IS LIFE UNFAIR? WHAT'S NEXT FOR JUVENILES AFTER ROPER V. SIMMONS

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I. INTRODUCTION

The juvenile justice system was founded on the concept of rehabilitation.[1] Yet in recent years the focus has shifted to punishment as more children commit violent crimes.[2] Legislatures and courts continue to struggle to find a balance between acknowledging the lesser culpability of children while holding those children accountable for their actions.[3] In 2005, Justice Kennedy, writing for the majority in Roper v. Simmons,[4] acknowledged that juveniles cannot be classified with adult offenders because of their lack of psychological development and vulnerability to outside influences: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character."[5] However, Justice Kennedy also noted, "we cannot deny or overlook the brutal crimes too many juvenile offenders have committed."[6] The Supreme Court, in attempting to further define the culpability of juveniles by outlawing the death penalty, created more unanswered questions about the limits of juvenile punishment.

While Roper v. Simmons appeared to be a positive result for juvenile justice, some states' approaches to life sentences are crippling efforts to take a hard look at the effects of life imprisonment upon juveniles who are

[1] 1 Thomas Jacobs, Children and the Law: Rights and Obligations § 1:1 (May 2006), *available at* CALRO § 1:1 (Westlaw).

[2] *Id.* at § 1:2.

[3] *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988); *In re* Gault, 387 U.S. 1 (1967); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968); Naovarath v. State, 779 P.2d 944 (Nev. 1989).

[4] 543 U.S. 551 (2005).

[5] *Id,* at 570.

[6] *Id.* at 572.

no longer being rehabilitated.[7] When the Supreme Court held the death penalty for juveniles to be in violation of the Eighth and Fourteenth Amendments in 2005,[8] all juveniles on death row adopted life sentences.[9] But are these sentences any better for the offenders or our society? The mere existence of life without parole allowed the Supreme Court to be comfortable in its decision to outlaw the death penalty for juveniles. Justice Kennedy, writing for the majority in Roper v. Simmons, explained, "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[10] Because the possibility of life without parole was partly justification for abolishing the death penalty for juveniles, it will be difficult for Roper to be justification for the abolition of life without parole. However, Roper provides insight into the approach that the Court will take if it eventually grants certiorari on this issue. The shift to life without parole as the new extreme punishment has created a further dilemma: where juveniles who received the death penalty were once thrust into the spotlight while lawyers fought to handle their cases on automatic appeal, now child offenders will spend their lives forgotten in prisons.[11] Those who have the possibility of parole may be released after spending the first half of their lives in prison. In forty-two states and under federal law, juveniles can be sentenced to life without the possibility of parole.[12]

The problem with sentencing juveniles to life without parole is that a wide variety of juveniles fall within the adult sentencing guidelines once they are tried as adults, and these juveniles can receive the same sentence for calculated murder, pure lapse in judgment, or felony murder. To illustrate these dilemmas in juvenile law, consider the following hypotheticals, based on actual cases:

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[7] See discussion supra at Section IV.A.

[8] Roper, 543 U.S. at 566.

[9] See Adam Liptak, Serving Life, With No Chance of Redemption, N.Y. TIMES, Oct. 5, 2005, at A1.

[10] Roper, 543 U.S. at 572.

[11] See Adam Liptak, Serving Life, With No Chance of Redemption, N.Y. TIMES, Oct. 5, 2005, at A1. An assistant warden in Louisiana explains that many prisoners whose death sentences have been commuted to life sentences rather than overturned are put on suicide watch because their chances of release have gone down to zero. Id.

[12] THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES, Human Rights Watch (2005), available at http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

Michael, a seventeen-year-old Texas resident, decides that he wants to kill someone. He meticulously plans the crime and chooses an elderly victim. After he enters her home, he knocks her unconscious and strangles her, watching her slowly die. Michael ties her up and puts her body in the trunk of his car. He drives to a bridge in his town and dumps the body into the river. The next day, Michael brags to his friends in school about his accomplishments. After Michael is arrested, he freely admits he murdered the victim and shows absolutely no remorse.[13]

In Florida, Timothy, age fourteen, is playing video games with a few kids at a friend's house. His friend's older brother also has a friend over and they ask the three younger kids if they want to come with them while they burglarize a neighbor's empty home. Timothy, not wanting to stay alone, agrees to tag along. The five children ride their bikes over to the neighbor's home, stopping to feed some ducks on the way. When they arrive, they put their bikes in the bushes and walk to the front door. Two of the younger kids run away at the last minute, and the older kids call them names. Timothy decides he does not want to be called names, so he stays with the older teenagers. They break a window and crawl inside, expecting the house to be empty. However, an elderly woman and her son are in the home. Timothy, scared and shaking, hides behind a chair while one of the older teenagers shoots and stabs the residents.[14]

In Florida, Rebecca, age fifteen, has trouble fitting in at school. She eventually falls into a crowd that enjoys drinking and occasional drug use. One night, after a particularly trying day, she drinks half a bottle of bourbon from her parent's liquor cabinet and joins her friend, Clifton, who is going out to a club. Clifton carries a gun with him at all times. They hail a cab, and within minutes, the cab driver has been shot. In trial, each blames the other. Rebecca truthfully cannot remember anything from that night. Although the jury never figured out exactly what happened, the jury decides that it was enough she was present, convicting her to life without parole.[15]

All of the above defendants were sentenced to life in prison without the possibility of parole. The first example would have been sentenced to death but could not be after the decision in Roper. The second example may have been sentenced to life imprisonment with the possibility of parole, but in

[13] This example is based on the facts in *Roper v. Simmons*.

[14] This fact pattern is based on a real life example provided in Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

[15] This fact pattern is based on a real life example provided in Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

1995, Florida changed its law to eliminate the possibility of parole for those sentenced to life.[16] The third example represents the most difficult dilemma: where the juvenile commits a serious crime, but the motivation behind committing that crime arises from characteristics that make teenagers who they are—conflicts in identity, lapses in judgment, and peer pressure.

This Comment will examine life imprisonment for juveniles, especially that without the possibility of parole. Part II will discuss the history of juvenile sentencing and the treatment of juveniles as a separate class. Part III will examine Eighth Amendment jurisprudence and Roper v. Simmons. Part IV will apply the reasoning in Roper to the context of life imprisonment for juveniles, looking specifically at recent state legislation in the area of juvenile sentencing. Finally, Part V offers possible suggestions how to balance punishment and retribution in the context of juveniles.

II. THE HISTORY AND CURRENT TRENDS OF JUVENILE JUSTICE

A. Beginnings of the Juvenile System

From the beginning of the United States and throughout the 1800s, juvenile criminals were treated and punished as adults.[17] As time progressed, states, upon realizing that juveniles had potential to be rehabilitated, began to implement juvenile systems.[18] By 1925, a formal juvenile system had been established in the United States and for the next forty years operated as a separate system without any oversight. [19] During this period "[t]here was little or no place for law, lawyers, reporters and the usual paraphernalia of courts . . . because the proponents of the Juvenile Court movement had specifically rejected legal institutions as appropriate to the rehabilitation of children."[20] In 1967, the Supreme Court ruled that Fourteenth Amendment procedural due process applies to juveniles in In re

[16] *Id.*

[17] 1 Thomas Jacobs, Children and the Law: Rights and Obligations § 1:1 (May 2006), *available at* CALRO § 1:1 (Westlaw).

[18] *Id.*

[19] *Id.*

[20] *Id.* (quoting Wadlington, Whitehead & Davis, Cases and Material on Children in the Legal System 198 (1983).)

Gault.[21] The lower court summarized the attitude towards children at this time: "Juvenile courts do not exist to punish children for their transgressions against society. The aim of the court is to provide industrialized justice for children. The delinquent is the child of, rather than the enemy of, society and their interests coincide."[22] As time has progressed, the debate between punishment and rehabilitation has intensified, but the overall goal still appears to be the latter.[23]

B. Current Trends

In recent years, some states have criticized the very purpose of the juvenile system as a rehabilitative process and "propose[d] to replace it with concepts of accountability and proportionality, concepts traditionally associated with the penal process."[24] Change in the attitude approaching juvenile crime, however, seems inevitable.[25] While many of the deficiencies of the juvenile court resulted from unrealistic expectations, an evolving attitude of punishment creates more realistic ones.[26] With this growing philosophy of punishment, the underlying goal of rehabilitation and protection of the youth can hopefully still remain.[27]

Consistent with an evolving philosophy of punishment, all states currently have a process by which juveniles can be tried as adults under certain circumstances.[28] The three main types of transfer provisions include waiver provisions, direct file, and statutory exclusion. Most states have a combination of these.[29] Waiver provisions always originate in the juvenile court and leave the decision to transfer to the judge: a juvenile court judge must specifically order that the juvenile be allowed to be prosecuted as an

[21] 387 U.S. 1 (1967).

[22] *In re* Gault, 407 P.2d 760, 765 (1965), *rev'd*, 387 U.S. 1 (1967).

[23] 1 Thomas Jacobs, Children and the Law: Rights and Obligations § 1:2 (May 2006), *available at* CALRO § 1:2 (Westlaw).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] PETER GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, (1998) [hereinafter TRYING JUVENILES], *available at* http://ojjdp.ncjrs.org/pubs/tryingjuvasadult//toc.html.

[29] *Id.*

adult criminal.[30] The degree of discretion varies from state to state.[31] Some states' wavier decision is purely discretionary, others have a presumption in favor of waiver, and others set forth circumstances where waiver is mandatory.[32] Most discretionary waiver statutes identify threshold criteria that must be met before the juvenile court can consider a waiver to adult court.[33] The criteria often include those set forth by the Supreme Court in Kent v. United States:[34] generally a minimum age, a type or level of offense, a satisfactorily serious record of previous delinquency, or a combination of the three.[35] Direct file provisions allow the prosecutor to file directly in adult criminal court.[36] Like waiver transfers, the criteria for direct file provisions vary widely among the states and usually require the prosecutors to look at similar criteria as those considered by judges in waivers.[37] Statutory exclusion provisions allow state legislatures to determine the class of crimes that will receive original jurisdiction in criminal courts.[38] A juvenile accused of an excluded offense specified by statute is considered an adult from the beginning by the state, and when the prosecutor decides to charge a juvenile with a statutorily excluded offense, the case must be filed in criminal (adult) court.[39]

C. Juveniles as a Separate Class

Throughout the history of the United States, juveniles have often been treated as a distinct and separate class.[40] The government often deprives

[30] *Id.* The states that only have waiver provisions include California, Connecticut, Hawaii, Kansas, Kentucky, Maine, Missouri, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Tennessee, Texas, and West Virginia.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] 383 U.S. 541, 566-67 (1966).

[35] TRYING JUVENILES, *supra* note 28 (explaining the factors are "always considerably more specific and are usually at least loosely based on the eight factors enumerated in *Kent*").

[36] TRYING JUVENILES, *supra* note 28. Nebraska is the only state with only direct file provisions.

[37] *Id.*

[38] *Id.* The states with only statutory exclusion are New Mexico and New York. States with all three mechanisms are Arizona, Florida, Georgia, Louisiana, Montana, Oklahoma, and Vermont. See this publication for a list of states with combinations of waiver, direct file, and statutory provisions.

[39] *Id.*

[40] 1 Thomas Jacobs, Children and the Law: Rights and Obligations § 1:3 (May 2006),

juveniles of many benefits of laws because of their age and immaturity, and it is this same ideology that formed the basis for juvenile courts.[41] In contracts, "[f]or the protection of infants against their inexperience and the undue advantage that might otherwise be taken of them, the law gives them the power of disaffirming their contracts and conveyances, except to the extent that they will be liable for the reasonable value of necessaries furnished to them."[42] At common law, children were found to come of the age of full capacity at age twenty-one.[43] However, many states have replaced common law with statutes ending the duration of infancy at eighteen or nineteen or upon a certain event, such as marriage or military enlistment.[44] Infants under this age are presumed to not have the capacity to contract, and their contracts are voidable.[45] Because the contract is voidable and not void, the actions of a child in ratifying the contract are considered.[46]

In tort, however, children are not given the same protections as in contract.[47] Generally, "infants are subject to liability for their torts, whether they are committed intentionally or negligently or as a matter of strict liability. Thus there may be recovery from an infant for assault or battery, false imprisonment, trespass to land or chattels, conversion, negligence, defamation, seduction or deceit."[48] The court must consider the immaturity of the infant when deciding whether he or she committed the tort at all, especially with intentional torts where state of mind is an element.[49] In the case of negligence, the standard of conduct varies according to the age, intelligence, and experience of the child.[50] If the court finds that these factors to be lacking, then no negligence may be found.[51] But if the court finds the tort has been committed, then an infant is subject to the same

available at CALRO § 1:1 (Westlaw) (specifically discussing children and the Bill of Rights).

[41] *Id.*

[42] Restatement of Torts, § 895I, cmt. a.

[43] Williston on Contracts § 9:3

[44] *Id.*

[45] Williston on Contracts § 9:5

[46] *Id.*

[47] Restatement of Torts, § 895I, cmt. a.

[48] *Id.*

[49] *Id.*, cmt. b.

[50] *Id.*

[51] *Id.*

extent of liability as an adult.[52]

Criminal law follows a similar approach as torts. Because, like torts, state of mind is often an element in criminal law, age and maturity of the child is considered.[53] However, unlike torts, courts sometimes turn a blind eye to the age and maturity factors when addressing children who commit severe "adult" crimes.[54] This paradox that children are often deprived of rights in society but treated as harshly as adults in criminal cases is often pondered in the courts. In Workman v. Commonwealth,[55] where the petitioners challenged the Kentucky sentencing standards confining juveniles to life imprisonment without the benefit of parole for rape, the Court of Appeals of Kentucky mused "[i]t seems inconsistent that one be denied the fruits of the tree of the law, yet subjected to all of its thorns."[56] In some states, however, children are judged by different standards than those imposed upon mature adults. Some presume certain-aged younger children incapable of committing crimes.[57] In Naovarath v. State,[58] the Supreme Court of Nevada reduced a juvenile's sentence for murder from life imprisonment without the possibility of parole to life imprisonment with the possibility of parole, stating, "[c]hildren are and should be judged by different standards from those imposed upon mature adults . . . punish[ment of] this severity . . . is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds."[59] This attitude of treating children as adults creates another unfortunate problem for juveniles: those juveniles who commit harsh crimes are caught up in the wave of the "crackdown on crime" attitude that many states embrace. States in general are moving towards stronger punishments and longer time in prison, and juveniles treated as adults are

[52] *Id.*

[53] Laura Dietz, et al, 21 Am. Jur. 2d, Criminal Law § 35.

[54] *Id.* (stating some statutes exclude particular offenses, or particular categories of offenses as applied to juveniles).

[55] 429 S.W.2d 374 (Ky. 1968).

[56] *Id.* at 377.

[57] Naovarath v. State, 779 P.2d 944, 946 (1989) (citing LaFave and Scott, Handbook of Criminal Law, 351 (1972)). *See also* TRYING JUVENILES, *supra* note 28, *available at* http://ojjdp.ncjrs.org/pubs/tryingjuvasadult//table8.html. In Oklahoma, for youth ages 7 to 14, the State must prove that, at the time of the act, the youth knew it was wrong. In Washington, youth ages 8 to 12 are presumed incapable of committing a crime.

[58] 779 P.2d 944 (Nev. 1989).

[59] *Id.* at 947.

caught in this trend.[60]

III. THE EIGHTH AMENDMENT AND THE JUVENILE DEATH PENALTY

A. The Eighth Amendment

The Eighth Amendment of the United States Constitution provides, "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"[61] and applies to the States through the Fourteenth Amendment.[62] Eighth Amendment jurisprudence states that punishment for the crime should be "graduated and proportioned to [the] offense"[63] and "bars not only punishments that are inherently 'barbaric,' but also those that are 'excessive' in relation to the crime committed."[64] The Eighth Amendment applies to the death penalty, as the most severe punishment "with special force."[65] A death sentence is considered cruel and unusual if it is imposed without an individualized determination that the death penalty is appropriate.[66] Although it remains the second most severe punishment, life imprisonment without parole does not require such a determination.[67]

B. Roper v. Simmons and the Juvenile Death Penalty

Roper v. Simmons,[68] decided by the Supreme Court in 2005, contains incredibly disturbing facts about a murder committed by a sociopath, who committed the crime partly encouraged by the lesser punishments against juveniles. The severity of the crime, the indifference of the juvenile, and the lack of deterrence caused by the reduced sentences for juveniles all make this an extremely important decision. At the age of 17, after deciding

[60] Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1.

[61] U.S. CONST. amend. VIII.

[62] Robinson v. California, 370 U.S. 600, 666–67 (1962).

[63] Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[64] Roper v. Simmons, 543 U.S. 551, 588 (2005) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

[65] Thompson v. Oklahoma, 487 U.S. 851, 856 (1988).

[66] Harmelin v. Michigan, 501 U.S. 957 (1991).

[67] *Id.* at 996.

[68] 543 U.S. 551 (2005).

he wanted to kill another human being, entered the home of Shirley Crook, tied her up with electrical wire and duct tape, and dumped her in the Meramec River.[69] There was no doubt Simmons committed the crime. He told others he wanted to murder someone, explaining to his friends that they would get away with it because they were minors.[70] After a valid Miranda waiver and less than two hours of interrogation, Simmons confessed to the crime.[71] The issue before the court was whether it is permissible under the Eight and Fourteenth Amendments to execute a juvenile who was older than fifteen but younger than eighteen when he committed a capital crime.[72]

The majority opinion, written by Justice Kennedy, focused its decision on the underlying "'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[73] Roper enlarged upon Thompson v. Oklahoma,[74] which held the death penalty to be unconstitutional for juveniles under sixteen and Atkins v. Virginia,[75] which held the death penalty to be unconstitutional for the mentally retarded. The majority used three factors to determine whether imposing the death penalty upon juveniles violated the Eighth Amendment.

The court began with "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."[76] The Court was not particularly interested in the number of states that had outlawed the death penalty for juveniles, but the consistency of the direction of change among state legislation.[77] In contrast to the swift pace of abolition seen before the decision in Atkins, between the time the Court decided Stanford v. Kentucky[78] and Roper, only five more states had abolished the death penalty for juveniles. However, the Court still considered this significant enough to find a consistent direction of change.[79] The Court explained that in the past it had been specifically swayed by the

[69] *Id.* at 556–57.
[70] *Id.* at 555.
[71] *Id.* at 557.
[72] *Id.* at 555.
[73] *Id.* at 561 (quoting Trop v. Dallas, 356 U.S. 86, 100–101 (1958)).
[74] 487 U.S. 815 (1988).
[75] 536 U.S. 304 (2002).
[76] *Id.* at 564.
[77] *Id.* at 566.
[78] 492 U.S. 361 (1989).
[79] *Roper*, 543 U.S. at 565.

fact that no State that had already prohibited a specific practice (such as the execution of the mentally retarded) then subsequently passed legislation reinstating the penalty.[80] The Court determined that to be particularly significant considering "the general popularity of anticrime legislation and . . . the particular trend in recent years toward cracking down on juvenile crime."[81] The Court next looked at "society's evolving standards of decency," including a look at other countries' positions on the juvenile death penalty.[82] Finally, the Court addressed the Eighth Amendment directly, deciding whether in its own independent judgment, the death penalty is disproportionate.[83]

The concurrence by Justices Stevens and Ginsburg simply agreed that the evolving standards of decency demand such a reading of the Eighth Amendment, noting, "[i]f the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of seven year old children today."[84] The concurrence called the majority's opinion as one within the evolution of continuing debate surrounding the Constitution which the best lawyers of its day would wholeheartedly join.[85]

The two dissents, however, struggled with the bright line rule the majority set forth. The first dissent, written by Justice O'Connor, agreed with the general principles of Eighth Amendment jurisprudence set out by the majority, but objected to its broad ban on the death penalty, regardless of the crime.[86] She explained that although "adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct than adults . . . many state legislatures [have concluded] that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case."[87] Justice O'Connor demanded a more obvious showing that society has truly gone against the practice of putting juveniles under age eighteen to death.[88] In response to Atkins being used as a basis to decide Roper, she explained that while mentally retarded offenders are by

[80] *Id.* at 566.
[81] *Id.*
[82] *Id.* at 562–63.
[83] *Id.* at 572–73.
[84] *Id.* at 587.
[85] *Id.*
[86] *Id.* at 588.
[87] *Id.*
[88] *Id.*

definition those whose "cognitive and behavioral capacities have been prove [sic] to fall beyond a certain minimum," many seventeen year old offenders maintain the maturity of adult offenders.[89]

The second dissent, written by Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, scathingly accused the majority of ignoring legislation and allowing the views of foreign courts to interpret the United States Constitution.[90] Justice Scalia explained that previous cases facing the Court have required overwhelming opposition to a challenged practice, generally over a long period of time.[91] Justice Scalia criticized the majority opinion for undermining faith in the jury, who almost always withhold the death penalty from an under-eighteen offender except in the rare case where it is warranted.[92] The dissent further pointed out that the United Nations Convention on the Rights of the Child, which the majority used as support for its decision, prohibits life without the possibility of parole for juveniles along with the juvenile death penalty.[93] If the Court uses treaties and foreign laws to influence its decision, then the dissent saw no reason why life without parole for juveniles should remain constitutional.[94] At the oral argument, Justice Scalia admitted that he did not see the logical line between the juvenile death penalty and life without parole.[95]

IV. APPLYING DEATH PENALTY JURISPRUDENCE TO LIFE WITHOUT PAROLE

A. The Review of the Objective Indicia of Consensus and State Response to Roper

As set forth in Roper, the beginning point is "the review of the objective indicia of consensus, as expressed in particular by enactments of legislatures that have addressed the question," specifically looking at the

[89] *Id.* at 602.

[90] *Id.* at 608.

[91] *Id.* at 609. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989); Ford v. Wainwright, 477 U.S. 399 (1986); Enmund v. Florida, 458 U.S. 782 (1982); Corker v. Georgia, 433 U.S. 584 (1977).

[92] *Roper*, 543 U.S. at 622–24.

[93] *Id.* at 623.

[94] *Id.*

[95] Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

consistency of the direction of change.[96] In 2005, 9,700 people were serving life sentences for crimes committed before they turned eighteen.[97] 2,200 people in the United States are serving life sentences without parole for crimes they committed before eighteen, more than 350 of those prisoners were 15 years or younger at the time of the crime.[98] Human rights groups estimate that twenty-six percent of juveniles sentenced to life without parole are for felony murder.[99] Forty-two states and the federal government allow offenders under eighteen to be convicted to life imprisonment without the possibility of parole.[100] Ten states have no minimum age, and thirteen set minimum ages from ten to thirteen.[101] Seven states have more than one hundred juveniles serving such sentences, and those states sending the largest percentage of their youths to prison for life without the possibility of parole are Virginia and Louisiana.[102] All life sentences handed down in Louisiana, in fact, are those without parole.[103]

Roper energized legislatures who want to reduce or strengthen juvenile rights. Compared to states that opposed the death penalty for juveniles, states are not consistently changing their policies toward life sentences, but the issue is only lately coming to the forefront of juvenile law.[104] Since the country-wide "crackdown on crime" began, the trends have generally been turning more in favor of punishment rather than rehabilitation, across the country and across all ages.[105] Even with the murder rates decreasing, the proportion of juvenile murderers receiving life sentences without parole is increasing, according to human rights groups.[106] For those who have the

[96] *Roper*, 543 U.S. at 566.

[97] Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1.

[104] Currently, 42 states and under federal law allow juveniles under 18 to be sentenced to prison for life without parole. At the time *Roper* was decided, 29 states had specifically outlawed the death penalty for juveniles. At the time *Atkins* was decided, 30 states had specifically outlawed the death penalty for the mentally retarded.

[105] Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1.

[106] Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005,

possibility of parole, governors are more hesitant to commute life sentences due to a concern about repeated offenses.[107] Fourteen states reported in 2001 that they released fewer than ten prisoners each.[108] Among eighteen states that were able to provide data from 1993, the amount of juveniles sentenced to life imprisonment rose seventy-four percent in ten years.[109] One explanation for this is that while the Supreme Court places more restrictions upon the death penalty and national fervor for the death penalty diminishes, states begin to embrace life sentences as an alternative.[110] Even the majority opinion in Roper used the option of life without parole as a justification for the decision to outlaw the death penalty for juveniles: "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular, for a young person."[111] The Court does admit, however, that juveniles are much less susceptible to deterrence because of their limited culpability.[112] The Court also relied on Article 37 of the United Nations Convention on the Rights of the Child, which contains an express prohibition on capital punishment for juveniles.[113] What the majority fails to mention is that Article 37 also has express prohibition on life without parole for juveniles.[114] Additionally, Justice Scalia's dissent scoffs at the majority for its perplexing analysis: "[i]f we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is not really needed, since 'the punishment of life imprisonment without the possibility of parole is itself a severe sanction' gives little comfort."[115] A further problem, especially for juveniles convicted to life imprisonment, is that children who were sentenced to death have appointed attorneys working aggressively on

at A1.

[107] *Id.*

[108] *Id.* 2001 is the latest year for which national data is available. Eight other states said they released fewer than two dozen each.

[109] *Id.*

[110] Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1.

[111] Roper v. Simmons, 543 U.S. 551, 571 (2005).

[112] *Id.*

[113] *Id.* at 576.

[114] United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–1470.

[115] *Roper*, 543 U.S. at 623.

their automatic appeals.[116] These attorneys are not provided for children who are sentenced to life imprisonment, with or without parole, and the juveniles sentenced to life are often locked away and forgotten because pro bono attorneys are simply not interested in the topic of life imprisonment.[117] Capital punishment cases are rarer and more controversial than life cases, and as a result, courts, attorneys, and human rights groups pay them special notice.[118]

These punitive trends, while intended to be aimed at adult offenders, often have adverse affects upon juveniles. For example, only days after the Supreme Court handed down its decision in Roper v. Simmons, Senators Rodney Ellis and Eddie Lucio presented SB 226 and SB 60 to Texas Governor Rick Perry on a requested fast track emergency basis, which passed into law only one month later.[119] SB 226 banned the execution of juveniles, while SB 60 instituted life without parole as a possible sentence in capital cases and eliminated life sentences as an option for the jury in capital murder and other offense.[120] While many death penalty opponents hailed the bill as a success in a state where the death penalty numbers are highest,[121] the effect upon juvenile offenders is devastating because the bill does not contain an exception for those who commit crimes under the age of eighteen. Because juveniles can no longer be sentenced to death, juries who wish to punish a juvenile for murder or other serious crimes are forced to sentence them to life imprisonment without the possibility of parole. This, in fact, is what the Texas Legislature expressly intended. Senator Ellis' press release explained:

"The Court's ruling also brings to light one of the major defects in our punishment system: the lack of a life without parole option in Texas," said

[116] Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1.

[117] *Id.*

[118] *Id.* Nonprofit groups helping those sentenced to death also do not have the resources to represent lifers. *Id.*

[119] Press Release From the Office of State Senator Rodney Ellis, *Ellis and Lucio Call for Emergency Status on Legislation to Ban Execution of Juveniles and Life Without Parole*, Mar. 4, 2005, *available at* http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr05/p030405a.htm. *See also* House Research Organization, S.B. 60, May 23, 2005.

[120] *Id. See also* House Research Organization, S.B. 60, May 23, 2005.

[121] Since the death penalty was reinstituted in 1976, Texas has carried out 13 of the 22 executions of juvenile offenders, nearly 60 percent of all such executions in America. When *Roper* was decided, there were 29 inmates on Texas Death Row who were juveniles when sentenced. *Id.*

Lucio. "Essentially, Texas juries will now only have one option when sentencing a juvenile in capital crimes cases: life with the possibility of parole. With the law as it is right now, this means that young persons who commit these terrible crimes are guaranteed to someday walk the streets again.

> SB 60 does not diminish my support for the death penalty, but as this ruling proves neither the death penalty nor life with the possibility of parole provide certainty to the families of victims - only life without parole guarantees that an these offenders will stay behind bars. Forty six other states give juries this option and so should Texans. I have complete faith in Texas juries and I believe we should give them the full range of options when deciding the severest of punishments, Lucio added.

Regarding SB 60 and the Court's ruling, Lucio noted:

> It is now time, more than ever, to pass this important piece of legislation. Now, more than ever, the safety of the citizens of this state demands this. We have one choice left to make. Are we going to allow persons who Texas juries would previously sentence to death to be eligible for parole one day or are we going to lock those people up and keep them away from our community forever?

Although Senator Lucio seems to imply that life without parole is an added option for juries to consider, he does not make clear that in capital murder and "other offenses,"[122] the only option for juveniles tried as adults is life without the possibility of parole.

Colorado passed a new law in May 2006, providing for parole hearings after 40 years for juveniles over thirteen convicted of first-degree murder and sentenced to life in prison, replacing the prior sentencing option of life without parole.[123] This law was introduced after increased attention on the subject by two local newspapers and the Human Rights Watch report.[124] In Washington, the legislature passed HB 1187 in their 2005 legislative

[122] *See* House Research Organization, S.B. 60, May 23, 2005.

[123] National Center for Juvenile Justice, State Juvenile Justice Profiles, Colorado, http://www.ncjj.org/stateprofiles/profiles/CO06.asp (last visited March 4, 2007).

[124] *Id.*

session.[125] This bill eliminates the application of mandatory minimum sentences for juveniles tried as adults.[126] The bill itself acknowledges the emerging research on brain development of juveniles, resulting in lessened culpability.[127]

New legislation in Michigan also directly addresses the issue of life without parole for juveniles. In November 2005, Senator Brater of Michigan announced she was drafting legislation in an attempt to lower the number of juveniles who serve life without the possibility of parole.[128] Introduced on January 10, 2007, Senate Bill No. 6 will prohibit sentencing an individual convicted as a juvenile to imprisonment for life without the possibility of parole.[129] If this legislation is not passed by the Michigan legislature, this rejection plus the type of reaction by Texas—enacting specific legislation to address the issue of keeping juveniles imprisoned for life with no possibility of parole—would provide evidence that some states are not yet willing to move in the direction of reducing or eliminating life without parole for juveniles. However, if Michigan were to pass this legislation, this could signal the beginning of a new change in direction. In Roper, the Court acknowledged that even a small change could still be significant enough to demand a legal change:

> There is, to be sure, at least one difference between the evidence of consensus in Atkins and in this case. 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. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of Stanford have abandoned it in the intervening 15 years-four through legislative enactments and one through judicial decision.

[125] H.B. 1187, 59th Leg., Reg. Sess. (Wa. 2005), *available at* http://apps.leg.wa.gov/.

[126] *Id.*

[127] *Id.*

[128] Christina Hildreth, *Bill Would End Life Without Parole for Minors*, THE MICHIGAN DAILY, Nov. 1, 2005, at 1, *available at* http://www.michigandaily.com.

[129] Senate Bill No. 6, *available at* http://www.legislature.mi.gov/documents/2007-2008/billintroduced/Senate/pdf/2007-sIB-0006.pdf.

> Though less dramatic than the change from Penry to Atkins . . . we still consider the change from Stanford to this case to be significant.[130]

Yet an important distinction remains. Before the Court decided Roper, other prominent cases concerning the constitutionality of the death penalty had come before the Court. By the time the Court heard Roper, it had already outlawed the death penalty for juveniles under the age of sixteen in Thompson v. Oklahoma.[131] The issue of juvenile life imprisonment without parole has not yet reached the Supreme Court, and other cases generally concerning life imprisonment have not fared in favor of the criminal.[132] Over time, as more states introduce legislation, the Supreme Court could begin considering the question of the constitutionality of life without parole for juveniles. But as with capital punishment, the Supreme Court will most likely start by setting age restrictions instead of a wide ban on the sentence.

State courts tend to read Roper in isolation and refuse to extend the reasoning to life without parole when examining the Eighth Amendment. Louisiana recently addressed this issue in State v. Craig.[133] After Roper, Craig's death sentence for kidnapping and murder was set aside, and he was re-sentenced to life in prison without parole. On appeal to the Louisiana Court of Appeals, the defendant argued that the trial court erred in denying his motion to reconsider sentence because his sentence was unconstitutional, violating both the Eighth Amendment and the Supremacy Clause.[134] The defendant used Roper as a basis for his argument, but the Court rejected it because of the fact that the Court was very specific that Roper applied only to the juvenile death penalty. The Court of Appeals

[130] Roper v. Simmons, 543 U.S. 551, 565 (2005).

[131] 487 U.S. 815, 857 (1988).

[132] *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 285 (1980). The Court explains, "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the [life imprisonment]. Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 273.

[133] 944 So.2d 660 (La. App. 2006).

[134] *Id* at 662. Craig argued that since the United States became a party to the ICCPR, that treaty became coexistent with the Constitution, and should therefore control his sentencing. This court rejected his argument, stating that even if this were true and although the Supreme Court used the ICCPR in arriving at their decision in *Roper*, the ICCPR contains an excepting provision. *Id.* at 663.

held that the sentence imposed was not unconstitutionally excessive and not grossly disproportionate to the severity of the offense, specifically rejecting that that life without parole for a seventeen-year-old is a per se violation of the Eighth Amendment. Therefore, this only further confirms that Roper can only be used by advocates of juvenile rights for its procedure, not for its holding.

B. Society's Evolving Standards of Decency and International Standards

The second factor set out by the Supreme Court in Roper addresses the "society's evolving standards of decency," which focuses on international positions[135] regarding juvenile life without parole. Only three other countries that have juveniles serving life imprisonment without parole, including Israel, South Africa, and Tanzania, which have seven, four, and one, respectively.[136] In November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child, which provides special legal protection, safeguards, and care for children.[137] Every country in the world, except the United States and Somalia, has ratified this treaty.[138] Article 37 has an express prohibition on capital punishment and life imprisonment without the possibility of parole for crimes committed by juveniles under eighteen.[139] The United States became a party to the International Covenant on Civil and Political Rights (ICCPR) in 1992, but when the United States ratified the ICCPR, it attached a limiting reservation, stating the following:

> [T]he policy and practice of the United States is generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal

[135] *Roper*, 543 U.S. at 562–63.

[136] Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1. While forty percent of adults were sentenced to life between 1988 and 2001 for crimes other than murder, only sixteen percent of juveniles were sentenced for a crime other than murder.

[137] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 *I.L.M.* 1448.

[138] *Roper*, 543 U.S. at 576.

[139] United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 *I.L.M.* 1448, 1468-70. The relevant section of Article 37 provides: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

> justice system. Nevertheless, the United States reserves the right, in exceptional circumstances to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.[140]

The United States asserts the right through this limiting reservation to try juveniles as adults through certification.

While the same reasoning that applied in Roper to capital punishment can also apply to life without parole because the treaties contain provisions that address both equally. Roper, however, used the treaties and foreign decisions to enhance their opinion. The hard look at the overall national trend and states' legislation served as the most important factor in the decision. Roper only further confirmed that the Courts only look to foreign opinion to confirm the centrality of rights within the United States.

C. Life Imprisonment Without Parole as a Disproportionate Punishment

The third factor in Roper addresses the Eighth Amendment directly, deciding whether the punishment of life without parole is disproportionate for juveniles.[141] Juveniles sentenced to life without parole are much more likely to be sentenced for murder than are their adult counterparts, implying that juries and prosecutors reserve the punishment for only the most serious crimes.[142] The question remains whether life without parole is too cruel and unusual for a juvenile, a class of defendants who are often considered as having diminished culpability. Addressing this point, the majority in Roper acknowledged that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[143] Because the Court decided that the Eighth Amendment applies to the death penalty with "special force," juveniles are entitled to a harder look than the average adult because of their immaturity.[144] While a death sentence is considered cruel and unusual if it

[140] THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES, Human Rights Watch (2005), *available at* http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

[141] *Roper*, 543 U.S. at 572–73.

[142] Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

[143] *Roper*, 543 U.S. at 570.

[144] *Id.*

is imposed without an individualized determination that the death penalty is appropriate,[145] life imprisonment without parole does not require such a determination.[146]

The very existence of the juvenile justice system acknowledges the differences between adults and juveniles. The creation of the juvenile system was founded on two main fundamentals: first, that juveniles are less capable of mature judgment than adults, making them less culpable, and second, they are more likely to respond to rehabilitation.[147] Scientific studies suggest that the reasons for the creation of this system were correctly founded. Some scientists argue that adolescents' brains operate differently from adults, which causes some adolescents to perceive greater threats and make snap decisions without realizing the consequences of their actions.[148] Other studies additionally state that there are significant maturity of judgment differences between adolescents and adults, especially when the contemplation of consequences is involved.[149] If these results are true, then both of the bases of the juvenile system are being ignored by this country.

V. CONCLUSION

Life imprisonment without parole for juveniles is indeed a harsh penalty, but the prohibition of the death penalty in Roper leaves it as a significant option for juveniles who commit particularly heinous crimes. Ironically, Roper, while considered an achievement for juvenile justice, has pushed some states to compensate for a current lack of the ultimate capital punishment. The broad imposition of life without parole in some states risks imposing harsher punishments on juveniles who may not commit such heinous crimes. This is the downfall of Roper v. Simmons.

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[145] Harmelin v. Michigan, 501 U.S. 957 (1991).

[146] *Id.* at 996.

[147] 1 Thomas Jacobs, Children and the Law: Rights and Obligations § 1:1 (May 2006), *available at* CALRO § 1:1 (Westlaw). *See also* Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment of Adolescence: Why Adolescents May Be Less Culpable Than Adults*, BEHAVIORAL SCIENCES AND THE LAW, vol. 18 (2000), *available at* http://www.oja.state.ok.us.

[148] *See* Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, SCIENCE NEWS ONLINE, vol. 165, no. 19 (May 8, 2004), *available at* http://www.sciencenews.org/articles/20040508/bob9.asp.

[149] Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment of Adolescence: Why Adolescents May Be Less Culpable Than Adults*, BEHAVIORAL SCIENCES AND THE LAW, vol. 18 (2000), *available at* http://www.oja.state.ok.us.

Since the beginning, courts have struggled to understand the role the system plays in developing wayward juveniles while continuing to protect society. The decision in Roper v. Simmons in attempting to clarify this role has added to the confusion. Because the decision is fairly recent, effect of the holding upon juvenile punishment remains unknown, but states are revealing they are interpreting the decision to be strictly limited to the death penalty. Some legislatures, however, are using this decision to change their sentencing laws to either become more punitive or become more lenient toward juveniles. States must remember the purpose of the juvenile system. This country does not want children who make devastating mistakes and are able to be rehabilitated to be grouped with sociopaths and locked away forever. Despite being certified as adults, juveniles facing serious punishment need to be treated differently than adult offenders. All states should keep the possibility of life with parole for juveniles as an option for the jury. States should additionally set minimum ages for juveniles to be convicted to life without parole. Ultimately, the direction of change over the next few years will determine whether the issue will rise to the forefront of juvenile justice issues and whether the Supreme Court will be considering the issue anytime soon.