative justice encompasses a belief that incarceration is harmful and alienating to offenders, and ineffective at reducing crime.<sup>247</sup> One of the “primary objective[s] of

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243. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227–28 (2003).

244. See Bibas & Bierschbach, *supra* note 6, at 130–31 (providing examples of four different models: “Victim-offender mediation brings offenders (especially juveniles) and victims face to face. Community reparative boards allow panels of trained citizens to discuss crimes with offenders and agree on restitution plans. Family group conferences bring together the families of offenders and victims to discuss crimes, mediated by a trained facilitator. Sentencing circles allow victims, offenders, the friends and family of both, community members, and justice professionals to deliberate and agree upon a sentence.”); GORDON BAZEMORE & MARK UMBREIT, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: A COMPARISON OF FOUR RESTORATIVE CONFERENCING MODELS 2–6 (Feb. 2001) (discussing the same four models of (1) victim-offender mediation; (2) community reparative boards; (3) family group conferencing; and (4) circle sentencing); see also FRANK J. REMINGTON CTR., RESTORATIVE JUSTICE PROJECT, <http://law.wisc.edu/fjr/rjp/> (describing the University of Wisconsin Law School's Restorative Justice Project).

245. See Bibas & Bierschbach, *supra* note 6, at 114–15 (describing “a face-to-face interaction between offender and offended as essential to effective expressions of remorse and apology” because such interactions “allow nuanced communication that contextualizes the offender's crime and the harm done”).

246. See LINDA G. MILLS, VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE 85–90 (2009) (explaining how a child who has been directly abused by his parents is significantly more likely to become a violent adult; showing that the cycle of abuse and violence is ongoing); Henning, *supra* note 9, at 1144 n.227 (“Statistics from 2004 show that as many as two-thirds of victims of juvenile violent crime are children.”); see also Arredondo, *supra* note 26, at 27–28 (describing how children in the juvenile justice system are “oftentimes [the] most highly victimized youth,” and explaining the psychosocial challenges of trans-generational neglect and criminal system involvement).

247. See Luna, *supra* note 35, at 4 (“[R]estorativism laments the barbaric conditions of many modern prisons, with restorative practices minimizing or altogether rejecting the use of incarceration as inhumane and criminogenic.”). Howard Zehr has modified his earlier hard-line position that there should be no incarceration to say that such traditional forms of sentences may

restorativeness is making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender.<sup>248</sup> Purists oppose incarceration as a cruel and ineffective mechanism to deal with the problem of crime.<sup>249</sup> In the view of John Braithwaite, restorative justice should be defined as an alternative to the punishment-centered model of criminal justice.<sup>250</sup> Some in the field see restorative justice as an end in and of itself.<sup>251</sup> Opponents of

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need to exist as a fallback or last resort. See HOWARD ZEHR, *LITTLE BOOK OF RESTORATIVE JUSTICE* 12–13 (2002) (“If restorative justice were taken seriously, our reliance on prisons would be reduced and the nature of prisons would change significantly. However, restorative justice approaches may also be used in conjunction with, or parallel to, prison sentences. They are not necessarily an alternative to incarceration.”); see also Bibas & Bierschbach, *supra* note 6, at 121 (quoting Braithwaite’s view that “[r]estorative justice is most commonly defined by what it is an alternative to, namely the punishment-centered justice model” (citing John Braithwaite, *Assessing Optimistic and Pessimistic Accounts*, in 25 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 1, 4 (Michael Tonry ed., 1999)) (internal quotation marks omitted)); John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 391 (2003) (“I cannot see how one can nurture restorative values like mercy and forgiveness while taking retributive proportionality seriously.”).

248. Luna, *supra* note 35, at 3. In recent years, the victims’ rights movement has embraced the term *restorative justice*, while changing its original meaning. Some restorative justice programs advanced by victims’ rights groups are punishment-oriented with retributive goals and designs to exact pain and suffering from offenders. See Henning, *supra* note 9, at 1130. By adopting the term restorative justice, victims have changed its original or true meaning so that one must be careful and precise in order to understand who is advancing an agenda of restorative justice and in order to know what it truly means in that context. See ZEHR, *supra* note 247, at 6 (acknowledging that “[w]ith more and more programs being termed ‘restorative justice,’ the meaning of that phrase is sometimes diluted or confused”).

Critics of the unbridled use of victim impact statements have voiced concerns about the influence and emotional impact that victims may have on prosecutors and judges. See Henning, *supra* note 9, at 1139–40. Discussing the danger of court reliance on victim impact statements in juvenile court sentencing procedures, Henning says: “First, these statements hinder the court’s evaluation of the child’s often diminished culpability in delinquent behavior. Second, they distract the court’s attention from the important goal of rehabilitation by placing a disproportionate emphasis on the emotional appeal of the victim and any apparent lack of remorse shown by the child.” *Id.* at 1135 (footnote omitted).

In one case I worked on, a victim wrote,

I hope that [the offender] will be made to live in a system of fear that mirrors the prison of fear and hopelessness I have been made to live [in] for the past year. . . . One of the ways we can save others from this terror is to ensure that [the offender] is locked away in a prison away from persons that are trying to make this life a safe one for all.

Victim Impact Statement (on file with the author).

249. See Luna, *supra* note 35, at 2–4.

250. See Bibas & Bierschbach, *supra* note 6, at 103 (stating that restorative justice “does not seek to reform criminal procedure” but rather should be seen as a “complete alternative[] to punishment”).

251. See *id.* This Article does not propose that restorative justice means no consequences for the offender. Some scholars view restorative justice as the opposite of punishment; however, this

this pure form of restorative justice have concerns that the process is too offender-focused.<sup>252</sup>

### 3. Youthful Offenders and Restorative Justice

Youthful offenders are ideal targets when instituting restorative justice programs. They are the least culpable because their immature thought, impulsivity, recklessness, and susceptibility to influence is typical of their age group, and is not reflective of ingrained and intractable thoughtlessness. They are the most promising target group for rehabilitative efforts because their character and development are still transitory and not yet complete.<sup>253</sup>

Because children and young adults have a tendency for impulsivity that is biologically predetermined,<sup>254</sup> this group is an ideal population for the implementation of targeted restorative justice projects designed to improve decision-making and provide an opportunity to appreciate the consequences that flow from their conduct. Restorative justice allows the time to stop and contemplate what happened. Youth who made poor decisions to commit crimes in moments of impulsivity can slow down and reflect in a calm environment, away from peer and time pressure.

Youth also have little experience putting their decision-making skills in action. Restorative justice provides an opportunity for the development of the skill of reflecting upon mistakes to learn from them. The opportunity for youthful offenders to consider in hindsight how they came to make a poor decision—how they failed to accurately anticipate risks and to maturely and accurately weigh the risks and rewards of a given course of action—is an integral part of a restorative justice process guided by mature adults. Restorative

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Article does propose that the consequences that follow a true offense should not always equal punishment in the form of incarceration.

252. See ZEHR, *supra* note 247, at 6 (“All too often, victim groups fear, restorative justice efforts have been motivated mainly by a desire to work with *offenders* in a more positive way.”).

253. See Henning, *supra* note 9, at 1132 (arguing that victim input and participation in rehabilitative justice processes that are properly used with juvenile offenders could enhance the rehabilitation process). There is also an appropriateness of the timing of offering victim impact statements. *Id.* at 1147; see also *supra* Part II.B.

254. See *supra* note 130 and accompanying text; see also Brief for the AMA et al., *Miller*, *supra* note 3, at 6–14.

justice programming provides opportunities for discussions about how one might have handled a tough decision in what was a “hot” situation—where there were both peer and time pressures. Youthful offenders have the opportunity in a restorative justice program to see how they might have handled a tough situation differently and how they can do better next time so that the poor decision-making demonstrated in the commission of a crime does not define the offender and his or her future choices.

Offenders will also have the opportunity to apologize. The very act of apology teaches youthful offenders<sup>255</sup> because it is an expression of sorrow and regret<sup>256</sup> that promotes genuine repentance<sup>257</sup> and reinforces social norms.<sup>258</sup> After understanding what the impacts of his or her crime have been, an offender can take responsibility for the effects of his or her actions on the victim. Studies on the impact of an apology show that even those who are initially not amenable to participating in restorative justice wind up benefitting and apologizing after they have participated.<sup>259</sup> Through the process, offenders can develop empathy, compassion, remorse, and a desire for change.<sup>260</sup> This is a critical step on the road to rehabilitation, one that is largely ignored by the functioning of the American criminal justice system today.<sup>261</sup>

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255. Bibas & Bierschbach, *supra* note 6, at 143 & n.288.

256. *Id.* at 90.

257. *Id.* at 125.

258. *Id.* at 114, 144 & n.294.

259. *Id.* at 116.

260. See Arredondo, *supra* note 26, at 21 (describing why restorative justice mediations are appropriate tools to teach offenders about empathy because, while some youthful offenders may lack experience with empathy, they have the capacity to learn empathy); Henning, *supra* note 9, at 1151 (arguing that rehabilitative justice sentencing is an opportunity to teach young offenders empathy).

261. See Garvey, *supra* note 7, at 1804. Garvey discusses the stages of a secular process of atonement that he endorses. Garvey says that there are two stages: expiation of the offender and reconciliation by the victim. *Id.* In turn, expiation involves four steps: repentance, apology, reparation, and penance. *Id.* As a prerequisite to any form of expiation (defined by Merriam-Webster's dictionary as “the means by which atonement is made”), one must understand one's actions before one can truly go through stages of repentance and apology. MERRIAM-WEBSTER'S INTERNATIONAL DICTIONARY 801 (3d ed. 1986). Without an opportunity to understand the impact of one's actions, one cannot get to expiation, for how can one repent and apologize for something one did not think through and something for which one still does not understand the consequences?

Restorative justice is a particularly good approach for youthful offenders who are caught in a cycle of violence. Acts of violence are warped efforts to right a previous wrong.<sup>262</sup> Young people especially find it easier to continue antisocial behavior if they can tell themselves that others in their community are against them.<sup>263</sup> An effective restorative justice process eliminates the opportunity for an offender to tell himself that everyone is against him by simultaneously emphasizing care amongst the participants and accountability for that offender's actions.<sup>264</sup>

Restorative justice as a concept is an appropriate response to youthful offending because it directly addresses problems associated with adolescent thinking, teaches prosocial thinking, nurtures more mature decision-making processes, and interrupts the destructive thought processes associated with a cycle of violence.

*C. Proposal for a Specific Developmentally Appropriate,  
Community-Based Sentence Incorporating Restorative Justice  
Programming*

1. Marcus's Story<sup>265</sup>

*When he was twenty-one years old, Marcus robbed four of the nicest people on the planet at gunpoint. It was the summer of 2005, and the crisis in Darfur was a major human rights issue.<sup>266</sup> One of the four nicest people on the planet was leaving for Darfur the next day. One was a teacher for Teach For America. The other two people were a young married couple who had moved to a struggling neighborhood out of a sense of civic-mindedness. The couple also volunteered as mentors for a young foster care child in the neighborhood.*

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262. JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* (1997).

263. *Id.*

264. See Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES, Jan. 4 2013, [http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&_r=0).

265. Although Marcus is not his real name, all details of this story are real and unchanged. Unless otherwise noted, all facts and quotations within this part are from the Author's experience and account.

266. See Marc Lacey, *The Mournful Math of Darfur: The Dead Don't Add Up*, N.Y. TIMES, May 18, 2005, at A4.

*Marcus stole six dollars from these four people. He confessed immediately after being arrested, even talking more about other wrongdoings—offenses for which the police did not arrest Marcus and about which the police did not ask him.<sup>267</sup> Marcus used a BB gun, not a gun capable of killing anyone. He had the gun and the proceeds in his possession at the time of arrest, the victims identified him, and he confessed. Marcus was brought to court and charged with four counts of armed robbery and four counts of the possession of a firearm during a crime of violence. He faced mandatory minimums of five years for each offense of armed robbery—one for each of the four nicest people on the planet.*

*This is when I entered the picture as his attorney. Marcus was scared and seemed young and very immature for someone whose birthday made him twenty-one years old.<sup>268</sup> While Marcus was held in jail pretrial and during that time, I visited him regularly and got to know him. I learned that he had moved to the neighborhood where he committed the robbery in order to help out his aging grandmother. Marcus felt lonely and did not know anyone in his grandmother's neighborhood, a place that was tougher than the neighborhood where he had grown up. His mother and family thought he should live with his grandmother so that he could take care of her and protect her.*

*At the time, no one in Marcus's family knew what I later learned from a psychologist—Marcus was functioning well below normal for his age, even in areas where he scored better academically, and he had little ability to apply his knowledge to everyday life circumstances. For instance, he could not calculate how to make change or estimate the cost of a half dozen of something when he was given the cost of a dozen of the same item. Marcus's personality*

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267. See Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 11 (1997) (describing how young people do not understand the *Miranda* warnings).

268. Because Marcus was under twenty-two years of age, he was eligible for a sentence under the District of Columbia's Youth Rehabilitation Act. See Youth Rehabilitation Act, D.C. CODE § 24-901(6) (2001). This act allowed for youthful adult offenders to earn a chance to seal their adult record upon successful completion of the imposed sentence. See *id.* § 24-903. Under D.C. law, an emerging adult, like Marcus, was recognized to have greater potential than a fully mature adult. Thus, the law offered emerging adults in his age category the opportunity to recover from his adjudication.

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*testing showed that he had low self-esteem and felt incompetent, lonely, and anxious. He had a tendency to turn to others for guidance and follow their direction without much critical thought of his own. These findings meant that Marcus was tremendously susceptible to peer pressure and bad influences. As it turns out, Marcus was the worst possible person for his family to choose to send to live with his grandmother. Marcus did not function well in the tougher neighborhood, looking to his peers there for examples of how to behave. He did not do well without any support and with the expectation that he was going to be the tough man. His frailty was apparent to me, but of course I met him when he was in an orange jumpsuit, scared out of his mind, and behind bars.*

*Marcus also told me about the first time that he had tried to commit a robbery—it was in this same neighborhood a few months earlier. Marcus used the same BB gun that he used to commit the robbery for which he was arrested, but this purported victim was a bit savvier than the four people in the case just described. His purported victim told Marcus to put the gun away, said he was not scared of Marcus, and asked Marcus if he needed anything. The man then went into his home, got twenty dollars, came back outside, and gave the twenty dollars to Marcus. Marcus felt embarrassed. Marcus then tried again and attempted to rob a female victim. The woman simply told him no, told him to put the gun away, and then walked off without incident. Neither of these attempted robberies was reported to the police. To Marcus, these attempts felt like failures. He felt like he was not capable of what was expected of him as an adult male in his new community.*

*I knew from meeting with Marcus and from my experience as a high school teacher who had worked with adolescents with learning disabilities that he was unsophisticated and not functioning at or near a grade level that one would expect even of a middle-school aged youth. As it turns out, Marcus was reading at a second grade level and had been a victim of educational neglect in the D.C. public school system. He was a child who had been identified as having special needs, and the D.C. public school system had failed to deliver the services and support to which Marcus was entitled. Indeed, during Marcus's educational career, D.C. schools had, for a time, been under receivership by the federal government because of just*

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how poorly they were doing at educating their students.<sup>269</sup> Marcus had also been bullied and beaten up at school as a youth. I referred Marcus's case to an education attorney who sued the school system for compensatory educational services in order to make up for the system's failures. He won and was awarded services—services that he was only entitled to access through his twenty-first year and services which would be completely inaccessible if he were to spend time in federal prison, a destination toward which he was certainly headed because it is where all D.C. prisoners go to serve their sentences.

Due to mitigating evidence I had developed, my persistence with the prosecuting attorney, and Marcus's willingness to take early responsibility, Marcus was the recipient of an uncharacteristically beneficial plea deal.<sup>270</sup> Yet, despite this accomplishment, Marcus still faced a prison sentence. The voluntary sentencing guidelines suggested his minimum sentence should be two years. The statute for the lead and most serious offense to which he pled—robbery—did not carry a mandatory minimum, but rather a “soft minimum,” which is a provision stating that if Marcus was sentenced to any prison, the minimum prison term was two years. Further, I was bound by the terms of the plea deal not to advocate for a sentence under the guideline range. It looked pretty bleak.<sup>271</sup>

In between his plea and sentencing I attended a presentence interview of Marcus, who was being questioned by a probation officer.<sup>272</sup> The interview was conducted over video. In addition to

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269. Michael Powell & Vernon Loeb, *In Lieu of Planning, Patchwork*, WASH. POST, Feb. 18, 1997, at A01 (discussing the receivership of the D.C. public school system by the federal government).

270. The assistant United States attorney prosecuting the case actually told me that he had never had a defense lawyer make him do so much work for a plea. Although I believe that it is attitudes such as this one that compound the overarching problem of youthful offenders in detention, that is beyond the scope of this Article.

271. I remember talking to the education attorney and social worker on Marcus's case saying that we needed to figure out a way to get him out of jail and out from under a prison sentence, and that I was thinking creatively about it. The social worker spoke to me privately after the meeting and told me that she was worried that I was going to be disappointed because my goal was impossible.

272. In many ways this story is also about access to justice—it was unusual for public defenders and other defense attorneys to regularly attend these interviews. They were held at the jail at inconvenient times for attorneys with matters in court, and it was a huge time commitment.

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*attending the interview, I made comments to the probation officer about Marcus's case for his written presentence report and spoke to the officer on the phone trying to convince him of how much potential Marcus demonstrated. I also reached out to the complainants again.<sup>273</sup> I talked to Marcus about it, and he asked me to convey to the victims that he was very sorry for what he had done.*

*As it turns out, the couple was very appreciative of his apology through me. They asked me about Marcus, and, with his permission, I shared some of the details about him. Unbelievably, these lovely people wanted to meet Marcus and hear his apology face-to-face. It was a risky move for a defense attorney before a sentencing hearing to take two armed robbery victims to the jail to meet my client, but I did it. It was not easy. On our first attempt, the corrections officers were suspicious and contacted the warden. The two white individuals at the nearly all black D.C. jail stuck out like sore thumbs. Despite my pleading with the warden, she said "not without a court order." So next, I endeavored to obtain a court order. The prosecuting attorney thought that this was an insane idea and objected vigorously on and off the record. He called the victims at home and told them that Marcus was a dangerous and violent criminal. Nevertheless, the judge granted my request. I was able to take the complainants with me to meet Marcus face-to-face in an attorney-client visiting room rather than meeting him through plexiglass over a telephone.<sup>274</sup>*

*What transpired was one of the most amazing experiences of my life and is the inspiration for this Article. It was restorative justice in action. Marcus apologized to the victims, and they forgave him. Marcus and the two victims realized that they all knew someone in common from their shared neighborhood—a woman who had been shot and killed. They remarked about what a tragedy it was, as well as how nice of a person she was, and they affirmed that they all*

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Consequently, even great lawyers did not make it a practice to attend these interviews. However, it sure made a difference in the outcome of clients' cases when their attorneys were present.

273. Of course, during the investigation phase of the case prior to taking a plea or trying a case, one reaches out to complainants as well. The man going to Darfur was in Darfur. The Teach for America fellow was now off teaching somewhere else in America. That left the couple. The officer had said to me that the couple had asked questions about who my client was so it seemed that reaching out to them could be useful.

274. The face-to-face meeting was only possible because of the court order.

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wanted to live in a place where there were no random acts of violence like her killing. Through this process, they developed a greater sense of community and realized that they all wanted to live in the same type of society—a safe one. The victims, previously frightened by what had seemed to them like a monster with a gun, saw that his appearance was just a facade. When they met Marcus in jail, the couple encountered a scared and slouchy young man who seemed more cowed than menacing. They understood that Marcus was in fact a victim of educational neglect, that he was insecure, and that he was a scared young man. Marcus was not a scary monster anymore.

The victims also saw the jail—they saw the type of dirty and dank environment where Marcus was being housed. When they had come to the jail on the first attempted visit, it made an impression on them that all the folks who had come to visit their family members had to just wait and wait in line to get inside and that absolutely everyone else there was poor and black. To those unfamiliar with the conditions of American jails and prisons, confronted with the reality of what those facilities are like, it is hard to imagine that incarceration is a place where reform is encouraged or even possible.<sup>275</sup>

Marcus realized that the robbery he had committed had a significant impact on his victims. The victims told Marcus about what a hassle it was to be robbed—how they had to change the keys to their home, get new credit cards and licenses, and waste a lot of time. More importantly, they spoke about how scared they were during and after the robbery. They expressed how it had made them question where they had chosen to live and even their altruistic reasons for moving to their neighborhood (they wanted to invest in that community). Marcus learned that since the robbery the woman had been carrying mace around with her, and he learned that by robbing her, he had taken her sense of security from her. The couple

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275. At the sentencing hearing, one of the victims said, “If he spends much more time in prison around hardened criminals and gets back on the street after that, we and our neighbors may meet him again, but that time the gun may be something more than a broken BB gun, and we don’t want to see that happen.”

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*asked Marcus for advice about mentoring the foster child and how to keep him from falling off track.*

*In the end, it was this couple, two of the nicest people on earth, who came to court and pleaded with the judge to give Marcus a chance in the community. They met Marcus's mother. They understood a bit more about where Marcus came from and what would happen to him if he continued to be incarcerated—he would lose educational services accessible to him only in the community, and he would be in an environment that, even from their brief exposure, they knew and could see was not a place in which one grows and matures into a productive and law-abiding citizen. They saw Marcus as a person, as someone for whom there was hope. They were not sure he would succeed in the community, but they were sure that they wanted him to have a shot. They were rooting for Marcus to succeed. They were invested in his success. They said in court,*

*We would like to ask humbly, but somewhat insistently, that today you give [Marcus] a chance to make something of himself. We'd like to ask this both for his sake, and for our sake, and for the sake of the community . . . we'd like to ask you that you do everything in your power to get [Marcus] into school, not prison, as soon as humanly possible.*

*Marcus said a few words, meekly asking for a chance to do better in the future, but his words were few and far less powerful than those of the victims.*

*In this case, the judge bravely sentenced Marcus to a term of probation with a suspended jail sentence should he violate probation; a sentence below even the guidelines.<sup>276</sup> Because of the work done by the special education attorney to whom I had referred Marcus, he was able to attend a fancy private school in D.C. while he remained in the community.*

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276. A sentence of probation did not trigger the "soft" minimum of two years in jail. DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION, VOLUNTARY SENTENCING GUIDELINES MANUAL § 3.3 (2012), [http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/2012\\_Voluntary\\_Sentencing\\_Guidelines\\_Manual.pdf](http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/2012_Voluntary_Sentencing_Guidelines_Manual.pdf).

## 2. Proposal for a Developmentally Responsive Community-Based Sentence Incorporating Restorative Justice Programming

Naturally, there must be a selection process to identify youthful offenders who should be considered for restorative justice programming at the sentencing phase. At one end of the spectrum, one could argue that each and every youthful offender under twenty-five who has been adjudicated or convicted of a robbery offense should be eligible. On the other end of the spectrum is a limited eligibility program, which could run afoul of the sorting problems aforementioned. A limited eligibility program might exclude all but first time offenders. Instead, maximizing diversion from prison and jail to participate in the program—even for those offenders who have priors, and especially for those who have never previously participated in a restorative justice program—would maximize the learning opportunities for all offenders and could have the greatest potential impact on recidivism outcomes.<sup>277</sup>

The restorative justice programming should be implemented in three important stages. The first stage is a preparatory stage where offenders and victims separately prepare to engage in mediation with one another. Second is a victim-offender mediation or conference. In the third stage, offenders should have some opportunity to focus on the lessons learned in the mediation phase. These three stages of restorative justice programming would accompany probation supervision and, ideally, evidence-based practices demonstrated to improve outcomes for youthful offenders.<sup>278</sup> The services provided

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277. Additionally, there is a built-in safeguard: should the offender fail in the community, he would face the potential implementation of the significant prison sentence he faces under existing law.

278. Evidence-based practices are interventions that have been proven to be effective at addressing the root causes of crime and delinquency. Evidence- and community-based programs lead to a reduction in recidivism rates. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 *FUTURE CHILD* 185, 199 (2008); BALCK *supra* note 60, at 14 (evidence-based community programs should be individually tailored to a specific offender's needs). "[V]irtually all effective evidence-based practices occur in the community and at home." Arredondo, *supra* note 26, at 22 (emphasis omitted). One example of an evidence-based practice deemed an effective intervention is functional family therapy, which "provides a \$49,766 net benefit to crime victims and taxpayers per participant and reduces a juvenile's recidivism rate by 18.1 percent." BALCK *supra* note 60, at 14. Other examples of evidence- and community-based

through probation should be informed by and improved by information gleaned during the restorative justice programming. For instance, an offender who shares information about a past trauma in the course of the mediation should have counseling provided to deal with that trauma.

The preparation stage should be designed to educate both parties about the process of mediation, and this could be done in classes and in individual meetings with mediators.<sup>279</sup> Instructors who are trained mediators would teach offenders and victims about what it means to have a neutral mediator, the rules of mediation, the safe space of mediation, the goals of mediation, and generally about good communication habits.<sup>280</sup> General instruction could take place in classes, and then individual preparatory meetings could take place with the mediators in that case. There would likely have to be separate, general classes for offenders and victims at this stage, but this work could be done in small groups, to make it efficient. Offenders would need to learn about some common pitfalls of mediation and some important tips to foster good communication—for instance, how important eye contact, posture, and attitude are; how to refer to others in a formal setting; how important it is to be open in sharing negative and painful emotions and experiences of their own; and specifically how to express those emotions, including

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interventions include Multi-dimensional Treatment Foster Care, Multi-Systemic Therapy, and Cognitive Behavioral Therapy. *Id.* MTFC costs about \$7,000 per youth more than a group home placement; however, the benefits are tremendous: the Washington State Institute for Public Policy found that MTFC yields \$33,000 in criminal justice system savings and \$52,000 in benefits to potential crime victims. Greenwood, *supra*, at 201. In Ohio, counties that implemented Project RECLAIM (“Reasoned Equitable Community and Local Alternatives to the Incarceration of Minors”) decreased their commitments of juveniles to secure facilities where juveniles were incarcerated by 42.7 percent in its first year. Instead, the juveniles were diverted to evidence- and community-based programs such as day treatment, alternative schools, intensive probation, electronic monitoring, and residential treatment. *See States Strategize to Keep Systemic Reform Efforts on Track*, MODELS FOR CHANGE, <http://www.modelsforchange.net/newsroom/308> (last visited July 2, 2013).

279. Separate meetings with the mediator in order to prepare with both parties are a part of the DOJ guidelines for victim-offender mediation. *See* MARK S. UMBREIT & JEAN GREENWOOD, U.S. DEP’T. OF JUST., OFF. OF JUST. PROGRAMS, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 39 (2000), available at [https://www.ncjrs.gov/ovc\\_archives/reports/96517-gdlines\\_victims-sens/welcome.html](https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/welcome.html).

280. *See* Bibas & Bierschbach, *supra* note 6, at 87–90; Henning, *supra* note 9, at 1163 (discussing what is to be gained by delaying apology until after there has been some training and preparation).

an apology. This is all part of empathy-building and victim-awareness curricula that already exist.<sup>281</sup> Offenders might even role-play in those offender-only classes in preparation for their mediations. On the other hand, to promote victim sensitivity to offenders, victims may need to be educated about where an offender is coming from, what an offender's education level is, and what racial or community differences exist. Individual meetings with the mediator should then prepare each party for the next step and ensure trust with the mediator.<sup>282</sup>

Victim-offender mediation is the second stage. This is like what happened in the jail during the meeting between Marcus and the couple that he robbed. However, unlike what happened in Marcus's case,<sup>283</sup> the mediation should be led by a trained and professional mediator or a neutral party who was also involved in the preparation phase. At this stage, because it was part of a sentence, attorneys would not be required to participate to protect the rights of the probationer.<sup>284</sup>

The third stage is a debriefing stage to focus on what lessons offenders have learned.<sup>285</sup> This phase could again be conducted in class-settings, to make it efficient. Offenders should be given an opportunity to express what they learned about the impact of their

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281. See Henning, *supra* note 9, at 1162 & n.323 (citing BEST PRACTICE GUIDELINES FOR VICTIM IMPACT PANELS WITHIN PENNSYLVANIA'S JUVENILE JUSTICE SYSTEM 7); see also UMBREIT & GREENWOOD, *supra* note 283.

282. Henning, *supra* note 9, at 1163 ("[A] trained mediator who meets with the offending child before the victim-offender conference may help the child better articulate his feelings and avoid off-putting behaviors such as lowered eyes and mumbling. Because the victim's perception of the offender will determine how the apology is received, the offender's non-verbal 'cues,' such as eye contact, facial expressions, and body posture are important.").

283. Most defense lawyers, and public defenders especially, would not have the time, training, or resources to take on such a labor-intensive role as mediating between their clients and victims of crime. It is not a good or sustainable solution to have an expectation of lawyers to be involved in this way.

284. To promote openness, there would of course need to be binding legal safeguards. Nothing the offender shares during the mediation would be used either directly or indirectly to prosecute him or her for crimes. An offender should also have the opportunity to talk with his defense attorney about any concerns prior to agreeing to such a program as a part of his or her sentence.

285. In an ideal and pure restorative justice process, victims would have their own classes to debrief and follow-up programming to provide them with needed counseling and services. In this Proposal, my focus is on rehabilitating the offender through a court-ordered program so I am focusing on what should be ordered for the offender.

crime on the victims and on society. In some restorative justice programs, offenders attend victim panels where victims express how the crime impacted them. Such panels could be useful at this stage, as could offender panels where offenders present to one another what it is that they learned. Offenders could express their hopes and goals for the future. It would be important to work through the offender's emotional experience of the mediation with victims with some mature adult guidance and support.

These three stages of restorative justice programming should complement and be fully integrated into the probationary sentence. Most probationers are court ordered to participate in some type of counseling, especially those in juvenile court. All probationers have to check in with assigned probation officers. Counselors should be encouraged to work with offenders on both the preparation and debriefing phases of mediation. Further, both counselors and probation officers should provide follow-up referrals for appropriate programming to address needs that surfaced during the restorative justice programming.

### 3. Restorative Justice in Practice: Lessons from Marcus's Story

Apologizing demonstrates that an offender accepts social norms and understands that his behavior was not acceptable.<sup>286</sup> Apology had a positive impact on the victims and Marcus.<sup>287</sup> Both the victims and Marcus benefitted from some advance preparation and understanding of one another's circumstances before meeting face-to-face. With Marcus's permission, I shared sympathetic details from his past and information about his limited intellectual functioning.

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286. Bibas & Bierschbach, *supra* note 6, at 113; Henning, *supra* note 9, at 1148.

287. Further, the victim may obtain a sense of closure through the apology process. Apologies are meaningful to victims, and offenders apologize more frequently in victim-offender mediations than they do in court. *See* Henning, *supra* note 9, at 1162-63 & n.327. Done responsibly, restorative justice can have a positive psychosocial impact on offenders. Offenders report that they feel better about restorative justice mediations than about the traditional criminal justice courtroom experience. Bibas & Bierschbach, *supra* note 6, at 116-17, 131; *see also* Braithwaite, *supra* note 247, at 393 ("Most cultures and most religions encompass the notion of the grace that can come of giving a gift to one who has wronged us in instead of exacting a punishment.").

This enabled the victims to connect with him and to appreciate that he might not be as articulate as otherwise expected.

Marcus and his victims had very different backgrounds and life experiences.<sup>288</sup> When the victims came to the jail, they saw the racial composition of the inmates and families who came to visit. They began to appreciate how overwhelming it would be for a young man in Marcus's position to see so many young people from his community incarcerated, how race might impact Marcus's own perceptions of opportunities available to him, and how their Caucasian race could be a barrier to connection.<sup>289</sup> They also realized that they had something in common—an experience from their shared community. Marcus and the victims bonded over their feelings of sadness for the loss of a neighbor who had died in a random act of violence.<sup>290</sup>

Remorse is a difficult and painful emotion.<sup>291</sup> Youthful offenders might not have the intellectual ability or emotional capacity to express themselves—they do not have the same range of emotions as a developed adult and do not know how to deal with

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288. Unlike the victims in this case—who were “pure” victims—many victims were also criminal defendants at some point themselves. Participating in restorative justice programming has the potential to reduce the cycle of violence. People who do not resolve traumas are more likely to become future victimizers and pass along that cycle of violence to the next generation. See Zehr, *supra* note 247, at 30–32 (generally talking about offenders as victims). Zehr explains that “much crime may be a response to—an effort to undo—a sense of victimization.” *Id.* at 31; see *id.* 30–31 & n.3 (referring to Harvard professor and former prison psychiatrist James Gilligan who argued that “all violence is an effort to achieve justice or to undo injustice”). Zehr also argues that “unresolved trauma tends to be reenacted. If it is not adequately dealt with, trauma is reenacted in the lives of those who experience the trauma, in their families, even in future generations.” *Id.* at 31; see also *id.* at 31 n.4 (citing SANDRA L. BLOOM, CREATING SANCTUARY TOWARD THE EVOLUTION OF SANE SOCIETIES 30–31 (1997)); accord LINDA G. MILLS, VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE 85–90 (2009) (explaining how a child who has been directly abused by his parents is significantly more likely to become a violent adult; showing that the cycle of abuse and violence is ongoing).

289. A victim who has participated in such a program has the opportunity to learn about what challenges the offender faces in his or her life. The victim may, as a result, be better educated about societal problems and motivated to be more involved in community. See generally Robert Weisberg, *Restorative Justice and the Danger of “Community”*, 1 UTAH L. REV. 343 (2003) (acknowledging difficulties in the term “community” in this context).

290. The victims in Marcus's case were from the same immediate community, but they came from very different backgrounds and still were situated in different socioeconomic castes. Often, victims and defendants are from the same marginalized communities and have similar socioeconomic statuses.

291. See Henning, *supra* note 9, at 1150.

uncomfortable and overwhelming emotions in an appropriate way.<sup>292</sup> There is a danger that those offenders with the most sympathetic and deprived pasts will present themselves as the most hardened, least empathetic, and least amendable to rehabilitation.<sup>293</sup> Preparation before a mediation can help them address these shortcomings so that they can successfully explain their feelings during the mediation. I helped Marcus prepare for a successful interaction. I reminded Marcus about manners and how to refer to the victims—Mr. X or Mrs. X—as sir and ma’am. I told him how important it would be to make eye contact, even if it was difficult for him and even when he felt humiliated and embarrassed. I encouraged him to share difficult experiences and emotions, like expressing his shame. When I told Marcus about the woman carrying mace, I asked Marcus to think about whether or not she carried mace before he robbed her and whether the robbery may continue to impact her sense of safety. Marcus was thus able to understand in concrete terms what the mace was for and had some time to reflect on the impact of the robbery on his victim. When we were in the mediation, Marcus was the one who brought up the mace and asked the woman about it.

The victims saw what jail and prison had to offer Marcus, and they were dismayed at his prospects for reform in such a place. In conjunction with their concern for safety, they understood that Marcus was not the dangerous and wild person that he appeared to be on the street with a gun in hand, they understood the life circumstances and personal frailties that led Marcus to commit the robbery, they saw his potential, and they saw incarceration as a sure fire way to squash his potential. Their concern for community safety became directed toward getting Marcus help rather than toward incarcerating him for punishment’s sake alone.

There were some roadblocks to implementing a community-based sentence of probation, such as mandatory minimums, soft minimums, and sentencing guidelines. Atypically, I had the benefit of a lot of resources—namely, time—to devote to Marcus’s case. Access to justice issues and realities about public defender caseloads

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292. *See id.* at 1149 (“Not every offender will have the mental capacity to experience remorse or the intellectual capacity and language skills to convey remorse.”).

293. *See id.*

raise questions about how best to implement such a learning program, with or without the participation of attorneys and at what phase of a case. Attorneys could be roadblocks as well. In Marcus's case, the prosecutor was opposed to Marcus meeting his victims.

By providing an opportunity to meet with and learn from victims, restorative justice processes can inform best practices about educating offenders. It was much harder for Marcus to express himself in a short sentencing hearing with a lot of pressure. Physical and procedural obstacles in the courtroom, such as lack of opportunity for eye contact and the presence of strangers, function as barriers to true expressions.<sup>294</sup> Marcus was not the most sophisticated speaker, and his words at the hearing were not impactful. Were it not for the opportunity he had to meet with the victims, neither the judge nor the victims would ever have understood Marcus's true remorse.

Indeed, it is challenging and may take time for a victim to overcome resentment and "see offenders as redeemable human beings."<sup>295</sup> Creating an opportunity for offenders to understand the consequences of their actions is not in and of itself the cure, but it is a vital part of a youthful offender's development.<sup>296</sup> Looking at the root causes and the individual offender and crafting a consequence that is meaningful to victims<sup>297</sup> is therefore critical.

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294. *Id.* at 1150 ("Physical and procedural barriers in the courtroom further impede meaningful expression and experiences of remorse and apology. The courtroom, for example, is rarely set up to facilitate true eye-to-eye contact between the offender and the victim and does not provide the child with a safe space in which to explore or experience remorse. The parties, who generally speak to the judge instead of each other, are constrained by the limits of the court's time and have little or no meaningful opportunity to understand the other's plight and emotions. The offending child may also feel embarrassed, humiliated, or ostracized in court under the intimidating gaze and judgment of the prosecutor, judge, victim, and even his own family." (footnotes omitted)).

295. *See* Bibas & Bierschbach, *supra* note 6, at 115.

296. *See id.* at 125. Bibas and Bierschbach classify our criminal justice system as a "punishment assembly line." *Id.* The focus of this assembly line is "on achieving as just an outcome as possible for each offender with *maximum efficiency*" where "procedures speed cases through to a mathematically correct disposition." *Id.* at 95 (emphasis added). This emphasis on efficiency leaves little, if any, opportunity for offenders to truly contemplate the effects their actions have on victims, themselves, and the shared community. *Id.* at 96. That opportunity is as much about creating more time and space along the continuum as it is about infusing meaningful engagement into the steps along the American criminal process.

297. ALEX PIQUERO & LAURENCE STEINBERG, MACARTHUR FOUND., REHABILITATION VERSUS INCARCERATION OF JUVENILE OFFENDERS: PUBLIC PREFERENCES IN FOUR MODELS

## V. RESPONDING TO SKEPTICS

A. *Skeptics' Concerns About Effectiveness and Risk*

Skeptics may be concerned about the accuracy of a restorative justice process to measure offender remorse, the effectiveness of the program to reduce recidivism, and the risk posed by offenders who remain in the community.

Critics have been concerned about incentivizing offenders at this stage to feign or fake apology and remorse if it is tied to their ultimate sentence.<sup>298</sup> Ideally, a successful mediation would not be incentivized by or subject to the bias of others judging the sincerity and engagement of the participants. Instead, offender and victim alike should be free to focus on the tasks of learning, understanding, apologizing, forgiving, acknowledging harm, uniting in desire for safe and secure neighborhoods, appreciating their shared humanity, and shoring up feelings of community.

First, skeptics should be cautioned against using restorative justice to accurately measure a youthful offender's remorse and against linking that perception of remorse to any outcome in his case. In Marcus's story, a restorative justice-style mediation was used as a sorting tool to inform sentencing and increase the ability of the sentencing judge to accurately capture who Marcus was, gauge his remorse, estimate his potential for growth, and incorporate the input and experience of the victims. The temptation to use restorative justice as a sorting tool at sentencing is great precisely because a demonstration of remorse is such a powerful factor at sentencing.<sup>299</sup>

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FOR CHANGE STATES 4 (2007) available at [http://www.macfound.org/media/article\\_pdfs/WILLINGNESSTOPAYFINAL.PDF](http://www.macfound.org/media/article_pdfs/WILLINGNESSTOPAYFINAL.PDF) (“[T]he public clearly favors rehabilitation over punishment as a response to serious juvenile offending.”); see also Bibas & Bierschbach, *supra* note 6, at 138 (discussing victim satisfaction with restorative justice).

298. See Bibas & Bierschbach, *supra* note 6, at 142 n.286.

299. *Id.* at 92 (describing how remorse is a strong factor determining the sentencing practices of judges); see also U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.5 (2011) (officially recognizing acceptance of responsibility as a mitigating factor. In pertinent part, the commentary to section 3E1.1 reads: “The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.”). For more discussion, see Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and*

Yet, scholars have challenged the soundness of judicial use of “remorse and apology as a valid measure of amenability to treatment or a fair metric for punishment.”<sup>300</sup> Indeed, this moment when a youthful offender may understand and express remorse provides a wonderful learning opportunity, but not one on which the offender’s fate should depend. There are two obstacles to understanding an offender’s true feelings of remorse and his or her capacity for remorse: (1) the offender, especially a young one, may not have the intellectual and emotional ability to appropriately convey remorse, and (2) if the sincerity and depth of the offender’s remorse must be assessed, it has to be assessed by a fallible human being with biases and vested interests—judges,<sup>301</sup> attorneys,<sup>302</sup> victims,<sup>303</sup> and mediators.<sup>304</sup> An individual charged with assessing a defendant may not appreciate the disconnect between the offender’s capacity and his expression.

At first blush, the public and lawmakers alike might view an alternative to incarceration as far too lenient on offenders and unpopular with victims. Through education about the success of such programs, not just in terms of reduced recidivism but also in terms of increased victim satisfaction, programming could win the support of the public and of legislators. Postadjudication restorative justice mediations significantly increase opportunities for the offenders’ rehabilitation and the likelihood for victim satisfaction.<sup>305</sup>

Restorative justice programs appear to reduce recidivism rates.<sup>306</sup> Specifically, victim-offender mediations, like the ones I propose, reduce recidivism.<sup>307</sup> Like Marcus, offenders who participate in restorative justice programs are forced to confront the

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*Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012).

300. Henning, *supra* note 9, at 1149.

301. *Id.* at 1140.

302. *Id.* at 1142.

303. *Id.* at 1143. Indeed, Henning explains how difficult it is to keep victims’ statements in proper perspective when courts, probation officers, and police officers rely upon them. *Id.* at 1142. To alleviate this concern, Henning proposes that victim impact statements should be reserved only for the post-disposition phase and excluded from disposition hearings. *Id.* at 1135.

304. *Id.* at 1167–68.

305. *Id.* at 1135.

306. Bibas & Bierschbach, *supra* note 6, at 117 n.153.

307. *Id.* at 132–33.

reality of what they have done. Confronting the harm that offenders caused to their victims has the capacity to change them and impact their likelihood of re-offending. There is specific data reflecting that mediation reduces recidivism not only for juveniles<sup>308</sup> but for adult offenders as well.<sup>309</sup> One meta-analysis “found that 72 percent of mediation programs reduced the rate of re-offending.”<sup>310</sup>

Victim satisfaction is another benefit to restorative justice mediations.<sup>311</sup> One study found that 79 percent of victims who participated in mediations were satisfied versus 57 percent of victims who were satisfied by the traditional court system.<sup>312</sup> Specifically, victims who have participated in mediation benefit from an increased perception of safety in society as a result. A study of victims who participated in restorative justice mediations in both the United States and Canada found that victims who participated were “50 percent less likely to express fear of re-victimization than the comparable cohort of victims who did not [participate in] mediation.”<sup>313</sup> To the extent that victims of crime desire monetary restitution, they may also be happier with restorative justice processes conducted in the community.<sup>314</sup>

Critics of restorative justice who perceive leniency may not be persuaded by arguments of effectiveness. Offenders, however, must bear emotional difficulties through the process of confronting the pain and suffering they caused. Hearing about the impact of their transgressions and expressing remorse constitutes a type of painful suffering.<sup>315</sup> Confronting these difficult emotions is stressful, particularly for young people unfamiliar with productive ways of

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308. *Id.* at 132.

309. *Id.* at 132–33 nn.231–32.

310. LEVIN, *supra* note 94, at 2.

311. Bibas & Bierschbach, *supra* note 6, at 117; Henning, *supra* note 9, at 1164–65.

312. LEVIN, *supra* note 94, at 2; *see also* Joshua Wachtel, *Restorative Justice Backed by Over 95% of Crime Victims*, RESTORATIVE WORKS (June 16, 2012), <http://restorativeworks.net/2012/06/restorative-justice-backed-by-over-95-of-crime-victims/>.

313. LEVIN, *supra* note 94, at 2.

314. Victims, especially those who have suffered a property crime, want to be financially compensated for their monetary losses. This is hard to accomplish when offenders are incarcerated. *See* LEVIN, *supra* note 94, at 1 (showing that among burglary victims surveyed in Iowa, 81.4 percent are most interested in financial restitution and least interested (7.1 percent) in a prison sentence of a year or more).

315. Henning, *supra* note 9, at 1150.

coping with these emotions and experiences. It may surprise readers and fans of retributive justice that many of those who spent time both as inmates and in probation or parole find community-based supervision more challenging: “Inmates who were surveyed ranked equivalent time in seven alternative sanctions such as day reporting, intensive supervision probation, and community service as tougher than prison.”<sup>316</sup>

### *B. Defense Concerns*

A defendant who engages in a pretrial diversion program or a meeting such as the one in which Marcus and his victims participated risks incriminating him or herself. The Fifth Amendment to the U.S. Constitution, and the state constitution corollaries, guarantee criminal defendants the right against self-incrimination.<sup>317</sup> Much of the concern about self-incrimination dissipates if the mediation takes place after sentencing. However, if a defendant entered into mediation and throughout the course of mediation revealed information about other crimes that were not charged, additional charges could be levied against him or her based on those admissions. At that point, he or she would be disincentivized from participating. Indeed, without binding assurances that those communications are confidential and could not be used in any fashion, either directly or derivatively, to gather evidence and launch criminal charges, a defendant would be foolhardy to participate or would be chilled from participating in a meaningful and open way.

Timing the mediation as a part of a community sentence of probation assures that a defendant will not incriminate him or herself *in the instant case*. To promote openness, there must be binding legal safeguards ensuring that nothing that the offender shared would be used either directly or indirectly to prosecute him or her for *any* crimes. Specifically, an offender should be entitled to a guarantee that anything he or she reveals about this crime—the crime for which the mediation is occurring—will not be used to revoke his or her probation or file sentencing enhancements. Further, nothing an

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316. LEVIN, *supra* note 94, at 2.

317. U.S. CONST. amend. V.

offender discloses about unrelated crimes could be used against him or her. The agreement would be between the defendant and law enforcement and prosecuting agencies, both federal and state. The defendant would be entitled to the advice of his or her criminal attorney about the restorative justice process and the agreement prior to entering into the agreement. An offender should have the opportunity to talk with his defense attorney about any concerns prior to agreeing to such a program as a part of his or her sentence because not affording a defendant such an opportunity could also run afoul of coercion concerns. Sanctions should be imposed for any violation of the agreement.

Juvenile courts afford children with confidentiality.<sup>318</sup> This confidentiality exists to ensure that children have an opportunity to reform without forever having the shadow of their past cast over their heads. Confidentiality also reduces the impact of shaming and stigmatizing children, therefore intruding on the goal of rehabilitation.<sup>319</sup> In juvenile court, where confidentiality is a mandate, those concerns would be further complicated.

Timing is key. Incorporating these programs into a community-based program of probation *after* sentencing addresses the concern about confidentiality in the courtroom. Further, it allows victims the ability to participate in the process without requiring their participation in the court's sentencing hearing, a hearing that should be confidential to protect the child.

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318. See Henning, *supra* note 9, at 1158 (“Confidentiality was linked to the rehabilitative philosophy of the juvenile justice system since it was understood that confidential proceedings would allow youth to benefit from treatment and services while being protected from the stigma of a criminal record that might impede their progress in school, work, and the community.”).

319. See *id.* at 1124 (recognizing the existence of “procedural barriers, such as confidentiality protections for accused youth” in juvenile court); *id.* at 1126 (stating that child advocates, in response to proposed victims’ rights legislation, feared that “eroding confidentiality . . . would stigmatize the child”).

### C. Implementation Issues

Whenever there is a new program, cost is factor. However, community sentences of probation with restorative justice programming will be less expensive than sentences of incarceration.<sup>320</sup> Taxpayers will ultimately benefit from less money expended on incarceration.<sup>321</sup>

The number of hours spent in mediation may depend on the crime, the offender, and the victim. In Texas, the “Lubbock County Dispute Resolution Center estimates mediation costs as little as \$75 per case.”<sup>322</sup> At that center, there are about 600 criminal mediations per year.<sup>323</sup> Their funding comes from untapped victims’ group sources.<sup>324</sup> For instance, in Texas, the governor’s office gives over \$28 million a year in federal money for victims programs.<sup>325</sup>

In Marcus’s case and in Ben’s case, both offenders faced mandatory minimum sentences of incarceration based on the charges. Additionally, after a plea agreement was reached in Marcus’s case, he faced two more obstacles to a community-based sentence. His offense carried a soft-minimum of two years of incarceration and a guideline sentence of a minimum of two years incarceration. Under recent case law and within the current system,

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320. The mediation programs that I propose would be in addition to the probation expenses for offenders serving community-based sentences. Despite this, probation is far less expensive to administer than incarceration. Greenwood, *supra* note 278, at 186 (stating that “recent analyses have shown that investments in appropriate delinquency-prevention programs can save taxpayers seven to ten dollars for every dollar invested, primarily in the form of reduced spending on prisons”). In Texas, for example, probation “costs less than \$2 per day compared to \$56.10 per day for prison.” LEVIN, *supra* note 94, at 3. In 2010, the average cost per day for youth committed to the Texas Youth Commission (TYC) ranged from \$23.13 for community-based supervision to \$359.58 for TYC institutions. Tri-Cnty. Coal. for Literacy & Cmty. Servs., Cost to Incarcerate a Youth in Texas, <http://tricitycoalition.org/Cost%20to%20Incarcerate%20a%20Youth%20in%20Texas.htm> (last visited July 31, 2013).

321. In addition to putting cash savings from incarceration toward the implementation of restorative justice programming in the community, funds could also be diverted to public education, substance abuse treatment, the neglect and abuse system, and mental health services, which are all areas that would help better serve the vulnerable population most at risk for committing offenses.

322. LEVIN, *supra* note 94, at 2.

323. *Id.*

324. See Henning, *supra* note 9, at 1166.

325. LEVIN, *supra* note 94, at 2.

sentencing guidelines are voluntary, which theoretically would allow for nonadherence to sentencing guidelines.<sup>326</sup> However, statutory constraints like mandatory minimums would still pose obstacles to implementing my Proposal with youthful offenders who committed and were convicted of offenses deemed serious and violent.<sup>327</sup>

In cases where there are only sentencing guidelines and soft minimums, judges could easily impose a suspended sentence like the one imposed by Marcus's judge. By so doing, a judge would retain the ability to incarcerate an offender should he or she fail to succeed in the community. Suspended sentences would provide a sentencing judge with leverage if the defendant does not participate in the court-ordered process or re-offends. Upon proof that an offender has not satisfied the probation conditions, a judge may revoke his or her probation and impose prison time. Also, if an offender re-offends, he or she will face new charges. Mandatory minimums could be avoided with deft plea bargaining, but that may prove impossible without legislative reform to address harsh mandatory minimum sentencing schemes.<sup>328</sup>

In implementing a program, court systems should not require that defendants and victims participate. Participation would have to be voluntary. Legally, the Fourteenth Amendment to the U.S. Constitution ensures criminal defendants a right to due process, and state constitutions have adopted similar provisions.<sup>329</sup> Defendants in the criminal system cannot be forced, coerced, or otherwise made to participate in a program involuntarily or against their free will.<sup>330</sup>

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326. The Federal Sentencing Guidelines are an advisory scheme. In *Apprendi v. New Jersey*, the Court addressed the intersection of mandatory sentence statutes and the federal sentencing guidelines. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Apprendi* Court stated that any sentence imposed *above* the statutory maximum requires a jury finding of proof beyond a reasonable doubt. *Id.* at 475–76.

327. We need to reform or set aside mandatory minimums—they have gotten out of control. See ALEXANDER, *supra* note 84, at 221.

328. See Holder, *supra* note 42 (emphasizing the need to rethink mandatory minimum sentences and explaining that they are often “counterproductive”). Even Florida, the home of Governor Jeb Bush, famous for his “right on crime” mantra, has been considering scaling back on harsh mandatory minimum sentences. See Steven Bousquet, *Winds Shifting on Crime*, TAMPA BAY TIMES, Apr. 7, 2011, at 1B.

329. U.S. CONST. amend. XIV.

330. Additionally, the system has an interest in encouraging meaningful participation by defendants. However, courts should not attempt to measure just how meaningful an individual offender's participation has been.

When the victim wants to participate but the defendant does not, the defendant's participation cannot be mandated. A criminal defendant who has been convicted has to voluntarily choose probation and can always refuse a sentence of probation in favor of a prison sentence. Yet, a defendant will certainly be incentivized to participate when offered a community sentence with a suspended prison sentence hanging over his or her head.<sup>331</sup> Should the defendant refuse to participate, there will still be other opportunities for the victim to participate. For instance, a victim could participate in mediation with a different offender whose victim did not want to participate.

When an offender wants to participate, but his or her actual victim does not want to participate, the victim would be free to decline the opportunity to participate.<sup>332</sup> But the offender should not be precluded from participation in a rehabilitatively beneficial restorative justice program simply because his actual victim did not want to participate in a mediation. There are other options that would ensure that the offender still has an opportunity to participate. The role of the victim could be played by other crime victims of similar offenses (perhaps those victims whose offenders did not want to participate or whose offender was never located and arrested), by actors, or by other community member volunteers. In such situations, an offender can still reap the benefits of participation—namely, learning to understand and appreciate the consequences of his actions.<sup>333</sup>

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331. A less effective approach would be for an offender to participate while incarcerated. In such a situation, an offender could file a motion to reduce the term of incarceration based on his or her participation. This approach is not proposed and would be problematic because it still exposes the offender to all the negative impacts of incarceration.

332. But doesn't this punish the offender and deny him a shot at rehabilitation? How would you reconcile that? The victim should not have this power.

333. See Bibas & Bierschbach, *supra* note 6, at 116–17 (“Victims, offenders, and community members who have met and engaged in apologetic discourse overwhelmingly feel satisfied and relieved. Offenders who were interviewed, for example, reported feeling ‘happy because all my feelings were out.’ . . . Offenders welcomed the chance to ‘explain their own behavior, apologize, ease their consciences and reduce feelings of guilt.’” (quoting MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 101 (1994); Lutz Netzig & Thomas Trenczek, *Restorative Justice as Participation: Theory, Law, Experience and Research*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, 241, 256 (Burt Galaway & Joe Hudson eds., 1996))).

Differences in cultural, ethnic, and racial identity, socioeconomic status, and educational background may all lead to misperception, miscommunication, conscious and unconscious bias, and prejudice. Often, victims and offenders are from very similar communities—both are groups that are more likely to be poor and racial minorities. Yet, there are instances, like in Marcus's case, where the victims are from different racial, cultural, socioeconomic, and educational backgrounds. These cases present challenges in communication and understanding, but also offer great learning opportunities for both parties.

The solution to accounting for differences is to squarely address those differences with a trained facilitator in both a preparatory phase before the mediation as well as in a final debriefing phase. A trained mediator is essential to the solution to this problem. The mediator would need to be sensitive to the cultural, economic, racial, religious, ethnic, and other differences unique to the community in which the offender and victim live.<sup>334</sup> The success of such programming would depend on someone who can be sensitive and facilitate discussions even when there are conscious and unconscious racial resentments and judgments.<sup>335</sup>

The program that this Article has proposed is not a true or pure restorative justice program, though it is somewhere along the continuum. One tenet of a pure restorative justice process is participatory decision making, which would mean that victims and offenders all participate in deciding upon the consequences. This Proposal does not have a component of participatory decision making and is therefore not a pure restorative justice program.

It is important to be transparent in the labeling and naming of any programs. This Proposal is for a developmentally appropriate and community-based sentence of probation for youthful offenders. In describing a particular program to be implemented as a part of a sentence of probation, this Article borrows heavily from restorative justice models (so perhaps using the name restorative justice could create resentment or confusion). While this Proposal is along the restorative justice continuum, its focus is rehabilitation of youthful

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334. In the words of Cornel West, "Race Matters." CORNEL WEST, RACE MATTERS (1993).

335. See ALEXANDER, *supra* note 84, at 226, 227, 230.

offenders. The program that this Article proposes is, first and foremost, intended to educate offenders by offering guidance as they become adults.<sup>336</sup>

## VI. CONCLUSION

By implementing a developmentally appropriate, community-based sentence with restorative justice type programming, the behavior of many youthful offenders could be addressed in the community with programs that respond directly to youthful thinking. Youthful offenders are entitled to age-appropriate sentences that afford them educational opportunities, such as the opportunity to understand the consequences of their offending behavior, develop empathy, nurture their feeling of connection to their community, and promote their overall respect for the law. Through the implementation of restorative justice programming, youthful offenders will have both the tools and experience enabling them to think more about the consequences of their behavior before acting in the future. Restorative justice responds directly to youthful thinking and behavior with education and can rehabilitate individuals who have the capacity to grow and learn. Such programming as a part of a community-based sentence is faithful to penological justifications and makes good sense when comparing it to incarceration. Providing developmentally-based community programming for as many amenable youthful offenders as early as possible presents opportunities to reduce recidivism, enhance the probability that young people will grow into law-abiding citizens, reduce overall incarceration rates, and save money.<sup>337</sup>

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336. While increased victim satisfaction is a benefit, it is not an explicit goal.

337. See Guggenheim, *supra* note 200, at 487–88. See generally ALEXANDER, *supra* note 84, at 209–48 (emphasizing the importance of changing the general public’s collective denial to fix the problem of mass incarceration, which disproportionately impacts minorities). There has also been a recent trend in this country to reform expensive policies that have led to over-incarceration. For example, in its 2012 election referendum, California voted to limit offenses that can be considered a third strike. Jack Leonard, *Prop. 36 Seeks to Ease California’s Three-Strikes Law*, L.A. TIMES (Oct. 27, 2012), <http://articles.latimes.com/2012/oct/27/local/la-me-prop36-3strikes-20121028> (“The proposition’s changes would not apply to offenders with previous convictions for murder, rape or child molestation, or to those whose latest offense involved a sex crime, major drug dealing or use of a firearm.”); see also Reuters, *Jeb Bush Signs Right On Crime Statement of Principles* (Sept. 2, 2011), available at <http://www.reuters.com/article>

Nonetheless, more information is needed to guide the specific implementation of such a proposal. Educating, instead of incarcerating, is the right thing to do. With only 0.2 percent of the DOJ's budget devoted to research, there are significant gaps in research and data.<sup>338</sup> For instance, it would be helpful to know whether the effectiveness of such programming depends on the stage at which it is implemented (probation), the age of the offender, the type of offense committed, or the jurisdiction of the sentencing court (juvenile or adult). And, Does it matter if the offense was committed as a juvenile or an adult? Does the approach work more successfully for first time offenders or those that have previously served time; in

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/2011/09/02/idUS143110+02-Sep-2011+PRN20110902 (announcing that as the newest signatory of the Right On Crime Statement of Principles, Florida Governor Jeb Bush joins “dozens of conservative leaders supporting conservative criminal justice reforms”); Maroney, *supra* note 13, at 175 (explaining that since “recent fiscal challenges have wrought change, as states seek to avoid costly incapacitation if cheaper alternatives, like supervised release and family therapy, can be shown equally effective”); Editorial, *Money Saved, Safer Streets*, CHI. TRIB., Apr. 25, 2009, at 14, available at [http://articles.chicagotribune.com/2009-04-25/news/0904240242\\_1\\_juvenile-detention-center-illinois-kids](http://articles.chicagotribune.com/2009-04-25/news/0904240242_1_juvenile-detention-center-illinois-kids) (noting that the “Redeploy Illinois” program “saves money and steers kids in the right direction” by keeping them out of more costly detention while simultaneously reducing recidivism); Jackie Nash, *Legislation Would Transform Ohio's Criminal Prosecution of Delinquent Children*, DAILY REP., July 7, 2009, at 1 (discussing H.B. 235, which would prioritize cheaper community-based treatment over incarceration). Fiscal challenges also have created opposing pressures, highlighting the need to focus policymakers on principles even in hard economic times. See Kate Howard, *Budget Cuts Could Hurt Nashville's Juvenile Court*, TENNESSEAN, Mar. 23, 2009, at B1 (reporting that victims' rights group and a judge both warn of negative fallout from cuts to programming and probation services).

338. For instance, only 0.2 percent of the DOJ budget (\$54 million out of \$27 billion) goes to research as compared to 7 percent of the Department of Health and Human Services budget (\$28.5 billion out of \$707.7 billion) and 7 percent of the EPA budget (\$504 million out of \$7.2 billion). ROSENBERG & MARK, *supra* note 40, at 12. More research is needed based on the specific groups of offenders, ages of offenders, offense types, timing of the restorative process, specific types of processes used, and particular communities and victims impacted. Some of the data offered in this paper is in the form of “soft” anecdotal evidence from the stories of Ben and Marcus.

Hard evidence consists of quantitative data—oftentimes primary data gathered by researchers from experiments (preferably randomized control trials), as well as secondary social and epidemiological data collected by government agencies or through survey questionnaires. Soft evidence, on the other hand, is qualitative data such as testimonials or anecdotes. Cost-benefit analysis requires hard, quantitative evidence, and rigorous cost-benefit analysis will insist on quantitative evidence that has been collected using scientifically tested methodologies.

*Id.* at 10; see also Holder, *supra* note 42 (emphasizing the need for smart and cost-effective policy responses to crime and social problems: “Particularly in these challenging times—when budgets are tight, federal sequestration has imposed untenable and irresponsible cuts, and leaders across government are being asked to do more with less . . .”).

other words, does jail exposure reduce the effectiveness of such an approach? As a general matter, offenders who have served time in jail or prison may face poor recidivism rates. Therefore, it seems that catching offenders before they ever enter an incarceration facility is the best tactic.<sup>339</sup>

No matter what processes we engage in, we need to be mindful of race, ethnicity, class, socioeconomics, cultural forces, and differences in urban and rural areas. Only by keeping these factors in mind will we be able to assess how those differences can be approached in order to constructively create meaningful learning opportunities for youthful offenders.

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339. The Washington State Institute for Public Policy determined that incarceration is a financially expensive and minimally effective method of lowering crime rates, providing only two dollars of benefits for every dollar spent. BALCK, *supra* note 60, at 13.