

# THE ROAD LESS TRAVELED:<sup>1</sup> USING ADR TO HELP REFORM FIRST-TIME JUVENILE OFFENDERS

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## INTRODUCTION

Many have noted that “get-tough” measures in the approach to juvenile offenders are fueled by public fears resulting from media extensive coverage of the most heinous crimes committed by wayward youth.<sup>2</sup> Although the majority of the crimes committed by young people are not violent and some statistics indicate that juvenile crime is on the decline,<sup>3</sup> more and more children are being locked away because of a pervasive fear of what children could do.<sup>4</sup> Furthermore, this increased incarceration can have the psychological effect of promoting, rather than deterring, crime.<sup>5</sup> Alternative

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<sup>1</sup> This opening was inspired by Robert Frost’s poem “The Road Not Taken.” ROBERT FROST, MOUNTAIN INTERVAL (Henry Holt & Co. 1920), available at <http://www.bartelby.com/119/1.html> (last visited Feb. 16, 2006).

<sup>2</sup> See, e.g., C. Aaron McNeece & Sherry Jackson, *Juvenile Justice Policy: Current Trends & 21st Century Issues*, in THE JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 41, 42 (Albert R. Roberts ed., 2004) (noting continuing trend of retribution in juvenile justice spurred by coverage of high profile juvenile crimes); see also Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1365 (2001) (describing media terms for juvenile offenders that contribute to society’s “get tough” attitude toward young criminals).

<sup>3</sup> Lucas, *supra* note 2, at 1365-66; but see ROLF LOBER, DAVID P. FARRINGTON & DAVID PETECHUK, U.S. DEP’T OF JUST., CHILD DELINQUENCY: EARLY INTERVENTION AND PREVENTION (May 2003), available at <http://www.ncjrs.gov/app/publications/alphaList.aspx?alpha=C> (last visited Feb. 16, 2006) (citing an increase in delinquency of 33% during the 1990s).

<sup>4</sup> Margaret Talbot, *The Maximum Security Adolescent*, N.Y. TIMES, Sept. 10, 2000, §6 (Magazine), at 41 (noting that 34% of juveniles adjudicated as adults were charged with less serious property offenses).

<sup>5</sup> See Gordon Brazemore & Mark S. Umbreit, *Balanced & Restorative Justice: Prospects for Juvenile Justice in the 21st Century*, in THE JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 467, 468 (Albert R. Roberts, ed., 2004) (discussing how treatment of and attitude regarding crime can lead to even more crime); GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 92 (2002) (noting self-fulfilling prophesy sometimes results when

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dispute resolution (ADR) techniques may counteract this negative impact by diverting children from formal prosecution and punishment when they first encounter the system, thereby saving them from a prison – what some have called a “school for crime” where juveniles are concerned.<sup>6</sup> This Note will argue that in situations similar to the one below, and in less serious situations, it is increasingly incumbent upon society to treat children in such a way that embraces the promise of our youth to be productive. ADR can help achieve that goal.

The following case study illustrates the short-comings of “get-tough” justice.

Five years ago, the New York Times reported, in an article titled “The Maximum Security Adolescent,” the story of a young girl named Jessica who grew up in a broken home in Florida.<sup>7</sup> At age 13, Jessica and a few friends, in a vain attempt to gather the funds necessary to travel to Disney World, robbed Jessica’s grandparents.<sup>8</sup> Arrested and charged with “assault and armed kidnapping, as well as robbery,” Jessica was sentenced to 9 years in an adult prison, despite the fact that Jessica had not yielded a weapon and had likely succumbed to peer pressure and anger over a recent fight she had with her grandparents.<sup>9</sup>

While in prison, Jessica developed relationships with women that would serve as surrogates, replacing whatever mothering and family life that might have existed for her in the real world outside the prison walls.<sup>10</sup> The saddest part of this story is that the *best* “mother” Jessica encountered was in jail for embezzling money.<sup>11</sup> At the time that the article was written, the woman that Jessica

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youth are labeled as criminals). There is the theory that prison reinforces antisocial behavior in children. If this is the case, putting youths away for any period of time will likely have the effect of increasing future criminal activity rather than deterring such action. Talbot, *supra* note 4. In fact, some have noted that being “defined as delinquents may [lead to youth becoming] delinquents as the result of a self-fulfilling prophecy, leading to secondary deviance.” Albert R. Roberts, *An Overview of Juvenile Justice: Cases, Definitions, Trends and Intervention Strategies*, in *THE JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE* 6, 21 (Albert R. Roberts, ed., 2004) [hereinafter Roberts, *An Overview of Juvenile Justice*].

<sup>6</sup> JOHNSTONE, *supra* note 5, at 91 (internal quotations omitted).

<sup>7</sup> Talbot, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* For a discussion of why adolescents are different from adults in terms of awareness of consequences of actions, including “inexperience, less education, and less intelligence . . . more apt to be motivated by mere emotion or peer pressure,” see Ellie D. Shefi, Note, *Waiving Good-bye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 MICH. J.L. REFORM 653, 663 (2003).

<sup>10</sup> Talbot, *supra* note 4.

<sup>11</sup> *Id.*

called “mommy” was serving a life sentence for a brutal, depraved murder.<sup>12</sup> Jessica is scheduled to leave prison at the age of 22 with “no education beyond sixth grade, no job skills, no friends her age or experience of ordinary unincarcerated life after the age of 13. What she will have is a felony record [and] . . . [having] been raised by wolves, . . . then she will be released . . . when she is still young enough to commit many more crimes.”<sup>13</sup>

The current “get tough” attitude toward juvenile offenders has increasingly resulted in more young people being tried in adult criminal court.<sup>14</sup> According to one author, “the reality is that the majority [of children]. . . transferred to adult courts are . . . ages thirteen to eighteen who are accused of non-violent drug and property crimes.”<sup>15</sup> This is particularly unfortunate given psychological research that supports the notion that children and adolescents are less developed than adults – particularly when it comes to planning, judgment, and self-control.<sup>16</sup> Therefore, given the problems of overcrowding in both adult and juvenile detention centers, as well as high rates of recidivism for both juvenile and adult offenders,<sup>17</sup> it is increasingly important to put a stop to criminality in its early stages.<sup>18</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Talbot, *supra* note 4. For more on the notion of prisons as “schools for crime” as far as youth offenders are concerned that Talbot’s summary of the likely results of Jessica’s incarceration indicates, see Lindsay G. Arthur, *Punishment Doesn’t Work!*, 51 JUV. & FAM. CT. J. 37, 41 n.6 (2000). For additional information on the negative effects of juvenile incarceration, including increased recidivism and lack of rehabilitation, see Theresa Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to InnerCity Youths*, 36 NEW ENG. L. REV. 153, 157-58 (2001).

<sup>14</sup> According to cited statistics, “the number of youths under 18 held in prisons . . . doubled from . . . 1985 to . . . 1997.” Talbot, *supra* note 4.

<sup>15</sup> Shefi, *supra* note 9, at 662 (2003); see also SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, *BALANCING JUVENILE JUSTICE* 110 (2d ed., 2004) (noting that “the overwhelming majority of transfer cases are non-violent offenses”).

<sup>16</sup> Erica Goode, *A Conversation With – Laurence Steinberg: Are Young Killers Evil, Or Works in Progress?*, N.Y. TIMES, Nov. 25, 2003, at F1; see also Sue Lindsay, *Teens Show Poor Judgment Because Brains Are Still Growing*, SCRIPPS HOWARD NEWS SERVICE, Oct. 2, 2005 (Domestic News) (discussing the relationship between brain development and children being “impulsive, tak[ing] bad risks and do[ing] stupid things”).

<sup>17</sup> Michael Feuer & Victor C. Chaves, *Let’s Try Restorative Justice*, L.A. TIMES, Dec. 4, 2000, at B7; see also JAMES AUSTIN, KELLY JOHNSON & RONALD WEITZER, U.S. DEP’T OF JUST., *ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS* 1, 2 (2005), available at <http://www.ncjrs.gov/App/Publications/AlphaList.aspx?alpha=A> (last visited Feb. 16, 2006) (discussing the “unproven effectiveness of detention and confinement”).

<sup>18</sup> Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 586 (2004) (noting gradual development of criminal behavior). In a 1998 President’s Message in the A.B.A. Criminal Justice Magazine, Jerome Shestack noted the promise of intervention to rehabilitate juvenile offender – a chance most are not currently given. Jerome J. Shestack, *What About Juvenile*

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Section I of this Note details the history of the juvenile justice system, making specific reference to the various developments in juvenile justice policy,<sup>19</sup> concluding with a discussion of the conflicts involved in juvenile offending. Section II examines ADR techniques that have been used in the juvenile justice field, with some success, as an alternative to further prosecution, incarceration or other punishment, highlighting Victim-Offender Mediation and Family Group Conferencing. In Section III, I analyze why ADR techniques are an ideal solution to the ills of the current system, and how these methods meet many of the goals of the traditional criminal justice system. The final section describes the case of an actual first-time juvenile offender apprehended for purse snatching, highlighting how victim offender mediation works to successfully resolve conflict involving young offenders. Thus, I seek to demonstrate that it is possible to move away from the punitive model of juvenile justice currently used in the United States and achieve positive results. This Note further proposes that, if these alternatives are implemented and widely embraced, there is the possibility that, with patience and perseverance, these methods of treatment may have a halo effect<sup>20</sup> on the criminal system in general, by permanently removing as many young offenders from the system as possible.

## I. HISTORY OF JUVENILE JUSTICE

Approaches to juvenile justice have shifted back and forth in what has come to resemble a metronome.<sup>21</sup> On one side of the

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*Justice?*, 84 A.B.A. J. 8 (May 1998). Nancy Lucas noted that these crimes should “serve an educational function” to help with “moral growth and development.” Lucas, *supra* note 2, at 1377.

<sup>19</sup> Jeffrey K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 PUGET SOUND L. REV. 399, 399 (1992) (comparing the movements in juvenile justice philosophy to those of a pendulum – moving from one extreme to the other).

<sup>20</sup> The term “halo effect” as I have used it here is meant to convey the notion that, if youth can be diverted from a life of crime, then they will not become tomorrow’s adult criminals, and if today’s youths do not become tomorrow criminals, the criminal justice system overall will gradually feel the effects of lowered crime rates, decreased recidivism rates and a lowering of the prison population, as well as a less burdened criminal court docket.

<sup>21</sup> A metronome is a device used to keep a musical beat. “One common type of metronome is the wind-up metronome, which uses a weight on the end of a rod to control the tempo (slide the weight up the rod to decrease tempo, or down the rod to increase tempo). The pendulum rod swings back and forth in tempo; mechanics inside the metronome produce a clicking sound on each swing of the rod.” Definition of Metronome, <http://en.wikipedia.org/wiki/Metronome> (last

policy coin are the rehabilitative efforts, which see the promise of reform in children's malleable personalities.<sup>22</sup> On the other side is the punitive movement, which addresses community fears of juvenile crime, seeing restraint or incarceration as the most effective means of juvenile crime prevention.<sup>23</sup> The juvenile justice system has moved between these two approaches like a pendulum, and has come to rest, in recent years, on a "get-tough" attitude.<sup>24</sup> Given Jessica's situation and that of others committing far less serious crimes, it is time to re-evaluate the system and make a permanent move toward more productive juvenile "justice."<sup>25</sup> This section explores the roots of the juvenile justice system and the policy shifts between punishment and rehabilitation.

#### A. The Progressive Era and the First Juvenile Court

Prior to the turn of the last century, juvenile offenders were generally tried as adults.<sup>26</sup> Then, in the late 1800s, reformers began to act on concerns that "children as young as eight years of age were confined . . . in prisons with deplorable conditions."<sup>27</sup> These reformers built on the common law notion that children below a certain age were incapable of possessing criminal intent.<sup>28</sup> Thus,

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visited Feb. 16, 2006); see Lucas, *supra* note 2, at 1367 (discussing tension in juvenile justice between rehabilitation and punishment).

<sup>22</sup> Jacqueline Cuncannan, *Only When They're Bad: The Rights and Responsibilities of Our Children*, WASH. U. J. URB. & CONTEMP. L. 273, 275-76 (1997) (discussing current movement to focus more and more on punishment rather than rehabilitation).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Writing about various themes in juvenile justice and justice overall, Ellie Shefi built on the notion that juvenile offenders were more capable of change than their more hardened adult counterparts in recommending a focus on rehabilitation as a way to "transform . . . behavior." Shefi, *supra* note 9, at 654. Consequently, some have noted the transformative effects of mediation in the justice setting. Linda Morton & Floralynn Einesman, *The Effects of Mediation in Juvenile Incarceration Facilities: Reduction of Violence Through Transformation*, 49 CLEV. ST. L. REV. 255, 264-65 (2001). Similarly, family group conferencing has also been described as having a forward-looking view to changing problem juvenile behaviors. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 241-42 (2004).

<sup>26</sup> Day, *supra* note 19, at 401.

<sup>27</sup> Shefi, *supra* note 9, at 657.

<sup>28</sup> Children were deemed incapable because they lacked the "moral maturity of adults, and . . . were not entirely responsible for their actions." Roberts, *An Overview of Juvenile Justice*, *supra* note 5, at 20. For more on the common law view of children and criminal intent, see Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 40-41 (1998).

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the then budding juvenile justice system in the United States grew from the recognition that children were “less able to understand the wrongfulness of their actions” than older criminals.<sup>29</sup> Progressive reformers believed in the potential of children to ultimately contribute positively to society, and recognized that placement of wayward youth in the same confined spaces with more mature, adult criminal counterparts would not provide the training, treatment and rehabilitation that these children needed.<sup>30</sup>

The separation of youth and adults within the larger criminal justice system physically manifested itself in the first juvenile court, which began in Chicago in 1899.<sup>31</sup> The new system was intended to be informal, flexible, and individualized, as well as less adversarial than the adult criminal system.<sup>32</sup> The system’s goals were to reintegrate the offender into society, enhance accountability, and protect confidentiality.<sup>33</sup> Because the focus of this new system was more reparative and rehabilitative than punitive, the juvenile court operated on a civil, rather than criminal, basis.<sup>34</sup> The philosophy and policy that the progressive reformers espoused struck a nerve with

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<sup>29</sup> Walgrave, *supra* note 18, at 545.

<sup>30</sup> Conward, *supra* note 28, at 42 (purpose of Progressive reformers was to help “youths reconstruct their lives”); Walgrave, *supra* note 18, at 545 (noting “main function of the juvenile justice system should be the social integration of the offender.”).

<sup>31</sup> GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 6-7. For more detail about what led to the creation of the first juvenile court, see Conward, *supra* note 28, at 41-42. Some of the ideas leading to the creation of the court included the notion that “the child should be treated and rehabilitated, . . . that procedures . . . [should] be clinical rather than punitive.” The court’s creation was driven by a desire “to give young lawbreakers a combination of punishment, treatment and counseling with the aim of helping youths reconstruct their lives.” *Id.* at 42.

<sup>32</sup> GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 6-7; Day, *supra* note 19, at 403. The idea was that, while imprisonment might not be the right outcome, juvenile proceedings would give judges enough leeway to consider each child individually and act for each according to their best interest. Susan K. Knipps, *What is a Fair Response to Juvenile Crime?*, 20 *FORDHAM URB. L.J.* 455, 457 (1993).

<sup>33</sup> Walgrave, *supra* note 18, at 545; Bonnie Miller Rubin, *Mediation for Teens Wins Favorable Verdict: Court Alternative Grows in Suburbs*, *CHI. TRIB.*, Sept. 2, 2001, at C1; Hughes, *supra* note 13, at 161,176; Conward, *supra* note 28, at 43. All of these goals were likely intended to make the criminal process less stigmatizing for youth offenders. In particular, including confidentiality as part of the juvenile justice system addressed the concern that a child branded as a criminal would carry that label with him forever, impacting his life negatively in the future. Day, *supra* note 19, at 402; see also Albert R. Roberts, *Emergence and Proliferation of Juvenile Diversion Programs*, in *THE JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE* 183, 185 (Albert R. Roberts, ed., 2004) (citing data that indicate “the more a youth is engulfed in the . . . system, the greater the chances of future arrests for serious delinquency acts”) [hereinafter Roberts, *Emergence and Proliferation of Juvenile Diversion Programs*].

<sup>34</sup> Cuncannan, *supra* note 22, at 280. Criminal proceedings are adversarial in nature and, therefore, inconsistent with the more protective and treatment-oriented theory of rehabilitation where “the proceedings were intended to be non-adversarial.” *Id.*

legislatures and governments worldwide.<sup>35</sup> Within 25 years, the majority of states had followed suit, and the idea that there should be a separate system for youth offenders had taken hold internationally.<sup>36</sup>

As noted, one of the principal goals of the juvenile justice system was to enable young offenders to re-enter and positively contribute to society.<sup>37</sup> Some have recently echoed this earlier goal, counseling the public to embrace the premise that “today’s youth will grow into tomorrow’s responsible adult citizen.”<sup>38</sup> This rally cry of those who seek to reform the juvenile justice system today – to replace punitive measures with reparative ones – was the guiding light of the progressive reformers.<sup>39</sup> Embracing future possibility, Progressive Era reformers sought to provide juvenile offenders with “a combination of punishment, treatment, and counseling . . .” to help bring them back into the fold of law-abiding society.<sup>40</sup> By treating offenders as individuals, examining the various characteristics that had led them down the “wrong” path, courts could “prescribe the appropriate treatment for the particular offender.”<sup>41</sup> This, in turn, would “save children from a life of crime and the harsh consequences of incarceration with adults.”<sup>42</sup> For decades, the new system of juvenile justice incurred little criticism.<sup>43</sup>

Gradually, however, critics came forward. As the juvenile justice system became more established, its informality and discretionary decision-making led many to critique the system as

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<sup>35</sup> Walgrave, *supra* note 18, at 544 (citing the growth of a separate juvenile system for criminal justice “in North America, in Europe, and all over the world . . .”).

<sup>36</sup> See Shefi, *supra* note 9, at 663 (noting the importance of providing rehabilitation for wayward youths); see also Robert E. Shepherd, *The “Child” Grows Up: The Juvenile Justice System Enters Its Second Century*, 33 FAM. L.Q. 589, 590 (2000) (discussing desire to reform youth at heart of development of juvenile justice system) [hereinafter Shepherd, *The “Child” Grows Up*].

<sup>37</sup> See Conward, *supra* note 28, at 42 (noting goal of helping youth rebuild their lives).

<sup>38</sup> Day, *supra* note 19, at 446; see also Erin Ailworth, *Good Turns: Program Substitutes Meditation for Incarceration*, CHI. TRIB., Sept. 2, 2001, at C1 (the “notion that all human beings are capable of turning away from wrongdoing and turning back toward doing the right thing . . .”).

<sup>39</sup> Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 261 (1999) (discussing original beliefs of juvenile justice supporters).

<sup>40</sup> Conward, *supra* note 28, at 42. Among reforms designed to help children become productive members of society, were “child labor and welfare laws [and] compulsory school attendance . . .” Day, *supra* note 19, at 401.

<sup>41</sup> Shefi, *supra* note 9, at 659.

<sup>42</sup> C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 664 (2005).

<sup>43</sup> Walgrave, *supra* note 18, at 545.

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arbitrary.<sup>44</sup> In addition, a gradual shift from careful, individual assessments and treatment to expedient initial judgments of guilt or innocence before determining treatment options led many to scrutinize the system with a magnified lens.<sup>45</sup> Because the driving force behind initial movements in creating the juvenile justice system had been to engage “[p]rinciples of psychology and social work, rather than formal rules,” it lacked the important constitutional protections that grew out of the overall criminal justice system, including due process and right to counsel.<sup>46</sup> Critics argued that the absence of due process and other guarantees for children was unjust as well as unconstitutional.<sup>47</sup>

## B. The 1960s and 1970s – Shifting the Focus

As concerns grew that the general informality and paternalism of the juvenile justice system made it easy to disregard important due process rights, the public began to demand due process and other rights for young offenders.<sup>48</sup> Sometimes termed the “due process revolution,” these concerns led to several momentous Supreme Court decisions in the late 1960s that gave juvenile offenders the same constitutional rights and protections as adults.<sup>49</sup> These decisions signaled that the rehabilitative model of juvenile justice, so praised by its initial supporters for the flexible and com-

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<sup>44</sup> This arbitrariness was manifested in unequal interventions and a total lack of procedural safeguards. Cuncannan, *supra* note 22, at 281.

<sup>45</sup> “[O]ver time, the juvenile court began to lose its distinguishing characteristics as judges lost their paternalistic air and began to focus more on the juvenile’s guilt or innocence. Then, in the 1960s, the United States Supreme Court . . . declared that rehabilitation had failed.” Michelle Oropeza, *Early Intervention and the Right Percent Problem: Effectively Merging Theories of Rehabilitation and Retribution in the California Juvenile Justice System*, 26 WHITTIER L. REV. 1217, 1220-21 (2005).

<sup>46</sup> Clarke, *supra* note 42, at 668. The U.S. Constitution provides these protections to criminals through the Fifth and Sixth Amendments. See U.S. CONST. amend. V (privilege against self-incrimination and right to be accorded due process of law); U.S. CONST. amend. VI (right to counsel provided for all criminal prosecutions).

<sup>47</sup> Clarke, *supra* note 42, at 669-70 (stating that cases addressing due process and juvenile justice “stand for the proposition that the mere status of being a juvenile does not diminish one’s fundamental constitutional rights.”).

<sup>48</sup> See Shefi, *supra* note 9, at 659 (citing a 1967 presidential commission report that “raised questions . . . regarding the lack of procedural safeguards within that system”). Among the rights being denied juvenile offenders were the right to counsel and due process protection. “Rule of evidence and formal procedures” were also excluded from the realm of the juvenile court. Clarke, *supra* note 42, at 667-8.

<sup>49</sup> Among the rights accorded to juveniles were the right to counsel, notice and the privilege against self-incrimination. GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 98, 100.

paratively lenient treatment it offered, was no longer perceived positively.<sup>50</sup>

The first two cases that the Supreme Court decided, *Kent v. United States* and *In re Gault*, gave due process guarantees and other constitutional privileges to minors.<sup>51</sup> In *Kent*, a 1966 decision, the Court determined the validity of the transfer of a minor to adult criminal court.<sup>52</sup> While, on the facts presented, the court found it necessary to remand on a jurisdiction waiver issue,<sup>53</sup> the decision had important implications for the due process rights of juveniles, extending certain of those rights to juveniles, including notice and hearing.<sup>54</sup>

The following year, the Supreme Court's *Gault* decision enabled juvenile offenders to invoke numerous other constitutional rights and protections, among them notice, right to counsel and privilege against self-incrimination.<sup>55</sup> Following *Gault*, numerous other cases recognized that constitutional protections must extend to juveniles as well as adults.<sup>56</sup> It appeared that the Progressive Era's bright line between adults and children within the criminal system was beginning to fade, both as a result of the Supreme Court's rulings and public perceptions that the juvenile justice sys-

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<sup>50</sup> Shefi, *supra* note 9, at 659-60 (discussing implications of Supreme Court decisions in the late 1960s). In fact, the Supreme Court noted, at the time, that, while the original purpose of juvenile courts was "laudable," it decried the "immunity of the process from the reach of constitutional guarantees . . . ." *Kent v. United States*, *infra* note 51, at 555.

<sup>51</sup> See generally Shepherd, *The "Child" Grows Up*, *supra* note 36, at 590-91; see also *In re Gault*, 387 U.S. 1 (1967) (Supreme Court reversed AZ Supreme Court's dismissal of petition for habeas corpus in case of 15 year old committed until age 21 due to denial of counsel, notice, Fifth Amendment rights, etc. on the part of the offender); *Kent*, 383 U.S. 541 (1966) (Supreme Court held waiver of juvenile to criminal court invalid because no hearing and thus a denial to juvenile offender of basic due process rights).

<sup>52</sup> *Kent*, *supra* note 51, at 551-52.

<sup>53</sup> "In the circumstances of this case, . . . we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion." *Id.* at 564-65.

<sup>54</sup> *Id.* at 557; see also Shepherd, *The "Child" Grows Up*, *supra* note 36, at 591 (noting the focus of the court on D.C.-specific law and questioning the wider applicability of the holding in other circuits).

<sup>55</sup> *Gault*, *supra* note 51, at 13, 33, 36, 55. *Gault* involved a young boy who was committed as a juvenile delinquent after a female neighbor complained of lewd phone calls, while he was still subject to a six months' probation order as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. *Id.* at 4.

<sup>56</sup> See generally McConnell, *infra* note 85, at 439-41. In 1970, *In re Winship* extended the "beyond a reasonable doubt" standard to cases involving criminal conduct on the part of a juvenile. *Id.* *Breed v. Jones* extended the constitutional protection against double jeopardy to juveniles. *Id.*

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tem had serious shortcomings.<sup>57</sup> In his *Gault* concurrence, in fact, Justice Black declared “that this exalted ideal has failed . . . .”<sup>58</sup> It would not be long before others would jump on the bandwagon and start looking at juvenile crime in a different light.<sup>59</sup>

Nonetheless, in the mid-1970s, with federal support for rehabilitation committed via the Juvenile Justice and Delinquency Prevention Act (JJDPA), it appeared that the tide might not have turned yet.<sup>60</sup> The JJDPA reinforced the ideal, first articulated by Progressive reformers, that juveniles and adults should be separated from one another when incarcerated.<sup>61</sup> The Act was meant to support a more rehabilitative view of juvenile justice, looking at diversion programs and community-based treatment as a solution to the plight of young offenders.<sup>62</sup> The Act also created the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to help institute the purposes of the Act itself.<sup>63</sup>

However, the difficulties in devising appropriate alternatives methods of treatment became clear through subsequent amendments to the Act, which limited its goals to accountability and “combating juvenile delinquency.”<sup>64</sup> Due to increasing media reports of juvenile crime, the paradigm shifted throughout the 1970s, with the public pushing for increased youth accountability and harsher punishments.<sup>65</sup> Thus, within less than a generation, the con-

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<sup>57</sup> Smallheer, *supra* note 39, at 269.

<sup>58</sup> *Gault*, *supra* note 51, at 60 (Black, J., dissenting).

<sup>59</sup> In the 1980s and 1990s, federal and local governments enacted legislation indicating a belief that the juvenile justice system was not protecting the public, and thus harsher punishment not rehabilitation, was the appropriate solution. Oropeza, *supra* note 45, at 1221.

<sup>60</sup> The initial sections of Public Law 93-415, the initial embodiment of the JJDPA, and codified as 42 U.S.C. §§ 5601-5602, stated legislative purpose in § 102 as providing “the necessary leadership, resources, and coordination to develop and implement effective methods of preventing and reducing juvenile delinquency,” reflecting an emphasis on methods to help reduce crime, other, presumptively, than imprisonment. Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974); *see also* Shepherd, *The “Child” Grows Up*, *supra* note 36, at 593 (describing the features of the JJDPA).

<sup>61</sup> GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 12-13.

<sup>62</sup> Roberts, *The Emergence and Proliferation of Juvenile Diversion Programs*, *supra* note 33, at 187-88.

<sup>63</sup> *Id.* Those purposes include prevention of juvenile delinquency and promotion of public safety. 42 U.S.C. § 5602.

<sup>64</sup> While the language used in Public Law 93-415 indicates efforts to develop methods that will ultimately keep children out of the criminal system, the current version of the JJDPA contains more adversarial language like “combating” to characterize intended legislative efforts. Compare 42 U.S.C.A. § 5602(3) (WEST 2005) (current language) with Pub. L. No. 93-415, *supra* note 60 and accompanying text.

<sup>65</sup> These sentiments reflected a sense that this was the way to achieve greater public safety. GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 15.

sensus was that, if children were being given the same rights and protections as adults, why should they not also be held as accountable as their more mature counterparts and in other ways treated as adult criminals.<sup>66</sup> As policy shifted ever more toward punishment and incarceration, the current “get tough,” zero tolerance approach to juvenile justice emerged.<sup>67</sup>

### C. Crime & Punishment – The Current Reaction

The congressional findings supporting the current version of the JJDPa paint a dismal picture of the effects of “get-tough” measures on the rate of juvenile crime.<sup>68</sup> It appears that the public consensus is that, despite an overall reduction in crime rate, the rate of juvenile crime remains too high.<sup>69</sup> Congressional findings indicate that recidivism is not decreasing, that youth offenders account for a high percentage of arrests and that gang violence is increasing.<sup>70</sup> Despite the fact that the federal government seems to acknowledge the relative failure of “get-tough” measures,<sup>71</sup> states have not yet taken action and have, in fact, been enacting statutes that make it easier to try young offenders as adults.<sup>72</sup>

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<sup>66</sup> See Cuncannan, *supra* note 22, at 281, 284-85 (noting criticisms of the Progressive Era juvenile justice system indicating a view that children ought to be treated as “adult criminal defendants”); see also Conward, *supra* note 28, at 44-5, 51 (return to treatment of juveniles as adults following social reforms of the 1960s that led to youths being held accountable for their crimes); Talbot, *supra* note 4 (quoting Steven Drizin, supervising attorney at the Children and Family Justice Center at the Northwestern School of Law to the effect that “[the] juvenile court has been fighting the sound bite ever since that if you give kids adult rights, you can give them adult time, too.”).

<sup>67</sup> Hughes, *supra* note 13, at 158.

<sup>68</sup> 42 U.S.C.A. § 5601(a) (WEST 2005).

<sup>69</sup> *Id.* at § 5601(a)(1) (noting consensus that crime still seems to be rampant among juveniles).

<sup>70</sup> *Id.* at § 5601(a)(3), (6) & (8) (statistics as follows: “[o]ne in every 6 individuals . . . arrested . . . in 1999 was less than 18 years of age”; over the last 30 years, “the number of cities reporting youth gang problems grew 843 percent, and the number of counties . . . increased more than 1,000 percent”; “One-fifth of juveniles 16 years of age who [were] arrested were first arrested before attaining 12 years of age.”).

<sup>71</sup> *Id.* at § 5601(b) (urging Congress to act expeditiously to reform juvenile justice, opining that “without true reform, the juvenile justice system will not be able to overcome the challenges it will face . . . when the number of juveniles is expected to increase by 18 percent between 2000 and 2030.”).

<sup>72</sup> See e.g., ALA. CODE § 12-15-34 (2005) (Alabama statute outlining situations in which juveniles are automatically tried as adults; maintaining adult status for all subsequent crimes committed); ARIZ. REV. STAT. ANN. § 8-302(B) (2005) (Arizona statute mandating transfer on prosecutorial motion); WYO. STAT. ANN. § 24-6-201(c)(ii)(A) (West 2005) (Wyoming statute

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State support for jurisdictional devices such as waiver, transfer, and statutory exclusion support the “get tough” attitude.<sup>73</sup> Judicial waiver expands the discretion of judges to transfer children to criminal court at a “younger age or for less serious offenses.”<sup>74</sup> Prosecutorial transfer similarly allows for discretion to move children into the adult system.<sup>75</sup> In these situations, though, it is left entirely up to the prosecution to decide whether the offense will be adjudicated in juvenile court or tried in criminal court.<sup>76</sup> Statutory exclusion is the purely legislative method for placing juveniles within the jurisdiction of the criminal court by defining certain offenses as “automatically . . . referred.”<sup>77</sup> In addition to these established methods, many states have also recently lowered the minimum age at which children can be tried as adults.<sup>78</sup> In light of the above, then, it should come as no surprise that “the number of youths . . . held in adult prisons . . . has doubled . . . .”<sup>79</sup>

The increase in youths tried as adults is an unfortunate development, particularly considering that, as one author notes, “children transferred . . . tend to recidivate more quickly. . . .”<sup>80</sup> Therefore, by enacting “get-tough” measures to deal with juvenile offenders, states and legislatures may sadly be contributing to the problem rather than fixing it.<sup>81</sup> Following the 1990 Victims’ Rights

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stating a purpose as promoting “the concept of punishment”); N.C. GEN. STAT. ANN. § 7B-1604 (West 2005) (NC statute covering juvenile delinquents makes it easier to treat children as adults for criminal sanctioning purposes).

<sup>73</sup> Shepherd, *The “Child” Grows Up*, *supra* note 36, at 599 (noting recent trends have made juvenile system “more closely [resemble] the adult criminal court . . . .”); *see also* Brazemore & Umbreit, *Balanced and Restorative Justice*, *supra* note 5, at 471 (describing “what now appears to be an ever-increasing demand to transfer more juveniles into the criminal justice system.”).

<sup>74</sup> Shepherd, *The “Child” Grows Up*, *supra* note 36, at 594.

<sup>75</sup> GUARINO-GHEZZI & LOUGHRAN, *supra* note 15, at 109-110.

<sup>76</sup> Such authority is often granted by statute. Note, *For the Good of the Child, For the Good of Society: Using Scotland and Jamaica as Models to Reform U.S. Juvenile Justice Policy*, 115 HARV. L. REV. 1964, 1967 (2002) [hereinafter *For the Good of the Child*].

<sup>77</sup> Carrie J. Petrucci & H. Ted Rubin, *Juvenile Court: Bridging the Past and the Future*, in THE JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 247, 257 (Albert R. Roberts, ed., 2004).

<sup>78</sup> Talbot, *supra* note 4. Currently, minors under the age of 18 can be tried as adults, the number lowered in some states to between 15 and 16 years of age. Conward, *supra* note 28, at 52-53.

<sup>79</sup> Talbot, *supra* note 4. It makes one wonder what happened to the supporters of a separate system who decried the despicable result of imprisoning children with adults.

<sup>80</sup> Shefi, *supra* note 9, at 666.

<sup>81</sup> “Get tough” measures include transfer to the adult criminal system and the lowering of the minimum age at which children can be tried as adults. *Supra* note 72 and accompanying text; *supra* note 78 and accompanying text.

and Restitution Act (VRA),<sup>82</sup> there has been increasing support for alternative treatment programs – the most successful of which use variations on traditional ADR techniques.<sup>83</sup> Because the VRA grants victims a greater role in the criminal justice process overall,<sup>84</sup> there is increasing hope for broader adoption of programs which use essential ADR elements to place opposing parties (victims and offenders here) on either side of the table for a face-to-face encounter, involving a neutral third party and ending in mutually agreed-upon solutions, such as victim-offender mediation and family group conferencing.<sup>85</sup>

A renewed focus on treatment that embraces the ADR techniques espoused by restorative justice regimes would effectively stem the development of more violent criminals by intervening when wayward youth first encounter the law, usually for a nonviolent, low-level offense.<sup>86</sup> However, increasing acceptance of these techniques and their potentially promising results does involve a fundamental re-conceptualization of juvenile crime.<sup>87</sup> From a traditionalist point of view, the conflict is seen as one between the state and offender, so that resolution is achieved when the “crimi-

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<sup>82</sup> Originally enacted as 42 U.S.C.A. § 10606, the Act was repealed and replaced by 18 U.S.C.A. § 3771 in 2004. The overall purposes of both versions of the Act are to provide crime victims with protection, compassionate treatment, compensation, a role in criminal proceedings, and minimal help in the healing process. See Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, § 506, 104 Stat. 4789, 4823; 18 U.S.C.A. § 3771(a) (WEST 2005).

<sup>83</sup> See Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice*, 6 CRIM. L.F. 576, 581 (1995) (discussing what ADR techniques offer, such as active victim/offender participation and aiding the post-crime healing process, that the current system fails to); see also Lucas, *supra* note 2, at 1382 (discussing how VOM acceptance grew out of the Victims' Rights Movement).

<sup>84</sup> See 18 U.S.C.A. § 3771(a) (WEST 2005) (first section focuses on how victims should be treated).

<sup>85</sup> See generally Marianne McConnell, *Mediation – An Alternative to the New Jersey Juvenile Justice System?*, 20 SETON HALL LEGIS. J. 433, 436 (1996) (discussing the benefits of mediation to victim, offender and community alike); Kerrin Wolf, *Making an Impact on Juvenile Delinquents: An Approach to Victim Impact Statements that Everyone Can Embrace*, 2004 JUV. & FAM. CT. J. 39 (2004) (discussing development and reasons for support for VOM); Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 FED. PROBATION 33 (1997) (describing mediation in the criminal justice context and how experiences impact victims).

<sup>86</sup> See Loren Walker, *Conferencing – A New Approach For Juvenile Justice in Honolulu*, 66 FED. PROBATION 38, 38 (2002) (discussing development of the conferencing process). For more on the potential for intervening early on in a youth offender's career, and early on in the process, see Roberts, *An Overview of Juvenile Justice*, *supra* note 5, at 11-16.

<sup>87</sup> Howard Zehr, the founder of the restorative justice movement, outlined the shift as a move to view crime as a conflict between individuals, as opposed to a conflict between the state and the offender. JOHNSTONE, *supra* note 5, at 65; see also Wellikoff, *infra* note 97.

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nal” pays his due to the state.<sup>88</sup> In this version of the conflict, the actually injured parties – often the victim and the local community – are “confined to the role of onlookers.”<sup>89</sup> On the other hand, those subscribing to the restorative justice framework view the conflict as between the offender and the individual and/or community injured by the crime.<sup>90</sup> Under that view, since conflict exists on a more personal level, embracing a resolution technique that involves all the potential parties to the conflict will produce a more individualized results, and thus have a greater positive outcome for all concerned.<sup>91</sup>

## II. ADR TECHNIQUES EMPLOYED IN THE JUVENILE JUSTICE SYSTEM<sup>92</sup>

The punitive model of juvenile justice embraced today is similar to treating a migraine with Excedrin. Over-the-counter medications quickly solve the immediate problem, but offer no long-term relief that takes into account possible contributing factors. In effect, it places those factors on the backburner in favor of removing the current aches and pains. A more holistic approach – acknowledging the effects of lifestyle, including diet, sleep habits and exer-

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<sup>88</sup> Glenda L. Cottam, *Mediation and Young People: A Look at How Far We've Come*, 29 CREIGHTON L. REV. 1517, 1536 (1996).

<sup>89</sup> JOHNSTONE, *supra* note 5, at 67.

<sup>90</sup> *Id.* at 11-12; *see also* Lucas, *supra* note 2, at 1371 (crime is a “conflict between individuals resulting in injuries to victims, communities and the offenders themselves . . .”).

<sup>91</sup> *Id.*

<sup>92</sup> ADR in the justice system operates within the same general framework as ADR in other situations. Features include confidentiality, “flexibility, informality, and control by the parties to a dispute.” Furthermore, the goals of ADR in general, such as offering a fair and voluntary process, developing a mutually satisfactory resolution, and building up relationships, allow parties more control in the solution of the problem. *See generally* Daniel Renken, *The ABC's of ADR: A Comprehensive Guide to Alternative Dispute Resolution*, Dec. 2002, available at <http://mediate.com/articles/renkend.cfm> (last visited Feb. 16, 2006). ADR techniques can be used to address and help solve the conflict underlying a variety of different crimes. Katherine L. Joseph, Note, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207, 209 (1996). Indeed, though today ADR is more often used in low-level, non-violent juvenile delinquency cases, Judge Leonard Edwards predicted that “the juvenile court of the future will . . . use the formal adversarial court process only as a last resort,” indicating that ADR processes such as victim-offender mediation and family group conferencing are appropriate for more serious crimes as well. Leonard P. Edwards, *The Future of the Juvenile Court: Promising New Directions*, 6 THE JUV. CT. 131, 134-5 (1996).

cise – would likely result in more permanent relief.<sup>93</sup> In a similar vein, the ADR techniques that are embraced within the overall framework of the restorative justice movement<sup>94</sup> can be seen as a holistic approach to treatment of juvenile offenders.<sup>95</sup> These methods involve examining each child who comes into contact with the juvenile justice system closely to provide solutions that are more “catered” to the specific situations involved – addressing not only the needs of the outh offenders, but of the victim(s) and the community as well.<sup>96</sup>

Techniques such as Victim Offender Mediation (VOM) and Family Group Conferencing (FGC) provide an “opportunity to resolve legal and social issues without formal legal proceedings.”<sup>97</sup>

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<sup>93</sup> For more information about migraines and their treatment, see The American Counsel for Headache Education (ACHE), *Taking Control*, available at <http://www.achenet.org/news/impact/control.php> (last visited Nov. 2, 2005).

<sup>94</sup> See Edwards, *supra* note 92, at 134 (discussing mediation, conferencing, among others as ADR techniques used by family court). Among the ADR techniques that are utilized in the juvenile justice setting are mediation, conferencing, community reparative boards, and circle sentencing. Brazemore & Griffiths, *infra* note 112, at 74. Of those, this Note explores mediation and conferencing in particular.

<sup>95</sup> In an article on restorative justice, Erik Luna notes that traditional punitive measures largely neglect the needs of those affected by crime, looking only at the crime itself. Luna advocates a more holistic approach which addresses “the needs of those directly injured by crime and the resulting damage done to social relationships” and is “mindful of damaged relationships and neglected obligations in civil society.” Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227 (2003).

<sup>96</sup> Hughes, *supra* note 13, at 176. Specific situations involve both family and environment, and, acknowledging these factors, an important aspect of alternatives methods is the notion that “it is unwise to prevent juvenile crime by removing [youths] from the conditions to which they will eventually return.” *Id.* As such, it makes sense that techniques implemented to break the traditional scheme of trial and prosecution in juvenile justice are focused on safe, constructive confrontations between individuals and their communities. Discussing specific goals, Gordon Brazemore and Mark Umbreit recently described a new direction in juvenile justice focused on “reparation for harm to victims and the community, increasing offender competencies, and protecting the public through processes in which offenders, victims, and the community are all active participants.” Brazemore & Umbreit, *Balanced and Restorative Justice: Prospect for Juvenile Justice in the 21st Century*, *supra* note 5, at 468.

<sup>97</sup> Conward, *supra* note 28, at 74 (discussing increased opportunities for “problem-solving discussions”). For more about the social and legal issues resolved through involvement with ADR processes, see Lucas, *supra* note 2, at 1374-76 (discussing benefits of restoring power balance and possibilities for transforming individuals and society); Walgrave, *supra* note 18, at 572-73 (enabling offender to understand and appreciate the consequences of criminal acts as a way to prevent further stigmatization and social problems). Starting from the premise that lack of accountability can produce a criminal “I-can-get-away-with-anything” mindset, other benefits include offenders taking responsibility for their actions, both parties being more invested in the resolution of the offense, and reduced rates of recidivism. See generally Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1 (2003). Finally, there is some support for the idea that “disapproval” is more effective when it

More often than not, in the realm of juvenile justice, a determination to use VOM or FGC should be made early on in the process to serve as a true alternative to more formal litigation in either juvenile or criminal court.<sup>98</sup> By establishing a dialogue among those affected by a particular crime, ADR methods go beyond the mere crime itself and come closer to the juvenile justice ideal of treating the underlying problem behavior that initially led to the criminal activity.<sup>99</sup>

### A. Victim-Offender Mediation

Victim-offender mediation (VOM), the most widely used form of ADR in juvenile justice today, has existed in the United States for nearly thirty years.<sup>100</sup> From initial successes, many began to recognize that actively involving affected parties in the resolution of criminal activity gave offenders a better chance at “a kind of meaningful accountability that punishment could not provide.”<sup>101</sup>

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comes from those in one’s community rather than from the unknown faces of state actors. JOHNSTONE, *supra* note 5, at 101.

<sup>98</sup> See e.g., Umbreit & Bradshaw, *supra* note 85, at 33 (noting use of VOM as an alternative to prosecution); Conward, *supra* note 28, at 74 (including VOM and FGC as ADR techniques and noting “increased reliance on ADR as a result of . . . an increase in caseloads”); Christine Coumarelos & Don Weatherburn, *Targeting Intervention Strategies to Reduce Juvenile Recidivism*, 28 THE AUSTL. & N.Z. J. OF CRIMINOLOGY, 1995 JC LEXIS 13 at \*18 (1995) (discussing opportunities for intervention with juveniles at first, second, and third contact with criminal system); Cottam, *supra* note 88, at 1541 (noting issues of timing in use of VOM). Cases are usually referred to alternative processes by “people within the justice system . . . police, prosecutors, judges and probation officers.” Joseph, *supra* note 92, at 209-10.

<sup>99</sup> In his article about the negative affects of punishment, Judge Lindsay Arthur notes that rehabilitation’s effectiveness derives from the fact that it “lets the punishment fit the criminal, not the crime.” It is the focus on the individual, according to Arthur, among others, that is at the heart of alternative treatment methods. Arthur, *supra* note 13, at 39. Robert Shepherd noted some of the issues that adolescents have in a recent ABA Criminal Justice Magazine article. Among those were lack of mature judgment, issues weighing the consequences of their actions, and an inability to resist peer pressure. Robert E. Shepherd, *The Relevance of Brain Research to Juvenile Defense*, 19 CRIM. JUST. 51 (2005) [hereinafter Shepherd, *Relevance of Brain Research*].

<sup>100</sup> Cottam, *supra* note 88, at 1536. According to Mary Ellen Reimund, in an article assessing the law and restorative justice, “the majority of cases across the country referred to VOM involve misdemeanors, property crimes, and minor assaults – all committed by youthful offenders.” Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 676 (2005).

<sup>101</sup> Wellikoff, *supra* note 97. It is generally presumed that it is precisely this lack of accountability that most contributes to a criminal mindset. Interestingly, one of the primary goals of the punitive system is enhanced accountability. See e.g. Smallheer, *supra* note 39, at 261 (paragraph discussing punitive system and perceived failure of rehabilitation in the context of juvenile justice).

While VOM can be used at any stage of the juvenile justice game, as a diversionary tactic it is likely to be most successful when instituted earlier rather than later.<sup>102</sup> This is because, as numerous authors, practitioners and experts have noted, the juvenile justice system is more effective when operated in a non-adversarial manner.<sup>103</sup> When VOM is turned to later on in the process, the destructive forces of the adversarial court system will have already had some negative effects.<sup>104</sup>

VOM engages the parties in a “storytelling” process, enabling victim and then offender to express how each view the offense, and it concludes with a mutually acceptable agreement as to how the offender will make amends for his or her actions.<sup>105</sup> As such, mediation in the juvenile justice system is a multi-step process, engaged in before, during and after resolution.<sup>106</sup> The first step, a prerequisite to the rest of the process, is for the offender to admit guilt.<sup>107</sup> Following admission, it is essential that the third-party neutral mediator ensure that all parties are voluntary participants.<sup>108</sup> The mediator then confers separately with each party, both to prepare each for the coming mediation session and to get a sense of each

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<sup>102</sup> Cottam, *supra* note 88, at 1541 (discussing timing issues with turning to VOM).

<sup>103</sup> See, e.g., *id.* at 1536 (discussing negative effects of adversarial system in increasing anger and frustration); Lucas, *supra* note 2, at 1393 (noting non-threatening aspects of VOM indicate more promise for resolution than traditional system offers);

<sup>104</sup> In the introduction to her article on restorative justices, Mary Ellen Reimund notes, metaphorically, how damaging the adversarial process can be: “we are tied at the wrist and pounding on each other.” Reimund, *supra* note 100, at 668. Mediation, then, in its “attack” on “problems instead of people,” makes an ideal solution. See Cottam, *supra* note 88, at 1518.

<sup>105</sup> Reimund, *supra* note 100, at 673-4.

<sup>106</sup> Wellikoff, *supra* note 97; see generally, Joseph, *supra* note 92, at 209-10.

<sup>107</sup> Cottam, *supra* note 88, at 1537 and 1539. The importance of an admission of guilt on the part of the offender prior to the start of the mediation process derives from the idea that, if the offender has already admitted to the crime, and is a voluntary participant, it will be easier for the conversation to progress and for both sides to achieve a personally positive outcome. Wellikoff, *supra* note 97. Furthermore, requiring an admission of guilt goes a long way to ensure the active participation of the offender in the resolution process, “penetrating the indifference and neutralization strategies of offenders which the formal legal process leaves in tact . . . .” JOHNSTONE, *supra* note 5, at 99.

<sup>108</sup> Cottam, *supra* note 88, at 1537. Voluntary participation likely contributes to the sense of ownership and mutual empowerment that parties ideally take away from the process. *Id.* In the criminal system, on the other hand, the state imposes the process on the offending party, usually leaving the victim and other concerned parties out of the picture, without any concern as to the offender internalizing the guilt and or consequences of their actions, thus making ultimate punishment rather empty and more of a burden to be borne than a resolution from which to move forward in a positive direction. See generally JOHNSTONE, *supra* note 5, at 88-92.

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party's position in order to better be able to facilitate the eventual resolution of the "conflict."<sup>109</sup>

The actual VOM session is the next step.<sup>110</sup> Indeed, the course of the session itself actually seems like a series of less prescribed steps designed to give each party the opportunity to express themselves.<sup>111</sup> The dialogue typically begins with the victim expressing the "full impact of the crime upon their lives."<sup>112</sup> The offender is then given the opportunity to respond.<sup>113</sup> Thus begins a dialogue in which the victims are "able to learn the answers to many lingering questions . . . and express their frustration, if not outright anger, in a safe environment."<sup>114</sup> Offenders are likewise able to express themselves, thus becoming accountable for their actions, and gain a "sense of empathy for the victim, this making it more difficult for the offender to repeat his or her crime."<sup>115</sup>

By offering an environment in which "both parties . . . deal with one another as people,"<sup>116</sup> both sides are able to regain a sense of control – the victim feeling less fearful of and victimized by the offender and the offender feeling less helpless and victimized by the system.<sup>117</sup> It is, perhaps, this renewed possession of power by parties that enables greater victim satisfaction, as well as a higher degree of offender compliance with the eventual restitu-

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<sup>109</sup> Coben & Harley, *supra* note 25, at 240.

<sup>110</sup> See Joseph, *supra* note 92, at 210 (detailing the steps of the mediation process).

<sup>111</sup> *Id.* at 209-210. The actual VOM process enables both parties to take steps toward resolution, including allowing them "to elaborate on the facts . . . to ask questions of each other, to reveal feelings, to review consequences . . . and to discuss a resolution." *Id.*

<sup>112</sup> Gordon Brazemore & Curt Taylor Griffiths, *Conferences, Circles, Board, and Mediations: The "New Wave" of Community Justice Decisionmaking*, 61 *FED. PROBATION* 25, 29 (1997) (discussing order of speakers in VOM). For a discussion of how the process works, in terms of what each party speaks to, see Mark S. Umbreit & Susan L. Stacey, *Family Group Conferencing Comes to the U.S.: A Comparison with Victim-Offender Mediation*, 47 *JUV. & FAM. CT. J.* 29, 30 (1996).

<sup>113</sup> Umbreit & Stacey, *supra* note 112, at 30.

<sup>114</sup> Cottam, *supra* note 88, at 1538. Among the features contributing to a sense of safety are the private setting, the presence of a neutral third party and the sense of empowerment that either party, though particularly important for from the victim's point of view, can terminate the mediation at any time. *Id.* at 1537-38; see also SAFE HORIZON, *COMMUNITY MEDIATION: RESOLVING CONFLICTS QUICKLY* (2005), [http://www.safehorizon.org/files/Mediation\\_Brochure\\_Eng.pdf](http://www.safehorizon.org/files/Mediation_Brochure_Eng.pdf) (last visited Feb. 16, 2006) (features of mediation setting include privacy and presence of impartial third party).

<sup>115</sup> Cottam, *supra* note 88, at 1537. When one knows and understands the human effects of their actions, one's outlook changes and it becomes less likely that he or she will again seek to inflict such harm. See McConnell, *supra* note 85, at 455.

<sup>116</sup> Cottam, *supra* note 88, at 1536-37. Cottam also notes that this environment helps the parties see one another as more than "stereotypical beings without humanity." *Id.*

<sup>117</sup> See Joseph, *supra* note 92, at 212-13 (discussing positive aspects of VOM).

tion agreement.<sup>118</sup> Because VOM offers both parties a neutral ground and a safe environment in which to encounter one another, in the realm of juvenile justice, the process offers the following benefits: (1) relative informality, (2) accountability, (3) serving the child's individual needs, (4) development of empathy on the part of the offender, and (5) confidentiality.<sup>119</sup> In addition, the offender's sense of accountability and increased likelihood of compliance with the agreement achieved through the VOM process would likely reduce the rate of recidivism.<sup>120</sup>

### B. Family Group Conferencing: Expanding the Participant Pool

Family Group Conferencing (FGC) is another adaptation of ADR techniques in the juvenile justice field. FGC began in New Zealand and Australia, and is now the dominant form of juvenile justice in New Zealand where "diversion of all juvenile offenders to family group conferences rather than traditional criminal justice processes" is now required.<sup>121</sup> While the traditional justice system often breaks the ties that bind, placing community, victim and offender in an adversarial position, conferencing allows *all* affected parties to resolve the conflict while still preserving a sense of com-

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<sup>118</sup> Cottam, *supra* note 88, at 1537-38 (noting the benefits resulting from empowerment of both parties, as well as increased compliance as a result of VOM process and resolution).

<sup>119</sup> See generally Michael Lindstadt, Note, *Employing Mediation to Approach Truants*, 43 FAM. CT. REV. 303, 309-11 (2005) (outlining overall benefits of mediation); Umbreit & Bradshaw, *supra* note 85; Cottam, *supra* note 88; *For the Good of the Child*, *supra* note 76. For additional information about the goals of the juvenile justice system, see *supra* Section I.A.

<sup>120</sup> Joseph, *supra* note 92, at 212-213; Lucas, *supra* note 2, at 1375. Furthermore, in my opinion, since accountability is a goal of the juvenile justice system, whether from a retributive or restorative perspective, focusing on it may help bridge the gap between the two juvenile justice approaches. The import of accountability is that its absence is generally recognized to produce an "I can get away with anything" criminal state of mind. Focus should therefore be on methods, such as VOM, that effectively foster a sense of accountability in juvenile offenders, thereby making them less likely to offend in the future. Indeed, there are studies indicating an increased likelihood of compliance and decreased reoffense rate when mediation programs are used. See McNeece & Jackson, *supra* note 2, at 46 (noting positive aspects of mediation for juvenile offenders).

<sup>121</sup> Walker, *supra* note 86, at 38. This legislative action is nothing short of a resounding testament to the success of the use of conferencing techniques in juvenile justice. *Id.* The New Zealand legislation is embodied in the "Children, Young Persons, and Their Families Act." Children, Young Persons, and Their Families Act 1989, 1989 S.N.Z. No. 24, available at [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes) (last visited Feb. 14, 2006). For more about FGC successes, see Edwards, *supra* note 92, at 135.

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munity.<sup>122</sup> Mediator and author Mark S. Umbreit has described FGC as a broadened version of VOM that invites not only the offender and the victim to participate, but concerned members of the community as well.<sup>123</sup> Indeed, it is this embrace of community that provides some of the support necessary to help both the victim and the young offender move forward.<sup>124</sup> In addition, given the reintegrative ideal of juvenile justice overall, inviting the broader community to participate simply makes logical sense.<sup>125</sup>

As noted above, FGC operates in a similar manner to VOM, only at a broader level. FGC enables offender, victim, and their “communities of support” – usually parents and teachers – to participate in a facilitated conversation resulting in “constructive resolution of the destructive behavior.”<sup>126</sup> Like VOM, a prerequisite of FGC is the initial admission of guilt on the part of the offender.<sup>127</sup> The coordinator or facilitator of the process contacts conference participants to review the process and expectations with them.<sup>128</sup> Similar contact occurs in VOM preparation, but the difference is that it is usually in person, while, in FGC, contact *can* occur over the phone.<sup>129</sup> In addition, while VOM preparation involves the mediator listening to each side’s story, FGC seeks to preserve objectivity and the power of the conferencing experience by *not* having coordinators listen to the tales of either side.<sup>130</sup> The actual conference meeting works similarly to VOM in giving all partici-

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<sup>122</sup> Coumarelos & Weatherburn, *supra* note 98, at \*5 (noting ill effects of destroying sense of community).

<sup>123</sup> Umbreit & Stacey, *supra* note 112, at 30.

<sup>124</sup> Many of these benefits parallel those achieved through VOM, including addressing the needs of victims, holding youths accountable, helping youth offenders see the effects of their actions. In addition, it is thought, conferences provide “a supportive community for offending youth.” EDMUND F. MCGARRELL, U.S. DEP’T OF JUST., *RESTORATIVE JUSTICE CONFERENCES AS AN EARLY RESPONSE TO YOUNG OFFENDERS 2* (2001), available at <http://www.ncjrs.gov/app/publications/alphaList.aspx?alpha=R> (last visited Feb. 16, 2006).

<sup>125</sup> After all, if the idea is to bring the offender back into the “fold,” then why not encourage the “fold” itself to actively embrace that individual. In describing the process, Umbreit and Stacey praise FGC because “the individual offender is affirmed and welcomed back into the community . . . .” Umbreit & Stacey, *supra* note 112, at 30.

<sup>126</sup> *Id.* at 31. In his discussion of the role of the community in FGCs, Gerry Johnstone notes the inclusion of “immediate and sometimes extended family members of the offenders, family members and other ‘supporters’ of victims, and others . . . .” JOHNSTONE, *supra* note 5, at 151.

<sup>127</sup> See *supra* note 95 and accompanying text for an explanation of why admission of guilt is required prior to participation of offenders in ADR processes within the juvenile justice system; see also Walker, *supra* note 86, at 39 (describing the steps of the FGC program used by a group called “Real Justice,” including the initial offender’s admission of guilt).

<sup>128</sup> Umbreit & Stacey, *supra* note 112, at 31.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 32.

pants the opportunity to speak about the incident.<sup>131</sup> Following the discussion, the session concludes with some sort of apology, an agreement about reparations and the development of an outcome acceptable to the group.<sup>132</sup>

Inviting a wider range of participants into the process is therefore the key difference between VOM and FGC, and is where the true benefits of FGC lie.<sup>133</sup> Part of the power of FGC is that it provides the often elusive opportunity for offenders to interact “with people . . . who have the potential to provide . . . legitimate avenues to a more functional lifestyle . . . [and] establish positive relationships.”<sup>134</sup> Furthermore, by involving a larger community, FGC has the potential to reduce recidivism even more than VOM.<sup>135</sup> In the end, FGC should be seriously considered as an alternative to traditional juvenile justice because it is likely to reduce recidivism rates, enhance accountability, “create bonds between more community members, and [create] a broader network for reintegrating the victim and offender into the community.”<sup>136</sup>

### III. WHY ADR IS THE IDEAL TOOL

As a more holistic approach, operating on a civil basis and seeking to preserve social relationships,<sup>137</sup> ADR techniques such as VOM and FGC are ideal tools for juvenile justice. Because children are less set in their ways and more capable of change than adults,<sup>138</sup> use of rehabilitative methods such as VOM and FGC builds on the idea that “today’s youth will grow into tomorrow’s

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<sup>131</sup> LaPrairie, *supra* note 83, at 586. However, in FGC, the offender is typically the first to speak. Umbreit & Stacey, *supra* note 112, at 34.

<sup>132</sup> LaPrairie, *supra* note 83, at 586. “Forms of redress include restitution, compensation, retribution and forgiveness.” Lucas, *supra* note 2, at 1378.

<sup>133</sup> Umbreit & Stacey, *supra* note 112, at 31; *see also supra* note 123 and accompanying text regarding the power of involving the community in the conflict resolution process.

<sup>134</sup> LaPrairie, *supra* note 83, at 588.

<sup>135</sup> The potential for reducing recidivism rates derives from the notion that “[p]eople refrain from offending because they are moral agents and fear disgrace in the eyes of the people who matter to them.” LaPrairie, *supra* note 83, at 583.

<sup>136</sup> Umbreit & Stacey, *supra* note 112, at 36. When communities break down and the ties that bind weaken, criminality increases and “civilized society” begins to lose its “heart and soul.” Oropeza, *supra* note 45, at 1217.

<sup>137</sup> For a description of the preservation of social ties, *see supra* note 110 and text at II.B. For more about the civil basis of ADR techniques, *see supra* note 83 and accompanying text.

<sup>138</sup> Christopher Slobogin, Mark R. Fondacaro & Jennifer Woolard, *A Prevention Method of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185, 190 (1999).

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responsible adult citizen.”<sup>139</sup> Many of the characteristics of FGC and VOM effectively combine some of the goals of a punitive system of justice<sup>140</sup> through a rehabilitative model that is better suited to transforming juvenile offenders into law-abiding citizens.<sup>141</sup>

## A. Achieving Accountability

Emphasis on accountability is an aspect of both VOM and FGC that makes those techniques particularly valuable alternatives to traditional criminal justice.<sup>142</sup> Because one of the main goals of the adult criminal system is offender accountability,<sup>143</sup> it is important to address concerns that non-punitive alternatives let young offenders off too easily and to demonstrate that ADR techniques similarly embrace accountability as an essential end result.<sup>144</sup> Based on evidence that placing juveniles offenders in prison does little if anything to stave recidivism rates<sup>145</sup> and the importance of holding offenders responsible for their actions, VOM and FGC satisfy both the punitive and rehabilitative theories of juvenile offender treatment by promoting accountability and intervening to

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<sup>139</sup> Day, *supra* note 19, at 446. For more about the transformative nature of techniques some ADR techniques, see Morton & Einesman, *supra* note 25 (discussion of VOM) and Coben & Harley, *supra* note 25 (discussion of FGC).

<sup>140</sup> Smallheer, *supra* note 39, at 260-61 & 275.

<sup>141</sup> Shestack, *supra* note 18. In particular, Jerome J. Shestack notes that denying treatment to juvenile offenders and forcing them into the adult criminal system does not improve their lot. Experts, however, Shestack mentions, have found that rehabilitation shows great promise for juvenile offenders to “have their lives rescued from further crime . . . .” *Id.* Shestack mentions carefully crafted intervention and prevention programs as the key to rehabilitation, and Leena Kurki highlighted VOM and FGC as programs that can be used to “resolve the normative conflict” between a desire to punish and the equally strong need for treatment as an alternative. LEENA KURKI, U.S. DEP’T OF JUST., INCORPORATING RESTORATIVE AND COMMUNITY JUSTICE INTO AMERICAN SENTENCING AND CORRECTIONS 4 (1999), available at <http://www.ncjrs.gov/app/publications/alphaList.aspx?alpha=I> (last visited Feb. 16, 2006).

<sup>142</sup> See Cottam, *supra* note 88, at 1537 (noting VOM’s efforts to hold youth accountable); see also Umbreit & Stacey, *supra* note 112, at 35 (Table 1 details the goals of both VOM and FGC – first among those being “offender accountability”).

<sup>143</sup> See, e.g., Smallheer, *supra* note 39, at 261 (discussing the fact that the juvenile justice system has recently come under attack as too lenient on youth, in contrast to the adult criminal system, predicated on accountability and punishment).

<sup>144</sup> See Clarke, *supra* note 42, at 673 (noting a lack of faith in the current system as a result of its perceived leniency); Brazemore & Umbreit, *supra* note 5, at 481 (discussing the retributive theory of criminal sanctioning that uses punishment as a way to accomplish offender accountability as opposed to a more productive VOM and FGC techniques in which an offender must actively take responsibility for their actions face-to-face with their victim).

<sup>145</sup> Arthur, *supra* note 13, at 37.

prevent low-level, non-violent juvenile offenders falling into a life of crime.<sup>146</sup>

### B. Seeing One Another as Individuals

One of the reasons that incarceration does not effect recidivism is its tendency to stigmatize those who offend, labeling them as criminals.<sup>147</sup> Stigmatization can destroy the relationships and connections that need to be maintained to have a successful reintegration.<sup>148</sup> In addition, children's perception of themselves as criminals is likely to casue further criminal conduct by making them feel powerless and "bad," resulting in future, perhaps harsher, encounters with the courts.<sup>149</sup> By encouraging parties to see one another as individuals, FGC and VOM empower parties to create a positive environment from which the juvenile offender, victim and community can build towards a productive future.<sup>150</sup> By contrast, the traditional criminal system focuses simply on the crimes, punishes through prison sentences, and returns offenders to society "better educated in how to commit bigger crimes without being caught."<sup>151</sup> Since the current criminal justice seems to create

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<sup>146</sup> Conward, *supra* note 28, at 75.

<sup>147</sup> See LaPrairie, *supra* note 83, at 581 (discussing the negative aspects of the criminal justice system and its negative impact on victims and offenders alike); see also Conward, *supra* note 28, at 58 (noting permanence of juvenile's association as a criminal). In particular, Conward noted that identification as a criminal can "subject him or her to suspicion and mistrust from society." *Id.* Such societal mistrust and suspicion, in turn, will simply lead to "even more crime." Brazemore & Umbreit, *supra* note 5, at 468.

<sup>148</sup> JOHNSTONE, *supra* note 5, at 92.

<sup>149</sup> See Coumarelos & Weatherburn, *supra* note 98, at \*5, 9-10 (arguing, among other things, that "processes of criminal justice systems . . . are criminogenic because they lack . . . processes designed to prevent offenders adopting deviance as a 'master status,'" and also that, in making a criminal, those punishing actually evoke the very degeneracy in the juvenile offender that they are attempting to expunge); see also Morton & Einesman, *supra* note 25, at 263 (noting that empowering youth to solve disputes can have a positive effect and that those who feel powerless are likely to turn to more violent behavior).

<sup>150</sup> See generally NEW YORK STATE UNIFIED COURT SYSTEM, OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, YOUTH INITIATIVES AND EDUCATIONAL PROGRAMS, at 4, available at [http://www.courts.state.ny.us/ip/adr/Publications/info\\_for\\_programs/youth.pdf](http://www.courts.state.ny.us/ip/adr/Publications/info_for_programs/youth.pdf) (discussing benefits of Community Dispute Resolution in creating a positive foundation from which to build towards a productive future) [hereinafter YOUTH INITIATIVES]; accord, Lindstadt, *supra* note 119, at 309 (noting therapeutic effect of mediation on offender, through an exploration of mediation in truancy cases).

<sup>151</sup> Arthur, *supra* note 13, at 38; see also Dieter Rossner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, 3 BUFF. CRIM. L. REV. 211, 218 (1999) (noting important difference between individuals and their acts).

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criminals, then remaining optimistic about the future potential of first-time juvenile offenders by adopting an alternative to realize that optimism is essential.<sup>152</sup> Acceptance of VOM and FGC is necessary to improve the state of juvenile justice today because these techniques can rebuild important social bonds, helping young offenders move back into society successfully, without exposing them to the criminal training ground of the punitive justice system.<sup>153</sup>

### C. Keeping Society Safe

Any solution that seeks to reconcile the punitive with the rehabilitative models of justice must balance the societal protection goal of current “get tough” measures and the juvenile justice focus on the “best interests of the child.”<sup>154</sup> Tough on crime measures are unlikely to protect society in the long run because they treat all children committing similar crimes alike.<sup>155</sup> In addition, such harsh, generalized punishment may result in worse crimes.<sup>156</sup> Success may be found in just the opposite – a focus on individualized treatment – one of the goals of the juvenile justice system that is embodied in ADR techniques as well.<sup>157</sup> In addition, VOM and FGC also address community needs by involving others in the resolution process – an aspect of the methods that may ultimately make society safer.<sup>158</sup> VOM and FGC enable victims, offenders

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<sup>152</sup> Smallheer, *supra* note 39, at 261.

<sup>153</sup> LaPrairie, *supra* note 83, at 588. LaPrairie argues that the reaffirmation of social bonds helps offenders “establish positive relationships” and provides them with “legitimate avenues to a more functional lifestyle.” *Id.*

<sup>154</sup> Smallheer, *supra* note 39, at 262.

<sup>155</sup> Oropeza, *supra* note 45, at 1224; *see also* Arthur, *supra* note 13, at 38 (presenting the idea that where punishment is fit to the crime rather than the criminal, it is less successful in preventing future crime).

<sup>156</sup> Peter Schworm, *Study Faults Treatment of Juvenile Offenders*, *BOSTON GLOBE*, Mar. 14, 2005, at B1 (citing results of recent study that imprisoning low-level offenders is likely to lead to the commission of more serious future crimes). Judge Lindsay Arthur describes why punishment doesn’t work, noting that “[t]he system is not designed for public safety . . . . Incarceration does have one salient value: it protects the public from the violent. But . . . only as long as the criminal is incarcerated . . . .” To which summary the Judge adds, the criminal “returns better educated in how to commit bigger crimes . . . .” Arthur, *supra* note 13, at 37-8.

<sup>157</sup> *See* Shefi, *supra* note 9, at 657 (noting the development of “a firm belief in individualized assessment” that developed during the early years of the juvenile justice movement in the United States); *see also* *For the Good of the Child*, *supra* note 76, at 1986 (discussing the original purposes of juvenile courts in the United States, including individualized justice). For a description of some of the goals of ADR, *see* Renken, *supra* note 92.

<sup>158</sup> *See* Lucas, *supra* note 2, at 1369 (describing the fact that, through VOM in particular, “public safety is enhanced at the lowest possible cost using the least restrictive level of supervi-

and the community to get involved in conflict resolution through a focus on individual participants, making the “overall quality of life in communities . . . significantly improved.”<sup>159</sup> Because the penal system often fails in this regard, VOM and FGC should be adopted for their benefits to the child and society as a whole, again addressing both the punitive and rehabilitative views of juvenile justice.<sup>160</sup>

#### D. Reducing Recidivism

Finally, the most important thing that the juvenile justice system can accomplish is a reduction in the recidivism rate.<sup>161</sup> Implementing processes such as FGC and VOM can reduce recidivism by intervening to affect a transformation away from criminal tendencies as early as possible.<sup>162</sup> The current punishment model of juvenile justice does not achieve this end.<sup>163</sup> ADR techniques, on the other hand, aim to reintegrate wayward youth back into their communities, supporting a belief in the promise of all youth to make positive contributions to society in the future.<sup>164</sup> Ultimately, because they show promise for keeping children out of jail and “turning [them] back toward doing the right thing,”<sup>165</sup> VOM and

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sion possible.”)( quotations omitted); Rossner, *supra* note 151, at 214 (noting benefits of non-violent conflict resolution in offering enhanced “social safety, stability and progress”).

<sup>159</sup> Lucas, *supra* note 2, at 1369. Quality of life is improved, in part, because “youth will tend to commit fewer crimes [and] victims may feel less victimized.” *Id.*

<sup>160</sup> *Id.*; Smallheer, *supra* note 39, at 262.

<sup>161</sup> Judge Lindsay Arthur, in an article about the ineffectiveness of punishment in the juvenile justice arena, put it best when he noted that imprisonment only protects society “as long as the criminal is incarcerated.” The main point to take away being that offenders, when released from prison, are more likely to commit not only another crime, but likely a more violent or dangerous one as well. Arthur, *supra* note 13, at 38.

<sup>162</sup> See Rubin, *supra* note 33 (noting a 15 – 25% decrease in recidivism rate when mediation used). Other evidence reveals an 18% recidivism rate for mediated offenders, contrasted to 28% rate for juveniles going through the court system. Conward, *supra* note 28, at 75. Enabling the parties to see one another as individuals, mediation “may be a strong factor in reducing aggression and . . . work[s] best to reduce adolescent violence.” Morton & Einesman, *supra* note 25, at 264.

<sup>163</sup> According to one author, “the . . . ‘gains’ achieved by . . . incarceration are quickly offset by the increase in crime. [Incarceration] . . . is ‘at best ineffective and a worst counterproductive.’” Shefi, *supra* note 9, at 667; see also Hughes, *supra* note 13, at 167-68 (noting that imprisonment indicates a lower likelihood that “youths will be educated and rehabilitated”).

<sup>164</sup> Shefi, *supra* note 9, at 669 (discussing importance of reintegrating youth into society); Smallheer, *supra* note 39, at 261 (noting importance of protecting the potential of even criminal youth to contribute to society in the future).

<sup>165</sup> Ailworth, *supra* note 38 (discussing the idea of helping youth to turn away from lives of crime and criminal behavior).

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FGC may have the beneficial halo effect of decreasing the number of more violent criminals in the system overall.<sup>166</sup> How, given their similar goal of reducing crime, can proponents of punishment ignore the promise of VOM and FGC?<sup>167</sup>

IV. CASE STUDY – THE PROMISE OF VOM IN PRACTICE<sup>168</sup>

The following is a summary of a first-time offender case referred by the Corporation Counsel of New York City to Safe Horizon Manhattan Mediation Center, the nation's leading victim assistance organization, providing support, preventing violence, and promoting justice for victims of crime and abuse, in 2005. This brief study demonstrates the overwhelming benefits of VOM to all participants.

A 20-something young woman walking down the street with her friend became the victim of a purse snatching. Among the contents of her purse were some gift items, a cell phone and other items of sentimental value to her. The monetary value of the contents totaled close to \$1,400. The young woman was left feeling violated and afraid. Her personal space had been invaded, the private contents of her pocket book stolen, rifled through and used. Her experience of New York City changed drastically. The sounds of children talking or laughing were no longer the everyday sounds of the city, but had become menacing after the purse-snatching. The young woman was angry and simply wanted restitution – to be made whole again.

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<sup>166</sup> This is my personal conclusion based on the notion that imprisonment of juvenile offenders seems to result in the commission of more violent crimes by these offenders when they are released from prison. Oropeza, *supra* note 45, at 1230 (“tomorrow’s adult criminals are appearing in juvenile court today”); *see also* Walker, *supra* note 86, at 41 (noting statistics that indicate non-conferenced young offenders are significantly more likely to be rearrested for violent crimes than were their counterparts who went through FGC); Talbot, *supra* note 4 (noting the fact that youth, living in prison, “raised by wolves,” are “released . . . when [they are] still young enough to commit many more crimes”).

<sup>167</sup> Indeed, the traditional, punitive system fails to reduce recidivism, in part, because it fails at “restoring juveniles to being productive members of society.” Hughes, *supra* note 13, at 163.

<sup>168</sup> The following case study is the result of an interview with Mr. Charles Schnall of Safe Horizon, conducted on January 5, 2006. The mediation session that is the subject of this case study was co-mediated by Mr. Schnall and Ms. Rochelle Arms. I would also like to thank Gene Johnson, Jr., Director of the Manhattan Mediation Program and Safe Horizon, who helped to make this interview possible. Therefore, unless otherwise footnoted, all information in Section IV of this note comes from that interview. Interview with Charles Schnall, Manhattan Civil Court Coordinator and Coordinator for Victim-Offender Mediation, Safe Horizon (January 5, 2006).

A teenage girl was apprehended in the purse snatching. She had never done anything illegal before. This was possibly an instance of an impressionable young girl caving to peer pressure.<sup>169</sup> At this point, the case could either go through the court or to an alternative dispute resolution process, such as victim-offender mediation. Generally, in pre-hearing juvenile delinquency cases, first-time offenders are the most likely to be referred to mediation. Since this was the girl's first arrest, New York City's Corporation Counsel referred the case to Safe Horizon for mediation.<sup>170</sup>

For the victim, mediation made the most sense as it offered the best opportunity she would have to get restitution.<sup>171</sup> Likewise, eager to avoid a criminal record, mediation was the best option for the offender as well. During the course of the mediation, she indicated that one of her dreams for the future was to become a lawyer. For a high school freshman with such goals, a criminal record could be disastrous.<sup>172</sup>

The VOM process began with a pre-mediation conference.<sup>173</sup> At this point, the mediators spoke with each party individually, explaining the possibilities and realities of the process to avoid potential surprises that might arise during the actual mediation. Both parties were also asked if they wished to have any support people with them during the mediation. Initially, the young woman wanted both her parents present, but in the end, the only support person at the mediation was the offender's father. Mediators advised both sides of the other's wishes regarding support, again, to avoid potential surprises.

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<sup>169</sup> Goode, *supra* note 16, at F1. Steinberg notes, in an interview with the New York Times, that adolescents are not as capable of resisting peer pressure as adults are, in part because of still-developing areas of the brain. In particular, Steinberg notes the connection between the limbic system and the prefrontal cortex, stating that "in the younger adolescent's brain, it's more likely that a very strong emotion will overwhelm rational decision making." *Id.*

<sup>170</sup> In situations like this, while mediation is ongoing, the Corporation Counsel holds the case pending the outcome of the process. If mediation is successful and an agreement is reached, then, once the agreement has been fully carried out, the case is closed and the record is sealed. On the other hand, should mediation fall apart or the agreement not be carried out, the case would then be processed through the court, resulting in an open criminal record for the young offender. Interview with Charles Schnall, *supra* note 168.

<sup>171</sup> See Walgrave, *supra* note 18, at 550 (discussing victims' needs and interests in the context of criminal proceedings).

<sup>172</sup> Footnote 13 to the ABA Model Rules of Professional Responsibility DR 1-102 indicates that, in many states, misdemeanor convictions can be grounds for discipline and disbarment. MODEL RULES OF PROF'L RESPONSIBILITY DR 1-102 (LEXIS 2005).

<sup>173</sup> Mr. Schnall emphasized that the two most important goals in the mediation process were *first* to repair the harm done to the victim as much as possible, and *second* to hold the offender accountable. Interview with Charles Schnall, *supra* note 168.

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One issue arose during the pre-mediation conference. The young offender was reticent to share her story and unable to give an account admitting an appropriate level of responsibility. Though generally, if the offender refuses to take responsibility for their actions, the mediation comes to an immediate halt,<sup>174</sup> in this case there seemed to be a willingness on the part of the offender, but she simply was not being very forthcoming.<sup>175</sup> It seemed possible that the girl had given her father a more rosy-colored account of the incident to avoid his anger and disappointment. In total, the pre-mediation conferencing lasted almost 3 hours – one-and-a-half hours with the offender and one-and-a-quarter hours with the victim.

The mediation occurred the next week, lasting two-and-a-half hours. The young woman, the girl and her father arrived at the appointed time and were led into the mediation room. There, they were introduced and the mediators gave a brief opening statement. The victim spoke first, telling the offender about her experience of the crime and its aftermath. She shared her feelings of fear and anxiety and gave an account of the incident in which the offender was completely to blame. Then, the offender spoke in hesitant, short sentences. She persisted in taking as little responsibility as possible for the crime. The victim, nonetheless, insisted that she knew the young girl was the perpetrator.

At that point, the mediators took a break to caucus with each party. The mediators had a sense that the girl was holding something back because she felt inhibited by her father's presence. Taking the father aside, the mediators explained that children sometimes felt uncomfortable telling the whole truth about an incident when a parent is present. The three of them discussed the possibility of the father sitting outside for a few moments to give his daughter a chance to talk with the victim one-on-one and he was amenable. The victim was asked if she would be comfortable with this situation. The slight change in structure made all the difference. When the parties returned, the young girl was apologetic, conveying remorse for her actions and their effects. As the mediation had progressed, the young girl's posture shifted and she began to take full responsibility for her actions – just that level of ac-

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<sup>174</sup> *Id.*

<sup>175</sup> During the course of the mediation, it seemed possible that the dynamic between father and daughter was preventing the young girl from sharing a full account of the incident.

countability that is one of the objectives of this process – admitting that she had given in to peer pressure.<sup>176</sup>

Once the apology was made<sup>177</sup> and emotions had been aired on both sides, the mediation process moved into the restitution agreement phase. The young woman, who had initially approached the mediation process with a single-minded goal of achieving restitution, was now looking at her offender through a new lens, with an increased level of understanding and compassion. The second break to caucus in the mediation process occurred during the discussion of restitution because the young woman was now uncertain as to how much money to ask for from the offender. The victim felt badly about asking for the full \$1,400, acknowledging that it would be a hardship for the offender's family. This concern for the offender and her family is particularly notable because all the victim had wanted at the beginning was full restitution. In the end, the young woman requested \$200 less than her originally stated amount.

Throughout the VOM process, a transformation occurred. It is through the "confrontation" between victim and offender that such change is effected.<sup>178</sup> Indeed, for the offender, having to look his or her victim in the face can be mentally harder on them than dealing with a judge in a courtroom. In essence, the process has a humanizing effect, forcing victim and offender to see one another as individuals with real feelings and concerns. In this case, the victim had now become sympathetic to the offender, to the point that she was willing to abandon her original vision of a complete restitution. Likewise, the offender had apologized, taken responsibility for her actions and embraced the opportunity to see her victim as an individual with real fears and real emotions who did not deserve what happened to her.

In the end, both parties walked away in a better position than would have existed had the case gone to trial.<sup>179</sup> Given both the

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<sup>176</sup> Interestingly, Gerry Johnstone notes, in his book on restorative justice, that "most people, including most offenders, care about the plight of others sufficiently to refrain from crime once they are made aware of its traumatic effects." JOHNSTONE, *supra* note 5, at 97.

<sup>177</sup> *Id.* at 77 (noting importance of apology in the context of VOM); LaPrairie, *supra* note 83, at 584 (noting critical nature of apology in FGC situations).

<sup>178</sup> See JOHNSTONE, *supra* note 5, at 144 and 150 (discussing transformative potential of restorative justice methods and true potential of mediation).

<sup>179</sup> If a judge had heard the case, the victim would likely have had little or no part to play in the process other than as a possible witness. Restitution might have been less likely, since in a courtroom, the crime is viewed as a crime against the state to which the offender then owes a debt. Furthermore, the offender, if found guilty, would likely have ended up with an open criminal record. Interview with Charles Schnall, *supra* note 168.

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promise of this young offender/budding lawyer and the victim's need for personal repair and to have her questions answered, VOM was truly the ideal option. The victim had come to a realization that her offender was an individual and not some unknown, lurking person laying in wait to attack her. The offender was relieved not to have a criminal record and to have a second chance to follow her life without a the specter of such a record. According to post-mediation surveys, the victim and the offender felt satisfied with the process. Both felt that they were each treated fairly and with respect and not forced into anything unwanted.

## CONCLUSION

Public perception of a pervasive juvenile crime problem, nurtured by sensationalist media stories, has contributed to the "get tough" view of juvenile justice prevalent today. In the last generation, legislative activity, reflecting public opinion, has turned away those children who could benefit most from constructive treatment, opting to "protect" society by removing them from the community via the prison track. These efforts, however, have had the opposite effect and exacerbated the problem. Since incarceration often leads to future commissions of possibly more violent crimes, it is incumbent upon legislators and society to embrace alternative treatment methods such as VOM and FGC in particular.

In this Note, I have presented the history of juvenile justice, the system as it operates today and the ways in which ADR can successfully interact with today's more punitive framework to turn the tide toward treatment rather than punishment. Based on the foregoing overview and case study, it is evident that VOM and FGC offer advantages that the punitive view of criminal justice cannot match. Ultimately these alternative methods ought to be fully embraced because the earlier children are taught to take responsibility, understand the consequences of their actions and are embraced by the society in which we expect them to become productive citizens in the future, the more both the individual children, and the public as a whole, will benefit.

Adopting mediation and other alternative dispute resolution techniques within the juvenile justice system as an alternative to incarceration will create a secure future and help eliminate a great proportion of the criminal element from society. The time has come to abandon the old paradigm and embrace a new one. If

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politicians and communities alike would acknowledge that punitive measures do not provide children with appropriate opportunities for their future success, then they will see that punishment of low-level juvenile offenders is not the answer and, in effect, accomplishes just the opposite. It is therefore incumbent upon society in general to embrace a middle ground – the ADR ground which accomplishes many of the goals of the punitive system, but retains faith in the ability of children to grow, develop, and learn from their mistakes.

