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By D. Brian Woo

I. INTRODUCTION

In 2005, the United States Supreme Court held, in *Roper v. Simmons*, that the execution of convicted juveniles violated the Eighth Amendment's prohibition on cruel and unusual punishment.[1] In addressing the issue, the Court determined that a national consensus had developed against the execution of juveniles.[2] Ultimately, a majority of the court decided that a national public consensus had been reached against the execution of juveniles under 18 in age.[3]

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1. Roper v. Simmons, 543 U.S. 551, 578 (2005) [hereinafter *Roper*]. Christopher Simmons killed Shirley Crook when he was only 17 years old. *Id.* at 558. The state of Missouri charged him with murder; at trial he was convicted and sentenced to death. *Id.* at 557. After numerous appeals, the Missouri Supreme Court reversed the conviction. On certiorari, the United States Supreme Court affirmed the Missouri Supreme Court's decision to set aside Christopher Simmons verdict.

2. In reversing Simmon's conviction, the Missouri Supreme Court found that:

> [A] national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, an that the imposition of the juvenile death penalty has become truly unusual over the last decade.

Id. at 559 (citing State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (2003) (en banc). *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002). This "national consensus" test developed through a long line of death penalty jurisprudence. "The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Coker v. Georgia, 433 U.S. 584, 597 (1977). Later, in *Penry v. Lynaugh*, the Court held that national public opinion was against the execution of mentally retarded convicts. 492 U.S. 302 (1989).

3. *See Roper*, 543 U.S. at 568. The Court concluded that a national consensus had developed because a majority of the states forbid the imposition of the death penalty on juvenile offenders younger than eighteen. *Id.* In addition, the Court did not limit its assessment of national consensus to the United States alone, but also reviewed whether other countries permitted the execution of

The *Roper* decision rested on a long line of evolving jurisprudence; as society's attitudes towards the execution of juveniles has changed, so too has the law evolved to exempt certain classes of people.[4] The law in this area focuses on whether an amorphous national consensus has developed against the death penalty. Prior to *Roper*, the Supreme Court concluded on several occasions that a national consensus had not developed.[5] However, over time the line has gradually advanced from holding that 15 year old defendants could not be executed, to barring the death penalty for the mentally retarded. Finally, in 2005, this line of jurisprudence culminated in the *Roper* decision.[6]

With *Roper*, no longer can juveniles of any age be executed.[7] This decision will undoubtedly affect the entire juvenile penal system, from how cases enter the system, to how they exit the system. And in a system so reliant on plea bargaining, *Roper* has now removed the ultimate retributive factor—the possibility that a jury will sentence the juvenile to death—from the prosecutor's deck of cards. No longer can the prosecutor seek the death penalty in juvenile cases, in order to receive a plea bargain for a lesser sentence.

This comment examines the effect *Roper v. Simmons* will have on plea bargaining in the juvenile system. Part II discusses the Supreme Court's

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juveniles. *Id.* at 575. After finding that "the United States is the only country in the world that continues to give official sanction to the death penalty," the Court acknowledged the international consensus against the juvenile death penalty to confirm its holding. *Id.* at 578.

4. This jurisprudence often reflects how the Supreme Court defines "national consensus." While the majority in *Roper* draws from many sources—including polls, research, state attitudes, and foreign attitudes—the dissent believes overwhelming evidence, such as state statutes, must be considered to determine if a national consensus has developed. *See Roper*, 543 U.S. at 609 (Scalia, J., dissenting) ("[o]ur previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time.").

5. In *Stanford v. Kentucky*, decided in 1989, the Court found that no national consensus existed against the execution of 16 and 17 year old offenders. 492 U.S. 361, 378 (1989). The same day *Stanford* was decided, the Court rejected a categorical exemption for mentally retarded persons sentenced to death. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989).

6. In *Atkins v. Virginia*, the Court reconsidered the *Penry* holding, stating that modern standards of decency had evolved that now forbid the execution of the mentally retarded. *See Atkins*, 536 U.S. at 314-321. In much the same way that the *Atkins* court held a national consensus had developed against the execution of the mentally retarded, *Roper* challenges the *Stanford* holding to determine whether modern norms now consider the execution of juveniles as "cruel and unusual punishment." *See* U.S. CONST. amend. VIII.

Because certain groups are less culpable, "the death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime." *Roper*, 543 U.S. at 568 (citing Thompson v. Oklahoma, 487 U.S. 856 and Ford v. Wainwright, 477 U.S. 399 (1986)).

7. *Roper*, 543 U.S. at 578.

decision in *Roper*.[8] Part III presents the framework and goals of the juvenile system.[9] Part IV analyzes the impact of the *Roper* decision on the juvenile criminal justice system.[10] Finally, Part V concludes the comment.

II. THE SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS*

Christopher Simmons was only 17 when he murdered Shirley Crook and 18 when he was convicted and sentenced to death.[11] He bragged to friends about his plan to murder a woman because as a juvenile he could "get away with it."[12] Simmons then broke into Shirley Crook's house, tied her up, and threw her off a bridge.[13] The state of Missouri charged him with murder and sought the death penalty.[14] Following a jury trial, Simmons was convicted and sentenced to death.[15]

Following unsuccessful appeals and habeas petitions, Simmons filed a petition for post-conviction relief, after the United States Supreme Court decided *Atkins v. Virginia* in 2002.[16] The Court held in *Atkins* that due to "evolving standards of decency," the Eighth Amendment prohibits the execution of a mentally retarded person.[17] The *Atkins* decision reversed the holding in the case of *Penry v. Lynaugh*: that a mentally retarded defendant could be executed (decided thirteen years prior).[18] The Supreme Court had several reasons for reversing *Penry*, including the fact that sixteen states had prohibited the execution of the mentally retarded over the thirteen years

8. *See infra*, notes 11-56 and accompanying text.
9. *See infra*, notes 57-88 and accompanying text.
10. *See infra*, notes 89-143 and accompanying text.
11. *Roper*, 543 U.S. at 556, 558.
12. *Id.* at 556.
13. *Id.* at 556–57.
14. *Id.* at 557.
15. *Id.*
16. *Id.*
17. *Atkins*, 536 U.S. at 321 (citing *Ford v. Wainright*, 477 U.S. 399, 405 (1986)).
18. *Roper*, 543 U.S. at 565 (explaining that the *Atkins* decision was in large part due to new state statutes prohibiting the execution of mentally retarded people). In making its holding, the Court also found that "with respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319.

since the *Penry* decision, and the view that because of their deficiencies, mentally retarded offenders were less culpable than other criminals.[19]

Simmons' new petition alleged that under the logic in *Atkins*, the state is now prohibited from executing a juvenile offender.[20] Based on this argument, the Michigan Supreme Court reversed.[21] After the United States Supreme Court granted certiorari, the Court then had to decide whether the Eighth and Fourteenth Amendments forbid the execution of a convicted juvenile, who was under 18 at the time the offense was committed.[22] In deciding this, the Court looked to (1) whether a national consensus had developed for or against the juvenile death penalty; and (2) new attitudes that juveniles are too immature to be held fully culpable.[23]

In determining whether a national consensus had developed, the Court looked to state attitudes regarding the execution of juveniles. In *Stanford v. Kentucky*, the Court held that a prevailing number of states allowed for the juvenile death penalty; however, now the Supreme Court faced a different climate.[24] At the time of the *Stanford* decision, only twelve states had laws prohibiting the juvenile death penalty and fifteen states had laws prohibiting the execution of a juvenile seventeen years old or younger.[25] However in 2005, five more states had prohibited it.[26] Although this is clearly not a majority of states, as vigorously pointed out by the dissent, the Court looked to other factors, such as the actual rate of execution in states where the juvenile death penalty was still allowed.[27] The Court considered execution

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19. Crucial to the Court's decision to reverse *Penry* was the rapid change in state attitudes towards the execution of the mentally retarded. "Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*." *Roper*, 543 U.S. at 565.

20. *Roper*, 543 U.S. at 559.

21. *Id.* at 559.

22. Simmons argument forces the Court to reconsider their decision in *Stanford v. Kentucky*, which held that 16 and 17 year old juveniles could be lawfully executed under the Eighth Amendment. *Roper*, 543 U.S. at 555–56.

23. *Id.* at 564, 570.

24. Stanford v. Kentucky, 492 U.S. at 370.

25. *Id.* Writing for the majority in *Stanford*, Justice Scalia stated that this was insufficient to establish a national consensus. *Id.*

26. *Roper*, 543 U.S. at 560.

27. *See id.* at 567. The Court explains:

> As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

statistics, developed by Victor L. Streib, to determine the actual rate of execution. According to Streib, between 1973 and February 2005—the date of the *Roper* decision—only 22 juveniles have been executed.[28] Moreover, "the annual death sentencing rate has been declining rapidly and now is at its lowest point in 15 years."[29] The Court believed that these statistics illustrated the public sentiment that a juvenile was "less culpable than the average criminal."[30]

The Court also considered several other factors in determining whether a national consensus for or against the juvenile death penalty had developed. For instance, in developing the Federal Death Penalty Act, Congress concluded in 1994 that juvenile defendants should not be subject to the death penalty.[31] The Court took into account popular opinion polls: an ABC news poll from 2003 found that only 21% of those polled believed that juveniles should be executed for murder, over a life sentence.[32] Additionally, the Supreme Court considered international attitudes regarding the juvenile death penalty. In particular, the Court found that an international consensus had developed against the execution of juveniles.[33] The Court stated that although nine countries allowed the death penalty in 1990, these countries have since abolished or disavowed the juvenile death penalty, causing the United States to stand alone.[34] Taken *en masse*, the majority was convinced

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Id. (citing *Atkins*, 536 U.S. at 316).

28. *See* Victor L. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004, No. 76, 3 (2005), *available at* http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005).

29. *See* Streib, *supra* note 28, at 3.

30. *See supra* note 27.

31. *See* 18 U.S.C. § 3591. The statute explicitly holds that "no person may be sentenced to death who was less than 18 years of age at the time of the offense." *Id.*

32. *See* Streib, *supra* note 28, at 3.

33. However, as the dissent is quick to point out, the test is whether a *national* consensus had developed, not an international consensus. Although international sentiments might play a part in the politics of the death penalty, the majority oversteps constitutional boundaries by not limiting its analysis to a national consensus. *Roper*, 543 U.S. at 622 (Scalia, J., dissenting) ("[t]hough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.").

34. *Id.* at 577. The countries that allowed the juvenile death penalty in 1990 were: "Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China." *Id.* The U.N. has expressly forbid the execution of juveniles in Article 37 of the United Nations Convention on the Rights of the Child. *Id.* at 576. However, this article has not been ratified by two countries: The United States, and Somalia. *Id.*

that both an international and a national consensus had developed against the juvenile death penalty.[35]

Second, the Court looked to new attitudes about the maturity level of juveniles. Under death penalty jurisprudence, the Eighth Amendment demands that only those most deserving of execution should be sentenced to death, due to the severe nature of the penalty.[36] The majority based its holding in part on the fact that "the character of a juvenile is not as well formed as that of an adult. The personality traits are more transitory and less fixed."[37] Previous Supreme Court holdings established that 15 year-olds could not be executed.[38] Yet in extending this prohibition to all juveniles, the Court took into account new research regarding the maturation and development of the teenage mind.[39] Over the 15 years since the *Stanford* decision, new research has come to light that the juvenile mind is not fully formed at eighteen years of age.[40] In fact, juveniles lack the level "of judgment, impulse control, or ability to assess risks," that adults possess.[41] Based on these findings, the Court believed that juveniles—much like mentally retarded defendants—were inherently less culpable than those cold-blooded murderers who actually deserved execution.[42]

Ultimately, the Court weighed the public's interest in retribution and did not find that it merits the execution of juveniles.[43] Justice Scalia, however,

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35. *Id.* at 575-576.

36. *Roper*, 543 U.S. at 568.

37. *Id.* at 570.

38. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.").

39. This evidence comes from magnetic resonance imaging (MRI) scans performed on adolescents. In particular, these studies show that the frontal lobes of the brain—responsible for impulsive behavior, risk-management, and foresight—are "one of the last parts of the brain to reach maturity." Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent at 10, *Roper*, 543 U.S. 551 (2005) (No. 03-633) (citing Nitin Gigtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004)).

40. "Although the precise underlying mechanisms continue to be explored, what is certain is that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive function." Brief for the American Psychological Association at 12, *Roper*, 543 U.S. 551 (No. 03-633). In fact, drawing the line of majority at 18 may be too low. "[A] study, based on a sample of more than 1,000 adolescents and adults, established that psychosocial maturity is incomplete until age 19, at which point it plateaus." Brief of the American Medical Association et al. as Amici Curiae Supporting Respondent at 4, *Roper*, 543 U.S. 551 (2005) (No. 03-633).

41. Brief of the American Medical Association et al. at 4, *Roper*, 543 U.S. 551 (2005) (No. 03-633).

42. *Roper*, 543 U.S. at 571.

43. *Id.* at 575.

dissented in *Roper* and rejected a categorical rule forbidding the death penalty, writing that in some situations, the death penalty is warranted. Scalia opined that some juveniles are "just as culpable as adults."[44] For certain reprehensible crimes, Scalia believes that the juvenile offender may be beyond rehabilitation and deserves the full punishment of the law.[45] To determine this, the jury should take into account the particular circumstances of the case and any mitigating or aggravating factors, rather than simply forbid the execution of juvenile offenders.[46] Because the jury is in the best position to determine the culpability of the offender, Scalia opined that the ability to prescribe a death sentence should not be removed from the jury's hands.[47]

Justice O'Connor also dissented along these lines. Although she conceded that juveniles are less mature than adults and therefore less culpable, she believed that "at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case."[48] Rather than consider juveniles as a class in the aggregate, Justice O'Connor opined that age alone cannot be substituted as a measure of an individual's

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44. *Id.* at 618 (Scalia, J., dissenting). Justice Scalia recounts the facts in *Roper*, where the defendant described his plan to his friends, before binding Shirley Crook with duct tape and throwing her off a bridge. Scalia also cites the following example:

> In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximate 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse.

Id. at 618–19. In certain, horrific situations such as this, Scalia believed that juries are in the best position to determine whether the crime warrants the punishment. *Id.* at 620. However, it is questionable if jurors could adequately take into account the defendant's youth and not be swayed by the nature of the crime.

45. *Id.* at 619.

46. *Roper*, 543 U.S. at 620 (Scalia, J., dissenting).

47. *Id.* at 615-16.

48. *Id.* at 588 (O'Connor, J., dissenting) (emphasis in original). Justice O'Connor saw no compelling evidence for changing the "reasonable conclusion reached by many state legislatures," allowing the jury to determine whether death is appropriate. *Id.* Choosing to "not substitute [the Supreme Court's] judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures," Justice O'Connor dissented. *Id.* Using the language from *Penry v. Lynaugh*, O'Connor believed that while the national consensus test is appropriate under the Eighth Amendment, that each individual state legislature "provide[s] the 'clearest and most reliable objective evidence of contemporary values.'" *Id.* at 589 (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). To this end, Justice O'Connor disagreed with the majority's use of statistics and international opinion to determine whether a national consensus had been reached. *Id.* at 590.

maturity or psychological development.[49] According to her, this differs from the holding in *Atkins*, because mentally retarded defendants are, by definition, less culpable due to their lack of cognitive capacity.[50] Hence, rather than adopt a brightline rule, the Court should allow the jury to factor in any mitigating evidence, i.e., youth or immaturity, when determining an appropriate sentence.[51]

However, Justice Kennedy, writing for the majority, disagreed on the grounds that juries could not adequately separate mitigating evidence from aggravating evidence in such cases.[52] Instead, the majority felt that once the special, protected status of juveniles is recognized, the state interest in retribution is not served by the execution of juveniles:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.[53]

When the homicide committed is especially revolting, the prosecutor will focus on the horrible, senseless nature of the crime instead of protecting the juvenile's best interest.[54] This could cause the prosecutor to push even harder for the death penalty, knowing that youth should be a mitigating factor. For instance, the closing summation given by the prosecution attempted to use age as an aggravating factor, instead of a mitigating one.[55] The prosecutor used the age of the juvenile offender to prove how truly

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49. *Roper*, 543 U.S. at 601 (O'Connor, J., dissenting).

50. *Id.*

51. *Id.* at 602. The sentence must "reflect a reasoned *moral* response to the defendant's background, character, and crime." *Id.* at 603 (citing California v. Brown, 479 U.S. 538, 545 (1987)).

52. *See Roper*, 543 U.S. at 558. The prosecution's speech, for instance, urged that jurors consider age as an aggravating factor, due to the atrocious nature of the crime:

> During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

Id. Subsequently, "the jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it." *Id.*

53. *Id.* at 571.

54. *See Roper*, 543 U.S. at 557-58.

55. *See supra* note 52.

scary it is when a juvenile commits such a horrible crime—that the age of the juvenile defendant made the crime even worse.[56] Such a speech shows that when the facts are truly horrible, the prosecutor will focus even harder on seeking the harshest punishment; even if that means ignoring the juvenile's protected status or the juvenile's interest and ability in rehabilitation.

III. THE ORIGIN AND THE PERCEIVED FAILURE OF THE JUVENILE SYSTEM

A. The juvenile system originally focused on the rehabilitation of juveniles.

A separate juvenile court system originated due to one key distinction: When a juvenile enters the criminal justice system, the main goal is to rehabilitate the offender, not to punish the offending conduct.[57] This was based on the assumption that juveniles could be easily reformed because of their age.[58] Their age gives the juvenile criminal case a special status, which courts have attempted to accommodate by balancing the protection of juveniles with the state's need for punishment.[59] Thus, the juvenile system was designed to rehabilitate convicted youths, rather than simply punish the offensive conduct.

To accomplish this goal, "juvenile proceedings were designed to be nonadversarial with all parties involved working together 'in the best

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56. *See supra* note 52.

57. Illinois created the first juvenile court in 1899, where the focus was on rehabilitation, not punishment. Susan R. Bell, *Tenth Annual Corporate Law Symposium: Intellectual Property Law for the Twenty-First Century: Comment: Ohio gets tough on juvenile crime: an analysis of Ohio's 1996 Amendments concerning the bindover of violent juvenile offenders to the adult system and related legislation*, 66 U. CIN. L. REV. 207, 209 (1997). *See* Matthew William Bell, *Comment: Prosecutorial Waiver in Michigan and Nationwide*, 2004 MICH. ST. L. REV. 1071, 1072 (2004). Professor Francis B. McCarthy writes:

> Until recently, the juvenile court's central thrust, indeed its entire reason for being, has been an attempt to reform or rehabilitate children and to prevent them from entering a lifetime of crime. An integral part of the philosophy of the juvenile court was that children were not fully responsible for their acts and consequently should be shielded from the punishment that would be exacted from a responsible actor.

Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS L.J. 629, 641–42 (1994).

58. McCarthy, *supra* note 57, at 641-42.

59. *See* Mattew William Bell, *supra* note 57, at 1082 ("Juveniles are arguably the most protected class of individuals in our society, justifying an individualized court system, as well as an entire set of statutes.").

interests of the child.'"[60] This has resulted in the creation of a separate juvenile court system, in addition to statutes designed to protect the juvenile defendant.[61] Some of these differences include:

> The terms "warrants," "trials," "sentences," and "guilty" were replaced by "petitions," "hearings," "dispositions," "delinquency," respectively. In order to reduce the stigma of the proceedings, hearings were conducted in private, as opposed to the publicized trials of adults. Moreover, the juvenile hearings were designed to be less formal with judges often abandoning their black robes and benches for a more confererence-like setting around a table.[62]

Because the focus and the methods were specific to juvenile cases, juvenile offenders became special in the eyes of the court. Due to their age and lack of maturity, juvenile offenders were seen as malleable, and thus, candidates for rehabilitation.

Despite these goals, over time an increasing number of juveniles have found themselves in adult court.[63] There are two methods by which a juvenile is tried as an adult: (1) legislative waiver, also known as statutory "bindover" laws created by the states; and (2) judicial waiver.[64] States have increasingly created mandatory statutes known as "bindover" laws that place a juvenile in adult court—instead of a juvenile court—for more reprehensible offenses, i.e., homicide.[65] When juveniles commit these crimes, these new state laws rendered them incorrigible and beyond rehabilitation.[66] The theory behind this principle is that the individual juvenile perpetrator who committed such a reprehensible crime was incapable of correction, and therefore would not benefit from the rehabilitation offered by the juvenile system.[67]

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60. *See* Susan R. Bell, *supra* note 57, at 209.

61. *See* Susan R. Bell, *supra* note 57, at 208. Juvenile courts were special because they were designed to differ in a number of ways from the existing adult courts. *Id.*

62. *Id.* at 209.

63. *See* McCarthy *supra* note 57, at 631–632.

64. *See Id. See also* Matthew William Bell, *supra* note 57, at 1072. In 1999, 46 states, including the District of Columbia, allow for judicial waiver. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Statistical Briefing Book, at* http://www.ojjdp.ncjrs.gov/ojstatbb/ structure_process/ qa04102.asp?qaDate=20020425 (last visited Mar. 9, 2006).

65. *See* Susan R. Bell, *supra* note 57, at 209.

66. *See* Matthew William Bell, *supra* note 27, at 1072 n.10 (citing DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 28 (2001) ("the decision to transfer a case still denotes that a youthful offender is beyond whatever treatment capacity remains in the juvenile justice system.")).

67. *But see* Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121 (2003). Streib "wonders if these are absolutely the worst cases: the mass murderers, the precocious Jack the Rippers. Or are they simply a random sample of those sentenced to death and who happened to be in the wrong place at the wrong time?" *Id.* at 126.

Similarly, judicial waiver works much the same way. Typically, the court in most states has the initial authority over juvenile offense cases.[68] If the court deems the case outside the jurisdiction of the juvenile court system, the case can be transferred to adult court.[69]

Regardless of the method, juveniles themselves waive their protected status by committing heinous crimes.[70] When the nature of these crimes is atrocious, the state prosecutor must balance the public interest in punishment against the juvenile's interest in rehabilitation.[71] If the public interest outweighs the possibility of rehabilitation, state prosecutors will charge a juvenile as an adult under these bindover laws.[72] In essence, the prosecutor has effectively determined that the juvenile would not benefit from the rehabilitation offered by the juvenile system. The system will then treat the juvenile as an adult, subject to adult penalties.[73] Pre-*Roper* this could lead to a jury sentencing a 17-year-old defendant to death; now the stiffest penalty faced is that of a life sentence.[74] Regardless of the penalty, when juveniles are placed in adult court, they no longer benefit from a system designed to protect their interests—they have essentially waived their juvenile status.

Based on studies, most of those sentenced to death are black or latino males who have committed crimes against white women. *Id.* at 127–28, 130.

68. *See* McCarthy *supra* note 57, at 631–632.

69. *See* McCarthy *supra* note 57, at 631–632.

70. *Roper*, 543 U.S. at 573.

71. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as the Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1318 (2000). There are four purported goals of the any criminal sentence: retribution (punishment for the crime); deterrence (to dissuade future criminals from offending); incapacitation ("to remove the offender from society"); and rehabilitation (to improve the offender so that he or she will not commit further crimes). *Id.* at 1315–17. Rehabilitation—the main goal of the juvenile system, and an impossible goal if a defendant is sentenced to death—becomes the focus of the prosecutor's inquiry pre-*Roper*. Therefore, the prosecutor must balance this goal with that of retribution to determine if a sentence is appropriate.

72. *Id.*

73. *Id.*

74. McCarthy, *supra* note 57.

B. The perceived failure of the juvenile system.

Recently bindover laws have gained popularity due to the perceived failure of the juvenile system to handle capital offenders.[75] Although any homicide is a tragedy that garners a certain amount of local attention, juvenile cases receive far greater national news coverage.[76] One only has to look to certain, recent crimes, such as when 18-year-old David Ludwig killed his 14-year-old girlfriend's parents before abducting her, and the murder of prominent defense attorney David Horowitz's wife at the hands of 16-year-old neighbor Scott Dyleski.[77] A quick search of headlines on CNN.com between January and February 2006 illustrates the increased attention given to juvenile cases. For instance, on January 12, 2006, three teenagers murdered a homeless person in Florida.[78] Similarly, on January 21, 2006, a 17-year-old teenager named Sarah Kolb killed her best friend in a fast-food parking lot, burned and dismembered her body, and hid her remains in two counties; if convicted she faces up sixty years.[79]

Because these crimes have gained so much national attention, the stakes are even higher to reach a "just" outcome. Thus, these juveniles will be tried as adults, subject to adult penalties. The more public and despicable a crime, especially when committed by a juvenile, the more willing the public—represented by the state prosecutor—becomes to try the juvenile in

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75. "Today, faith in the system's capacity for rehabilitation has been largely lost. There also seems to be a growing sentiment that some juveniles are indeed responsible for their actions and should be held accountable for them." *See* McCarthy *supra* note 57, at 641–42.

76. Homicides committed by juveniles receive a great deal more media attention than the average homicide. In particular:

> Americans still believe that crime, and particularly juvenile crime is a desperate problem, possibly because of the sensationalization of specific instances of juvenile crime by the media. Juvenile violent crime receives countless hours of news coverage, particularly on television, while coverage of issues that may contribute to juvenile crime, such as child welfare and education, is sparse. Compounding this problem is the media's presentation of such crime, which usually includes graphic dramatization of the juveniles' acts, without discussing the various factors that led to the behavior, thereby making the children seem all the more disturbed.

Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1200 (2000).

77. CNN.com, http://www.cnn.com/2005/US/11/14/parents.slain/index.html (last visited Mar. 9, 2006); Findlaw.com, http://writ.news.findlaw.com/commentary/20051024_spilbor.html (last visited Mar. 9, 2006).

78. CNN.com, http://www.cnn.com/2006/LAW/02/22/meangirl.convicted.ap/index.html (last visited Mar. 8, 2006).

79. CNN.com, http://www.cnn.com/2006/LAW/02/22/meangirl.convicted.ap/index.html (last visited Mar. 8, 2006).

adult court.[80] In order to represent the public's interests, district attorneys frequently seek the maximum sentence for these heinous crimes.[81] Because state prosecutors represent "the people," by analogy the public deems such a juvenile offender incapable of reform, and therefore would not benefit from the rehabilitation offered by the juvenile court system.[82]

As certain juvenile crimes gather more media attention, the focus turns to one of punishment, rather than reform. Although the juvenile system originally developed based on the belief that the public was best served by rehabilitating a juvenile offender, the nature of the crime often provokes greater attention. Moreover, the age of the offender can conversely increase public outcry that this juvenile be punished. Therefore, legitimate public interests are often subject to knee-jerk public reactions. Within this context, a juvenile could be executed for his or her crimes, despite the original focus of the juvenile system.

However, sometimes the public reacts compassionately towards a high-profile juvenile case and does not abandon the possibility of rehabilitation. For instance, on February 23, 2006, Cody Posey—who murdered his family when he was only 14, after years of physical and mental abuse—was convicted and sentenced to a juvenile detention facility, where he will be released upon turning 21.[83] The prosecutor told reporters that "unfortunately, there are some kids we can't fix, and this is one of them," and sought a sentence up to 50 years for the killings.[84] The prosecutor

80. For example, on Halloween 2005, Brendan Dassey, a 16 year old, reportedly assisted his uncle in raping and murdering a young photographer named Teresa Halbach. The prosecutor, Ken Kratz, stated: "I intend to hold each of these defendants accountable for the rape, torture and murder of Teresa Halbach." CNN.com, http://www.cnn. com/2006/LAW/03/03/woman.slain.ap/index.html (last visited Mar. 8, 2006). Although the defense alleges that Brendan Dassey was coerced by his uncle, the public has an interest in punishing the perpetrators of such a heinous crime. As such, the district attorney represents the interests of the citizens in seeking a just result.

81. *But see* Laura Beresh-Taylor, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311, 344–345 (2000) ("[d]espite sensational media coverage of juvenile crime, incarceration should not be impulsively imposed on all juveniles.").

82. *See* Victor L. Streib, *Essay: Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim?*, 26 U. TOL. L. REV. 765, 769 (1995) ("[p]rosecuting attorneys are charged to represent the people of the jurisdiction—the community, if you will.").

83. *See* CNN.com, http://www.cnn.com/2006/LAW/02/20/ranch.killings.ap/index.html (last visited Mar. 8, 2006). Cody Posey had killed his parents after his father burned him with a welding rod for refusing to have sex with his step-mother. *Id.* Because Posey had been abused for years, the public gathered and held a candlelight vigil for him prior to the sentencing. *See* CNN.com, http://www.cnn.com/2006/LAW/02/20/ranch.killings.ap/index.html (last visited Mar. 8, 2006).

84. *See* CNN.com, http://www.cnn.com/2006/LAW/02/20/ranch.killings.ap/index.html (last visited Mar. 8, 2006).

commented further that his conduct was "the worst possible behavior that we can think of to use to predict his future behavior."[85] However, the trial judge found that the prosecutors failed to prove that he was beyond rehabilitation based on the testimony of staff workers who oversaw Posey at a juvenile detention facility.[86] After the sentencing, Cody welcomed the chance for rehabilitation: he apologized and asked for a chance to better himself.[87] The court listened and granted him a lenient sentence, allowing him the opportunity for rehabilitation.[88] Thus, while the public may consider some juveniles beyond rehabilitation, some may truly benefit from the rehabilitation offered by the juvenile system, even when the crime itself is severe.

IV. PLEA BARGAINING POST-*ROPER*.

Plea bargaining is, in the words of the Supreme Court, an "'important' and an 'essential' component of our criminal justice system."[89] It is "the process by which a defendant in a criminal trial relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence."[90] "Nearly all criminal cases that are terminated without a completed trial reach a disposition by means of some form of negotiation."[91] Ninety percent of criminal cases end not in trials, but in plea bargains.[92]

Both the prosecution and the defense benefit from plea bargaining.[93] The prosecution is rewarded with a reduced caseload and more cases resulting in incarceration time, which will satiate the public's interest in punishment.[94] Moreover, the defendant will benefit from a reduced sentence, which will benefit them even under statutory sentencing guidelines.[95]

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 81 (2005) (citing Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978) and Santobello v. New York, 404 U.S. 257, 260 (1971)).

90. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 1 (1978).

91. DAVID A. JONES, CRIME WITHOUT PUNISHMENT 109 (1979).

92. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA, 233 Tbl. 9.1 (2003).

93. *See* CASSIDY, *supra* note 89.

94. *Id.*

95. *Id.* In federal court, a defendant receives point deductions for avoiding trial.

Roper will undoubtedly affect the ability to reach plea bargains in juvenile cases. By eliminating the juvenile death penalty, juries have lost their ability to determine whether a juvenile defendant is culpable enough to deserve execution. Similarly, prosecutors will lose some of their ability to settle the case through plea bargaining. However, defense attorneys—and the juvenile clients they represent—will benefit from the *Roper* holding. Moreover, by reducing the stakes of the case, both the prosecution and the defense can focus on achieving the "right" result, not just the harshest.

A. The changing role of the jury.

The *Roper* decision will remove the jury from the equation and will place the focus back on the parties. Formerly, the ultimate decision whether to execute rested with the jury, who could consider mitigating (age, intelligence, or upbringing) or aggravating circumstances (nature of the crime).[96] However, post-*Roper*, the jury cannot play a role in determining the outcome, therefore the burden to reach the "right" result will return to the prosecutor and defense attorney.

Although only the prosecutor could choose to seek the death penalty, ultimately the final say was left to the jury. Because the ultimate decision to execute or not to execute rests with the jury, they must consider the circumstances and life of the offender. Before the holding in *Roper*, the jury decided whether a convicted juvenile would be put to death. Similar to every death penalty case, after the guilt phase of the trial, the jury would have to decide whether the death penalty was warranted. After the close of the guilt phase of the trial, the case progresses to a sentencing phase, unique to death penalty cases. In this phase, each party presents their arguments either for or against the death penalty. To this end, the parties present either mitigating or aggravating circumstances. Mitigating circumstances include, but are not limited to, factors such as age, intelligence, or upbringing.[97] Similarly, aggravating circumstances often involve the particular facts or the nature of the crime.[98] Jurors are required to assess these factors when determining if punishment of the offense warrants the death penalty.

Beyond weighing the defendant's culpability against the nature of the crime, the jury functions on a more esoteric level as representatives of the

96. *See Roper*, 543 U.S. at 628.
97. *See* 41 C.J.S. *Homicide* § 519 (1991).
98. *Id.*

public. Each juror has to weigh the public interest in execution and decide whether the punishment fits the crime. Because a criminal defendant must be tried by a jury of his or her peers, the random selection of jurors represents a sampling of public interest. In terms of juvenile offenders, juries—serving as representatives of that public interest—seldom sentenced juvenile defendants to death.[99] Although pre-*Roper* juries had the ability to order a death sentence, juries would rarely give juveniles the death penalty and those that were sentenced to death were rarely executed.[100]

However, *Roper*'s categorical rule against the juvenile death penalty removes any individualized fact finding by the jury. Justices Scalia and O'Connor voiced this concern in their vigorous dissenting opinions in *Roper*.[101] Juries can no longer consider whether the juvenile possesses the maturity, and hence the culpability, that warrants a heftier sentence. Nonetheless, the decision in *Roper* removes the ultimate question of death or life from the jury. No longer is the jury free to consider aggravating or mitigating circumstances. Because the jury has lost its power to reach the "right" result, the power to resolve the case has fallen back into the hands of the parties: the prosecutor and the defendant.

B. The Prosecutor's Role

The prosecutor plays a unique role in the criminal justice system, especially when it comes to juvenile cases. Because of this role, a prosecutor should strive to do justice, or "achieve a 'just,' and not necessarily the most harsh, result."[102] This applies not just to the trial, but to the entire system—including the terms of a plea bargain.[103] As such, prosecutors are the masters of the plea bargain because they control the charge and the sentence. How they will approach capital juvenile cases post-*Roper* remains unclear. If prosecutors sought to achieve a plea bargain

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99. *See Roper*, 543 U.S. at 571.

100. *See* Streib, *supra* note 67.

101. *See supra* notes 43–51 and accompanying text.

102. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608 (1999). Green argues that "doing justice" requires prosecutors to do more than simply telling the truth and keeping their word. *Id.* at 609. Rather, than acting as a zealous advocate for the state and seeking a conviction at all costs, the prosecutor should instead act in a "quasi-judicial" manner and serve both the court and the defendant fairly. *Id.* at 617. In short:

> It is to be regretted that prosecuting counsel, in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations.

Id. at 614 n.18 (citing People v. Tufts, 139 P. 78, 81 (Cal. 1914)).

103. *See* Green, *supra* 102, at 608.

to a life sentence by threatening the death penalty, their ability to achieve this result is compromised.

Whether one views a prosecutor as the pursuer of justice, or as an agent of the government seeking the harshest possible punishment, it is generally in the prosecutors best interest to negotiate a plea or to settle a case before trial. A successfully negotiated plea benefits the government by ensuring some punishment is given, thereby protecting the public's interest.[104] Beyond avoiding the hassles of a trial, and the possibility of defeat, a plea bargain conserves the scant resources available to state prosecutors.[105] Therefore, plea bargains allow prosecutors to win sentences more successfully and to tackle more cases concurrently. Additionally, the expense of going to trial is avoided, including the salaries and costs of the judge, the prosecutor, the defense attorney, the court staff, etcetera. [106] The prosecutor can also avoid any negative opinions associated with losing the case, especially if the lost case has generated a lot of publicity.[107]

Because there is a heightened need to achieve the right outcome in juvenile cases, prosecutorial discretion becomes even more vital. However, prosecutors do not always have discretion in how they pursue juvenile cases.[108] Although prosecutors generally have broad discretion in the charges they file, they typically exercise these powers only (1) in minor criminal cases; or (2) where prosecution of the juvenile offender is not in the best public interest.[109] This excludes the majority of criminal capital cases—virtually all juvenile capital cases are homicides, with the potential of life sentences.[110] Moreover, the shifting trend towards trying serious juvenile offenses in adult court illustrates the public's attitudes towards effective prosecution of these cases. The *Roper* decision narrows this discretion; prosecutors now have less bargaining power to effectuate pleas.

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104. *See* CASSIDY, *supra* note 89, at 81.

105. *See* CASSIDY, *supra* note 89, at 81. However, the theory that prosecutors settle cases to avoid heavy case loads has come under some attack. *See* Heumann *supra* note 90, at 27. *See also* WILLIAM F. MCDONALD, PLEA BARGAINING, COMMON ISSUES AND PRACTICES, UNITED STATES DEPARTMENT OF JUSTICE 19 (1985).

106. *See* JONES, *supra* note 91, at 63.

107. *Id.*

108. Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN. STATE L. REV. 1071, 1077 (2005).

109. *Id.*

110. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Statistical Briefing Book, at* http://ojjdp.ncjrs.org/ojstatbb/crime/ (last visited Mar. 9, 2006).

However, bargaining is not between equal parties; the prosecutor wields enormous power over the defendant in plea negotiations.[111] Because of this power imbalance, a prosecutor cannot assume that simply because a plea negotiation was reached in a juvenile case that the result is just.[112] By virtue of their position, prosecutors can influence the plea bargaining process by seeking two types of pleas: a sentence bargain, or a charge bargain.[113] A sentence bargain allows a defendant to plead to a charge, in exchange for a more lenient sentence.[114] On the other hand, a charge bargain allows a defendant to plead guilty to one charge, in exchange for the prosecutor dismissing other charges against the defendant.[115]

Typically, a charge bargain does not apply in capital juvenile cases, unless the prosecutor has charged multiple counts of homicide.[116] However, through use of a sentence bargain, the prosecutor has the power to influence the plea by allowing a juvenile defendant to plead guilty to a life sentence, in order to avoid the possibility of a death sentence if the juvenile went to trial. This practice is known as "vertical overcharging," which involves "charging a single offense at a higher level than the circumstances of the case seem to warrant."[117]

Although prosecutors commonly engage in this kind of plea bargaining, it could be seen as unethical to blackmail.[118] These kinds of actions speak more about the skill of the attorneys, rather than the merits of the case and usually involve "gamesmanship" on both the prosecutors and defense attorney's sides.[119] Gamesmanship can lead to unfair plea bargains; if the means used to achieve the plea are unjust, the plea itself is also the wrong result.[120] However, courts are reluctant to consider such a bargain as a

111. *See* CASSIDY, *supra* note 89, at 82.

112. *See* CASSIDY, *supra* note 89, at 82.

113. David A. Starkweather, Note: *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 858 (1992).

114. *Id.*

115. *Id.*

116. *Id.*

117. McDonald *supra* note 105, at 19.

118. *Id.*

119. *Id.* at 49.

120. *See* People v. Rice, 69 N.Y.2d 781, 782 (1987). In *Rice*, during plea negotiations, the prosecution purposefully withheld the fact that a star prosecution witness had died. *Id.* The defendant took the plea, even though he would not have pled had he known about the death of the witness. *Id.* As a result, the court found the prosecutor guilty of prosecutorial misconduct and withdrew the plea. *Id.*

violation of due process, but rather as part of the "give and take" nature of plea bargaining.[121]

If a prosecutor focuses on "doing justice," as opposed to focusing on receiving the harshest result possible, the *Roper* decision could lead to a more fair result. Because the power balance between a juvenile defendant and a prosecutor is grossly disproportional, the incentive for a juvenile to plead to a life sentence—even if the juvenile is innocent—is great.[122] In a study done on the rate of false confessions, out of 125 proven false confessions, 40 of them were given by juveniles charged with homicide.[123] Additionally, professional agencies that train law enforcement personal in interrogation techniques advise that false confessions from juveniles "appear with some regularity in false confession cases."[124] This allows a juvenile, when faced with the pressure of a homicide charge, to confess to a crime he or she did not commit.[125] Moreover, a juvenile defendant may not truly understand the ramifications of the charges before him.[126] Before the *Roper* decision, the threat of possible execution could unduly coerce an innocent juvenile into confessing, in order to receive a life sentence instead. Now the concern that an innocent juvenile could face death evaporates. A prosecutor concerned with seeking justice, and not with the harshest punishment available, would actually stand to benefit from the lesser bargaining power offered post-*Roper*.

In addition to reaching a "just" outcome regarding the juvenile defendant, the prosecutor must also consider the victim's desire for

121. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). In this case, the Supreme Court held it is not vindictive prosecution for a prosecutor to threaten greater charges if the defendant rejects a plea bargain. *Id.*

122. *See* CASSIDY, *supra* note 89, at 82.

123. Brief of Juvenile Law Center et al. as Amici Curiae Supporting Respondent at 27, *Roper*, 543 U.S. 551 (2005) (No. 03-633) (citing to Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the post-DNA World*, 82 N.C. L. REV. 891, 947 (2004)).

124. Brief of Juvenile Law Center et al. at 27–28, *Roper*, 543 U.S. 551 (No. 03-633).

125. *Id.*

126. *See* CASSIDY, *supra* note 89, at 82. Because of their youth, juveniles suffer from "immature decision-making abilities, as well as their limited time perspective, emphasis on short-term benefits versus long term benefits, and willingness to take risks." Brief of Juvenile Law Center et al. at 26, *Roper*, 543 U.S. 551 (No. 03-633) (citing Thomas Grisso & Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 LAW & HUMAN BEH. 333, 353–56 (2003)).

justice.[127] Typically, the facts in these cases are so reprehensible that the victim has a strong desire for retribution.[128] The plea bargaining system shuts out the victim from this process—only the prosecutor and the defendant are involved in plea negotiations.[129] If the defendant reached a plea bargain for life imprisonment, instead of the death penalty, the victim may feel that the system neglected his or her interests. However, in a post-*Roper* world where juveniles can no longer be sentenced to death, this interest is completely negated. Because victims now know that the juvenile cannot be executed, from the inception of the case, they cannot feel that the local prosecutor let them down. Alternatively, they could direct their frustration on the United States Supreme Court; however, the local state District Attorney's office would be exempt from any criticism. The victim could at least take solace in knowing that the prosecutors tried their best to receive a "just" outcome. Thus, prosecutorial agencies could experience some freedom from having to cater to the victims' need for retribution.

Similarly, the prosecutor must also cater to the public's need for just punishment. Juvenile capital cases usually garner a great deal of media coverage.[130] The stakes are raised even higher when the public decides to focus in on the case. Usually the facts of these cases are so reprehensible that the natural public reaction is to try the juvenile in adult court and to seek a heavier sentence. Even if the case does not gain national attention, it usually will create a stir in the local community. These extra concerns mean the prosecutor will be less willing to settle these cases, because they must cater to public sentiment.

In sum, while prosecutors may lose some of their bargaining power, this could result in a more just outcome. Although their ability to achieve plea bargains might be compromised, any prosecutor who is more concerned with doing justice—certainly having an innocent juvenile plead to charges to avoid the death penalty is unjust—would no longer be able to seek the death penalty. In turn, any community pressure to seek a heftier sentence is

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127. Although prosecutors commonly include the victim in the sentencing process, the assumption that victims have something to contribute could be a fallacy. *See* Streib *supra* note 83, at 768–69. Streib writes that:

> A criminal trial and sentencing hearing are about the crime and the accused, and as such, seem particularly ill-suited to serve as a wake or funeral service for the deceased victim . . .we are inducing prosecutors to see themselves as representing the victim and the victim's family, rather than representing the state as is their duty.

Id.

128. *See supra* note 44. Writing for the dissent in *Roper*, Justice Scalia painstakingly describes two horrific homicides committed by juveniles.

129. *See* Starkweather, *supra* note 113, at 858.

130. *See supra* note 71 and accompanying text.

reduced post-*Roper*. Therefore this limitation would serve justice better, even at the expense of some bargaining power.

C. Defense Attorney's Role

The representation of a death penalty case poses a higher challenge for a defense attorney than a regular case. In the eyes of the court, "death is different." [131] Consequently, defense attorneys are advised to treat a death penalty case differently than their regular cases.[132] The defense attorney must "constantly consider the death sentencing ramifications of each step prior to the actual sentencing hearing itself."[133] This heightened sensitivity towards the consequences of failure infects the entire case.

Similarly, juvenile cases also differ from adult cases. Pre-*Roper*, when the age of the defendant was coupled with a potential death sentence, the stakes were raised even higher. Because of the age of the defendant, juveniles require special protections and concerns that also elevate the nature of the case. The defense attorney's focus would shift from reducing jail time to saving a juvenile's life. When seeking a plea bargain to avoid the death penalty, there are three kinds of life sentences, which a defendant can plead to: (1) life without parole; (2) life with a fixed minimum sentence, i.e., twenty-five years; or (3) life where the defendant may be eligible for parole after seven to ten years.[134] Each of these pleas still holds profound ramifications for a juvenile defendant: the possibility of a lost life.

Because of the harsh penalties faced by juvenile offenders, defense attorneys must treat these cases differently by communicating more openly with prosecutors. When representing a juvenile capital case, the defense attorney should maintain pressure on any person in a position to encourage a plea bargain, which in turn requires the attorney to foster more communication and greater cooperation with the prosecutor.[135] To do this,

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131. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (citing Furman v. Georgia, 408 U.S. 238 (1972)).

132. Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 31 AKRON L. REV. 331, 333 (1997).

133. Victor Streib, *Standing Between the Child and the Executioner: The Special Role of Defense Counsel in Juvenile Death Penalty Cases*, 31 AM. J. CRIM. L. 67 (2003).

134. *See* Balske, *supra* note 132, at 333. The nature of the plea bargain depends on the state. *Id.*

135. *See* Balske, *supra* note 132, at 334. Maintaining open communication does not mean catering to the prosecutor's whim. *Id.* Instead of acquiescence, the defense attorney should still confront the prosecutor "when he has mistreated the defense." *Id.* The attorney was advised to do

defense attorneys are commonly advised to inform the prosecution that "the defendant will settle for a life sentence."[136] Additionally, the defense attorney should contact the victim's family, to prove the attorney is not seeking to let a guilty person go free but rather to represent a defendant within the boundaries of the law.[137]

However, following *Roper*, these special concerns disappear. Pre-*Roper*, a defense attorney who was ultimately concerned with saving the juvenile's life might be more willing to settle the case during plea negotiations. Without the possibility of execution hanging around the juvenile defendant's neck, the defense attorney can now focus more on the case, and less on the possible results. This could cause less communication between the district attorneys and the defense attorneys. The defense attorney no longer has to work together with the prosecutor if the defense attorney believes the merits of the case warrant bringing it to trial.

Because the threat of executing the juvenile has been removed, defense attorneys will have less incentive to settle the case. It may actually be in the defense attorney's best interest to now try a juvenile capital case, which the attorney would have otherwise settled pre-*Roper*. The *Roper* decision may encourage defense attorneys, and the juveniles they represent, to take more cases to trial in hopes of winning on the merits of the case. Although the penalties faced by juveniles tried in adult court are still severe—life imprisonment for a youth is certainly no small punishment—the defense attorney no longer has to try to save the juvenile's life from day one. In addition, most juvenile capital cases were tried by public defenders, due to monetary issues. Public defenders may have less incentive to settle because they do not represent a client who pays for and expects progress at the end of the day.[138] Absent any concern that the juvenile could be executed, there is even less incentive for a public defender to settle a case.

Although juvenile defendants tried as adults in homicide cases can no longer be put to death, the juvenile himself may suffer from a system that now prefers going to trial. Typically, the juvenile defendant benefits greatly from the plea bargaining arrangements:

> The defendant also enjoys advantages from plea bargaining that he would not enjoy at trial; including the prompt resolution of the charges against him, the reduction of risk, and an agreement by the prosecutor to lower the defendant's exposure to punishment by reducing the charges or recommending a lenient sentence. Even under a "sentencing

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this as early as possible and to reaffirm his or her position during preliminary hearings. *Id.* at 335. This shows that, regardless of the defense strategy, the entire case is infected when the death penalty is a possibility. *Id.*

136. *Id.* at 334.

137. Balske, *supra* note 132.

138. *See* Streib, *supra* note 133.

> guideline" system, where the defendant's ultimate sentence is fixed by a predetermined range, the prosecutor has the power to offer concessions to the defendant in order to induce him to plea guilty, including agreeing to stipulate about the presence or absence of certain facts that might be considered aggravating or mitigating under the guidelines, and has the power to represent to the court that the defendant has cooperated substantially with the government.[139]

Given how the juvenile system ultimately seeks rehabilitation, juveniles stand best able to benefit from the plea bargaining system. The special concerns of juveniles—coupled with the desire from both sides to reach the right result—illustrates the importance of plea bargaining juvenile cases.

Plea bargaining, however, is not always in the defendant's best interest, nor is the result always a just one.[140] Certainly any juvenile faced with a possible death sentence would undoubtedly feel intense pressure that could unduly coerce them into accepting a plea arrangement. Because of their age, juvenile offenders may not fully understand the charges against them, and because they often make impulsive choices focused on short-term benefits, rather than long term goals, charged juveniles may accept a detrimental plea bargain.[141] The same impulsivity that causes juvenile offenders to commit crimes would undoubtedly lead to hasty plea bargains, if guilty. In addition,if one accepts the conclusion that juveniles as a class are less rational than adults, even innocent juveniles plead to a charge he or she did not commit.[142] An innocent defendant may agree to a plea bargain to avoid the hassles of a trial, especially if the defendant faces a lengthy sentence (or the death penalty in a pre-*Roper* era).[143]

However, in some aspects, the *Roper* decision could foster greater plea bargaining. If defense attorneys insist on bringing more cases to trial, state prosecutors, when faced with overwhelming court dockets, may settle less meritorious cases. Simply because the prosecution possesses less bargaining power does not mean that plea bargains will never occur in juvenile homicides, but rather that the result of the plea bargain will be more fair because the special threat of death has been averted. Defense attorneys can

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139. *See* CASSIDY, *supra* note 89, at 82.

140. *See* CASSIDY, *supra* note 89, at 82.

141. *See supra* notes 122–26. These recent studies, presented to the Supreme Court through several *amici curiae* briefs, clearly show that juveniles lack the decision-making skills to properly assess their situation. *See Roper*, 543 U.S. 551.

142. *See supra* notes 122–23 and accompanying text. This is not just an assumption—studies clearly show that innocent juveniles confess to crimes they did not commit. *Id.*

143. *See* CASSIDY, *supra* note 89, at 82.

focus more on the merits of the case during the negotiation, rather than evading a death sentence for their young clients.

Ultimately, juveniles stand to benefit from the *Roper* decision. Without the possibility of execution to raise the stakes of the case, juvenile defendants accused of homicide will most likely accept fewer plea bargains. Conversely, these cases can now play out in court; the evidence can be presented and the attorneys can argue the case to its full merit. The finders of fact will now be able to decide if the juvenile is truly incorrigible—or if, like Cody Posey mentioned above—capable of rehabilitation. The nature of how the defense attorney approaches a death penalty case is fundamentally different; instead of trying to reduce the length of incarceration, the defense attorney is trying to save the defendant's life.

V. CONCLUSION

The Supreme Court's decision in *Roper* will send ripples through the entire juvenile justice system. Now that the execution of juvenile defendants is forbidden by the Eighth and Fourteenth Amendments, it will be harder to successfully plea out juvenile defendants to life sentences. Prosecutors will no longer be able to settle capital juvenile cases as easily by seeking plea bargains. Consequently, defense attorneys will no longer feel the need to plea out their clients to save their lives and will try the cases on their merits.

Ultimately, the approach will change but most likely the result will stay the same. Although there is now less incentive for a defense attorney to settle the case, the fact that more cases will now go to trial on the merits will increase the prosecutor's workload, thereby forcing the prosecutor to plea out smaller cases. Given that most of the juvenile cases that would warrant the death penalty are few and far between, the net result will be small if any.

However, the approach will change. In capital juvenile cases, the attorneys will no longer have any pressing need to negotiate or to reach the "right result." The special concerns created by the death penalty are eliminated. Although there are still additional interests at stake due to the fact that a juvenile is charged, the life of the juvenile is no longer forfeit if the defense attorney loses (or the prosecution wins). While the cost of a life sentence is high, especially for a young defendant, a life imprisoned is better than a life cut short.

Finally, the *Roper* decision will cause juveniles to unilaterally benefit. Not only can a juvenile offender not be executed for murder, the defense attorney no longer has to focus on saving the defendant's life, but can instead focus on reducing incarceration time. Without the proverbial noose dangling over a juvenile defendant's head, the system's focus can shift back to rehabilitation. Although a juvenile could still be sentenced to life in

prison, the possibility of rehabilitation exists. Moreover, prosecutors can no longer use the threat of the death penalty as a tool to blackmail the juvenile into life sentences. If anything, this will cause the prosecutor to operate more ethically than they are typically accustomed to operating.

With *Roper*, the Supreme Court has spoken that the public is best served by not executing juveniles. Prosecutors, as servants of the public interest, will have to live with the consequences of this. And juveniles, along with the public, will be served better by a system intent on saving them, instead of executing them.