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Legal disputes involving children invariably evoke a complex matrix of issues such as child and adolescent capacity, individual rights and autonomy, parental authority, and in the criminal justice context—diminished culpability for a minor's actions. While it is difficult to identify a clear and cohesive jurisprudence regarding the balance between children's autonomy and children's vulnerability across Supreme Court cases, a series of cases over the last decade, including *Roper v. Simmons*,[1] *Graham v. Florida*,[2] and *J.D.B. v. North Carolina*,[3] offer a more consistent view of children as vulnerable, malleable, and in need of protection, at least in the criminal and delinquency context. In each of these cases, the Court solidly reaffirms the view that youth lack maturity and are more "susceptible to negative influences."[4] In *Graham*, the focus of this Symposium, the Court relied on this view of adolescence to conclude that a sentence of life without the possibility of parole is cruel and unusual punishment for juveniles who are not "as well formed" and therefore less responsible than adults for their conduct.[5] This holding is undoubtedly a "win" for youth and youth advocates concerned about the increasingly harsh legal responses to adolescent criminal

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1. 543 U.S. 551, 578 (2005) (finding that the death penalty is cruel and unusual punishment for juveniles).

2. 130 S. Ct. 2011, 2034 (2010) (finding that life without parole for non-homicide offenses is cruel and unusual punishment for juveniles).

3. 131 S. Ct. 2394, 2408 (2011) (finding that age must be considered in the custody analysis for purposes of *Miranda*).

4. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569; *see also J.D.B.*, 131 S. Ct. at 2403.

5. *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569–70).

behavior. This Essay applauds the Court's holding in *Graham*, however, it pauses to consider the impact of the Court's analysis on the delicate balance of due process, autonomy, and paternalism in resolving children's issues.

Specifically, this Essay considers *Graham*'s impact on the ever-changing philosophy of the juvenile justice system, which is often at a crossroads between its rehabilitative, punitive, and due process agendas. The Supreme Court's affirmation in *Graham* of research on the important developmental differences between juveniles and adults may reinvigorate the rehabilitative goal of traditional juvenile courts and challenge the recent trend toward more punitive juvenile justice policies. However, it may also signal a shift back to a more paternalistic approach to children's law and policy, including reduced autonomy for youth and greater state intervention in the lives of children.

Part I of this Essay begins by situating *Graham* within the historical continuum of juvenile justice practice, philosophy, and jurisprudence and considers how the rationale of *Graham* may be used to advance a more adolescent-appropriate response to youth at all stages of the juvenile justice system. By contrast, Part II reviews the costs associated with an unconstrained return to the rhetoric of rehabilitation and paternalism in juvenile courts, including the risk of unfettered discretion and compromised due process that were pervasive in the late Nineteenth and early Twentieth Centuries. Part III considers the potential impact of *Graham* on the individual rights and autonomy of youth both inside and outside of the juvenile justice system. Recognizing that the Court's holding in *Graham* grew partly out of concerns about youths' inability to effectively communicate and consult with defense counsel, Part III also considers the implications of developmental research on the autonomy and capacity of youth to exercise the right to counsel.

Finally, in an effort to sort out the delicate balance among the competing interests of rehabilitative paternalism, due process, and individual autonomy, Part IV distinguishes between protective rights that are necessary to ensure accurate fact-finding and prevent undue coercion by the state, and capacity-based rights that are arguably only appropriate for youth who have sufficient capacity to exercise them. Part IV further recognizes that capacity is not a binary concept, but

instead depends significantly on the social and environmental context in which youth make decisions and exercise rights. Returning to the discussion of the role of juvenile counsel, Part IV contends that notwithstanding common deficiencies in the attorney-child relationship, loyal, client-directed defense advocacy is required in delinquency cases as both a protective and a capacity-based right. Like other due process protections, loyal defense advocacy is essential for accurate fact-finding in the juvenile justice system. Further, because capacity is a fluid concept that varies according to context, adult guidance, and individual ability, youth who are counseled in an appropriate setting, with adequate time and support from the lawyer, can effectively exercise the right to counsel.

I. SITUATING *GRAHAM* IN THE HISTORY OF JUVENILE COURT POLICY, LAW, AND PRACTICE

The key differences between juveniles and adults that were articulated in *Graham v. Florida* are not much different from those posited by the founders of the first juvenile court in 1899.[6] The very establishment of the early juvenile court was rooted in the belief that children are not fully formed beings, but are instead malleable to treatment and rehabilitation.[7] Although the Progressive reformers of the late Nineteenth Century were not privy to the developmental research available today, the reformers intuitively understood that children were physically, mentally, and morally different from adults and that society should respond differently to their behavior.[8] Reformers further believed that youth lacked the capacity for moral and reasoned judgment and that their behavior was impulsive and caused by environmental factors beyond their control.[9]

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6. AM. BAR. ASS'N, DIALOGUE ON YOUTH AND JUSTICE, PART I: THE HISTORY OF JUVENILE JUSTICE 5 (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJfull.authcheckdam.pdf.

7. *See* David S. Tanenhaus, *Degrees of Discretion: The First Juvenile Court and the Problem of Difference in the Early Twentieth Century*, *in* OUR CHILDREN, THEIR CHILDREN 105, 107 (Darnell F. Hawkins & Kimberley Kempf-Leonard eds., 2005) (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909)).

8. *Id.* (discussing Progressives' call to find out where children were in each of these categories).

9. Donna Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent*

Because they were perceived as more amenable to treatment and less culpable for their criminal behavior than adults, youth were diverted from the criminal justice system to newly established juvenile courts.[10] These courts were created to "rescue" wayward youth and transform them into responsible citizens.[11] Benign judges talked to the children in informal, confidential proceedings, where they were shielded from the public ridicule of a criminal accusation or conviction, and decided how best to "treat," rather than punish, the child.[12] Beginning in 1899 as an experiment in Illinois, juvenile courts spread across the country by 1925.[13]

Notwithstanding these early goals and intuitions, the juvenile court has experienced a number of philosophical shifts since its inception. Judicial discretion has been tempered by due process; paternalism has given way to accountability; and rehabilitative responses to adolescent behavior have been eroded by increased media attention to public safety, victims' rights, and a demand for increasingly harsh punishments in juvenile court.[14]

Developmental Capacities with the Legal Rights Provided by In re Gault, 60 RUTGERS L. REV. 125, 127–29 (2007); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 143–44 (1997) [hereinafter Scott & Grisso, *Evolution of Adolescence*]; Elizabeth Scott, *The Legal Construction of Childhood*, *in* A CENTURY OF JUVENILE JUSTICE 113, 117 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernadine Dohrn eds., 2002) (juvenile court founders believed that children lacked "the capacity for reasoning, moral understanding, and judgment on which attributions of blameworthiness must rest").

10. Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 141–44; Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. FAM. STUD. 11, 16 (2007); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 146 (2003).

11. *See* Barry Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1456–57 (2003); Elizabeth Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003).

12. *See In re* Gault, 387 U.S. 1, 15–16 (1967); Kristin Henning, *Eroding Confidentiality in Juvenile Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 525–38 (2004) (reviewing history of confidentiality in juvenile courts); Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 138.

13. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 24 (1927) (placing juvenile courts' spread across the country at around 1914); Michele Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 101 (2011) (placing the spread of juvenile courts at 1925).

14. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112–15 (2009)

By 1967, punitive practices came into direct conflict with the paternalistic philosophy of juvenile courts and were a direct target of the "due process revolution" of the 1960s.[15] Proponents of due process complained that the rhetoric of rehabilitation was a mask for unfettered discretion and punishment imposed without necessary procedural protections.[16] The Supreme Court acknowledged these concerns in 1967, when it held in *In re Gault* that youth were getting the "worst of both worlds," as they had neither the rehabilitation that was promised nor the procedural rights that were afforded to adults.[17] *Gault* ultimately guaranteed accused youth the right to notice of charges, the right to counsel, the privilege against self-incrimination, and the right to cross examination and confrontation.[18]

Although *Gault* did set the stage for procedural reform in the juvenile justice system, it did not dismantle juvenile courts and did not guarantee accused youth all constitutional protections afforded to adults.[19] Further, notwithstanding evidence of evolving skepticism about the viability of rehabilitation and increasing support for youth accountability,[20] judges and policymakers did not fully abandon rehabilitation in the "due process era" and still viewed youth as less mature and less deserving of punishment than adults.[21]

(detailing punitive policy wave of the 80s and 90s); Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 138 (discussing shift from rehabilitative era to due process era to get tough era).

15. *See Gault*, 387 U.S. at 18 n.23 (citing Kent v. United States, 383 U.S. 541, 556 (1966)) (articulating the concern that without due process or effective rehabilitation juveniles were getting the "worst of both worlds"); Bishop & Farber, *supra* note 9, at 132–36 (discussing the Due Process revolution); Feld, *supra* note 11, at 1461–83 (tracing racial and political history from the first juvenile courts to the due process revolution).

16. *See generally* Feld, *supra* note 11, at 1480–83.

17. *Gault*, 387 U.S. at 18 n.23 (citing *Kent*, 383 U.S. at 556).

18. *Id.* at 33, 41, 55.

19. *See id.* at 22, 25 (noting that due process does not prevent states from providing for the confidentiality of juvenile court); *see also* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558–62 (1998) (detailing the Court's decision in *Gault* to recognize some rights for juveniles but not others).

20. Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 371–72 (1996); Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 145–46.

21. Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 145–46; Feld, *supra* note 11, at 1486–87.

Rehabilitation faced the most significant challenge in the late 1980s and 1990s, when public perceptions of high and rising crime rates led state legislatures to pass punitive laws to address juvenile delinquency.[22] Throughout the country, legislators amended statutes to require that youth be tried in adult court at younger ages and for more offenses, be presumptively detained pending trial, serve mandatory minimum or blended sentences in both juvenile and adult facilities, and submit DNA samples or register in sex offender databases.[23] Even more explicitly, legislators amended juvenile court purpose clauses to incorporate the goals of public safety, youth accountability, and victims' rights.[24] More than ever, recent trends in juvenile court law and practice suggest that policymakers have lost sight of the founders' initial vision of immature and malleable youth and have given up the prospect of rehabilitating young offenders.[25]

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22. *See* Scott & Steinberg, *supra* note 11, at 806–10; *see also* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (discussing facts that cast doubt on the validity of those perceptions). *See generally* RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 29–37 (2000); HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 127 (2006) (reporting that between 1994 and 2003, there were substantial declines in arrests for overall juvenile violent crime (-32%), murder (-68%), forcible rape (-25%), robbery (-43%), and aggravated assault (-26%) and noting that declines were proportionately greater for juveniles than for adults).

23. *See* Feld, *supra* note 11, at 1558–68 (discussing waiver laws and harsher sentences in juvenile courts after the 1980s); Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210, 219 (2000) (listing twenty-six states with laws including juveniles in DNA collection); Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 504–05 (2006) (addressing the political climate as leading to harsh prosecution of juveniles for sexual offenses and the requirement to register); Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 308 (2008) (observing that nearly half of the states used mandatory minimum sentencing in 1997).

24. Henning, *supra* note 14, at 1113–15 (surveying changes in juvenile court purpose clauses).

25. *See* Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 137, 148–49; Scott & Steinberg, *supra* note 11, at 805–07; Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 611–19 (1999) (responding to argument that rehabilitative programs do not reduce recidivism with meta-analysis of efficacy and effectiveness of rehabilitative programs).

The Supreme Court's recent review of adolescent development research in *Graham v. Florida* and *Roper v. Simmons* suggests that policymakers may be heading in the wrong direction with juvenile court policy. Unlike policymakers who are beholden to the political will of their constituents, the Supreme Court has been seemingly less reactionary and more attentive to science in its analysis of criminal justice issues involving children. In 2005 and 2010, the Court relied on evidence of key differences between juveniles and adults to conclude that both the death penalty and life without possibility of parole in non-homicide cases constitute cruel and unusual punishment for youth.[26] The Court's apparent endorsement of the developmental research in these cases arguably legitimizes it as relevant to the development of policy and practice for responding to juvenile crime.

While fears about public safety seem to undermine confidence in the viability of rehabilitation for juveniles and obscure the important differences between juveniles and adults, contemporary research in child and adolescent development paints a different picture—one that re-affirms the beliefs of the founders of juvenile court. Over the last thirty years, research has identified significant disparities between adolescent and adult capacity—cognitively, psychosocially and, more recently, neurologically.[27] Cognitive capacity involves logical reasoning and the ability to identify and weigh competing alternatives of a given choice, while psychosocial development involves social, emotional, and temporal perceptions and judgments.[28] Neurological development involves the maturation of the brain and brain functioning over time.[29] As suspected by the Progressive reformers,

26. Roper v. Simmons, 543 U.S. 551, 578 (2005); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

27. *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 95–100 (2009) (surveying developmental psychology and neuroscience, but generally cautioning against the overreliance of developmental neuroscience in juvenile justice law and policy).

28. *See* Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 303–04 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter YOUTH ON TRIAL].

29. *See* Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812 (2005).

research confirms that youth in early adolescence have difficulty conceptualizing future consequences and do not have the same cognitive ability to process information and engage in logical reasoning as adults.[30] Although research has shown that these cognitive differences begin to even out by late adolescence and that by the age of fifteen or sixteen, youth have similar cognitive abilities as adults in controlled settings, youth's psychosocial deficiencies persist well into late adolescence and often into early adulthood.[31] These psychosocial deficiencies mean that youth tend to underestimate the risks involved in a given course of conduct, focus heavily on the present while failing to recognize and consider the future, and often have difficulty controlling their own conduct and regulating their moods and emotions.[32] Further, as the Supreme Court recognized in *Roper* and *Graham*, youth "are more vulnerable or susceptible to . . . outside pressures" than adults, especially peer pressure.[33]

Fortunately, as youth grow and mature, their cognitive and psychosocial capacities improve.[34] Over time, youth develop the skills they need to process information and think in hypotheticals.[35] As they move into early adulthood, they are also less likely to make impulsive, peer-driven decisions and begin to mature out of criminal behavior precisely because they acquire new values, learn to resist peer pressure, and are better able to understand and control their emotions.[36] As both *Roper* and *Graham* recognize, juveniles are "more capable of change than are adults" and "their actions are less likely to be evidence of 'irretrievably deprived character' than are the actions of adults."[37] This concept of youth has obvious implications

30. Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL, *supra* note 28, at 304–05.

31. *Id.*

32. *See id*. at 303–04; Scott & Grisso, *supra* note 29, at 815–16; Scott & Steinberg, *supra* note 11, at 811–12.

33. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 569 (2005).

34. *See* Scott & Grisso, *Evolution of Adolescence*, *supra* note 9, at 157–58.

35. *See* Scott & Steinberg, *supra* note 11, at 812.

36. *See id*. at 816.

37. *See Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569 (recognizing youth's malleable nature and the potential for maturation).

for every stage in the juvenile court process and may provide the impetus for juvenile court reform. The next two sections explore the possible scope and limits of that reform.

II. *GRAHAM V. FLORIDA*: RE-AFFIRMING AN ADOLESCENT-APPROPRIATE RESPONSE TO JUVENILE BEHAVIOR

The Court's rationale in *Roper* and *Graham* treats youth as a mitigating factor and supports a rehabilitative response to juvenile crime.[38] In both cases, the Court refused to characterize youth as irredeemable and was unwilling to give up on their potential for "remorse, renewal and rehabilitation."[39] Advocates and scholars committed to juvenile justice reform can, and have already, drawn upon the language of *Graham* and the developmental research it endorses to challenge coercive police tactics that take advantage of the youth's immaturity, advance affirmative defenses to a range of alleged offenses, and resist punitive juvenile court sentences, transfers to adult court, and collateral consequences of sex offender registries.[40]

As Professors Steven Drizin and Richard Leo argue, immature judgment, poor risk perception, and susceptibility of youth to external pressures make youth particularly vulnerable to coercive police tactics such as intimidating interrogations and coercive searches at the time of arrest.[41] Because juveniles are often eager to comply with adult authority figures and generally focus on more immediate goals

38. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 124 (2010) (asserting that Graham establishes a right to rehabilitation for juvenile offenders).

39. *Graham*, 130 S. Ct. at 2032; *see also Roper*, 543 U.S. at 570 ("[I]t would be misguided to equate the failings of a minor with those of an adult, for greater possibility exists that a minor's character deficiencies will be reformed.").

40. *See* Arya, *supra* note 38, at 133–44 (arguing that the logic in *Graham* could be applied to challenge juvenile transfer laws); Nina W. Chernoff & Marsha L. Levick, *Beyond the Death Penalty: Implications of Adolescent Development Research for the Prosecution, Defense and Sanctioning of Youthful Offenders*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 209, 209–18; Meiners-Levy, *supra* note 23, at 505–06 (suggesting that developmental research be used to challenge juvenile sex offender statutes); Taylor-Thompson, *supra* note 10, at 162–63 (proposing an affirmative defense of "developmental negligence").

41. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944, 1004–05 (2004).

such as trying to end the police interview, they are often more susceptible to trickery, duress, and false promises than adults.[42] Youths' general lack of knowledge, experience, and capacity to identify and weigh risks further compounds their vulnerability in interactions with the police.[43]

Such concerns were central to the Supreme Court's holding in *In re Gault* that fundamental fairness guarantees accused youth the right against self-incrimination. As the Court noted, "admissions and confessions of juveniles require special caution."[44] Reciting from its prior opinion in *Haley v. Ohio*, the Court recalled Justice Douglas' sentiment:

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.[45]

As recently as July 2011, in *J.D.B. v. North Carolina*, the Court cited to *Graham* in expanding its understanding of the vulnerability of youth in contact with the police and held that age must be considered in determining whether a suspect was in custody for purposes of the *Miranda* analysis.[46] The Court relied on both adolescent development research, as well as common understandings about the differences between juveniles and adults.[47] Specifically, the Court accepted the "commonsense conclusion[]" that juveniles are "'less mature and responsible than adults,'" "'more . . . susceptible to . . . outside pressures,'" and lacking in "'experience, perspective, and judgment to recognize and avoid choices that could be detrimental to

42. *Id.*
43. *See id.* at 1005.
44. *In re* Gault, 387 U.S. 1, 45 (1967).
45. *Id.* at 45 (quoting Haley v. Ohio, 332 US 596, 599 (1948) (plurality opinion)).
46. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403, 2406 (2011).
47. *Id.* at 2403 n.5.

them.'"[48] The Court also cited studies finding a considerable risk that many juveniles will confess to crimes they never committed in the physical and psychological isolation of custodial interrogation.[49] Unlike subjective factors that are inappropriate for consideration in a *Miranda* analysis, youth is typically readily apparent to the officer, and common experience makes clear that youth generally lack the capacity to avoid choices that could be detrimental.[50]

Following the logic of *Gault*, *Graham*, and *J.D.B.*, research documenting deficiencies in adolescents' decision-making and impulse control may be incorporated into other challenges to the admissibility of evidence obtained from youth. Developmental research has obvious implications for the youth's capacity to knowingly, voluntarily, and intelligently consent to a search of personal property, participate in a lineup, or waive other procedural protections such as the right to counsel and the right to trial.[51] Because a minor's capacity to waive rights depends on his ability to engage in logical reasoning as well as psychosocial variables such as peer influence, pressure to please authority figures, impulsivity, and risk perception, all waivers by juveniles should be scrutinized closely.

Key differences between juveniles and adults may also support various affirmative defenses at trial and allow defense counsel to challenge government evidence regarding the mens rea—or state of mind—necessary for criminal intent.[52] Research suggests that youth may lack the capacity to engage in mature judgments that form specific and even general intent to commit a crime.[53] For example, psychosocial features of childhood and adolescence that affect impulse control, prevent youth from regulating emotions, and

48. *Id.* at 2403 (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Roper v. Simmons, 543 U.S. 551, 569 (2005); Belloti v. Baird, 443 U.S. 622, 635 (1979)).

49. *Id.* at 2401 (citing Corley v. United States, 129 S. Ct. 1558, 1570 (2009) (citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906–07 (2004))).

50. *See id.* at 2403.

51. Chernoff & Levick, *supra* note 40, at 215.

52. *See id.* at 213–15; Taylor-Thompson, *supra* note 10, at 165–67.

53. *See* Chernoff & Levick, *supra* note 40, at 213–14; Taylor-Thompson, *supra* note 10, at 162–65.

heighten the youth's perception of threat, may bolster a claim of self-defense in juvenile court.[54] In an adolescent-appropriate response to juvenile behavior, the reasonable person standard should be modified to account for differences in the decision-making capacities of youth and adults.[55] Some advocates have even argued for a return of the infancy defense that would prohibit the state from prosecuting youth under the age of seven and impose a burden on the prosecution to prove that youth in early adolescence have the "capacity to understand the wrongfulness of their conduct" and control their behavior.[56]

Theories of diminished culpability and rehabilitative potential advanced in *Graham* also call into question harsh, punitive dispositions such as lengthy periods of incarceration in state juvenile justice facilities, blended-sentences that require youth to spend time in juvenile and adult facilities, and waiver to adult court.[57] Likewise, collateral consequences such as sex offender registration, DNA databanking, eviction from public housing, and exclusion from public schools only make sense if youth are sufficiently blameworthy to warrant such harsh, long term consequences or if such consequences would serve as a legitimate deterrent to future criminal behavior. Addressing both retribution and deterrence, the Supreme Court in *Graham* concluded that minors are categorically less deserving of retribution than adults because the same characteristics that make juveniles less culpable make them less susceptible to deterrence.[58] Because youth are often unable to control their impulses and unable to hypothesize about the future consequences of their actions, they

54. Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL, *supra* note 28, at 389–91 (arguing that the claim of self-defense should be used more liberally as the "context-defense" in juvenile cases, considering their social environment in determining culpability for violent encounters). *See generally* Taylor-Thompson, *supra* note 10, at 165–67 (discussing the employment of expert witnesses to testify about an adolescent's developmental status as an argument about the lack of ability to form intent).

55. Taylor-Thompson, *supra* note 10, at 171.

56. *See* Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 190 (2000) (suggesting revitalizing the infancy defense by switching to a presumption against the necessary mens rea for preadolescents).

57. *See* Chernoff & Levick, *supra* note 41, at 211–12; Arya, *supra* note 38, at 133–37.

58. Graham v. Florida, 130 S. Ct. 2011, 2027–29 (2010); *see also* Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

are not likely to be deterred by harsh penalties.[59] If deterrence does not work in the context of the harshest of penalties (the death penalty and life without parole), then it may be that deterrence does not justify other harsh, punitive sanctions. In addition, long term placements and lengthy periods of detention may not be warranted for retribution and incapacitation considering that most youth are amenable to rehabilitation or will likely grow out of crime after adolescence.[60] In fact, studies have repeatedly shown that lengthy periods of institutionalization are more harmful than helpful, resulting in higher recidivism rates for institutionalized youth than for those supervised in the community.[61]

As evident from the forgoing discussion, *Graham* has great promise for guiding society's response to juvenile crime in an adolescent appropriate frame; however, taken out of context, it carries considerable risks. The remainder of this Essay considers some of the tensions that *Graham* creates in the quest to balance due process, paternalism, and autonomy in children's law and policy.

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59. *Graham*, 130 S. Ct. at 2028–29; *Roper*, 543 U.S. at 571.

60. *See* Scott & Steinberg, *supra* note 11, at 834–35 (suggesting that lengthy incarceration of youth like Lionel Tate may not be warranted if adolescent behavior is evidence of developmental immaturity that youth will likely outgrow rather than a manifestation of bad character); *see also* Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL, *supra* note 28, at 28 (arguing that most youthful offending is a relatively normal adolescent phenomenon that youth will outgrow without major intervention and that formal social control may cause more harm than good); David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1575 (2004) (arguing that youths' diminished moral competence means they should be punished proportionately less severely than adults and that punishment serves neither rehabilitative nor deterrent goals for youth who tend to outgrow their deviance).

61. *See, e.g.*, BAZELON CTR. FOR MENTAL HEALTH LAW, THE DETRIMENTAL EFFECTS OF GROUP PLACEMENTS/SERVICES FOR YOUTH WITH BEHAVIORAL HEALTH PROBLEMS 1–2 (2006), *available at* http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=NCd6-AmZxdg%3d&tabid=166 (positing that segregating youth with behavioral issues is more harmful than helpful); MAGELLAN HEALTH SERVS. CHILDREN'S SERVS. TASK FORCE, PERSPECTIVES ON RESIDENTIAL AND COMMUNITY-BASED TREATMENT FOR YOUTH AND FAMILIES (Mar. 2010) (detailing research on effectiveness of out-of-home placements); ASHLEY NELLIS, RICHARD HOOKS WAYMAN & SARAH SCHIRMER, YOUTH REENTRY TASK FORCE OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION COALITION, NATIONAL ALLIANCE TO END HOMELESSNESS AND THE SENTENCING PROJECT, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 17–23 (Fall 2009) (outlining negative effects of out-of-home placement).

III. PROCEEDING WITH CAUTION AFTER *GRAHAM*: THE RISK OF TURNING BACK THE CLOCK ON DUE PROCESS

Achieving a balance among due process, individual rights, and paternalism has been one of the greatest challenges in the development of a coherent policy and jurisprudence in the juvenile justice system—and in children's law more broadly. Paternalism and due process have long existed at a tenuous balance in juvenile courts. While the flexibility and informality of most juvenile courts have significant advantages for youth, history has shown that these features often come at the high cost of inaccurate fact-finding, punishment in the name of rehabilitation, and abuse of discretion that may be consciously or subconsciously motivated by class and racial biases throughout the system.[62] At the risk of undermining a very important victory in the recognition of diminished culpability of youth, this Essay considers how an overbroad reading of *Graham* may support arguments for a more paternalistic juvenile court, derail the long-fought battle for due process for accused youth, and undermine adolescent autonomy.

A. Unconstrained Paternalism Versus Due Process

Early juvenile courts were very paternalistic, with the state serving as surrogate parents when court officials believed the natural parents had neglected or failed in their duties.[63] Progressive reformers believed that children were essentially dependent on others for moral guidance, particularly their parents; thus, when parents failed, the state had no choice but to intervene.[64] Some early reformers even proposed that society should respond to delinquent children in the

62. *See* Guggenheim & Hertz, *supra* note 19, at 571–82 (contrasting the informality and discretion of judicial fact-finding in juvenile courts with the group decision-making in jury trials that tends to reduce the risk of bias); Moriearty, *supra* note 23, at 307–08 (arguing that juvenile court's lack of fundamental procedural safeguards and emphasis on social factors require subjective value judgments and "heighten the risk that impermissible factors, such as race, will influence outcomes").

63. *See* Tanenhaus, *supra* note 7, at 109 (citing Chicago's first Juvenile Court probation officer, TIMOTHY D. HURLEY, JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED, CHICAGO: VISITATION AND AID SOCIETY (1904)).

64. *Id.*

same way they respond to neglected children.[65] Early application of this parens patriae doctrine meant that youth could be deprived of liberty with minimal or reduced procedural protections.[66] Because the courts intended to serve the "best interest" of the child rather than impose punishment, the formalities of counsel, cross-examination, jury determinations, public trials, and other features of due process were seen as unnecessary.[67] Instead, juvenile courts were designed to allow judges the flexibility to "fashion individualized treatments in order to rehabilitate offenders."[68]

Over time, the Supreme Court recognized that the promise of rehabilitation could not be made at the sacrifice of all due process. In a series of cases spanning from *Kent v. United States* in 1966 to *Schall v. Martin* in 1984, due process and rehabilitative paternalism were at the core of the legal debate concerning American children.[69] While there is now little dispute that accused youth are at least nominally entitled to certain fundamental rights, such as the right to counsel and notice of charges in delinquency cases, the Court has repeatedly tried to strike a balance between the "informality" and "flexibility" that traditionally characterize juvenile proceedings and the "fundamental fairness" demanded by the Due Process Clause.[70] Thus, even in the heart of the "Due Process Era," which led to considerable procedural reform in the juvenile justice system, the Supreme Court often noted that many aspects of the juvenile court process are still valued and should remain unencumbered by

65. *Id.* at 107.

66. *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL, *supra* note 28, at 82.

67. *Id.* at 82–83; Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1403 (1973).

68. Tanenhaus, *supra* note 7, at 110.

69. Kent v. United States, 383 U.S. 541, 554–55 (1966) (discussing due process requirements for waiver hearing); Schall v. Martin, 467 U.S. 253, 281 (1984) (holding that due process does not preclude preventive detention for juveniles); *see also* Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that due process bars double jeopardy in juvenile cases); McKeiver v. Pennsylvania, 403 U.S. 528, 550–51 (1971) (finding that jury trials not required by due process in a juvenile proceeding); *In re* Winship, 397 U.S. 358, 367 (1970) (holding that proof beyond a reasonable doubt is required by due process in juvenile cases).

70. *See Schall*, 467 U.S. at 263 ("'The problem,' we have stressed, 'is to ascertain the precise impact of the due process requirement upon [juvenile] proceedings.'") (citing *In re* Gault, 387 U.S. 1, 13–14 (1967)); *Breed*, 421 U.S. at 531; *McKeiver*, 403 U.S. at 543 (plurality opinion); *Winship*, 397 U.S. at 366.

constitutional restraints.[71] In *Gault* for example, the Court explicitly reaffirmed the value of state experimentation with confidentiality in juvenile proceedings and has never since concluded that juveniles have the right to a public trial.[72] Similarly, in 1971, the Court declined to hold that juveniles are entitled to a jury trial after concluding that juries were not necessary to ensure accurate fact-finding and would "effectively end the idealistic prospect of an intimate, informal protective proceeding."[73]

As late as 1984, paternalism was used to justify preventive detention of juveniles, even for low-level crime that would not warrant such detention for adults.[74] As the Court noted in *Schall v. Martin*, a "juvenile's liberty interest may, in appropriate circumstances, be subordinated to the state's '*parens patriae* interest in preserving and promoting the welfare of the child.'"[75] In deciding whether preventive detention of juveniles before trial comported with principles of fundamental fairness, the Court drew heavily from its understanding of the diminished capacity of youth to regulate themselves and reasoned that

> children, by definition, are not assumed to have the capacity to take care of themselves. . . . Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.[76]

In the lower court opinion cited in *Schall*, the New York Court of Appeals went even further by suggesting that because children lack

71. *Gault*, 387 U.S. at 22; *Schall*, 467 U.S. at 263 ("The Constitution does not mandate elimination of all differences in the treatment of juveniles.").

72. *In re Gault*, 387 U.S. at 24; *see also* Henning, *supra* note 12, at 531–32.

73. *McKeiver*, 403 U.S. at 545.

74. Gary L. Crippen, *Can Courts Fairly Account for the Diminished Competence and Culpability of Juveniles?: A Judge's Perspective*, *in* YOUTH ON TRIAL, *supra* note 28, at 410 (calling for the end of overuse of pretrial detention as a central step towards effective juvenile justice reform); Moriearty, *supra* note 23, at 303–06 (criticizing the extensive use of pretrial detention under paternalist rationales that actually do more harm than good).

75. *Schall*, 467 U.S. at 265 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

76. *Id.* at 265–66.

restraint and control, society should *expect* that children will commit crimes and must act to protect itself and the child from the likely repetition of crime. As that court noted:

> Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted. . . . For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles.[77]

Given the Court's on-going commitment to rehabilitation and its unwillingness to fully regulate juvenile courts with due process, paternalism retains a strong presence in the contemporary juvenile justice system.

Several assessments of juvenile courts across the country reveal some of the detrimental impacts of paternalism.[78] Assessments are rife with evidence that judges and probation officers pressure children to waive their right to trial and counsel to expedite proceedings and access purportedly rehabilitative services.[79] Evidence also indicates that judges, prosecutors, and probation officers often expect the child's lawyer to act in the "best interest" of the child and ignore legal errors and deficiencies in the prosecution's

77. People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 687–88 (1976).

78. For example, the American Bar Association and the National Juvenile Defender Center, in partnership with a number of other advocacy organizations, have conducted a series of state assessments on the access to and quality of legal representation for juveniles. All of those assessments are available at http://www.njdc.info/assessments.php.

79. Bishop & Farber, *supra* note 9, at 142–47 (discussing motivations behind the high rate of juvenile waivers of the right to counsel); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 260–63 (2005) (compiling systemic evidence of paternalism).

case.[80] In the face of systemic pressure, defense counsel routinely waive evidentiary challenges to government evidence, encourage children to plead guilty before investigating the charges, and defer to probation officers and parents as a primary source of information about the child's interests.[81] Attorneys concerned about the welfare of the child may ignore ethical mandates regarding client loyalty and the attorney-client privilege to ensure the child gets services that the attorney thinks are needed.[82] At the extreme, an attorney may "refuse to fight" charges of alleged delinquent conduct even if he knows the child is innocent, or may request "more restrictive or longer periods of confinement" if he believes such penalties will better rehabilitate the child.[83]

Studies also document the dangers of unfettered discretion and paternalism facilitated by juvenile detention and disposition statutes that provide few or no criteria for judges and probation officers. In most juvenile courts, children can be sentenced to indeterminate commitments to a state facility until their twenty-first birthday for any delinquent offense.[84] At disposition, decision-makers often rely on social factors, such as perceived family instability, that may lead to racially-coded disparities.[85] The informality of juvenile courts and the broad discretion afforded to juvenile court judges creates an opportunity for conscious or unconscious bias and allows for lengthy removals of youth from the community.[86] Discretion at every stage of

80. Henning, *supra* note 79, at 260–62.

81. *See id*. at 288–89 (discussing evidence and effects of paternalistic advocacy).

82. Ellen Marrus, Gault, *40 Years Later: Are We There Yet?*, 44 CRIM. L. BULL. No. 3 Art. 6 (2008) (discussing the "child saver" lawyering-style of defense attorneys who saw the justice system as a way to teach the child a lesson); Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court-A Promise Unfulfilled*, 44 CRIM. L. BULL. No. 3 Art. 5 (2008) (discussing the culture of the court and how the "best interest" model persists despite it being harmful and unethical to young clients).

83. Henning, *supra* note 79, at 288–89.

84. *See, e.g.*, D.C. CODE § 16-2322(a)(4) (2011).

85. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 404–05 (2007); *see also* Moriearty, *supra* note 23, at 287 (discussing reliance on "social factors" such as family stability).

86. *See, e.g.*, Sandra M. Ko, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 184–85 (2004) (identifying the trend of over-institutionalizing non-violent youth and the reality of judicial discretion leading to racial disproportion in Louisiana).

the juvenile justice process, including the disposition stage, has been identified as a significant contributor to the current disproportionate incarceration of youth of color in state institutions and residential facilities.[87]

Youth processed through juvenile justice systems may be sent to facilities euphemistically labeled residential treatment centers (RTCs) designed to "treat" youth with mental health or behavioral problems. The placement of youth in these facilities, whether they be referred to as "treatment" or "incarceration," has not been supported by the research as an evidence-based best practice.[88] There is little to no reliable research that illustrates that residential treatment centers actually work to improve behavioral problems.[89] In fact, placing children with behavioral difficulties with other children with similar issues may only exacerbate behavioral concerns.[90] Not only are these youth deprived of positive role models, but they may also adopt the negative behaviors of their peers.[91] Furthermore, any gains that may be made in placement do not easily translate into the community upon release. Many children revert back to old patterns, and any skills acquired while in "treatment" are lost in the difficult transition from institutionalization to the community.[92]

Residential treatment programs can also be dangerous. Placement can expose youth to physical abuse and abusive behavioral control methods, such as seclusion and restraints.[93] In 2007, the Government

87. *See* Johnson, *supra* note 85, (discussing the problem of discretion and the resultant racial bias, masked punitive agendas, and overuse of residential facilities); Moriearty, *supra* note 23, at 315 (quoting a judge admitting to placing more youth in residential facilities for factors that correlate with race).

88. Magellan Health Servs. Children's Servs. Task Force, *supra* note 61, at 4; UNIV. LEGAL SERVS., INC., OUT OF STATE, OUT OF MIND: THE HIDDEN LIVES OF DC YOUTH IN RESIDENTIAL TREATMENT CENTERS 10 (2009); U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 170 (1999), *available at* http://www.surgeongeneral.gov/library/mental health/toc.html#chapter3.

89. *See* MAGELLAN HEALTH SERVS. CHILDREN'S SERVS. TASK FORCE, *supra* note 61, at 4.

90. *See* BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 61 ("The effects of labeling, being part of a cohort group with non-normative behavior, reinforcement of deviant behavior, and deviance training are all factors contributing to adverse outcomes.").

91. *Id.*; UNIV. LEGAL SERVS., *supra* note 88, at 7.

92. MAGELLAN HEALTH SERVS. CHILDREN'S SERVS. TASK FORCE, *supra* note 61, at 4.

93. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-146T, RESIDENTIAL TREATMENT PROGRAMS: CONCERNS REGARDING ABUSE AND DEATH IN CERTAIN PROGRAMS FOR

Accounting Office released a report surveying residential treatment programs throughout the country and uncovered rampant allegations of abuse as well as reports of deaths.[94] Such abuse is obviously not rehabilitative but rather harmful to the child's psyche and ability to function upon release.

Finally, youth placed in residential programs risk the collateral consequences of institutionalization upon release. Many schools will prevent youth who have been detained from re-enrolling due to fear of the youth's behavior or concerns about the school's overall academic performance.[95] Even if the youth is allowed to return, credits earned in classes taken in placement often will not transfer to their home schools.[96] Youth may also be automatically disqualified from Medicaid while incarcerated in juvenile facilities and required to re-enroll upon release, which can take up to three months.[97] Unfortunately, many youth are not able to move back home after placement because of conflicts with parents or exclusion from public housing after arrest.[98]

While key differences between juveniles and adults acknowledged in *Graham* provide firm support for a paternalistic response to juvenile crime and delinquency, unconstrained paternalism may do more harm than good. It is essential that policymakers, judges, and other juvenile justice stakeholders keep paternalism in balance with due process and individual autonomy, as explored in the remainder of this Essay.

B. Autonomy

While evidence of deficiencies in adolescent decision-making has deeply influenced the Court's views on the diminished culpability of minors in criminal cases,[99] similar evidence has long provided the

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TROUBLED YOUTH 3 (2007); UNIV. LEGAL SERVS., *supra* note 88, at 8–9.

94. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 93.

95. NELLIS ET AL., *supra* note 61, at 13–14.

96. *Id.* at 14.

97. *Id.* at 16.

98. *Id.* at 17–18.

99. *See* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding life without parole for juveniles in a non-homicide conviction unconstitutional); Roper v. Simmons, 543 U.S. 551, 578

rationale for legislative and judicial limits on the autonomy of youth. As the argument goes: if it is true that youth lack the capacity, control, and judgment necessary to warrant punitive responses to their criminal behavior, then it is also true that youth lack the capacity and judgment necessary to make decisions and exercise rights on their own behalf. As a result, youth need to be protected from the potential consequences of their own poor judgment and behavior and need adults to identify and protect their interests for them. Thus, theories of diminished capacity bring the need for paternalistic regulations in direct competition with children's autonomy and right to self-determination.[100]

Outside of the juvenile justice system, presumptions about the diminished capacity of youth have been used to justify laws and regulations that curtail youth's recreational activities, restrict a young girl's unfettered access to an abortion, and limit a child's right to avoid unwanted medical treatment.[101] Laws that impose compulsory school attendance and deny youth the right to drive, marry, and purchase alcohol or pornography all stem from a belief that minors lack the experience and judgment necessary to make good decisions for themselves. Judicial determinations that favor parents' rights over children's rights in medical decisions involving the child rely on similar judgments.[102]

The tension between adolescent rights and capacity has been most obvious in the seminal debate about a young girl's right to an abortion without parental consent. In *Bellotti v. Baird*, the Supreme Court was forced to grapple with the tension between the fundamental right to liberty and integrity of one's body and the need

(2005) (holding unconstitutional the imposition of the death sentence when offender was under eighteen at the time the crime was committed).

100. *See* Taylor-Thompson, *supra* note 10, at 149–50 (discussing the competing agendas of pro-choice advocates and those pushing for juvenile justice reform); Cynthia Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 433–35 (2006) (pointing out the irony of the contradictory positions while arguing against diminished culpability of youth).

101. *See* Bellotti v. Baird, 443 U.S. 622, 647–48 (1979) (restricting a minor's access to abortion unless she has proven to a judge that she is mature enough to make the decision and it is in her best interest); Parham v. J.R., 442 U.S. 584, 602 (1979) (granting parents the ability to commit children to state mental hospitals because children are not mature enough to make judgments about their own medical care and parents usually act in the best interest of the child).

102. *Parham*, 442 U.S. at 602. *But see Bellotti*, 443 U.S. at 647–48.

for parental or other adult guidance for young girls who presumptively lack the experience, judgment, and capacity to make such decisions for themselves.[103] The Court struck a balance by denying parents absolute veto over the minor's decision to abort and endorsed a judicial bypass system that would require a minor to show maturity to make the decision on her own. Although it recognized that many sixteen and seventeen-year-olds are capable of giving informed consent for an abortion,[104] the Court held fast to the view articulated in earlier cases that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[105]

While advocates for young people in the criminal justice system lobbied for wider recognition of the diminished capacity and reduced culpability of youth, advocates for youth in the abortion debate necessarily argued that adolescents are sufficiently mature and competent to reason through options and to make important healthcare decisions without the involvement and consent of their parents.[106] Children's advocates who supported a minor's right to abort recognized the potential consequences of a Supreme Court finding that minors are immature beings who lack the capacity for reasoned choice and refused to join the amicus brief in *Roper*, which argued that youth have diminished culpability when they engage in criminal conduct.[107] Thus, although youth advocates in both of these contexts are likely to sympathize with each other's agenda in the abstract, the important implications of the developmental research has produced an interesting, maybe unanticipated, rift in the child advocacy community.[108]

The American Psychological Association (APA) found itself at the center of this conflict. On more than one occasion, the APA has

103. *Bellotti*, 443 U.S. at 634–48.

104. *Id.* at 631.

105. *Id.* at 635; *see also id*. at 640.

106. Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 928 (2006).

107. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 584 (2009).

108. Mutcherson, *supra* note 106.

weighed in on the legal debates involving criminal culpability and the minor's capacity and right to choose an abortion. In its amicus briefs in *Ohio v. Akron Center for Reproductive Health* and *Hodgson v. Minnesota*, the APA argued against parental notification and consent based on research that most adolescents have the capacity to understand, reason, and solve problems in a way that makes them competent to make decisions about important moral and medical issues.[109] Specifically, the APA asserted that by the age of fourteen, youth demonstrate "adult-like intellectual and social capacities . . . necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent."[110]

In contrast, in its 2004 amicus brief in *Rope*r, the APA asserted that children are developmentally immature and less culpable than adults.[111] Judges and policymakers found it difficult to understand how youth as a class could be competent in one area of the law, while incompetent in others.[112] In his dissent in *Roper*, Justice Antonin Scalia took the APA to task for taking seemingly contradictory positions:[113] "[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court."[114]

Within the juvenile justice context, children's lawyers have also taken seemingly conflicting positions regarding the capacity of youth.

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109. *Id.* at 938 (quoting Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners/Cross-Respondents, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (Nos. 88-1125, 88-1309) [hereinafter APA *Akron* Brief]); Steinberg et al., *supra* note 107, 583–84 (discussing APA's brief in Hodgson v. Minnesota, 497 U.S. 417 (1990)); Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners/Cross-Respondents, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-805, 88-1125, 88-1301) [hereinafter APA *Hodgson* Brief].

110. APA *Akron* Brief, *supra* note 109, at 20.

111. Brief for the American Psychological Association & the Missouri Psychological Association as Amici Curiae Supporting Respondent at 5–8, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) [hereinafter APA *Roper* Brief].

112. *See* Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (noting seemingly divergent positions of APA); Steinberg et al., *supra* note 107, at 583–84 (discussing Court's attention to "flip-flop issue" during *Roper*).

113. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

114. *Id.*

While defenders frequently argue that children lack the decision-making capacity to justify full criminal responsibility, they also argue that youth have the capacity to exercise important rights—such as the right to engage and direct counsel, or deny a police search—and to make critical decisions—such as how to plead and whether to testify.[115] To some extent, the right to counsel and other procedural rights in the juvenile justice system only make sense if the child has the capacity to safeguard or exercise those rights. For example, the right to the assistance of counsel is most effective as a procedural protection when the child can provide counsel with information needed to confront the government's evidence, help counsel construct a defense, and guide counsel in key decisions regarding how to proceed at various stages of the juvenile case. When children are unable to engage and assist counsel, the right is undermined.[116]

The Supreme Court's rationale for adopting a categorical rule against the sentence of life without the possibility of parole for juveniles in *Graham v. Florida* was based in part on concerns about the deficiencies in the attorney-child relationship.[117] The Court specifically recognized that youths' "limited understandings of the criminal justice system," distrust of authority figures, "[d]ifficulty in weighing long-term consequences," and impulsiveness all threaten the attorney-client relationship and potentially affect the outcome of a case.[118] Further, because psychosocial features of adolescence lead many youth to reason and act with a more immediate, rather than future orientation, youth often make decisions based on a temporary set of beliefs and values that are likely to change over time and fail to consider the long-term consequences involved in the many decisions required to be made in a delinquency case.[119] To compensate for

115. Henning, *supra* note 79, at 317; Kristin Henning, *When Parental Authority Goes Too Far: The Fourth Amendment Rights of Minors in Their Parents' Homes*, 53 WM. & MARY L. REV. (forthcoming 2011).

116. *But see* Part IV, which recognizes the protective value of the right to counsel even if the child lacks the capacity to fully actualize the right.

117. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010).

118. *Id.*

119. *See* Bonnie & Grisso, *supra* note 67, at 91 (noting adolescents' "distorted time perspective and a tendency to discount long-term consequences (such as risk of long-term confinement) in favor of immediate consequences (such as looking 'cool' in the eyes of peers)"); Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The*

limitations in the youth's ability to effectively participate in and guide the attorney-client relationship, the Court determined that a categorical rule was necessary to protect against the risk of unfairness inherent in case-by-case determinations regarding juvenile culpability.[120]

The Court's understanding of adolescence and concerns about the attorney-child relationship arguably lend support to arguments in favor of a more paternalistic role for juvenile defenders and greater state interventions in the lives of youth. However, a more nuanced understanding of the developmental research should help judges and policy makers understand that *Graham*'s application of the research is limited by its context. Because youth rely on their decision-making capacity to different degrees in different settings, evidence suggests that paternalism may not be required to resolve every legal issue involving youth. In 2009, the APA responded directly to Justice Scalia's criticism and dissent in *Roper v. Simmons* when it distinguished between the cognitive capacity needed to make a decision in the controlled context of a medical decision and the psychosocial capacities needed to make and act upon good judgment in the context of typical juvenile criminal behavior.[121] As discussed more thoroughly in Part IV, these distinctions provide an important insight in our effort to balance due process, autonomy, and paternalism in contemporary juvenile courts.

IV. ANALYSIS OF THE RIGHTS-CULPABILITY TENSION

Given that paternalism, due process, and autonomy remain at such a precarious balance in the juvenile justice system, the Supreme Court's relatively rare discussion of adolescence in *Graham* and *Roper* has the potential to significantly influence juvenile justice

Attorney-Juvenile Client Relationship, 21 BEHAV. SCI. & L. 175, 179–80 (2003); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 591–92 (2000).

120. *Graham*, 130 S. Ct. at 2032.

121. Steinberg et al., *supra* note 107, at 585 (discussing APA's distinguishing of *Roper* from *Hodgson*); Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 13 n.23, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter APA *Graham* Brief]. For additional discussion of the importance of context in adolescent capacity, see *infra* notes 134–42 and accompanying text.

policy and practice beyond issues of culpability and mitigation. Part IV attempts to understand the limits of *Graham* in identifying an appropriate framework for children's rights that preserves due process and avoids overly paternalistic state interventions. Part A differentiates between "protective" rights that are guaranteed to youth, regardless of capacity, as a protection against unwarranted state deprivations of liberty and "autonomy" rights that are typically reserved for those who demonstrate the capacity to exercise and safeguard those rights. Part B draws from the APA's more recent literature to explore ways in which youth's capacities vary according to context. Both Parts A and B emphasize the right to loyal, client-directed defense advocacy as an example of due process and autonomy that should be preserved notwithstanding deficiencies in adolescent decision-making and psychosocial capacities.

A. Protective Rights

Although it is sometimes overly simplistic to collapse children's rights into any two categories, for our purposes, we can characterize most children's rights as either "protective" or "autonomy" rights. Protective rights are those necessary to ensure the welfare and safety of the child and to prevent exploitation and abuse, including abuses in the juvenile and criminal justice system.[122] Children are entitled to protective rights irrespective of their capacity to waive or assert those rights and generally depend on adults for their enforcement.[123] Capacity-based (or autonomy) rights are those that are generally reserved for youth or adults who have demonstrated the capacity to

122. *See* Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 165 (2006) (defining protective rights); *see also* John D. Goetz, Note, *Children's Rights Under the Burger Court: Concern for the Child but Deference to Authority*, 60 NOTRE DAME L. REV. 1214, 1224 (1985) (discussing due process and children's protective rights against the state in the civil context).

123. *See* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2100, 2129–30 (2011) (acknowledging fundamental rights of children and discussing recognition of procedural due process rights for children in *Gault*); *cf.* Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 1003 (1993) (discussing parental role in development of child's freedom).

exercise or protect those rights.[124] Parents, policymakers, and courts are more willing to respect the autonomy of youth as they demonstrate maturity, self-control, and capacity for reasoned judgment.

Many procedural protections guaranteed by the Due Process Clause are appropriately characterized as protective rights that do not depend on the minor's capacity for enforcement. For example, within the juvenile and criminal justice context, the accused is entitled to several protections designed to ensure accurate fact-finding and avoid unwarranted deprivations of the accused's liberty by the state.[125] In deciding whether to extend various protections guaranteed to adults in criminal proceedings to juveniles in delinquency cases, the Supreme Court has repeatedly analyzed the role of the proposed right in ensuring a fair and reliable fact-finding process.[126]

For example, in *Gault*, the Court concluded that the privilege against self-incrimination was necessary to prevent the state from using force, undue stress, or psychological domination to elicit a false or unreliable confession from a child.[127] The Court's concerns about the special vulnerabilities of youth made the privilege against self-incrimination even more important for juveniles than adults.[128] Other procedural protections extended to juveniles in *Gault*, such as the right to adequate notice of charges and the right to confrontation and cross examination, are also appropriately characterized as protective rights necessary to ensure accurate fact-finding.[129]

Similarly, in *In re Winship*, the Court concluded that the right to have the government prove its case beyond a reasonable doubt was

124. *See* Dailey, *supra* note 123, at 2137–38 (distinguishing between children's rights based on capacity and children's rights based on vulnerability, including due process rights in the juvenile justice system); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 37 (2004) (noting that capacity-based rights limit exercise of children's rights to those who self-initiate).

125. Schall v. Martin, 467 U.S. 253, 274–77 (1984) (discussing procedural protections necessary to ensure against "erroneous and unnecessary [pretrial] deprivations of liberty").

126. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (concluding that jury trials not necessary for accurate fact-finding); *In re* Winship, 397 U.S. 358, 373–74 (1970) (concluding that proof beyond reasonable doubt is necessary in avoiding erroneous confinement).

127. *In re* Gault, 387 U.S. 1, 47 (1967).

128. *See id.* at 45–46.

129. *Id.* at 33–34, 56–57.

equally necessary in juvenile courts as in criminal courts to protect the innocent and avoid erroneous confinement.[130] Even the Court's *McKeiver v. Pennsylvania* decision not to extend certain rights—such as the right to a jury trial—to juveniles was based in part on the Court's conclusion that jury trials were not essential to ensure reliable fact-finding.[131] The procedural protections discussed here emanate from a belief that all individuals have an inherent right to freedom and liberty from isolation and confinement by the state absent clear justification that intervention is warranted. These rights attach at birth and are not diminished by the limited capacities of youth.

Like other due process protections, the right to counsel is an essential component of a fair trial.[132] As the Supreme Court noted in the criminal context, an adversarial system with "partisan advocacy [from] both sides," including the defense, "best promote[s] the ultimate objective that the guilty be convicted and the innocent go free."[133] In *Gault*, the Court was swayed by the recommendation of the 1965 President's Crime Commission that defense counsel be appointed to ensure procedural justice "as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by [the] child or parent."[134] As the Court ultimately concluded, a "juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[135] As such, the defense counsel plays a central role in facilitating fair, accurate, and reliable fact finding.

While the right to counsel is certainly justified by a protective rationale, it may also be limited by capacity-based concerns. The unique function of the defense counsel as the voice of the accused necessarily invokes capacity-based concerns about the child's ability

130. *Winship*, 397 U.S. at 373–74.

131. *McKeiver*, 403 U.S. at 547.

132. *See* Polk Cnty. v. Dodson, 454 U.S. 312, 322 (1981) ("There can be no fair trial unless the accused receives the services of an effective and independent advocate.").

133. United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

134. *Gault*, 387 U.S. at 38 (quoting Commission Report).

135. *Id.* at 36 (footnote omitted).

to use his voice and effectively direct counsel. As discussed in Part III, the effectiveness of the right to counsel as a protective right turns in part on the capacity of youth to engage counsel, understand options, and make decisions. The next section considers the role of context in determining youths' capacity to make decisions, and contrasts adolescent decision-making during the commission of a crime, as explored in *Graham*, with adolescent decision-making in the context of an effective attorney-client relationship.

B. Capacity-Based Rights in Context

In analyzing the potential scope of the Court's conclusions about adolescent immaturity in *Graham*, it is important to understand that adolescent capacity is not a binary construct.[136] Context matters, and reasoned decision-making is a skill that varies according to experience, context, and instruction. In both *Roper* and *Graham*, the Court was asked to consider the relevance of adolescent immaturity and decision-making capacity in the context of adolescent criminal behavior, which involves a distinct set of psychosocial factors that differentiate it from other decision-making contexts.

In defending its seemingly contradictory position in the abortion and criminal cases, the APA distinguished between a youth's cognitive abilities exercised in a controlled setting, and psychosocial capacities (such as impulse control, sensation seeking, future orientation, temporal perception, and the ability to resist peer influence that may hinder decision-making in fast-paced events).[137] Research has indicated that even where there are "no appreciable differences between adolescents age 16 and older and adults" in "logical reasoning abilities in structured situations and basic information-processing skills," psychosocial characteristics continue to develop "well beyond middle adolescence and even into young adulthood."[138] It is these psychosocial features that greatly affect the

136. *See* Mutcherson, *supra* note 106, at 929 (arguing that two positions on adolescent capacity are compatible).

137. *See* APA *Graham* Brief, *supra* note 121; Steinberg et al., *supra* note 107, at 585–86 (discussing and supporting APA's distinguishing of cognitive abilities and psychosocial capacities).

138. Steinberg et al., *supra* note 107, at 586–87.

youth's behavior and capacity to make reasoned decisions for which they can be held completely accountable in the criminal context.[139] As the APA clarified in its brief in support of Terrance Graham:

> *Hodgson* addressed *competence* to make medical decisions, which can be made in a relatively unhurried manner in consultation with medical professionals, and thus focused on adolescents' *cognitive* abilities, noting that by mid-adolescence those abilities approximated those of adults. By contrast, the question in *Simmons*, as here, was the degree of adolescent *culpability* and (relatedly) adolescents' potential reformability when they commit criminal acts, acts that often result from impulsive and ill-considered choices driven by *psychosocial* immaturity.[140]

Research further indicates that youths' cognitive capacity and decision-making skills are particularly unreliable in stressful settings.[141] While adolescents' decisions about terminating a pregnancy can be made in a deliberative session in consultation with doctors, teachers, counselors, clergy, or mentors, decisions to commit crimes are usually spontaneous, unplanned, and typically committed with or in the presence of peers.[142] Psychosocial deficiencies such as impulsiveness, pleasure-seeking, and peer pressure lead to risky behaviors such as crime and delinquency, unprotected sex, and reckless driving.[143] Thus, the context in which the decision is made greatly affects the quality of the decision. Given the relevance of psychosocial variables in the different contexts, it is not inconsistent to argue both that youth are less culpable for acts they commit in

139. *See id.* at 587 (discussing continued development of psychosocial features).

140. APA *Graham* Brief, *supra* note 121.

141. *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 900–19 (1999) ("Not surprisingly, research has shown that children perform best in contexts that are familiar to them and devoid of stress."); Schmidt et al., *supra* note 119, at 179 ("[T]heory and research suggest that compared with adults, adolescents' newly acquired cognitive capacities may be deployed with less dependability and less uniformity across settings, especially in stressful situations."); Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, *in* YOUTH ON TRIAL, *supra* note 28, at 173, 178 (mentioning stress as influence on adolescents' performance).

142. *See* Steinberg et al., *supra* note 107, at 586.

143. *Id.* at 587.

stressful, peer-driven, and emotional scenarios, and yet capable of making informed decisions regarding, for example, their healthcare or legal choices.[144]

Context has a significant impact on the child's ability to understand and assert legal rights in the juvenile justice system. As discussed in Part I, youth are particularly vulnerable to poor decision-making in coercive, on-the-scene encounters with the police. Youth who are forced to make rapid decisions about whether to waive counsel, admit guilt, or consent to a police search without the opportunity to deliberate and consult with a loyal advisor, may make poor decisions that satisfy immediate rather than long term goals, and may not be able to identify and weigh all of the consequences associated with each of the available options. By contrast, lawyers and judges may provide a controlled, structured environment that is conducive to more deliberate decision-making. Thus, youth who have time to reflect, consider alternative strategies for release from police custody, and who consult with counsel about the likely consequences of a false confession are better positions to resist police pressure and make a well-informed decision about whether to talk to police.

To combat the risk of coercion in juvenile interrogation, some states have adopted statutes requiring parental participation in police interviews with children.[145] Although these statutes fall short because evidence suggests that parents are poor advisors in this context and lawyers generally have better knowledge and experience than parents to assist minors in these decisions, these statutes do properly recognize that adolescent capacity and decision-making may be improved in the right circumstances.

*C. Role of Counsel in a Post-*Graham *World*

The tension between paternalism, due process, and individual autonomy is probably nowhere more evident than it is in the debate about the proper role of juvenile defense counsel. While every state

144. *See* APA *Graham* Brief, *supra* note 121; Mutcherson, *supra* note 106, at 934; Steinberg et al., *supra* note 107, at 586.

145. *See, e.g.*, Ark. Code Ann. § 9-27-317 (i)(2)(C) (West 2011); Col. Rev. Stat. Ann. § 19-2-511(West 2011); Kan. Stat. Ann. 38-2333(a) (West 2011); N.C. Gen. Stat. Ann. § 7B-2101(b) (West 2010).

guarantees the right to counsel for an accused juvenile after *Gault*, there is still considerable tension in juvenile court practice regarding whether the child's counsel should assume the role of a zealous, client-directed advocate or maintain a more paternalistic relationship with the child. Much has been written about the limited capacity of youth to engage lawyers.[146] Historically, founders of juvenile court did not view the assistance of counsel as essential since juvenile courts were designed to rehabilitate and not punish the child.[147] In the years immediately after *Gault*, scholars questioned whether the role of counsel should reflect the paternalistic philosophy of juvenile courts or mirror the role of counsel in adult criminal proceedings.[148] Some proponents of paternalistic advocacy argued that a best-interest paradigm was appropriate given the rehabilitative goals of the juvenile court,[149] while others questioned whether youth had the capacity to direct their own counsel.[150] Notwithstanding the firm support for loyal, zealous advocacy that was evident by the early 1980s in legal scholarship and attorney practice standards produced by professional organizations such as the American Bar Association, the Office of Juvenile Justice and Delinquency Prevention, and the Institute for Judicial Administration,[151] contemporary evidence suggests that paternalism persists in juvenile defense practice of juvenile courts across the country and that zealous, client-directed advocacy is lacking in many jurisdictions.[152]

146. *See, e.g.*, Schmidt et al., *supra* note 119; Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, *in* YOUTH ON TRIAL, *supra* note 28, at 173, 177–78 (questioning whether juveniles can effectively participate in defense); Henning, *supra* note 79.

147. Kay & Segal, *supra* note 67.

148. *See, e.g.*, Elyce Zenoff Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375 (1971); Kay & Segal, *supra* note 67, at 1401.

149. *See* Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 507 (1962) (discussing vision of lawyer as "officer of the court"); Kay & Segal, *supra* note 67 (noting goal of focus on child welfare through non-adversary model); Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1179 (1968) (detailing lawyers' differing treatment of juvenile client in comparison with adult client).

150. Kay & Segal, *supra* note 67, at 1402, 1411.

151. Henning, *supra* note 79, at 255–57.

152. *Id.* at 257–59 (summarizing evidence of "persistent culture of paternalism in the legal representation of children in the juvenile justice system").

While apprehensions about the quality of the attorney-child relationship, as described by the Supreme Court in *Graham v. Florida*, may fuel additional concerns about the proper role of counsel and support a more paternalistic paradigm for the legal representation of children, context clearly differentiates adolescent decisions that are made in the attorney-client relationship from those that are made in the context of a criminal offense. Deficiencies in the attorney-child relationship are as much a function of limited resources and inadequate lawyering as they are a reflection of the limitations in adolescent capacity.[153] Even a child who makes poor judgments and rash decisions in on-the-street, peer-to-peer interactions may be able to render thoughtful, well-reasoned, case-related decisions after counseling by his defender.[154] Given adequate time and resources, juvenile defense counsel should structure the counseling process in a way that accommodates and enhances the child's cognitive, emotional, and psychosocial ability and fosters good decision-making for the child. Ideally, the attorney should provide clients with information about the available options, engage the child in a one-on-one, age-appropriate dialogue, and help the client assess the advantages and disadvantages of each alternative. Research suggests that the psychosocial aspects of decision-making, such as risk perception and risk-preference, are likely to improve as the attorney-client relationship improves.[155] A child who has the assistance of a lawyer who patiently helps him identify all of the long-term implications of any decision will be in a better position to avoid hasty, short-sighted decisions.

Although *Graham* expressed concerns about adolescent capacity to develop an effective attorney-client relationship, it did not suggest that juveniles are not entitled to zealous, loyal, client-directed

153. *See* Ko, *supra* note 86, at 181–82 (identifying the barrier to a fair trial posed by inadequate counsel for juvenile defendants); Jennifer M. Segadelli, *Minding the Gap: Extending Adult Jury Trial Rights to Adolescents While Maintaining a Childhood Commitment to Rehabilitation*, 8 SEATTLE J. SOC. JUST. 683, 703–04 (2010) (asserting that juvenile court is rapidly being equated with inadequate counsel).

154. *See* Steinberg et al., *supra* note 107, at 592; Henning, *supra* note 79, at 317–19 (outlining ways in which attorney can optimize decision-making capabilities of youth through relationship-building and conducive environment).

155. Henning, *supra* note 79, at 318.

counsel. In fact, to the contrary, the Court implicitly recognized that the youth's counsel serves an important protective function by ensuring that the government proves its allegations beyond a reasonable doubt and that the minor's defense theory and mitigating evidence is identified and effectively conveyed to the judge and jury.[156] It was the Court's concern that inadequate counsel could affect the outcome of a case that led it to adopt a categorical rule against the sentence of life without parole juveniles.[157]

CONCLUSION

Graham is one of three recent Supreme Court cases that advance a view of adolescents as immature, impulsive, and malleable. The Court relied heavily on this view to conclude that a sentence of life without the possibility of parole was cruel and unusual punishment for juveniles in non-homicide cases. While this categorical rule is a significant victory for children and provides considerable support for a more adolescent-appropriate response to juvenile offending, juvenile justice reformers must be careful not to over-read the Court's analysis and commitment to the rehabilitation of youth as a return to a pre-*Gault* paternalism that ignores due process and does little to protect youth from abuses and unwarranted interventions by the state.

Understood in context, *Graham*'s recognition of the diminished capacity of youth to make good decisions and control impulses is confined to the fast-paced, peer-driven, and stressful context of criminal activity. As the APA has discussed, adolescent capacity is not a rigid, binary construct. Context matters. While youth frequently demonstrate poor decision-making skills during the commission of crime, they may be able to engage in appropriate reasoning and analysis in a deliberative and controlled session with lawyers, doctors, or other advisors that is void of peer pressure and other negative influences. Thus, policymakers should not presume all youth to be incapable of making decisions in all contexts. Where adolescent capacity can be enhanced—such as in the attorney-client relationship or in important medical decisions—autonomy may be warranted.

156. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010).
157. *Id.*

Moreover, while some rights are reserved for adults who have demonstrated a capacity to exercise them, other rights are guaranteed to all, including youths, regardless of capacity to ensure the safety and welfare of the individual. Due process remains an essential feature in the justice system precisely because it protects against abuses, unnecessary interventions, and undue deprivations of liberty by the state. Thus, notwithstanding deficiencies in adolescent cognitive and psychosocial capacities, youth are entitled to important protective rights, such as the requirement of proof beyond a reasonable doubt, the right against self-incrimination, the right to counsel, and the right to confront the government's evidence in the juvenile and criminal justice systems.

In adopting a categorical rule against life without the possibility of parole for juveniles in non-homicide cases, the Court recognized the important function of defense counsel in ensuring fair, accurate, and reliable outcomes in criminal cases, and sought to guard against errors caused by limitations in the youth's ability to effectively guide and participate in the attorney-client relationship. As such, *Graham* is as much a reinforcement of the need for loyal, defense advocacy as an indispensable protective right as it is a recognition of the pervasive deficiencies in the attorney-child relationship. Ultimately, the fairly paternalistic outcome in *Graham* does not undermine adolescent autonomy in every context, nor does it diminish the Court's commitment to due process in the justice system.