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Why Use a Hammer When a Scalpel Will Do? Suggestions for Fairer Juvenile Plea Bargaining in Kentucky

Aaron Wallace Meek
University of Kentucky

NOTES

WHY USE A HAMMER WHEN A SCALPEL WILL DO? SUGGESTIONS FOR FAIRER JUVENILE PLEA BARGAINING IN KENTUCKY

*Aaron Wallace Meek**

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* J.D. Candidate, University of Kentucky J. David Rosenberg College of Law, Class of 2020. Sincere thanks to every editor of Volume 108 for their hard work on this note and their constant companionship this year.

INTRODUCTION

In the context of criminal punishment, "children are different."[2] Since the turn of the twenty-first century, the Supreme Court has shielded juvenile offenders from the harshest punishments offered by the criminal justice system. In a trilogy of cases, the Court held that the Eighth Amendment prohibited the imposition of the death penalty to juvenile offenders,[3] and later extended that protection to prohibit mandatory life without parole (hereinafter LWOP) sentences.[4] Central to the Court's reasoning in each case was the scientific community's growing acceptance that juveniles exhibit lower impulse control and a predisposition to engage in reckless behavior due to their incomplete cognitive development.[5] In *Miller*, Justice Kagan identified "immaturity, impetuosity, and failure to appreciate risks and consequences" as "hallmark features" of adolescence.[6] Generally, then, these decisions emphasize that the severity of the punishments available to juvenile criminal defendants requires limiting due to the consequences of their cognitive development.

Alongside the growth of Eighth Amendment protection of juvenile offenders, many states, including Kentucky, have taken steps to construct a fairer juvenile sentencing system through ongoing litigation and legislative reform.[7] In the wake of the Court's decision in *Miller*, several individuals sentenced to life without parole are now challenging their convictions, with varying degrees of success.[8] Despite this improvement, significant work yet remains before Kentucky's juvenile offenders receive the fundamental fairness owed to them.

An area of significant concern in the juvenile justice system is plea bargaining. Approximately ninety-five percent of all criminal convictions are obtained through plea negotiations; research shows these rates are similar for juveniles.[9] In order for a guilty plea to be effective, the court must find the defendant to have entered this plea "voluntarily and intelligently."[10] The Court's acceptance of a sentencing framework based on cognitive development however, creates friction when assessing the competence of minors. The Court noted this tension in both *Miller* and *Graham*.[11]

One specific area of concern is the acceptance of "hammer clause" provisions in guilty plea agreements for juvenile defendants. A "hammer clause" is "a provision in a plea agreement which, in lieu of bail, allows the defendant, after entry of his

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[2] Miller v. Alabama, 567 U.S. 460, 480 (2012).

[3] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[4] *Miller*, 567 U.S. at 489.

[5] *Id.* at 477.

[6] *Id.*

[7] *See* KY. REV. STAT. ANN. § 610.220(2) (West 2019) (reducing the amount of time that low-level juvenile offenders were required to spend in specialized treatment and detention centers in order to give priority to higher-level offenders).

[8] Associated Press, *4 in Kentucky Seek New Sentences for Juvenile Murder Cases*, COURIER J. (July 31, 2017, 11:01 PM), https://www.courier-journal.com/story/news/crime/2017/08/01/4-kentucky-seek-new-sentences-juvenile-murder-cases/527984001/ [perma.cc/L2GD-KV44]; *see also* Phon v. Commonwealth, 545 S.W.3d 284, 288 (Ky. 2018).

[9] Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611 (2016).

[10] Brady v. United States, 397 U.S. 742, 758 (1970).

[11] *Miller*, 567 U.S. at 477; Graham v. Florida, 560 U.S. 48, 68 (2010).

guilty plea, to remain out of jail pending final sentencing."[12] If the defendant complies with the conditions of the plea agreement, then the prosecution will recommend a certain, typically lower than the maximum, sentence.[13] If the defendant violates the agreement, the prosecution will "throw the book at them" so to speak.[14] The Kentucky Supreme Court upheld the use of hammer clauses in adult cases, provided the judge not abuse his discretion by committing herself to impose the maximum sentence at the plea hearing.[15] Despite their upholding of the practice, the court expressed wariness with the practice and emphasized that they were discomforted by these clauses' reliance on the threat of judicial enforcement.[16]

This Note argues that the law's recognition that a juvenile's cognitive development ought to influence the understanding of their culpability should be extended to the understanding of a juvenile's capacity in plea negotiations. If courts are willing to concede that juveniles lack sufficient decision-making ability so as to justify barring of certain forms of punishment, then the lack of mature decision-making functions ought to bar them from being bound to plea agreements that impose strict conditions with harsh penalties contingent upon—and often inhibited by—those same functions.

Part I of this Note will first discuss the historical purpose behind the separation of juveniles into a separate legal class and outline the procedure of the criminal proceedings at issue throughout the rest of the Note. Part II will trace the Supreme Court's gradual acceptance of a development-based juvenile justice system through its jurisprudence and provide an overview of contemporary, psychological research related to juvenile decision-making. Part III examines the potential harms faced by juvenile defendants in the plea bargain process, focusing specifically on "hammer clauses" often found in Kentucky guilty pleas. Finally, Part IV will advocate a two-part solution: first, the prohibition of the use of hammer clauses in juvenile criminal cases and second, a plea system with increased oversight to ensure that juvenile offenders are provided the fairest process possible.

I. STRUCTURE OF THE JUVENILE CRIMINAL JUSTICE SYSTEM

This section proceeds in two parts. First, this section provides a brief overview of the history of juvenile criminal law in America since the nineteenth century. The through-line of this historical account is the simultaneous decline in the juvenile justice system's emphasis on rehabilitation and the increase in social concern over serious offenses committed by juveniles. Second, this section explains the policy benefits derived from increased reliance on plea bargains, as well as the resulting costs.

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[12] Knox v. Commonwealth, 361 S.W.3d 891, 893 (Ky. 2012).
[13] *Id.*
[14] *See id.* at 893–94.
[15] *Id.* at 899.
[16] *Id.*

A. History of Juvenile Justice

Originally, the juvenile court system developed in order to *rehabilitate* children rather than punish offending conduct.[17] Key to this distinction was the view that children were less culpable for their actions and punishment should be limited accordingly.[18] The states attempted to realize this philosophical goal of rehabilitation through the creation of non-adversarial courts where the machinery of the state would work together in order to protect the best interest of the child.[19] Early juvenile courts attempted to achieve these goals in both form and substance: terms of art such as "warrants" and "trials" were replaced by "petitions" and "dispositions," and hearings were conducted in private to avoid public stigma.[20] At each stage in the process, juvenile courts attempted to distinguish themselves from ordinary criminal tribunals.

Over time, state legislatures across the country began to direct more juveniles into adult courts, especially when "serious" offenses were at issue.[21] Juveniles were entered into adult courts via two methods: (1) legislative waiver, otherwise known as "bindover" statutes, and (2) judicial waiver.[22] These bindover statutes mandate that juveniles charged with certain offenses be excluded from juvenile court and instead tried "as an adult."[23] Proponents of legislative waiver argue that individuals who commit certain serious offenses, regardless of their age, are incapable of correction and the juvenile system, with its focus on rehabilitation, would be wasted on them.[24]

In addition to mandatory bindover statutes, most states also allow for judicial waiver. This form of waiver occurs when the state files a motion requesting that a juvenile be tried outside of juvenile court, and the juvenile court holds a bindover

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[17] Susan R. Bell, 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). Illinois established the nation's first juvenile court in 1899 in response to pressure from Progressive Era social activists who sought to instill moral virtue in child offenders in order to prevent children from becoming lifelong criminals. *Id.* at 215–16; *see also* D. Brian Woo, *Cudgel or Carrot: How* Roper v. Simmons *Will Affect Plea Bargaining in the Juvenile System*, 7 PEPP. DISP. RESOL. L.J. 475, 483 (2007).

[18] Francis Berry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 641 (1994).

[19] *See* Bell, *supra* note 17, at 209.

[20] *Id.*

[21] *Id.* at 215–16.

[22] *See* Woo, *supra* note 17, at 484; *see also* Matthew William Bell, Comment, *Prosecutorial Waiver in Michigan and Nationwide*, 2004 MICH. ST. L. REV. 1071, 1073 (2004) (characterizing the emergence of waiver statutes as a recognition that certain juvenile offenders are beyond rehabilitation).

[23] *See* Woo, *supra* note 17, at 484. An example of a bindover statute is a Michigan law that allows for defendants between the ages of 14 and 18 to be charged as an adult if the crime they are accused of committing is designated as a felony or punishable by more than one year in prison. *See* MICH. COMP. LAWS § 712A.2d (West 2020). Such statutes are common across the nation. *See, e.g.*, OHIO REV. CODE ANN. § 2152.12(A)(1)(a)(i)–(ii) (West 2020).

[24] *See* DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 28 (2001) ("[T]he decision to transfer a case still denotes that a youthful offender is beyond whatever treatment capacity remains in the juvenile justice system.").

hearing in response to the motion.[25] At that hearing, the judge must consider: (1) if it is credible that the juvenile committed the offense, and (2) if the juvenile is amenable to rehabilitation.[26] Most states grant the juvenile court judge significant discretion in this judgment.

In modern times, increasing numbers of juveniles have been *bound over* to adult courts due to increased public pressure to punish serious and capital offenders.[27] Scholars note that homicides committed by juveniles receive significantly greater media attention than homicides committed by adults.[28] Simultaneously, studies show that public confidence in rehabilitative models of justice is declining.[29] Increased media attention arguably increases the pressure on the agents of the state—the prosecution—to reach a result that the public finds just.[30] This confluence of decreased public trust in rehabilitation and increased options to punish juveniles as adults results in an increase in the number of juveniles who are subject to the harshest penalties the justice system has to offer.

B. The Role of Plea Bargaining

An emerging reality of the American criminal justice system is that the vast majority of prosecutions are resolved through plea bargain rather than trial.[31] From the perspective of a defendant, accepting a guilty plea poses numerous potential advantages. First, the entry of a guilty plea ensures a swift resolution to judicial proceedings.[32] Second, a defendant may judge the risk of receiving a guilty verdict, accompanied by a longer sentence, as too great and decide to accept the plea as a way of mitigating the harm of their conviction.[33] From an institutional standpoint, plea bargains increase efficiency by reducing the number of pending cases in the court system.[34]

In spite of these benefits, a realistic account of the criminal justice system's increased reliance on plea bargains must take account of the harms this practice has on defendants. The aforementioned account of the benefits of pleas relies on the assumption that the machinery of the criminal justice system does not advantage one party over the other or any class of defendant more than another. This, however, is not always the case. For one, in the current federal sentencing regime based on limited judicial discretion and mandatory minimum statutes, the prosecution plays

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[25] *See* Bell, *supra* note 17, at 214–15.

[26] *Id.*; *see also* McCarthy, *supra* note 18, at 631–32.

[27] *See* McCarthy, *supra* note 18, at 641–42.

[28] Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1200 (2000) (arguing that serious crimes committed by juveniles receive increased and sensationalized news coverage emphasizing that the child who committed the offense was disturbed).

[29] McCarthy, *supra* note 18, at 641–42.

[30] Woo, *supra* note 17, at 491.

[31] *See* Redlich & Shteynberg, *supra* note 9, at 611.

[32] *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal Justice today is for the most part a system of pleas, not a system of trials.").

[33] Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 950–51 (1986).

[34] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 989 (2000).

an outsized role in determining the punishment faced by a defendant.[35] Across both the federal and state systems, prosecutors enjoy wide latitude in their decision of initial charges to file, which shapes the course of plea negotiations going forward.[36] The National District Attorney's Association articulates a standard that a prosecutor's role in plea negotiations is to balance the interests of the state alongside those of the juvenile.[37] And undoubtedly many prosecutors adhere faithfully to this standard. However, the level of discretion places a great deal of power in the hands of individual actors that, as individuals, may be susceptible to implicit biases regarding defendants.[38]

A related, but distinct harm is the *disengagement* of the defendant from the negotiation process. While the procedural protection of the right to counsel is essential to ensuring fairness in the justice system, a defendant's control over plea negotiations is limited.[39] As such, a key decision in the plea negotiation process is the choice of the defendant to trust that his counsel is obtaining the best possible outcome. Given the complexity of these negotiations, however, many defendants lack the perspective necessary to make such a judgment. The result is a defendant's resigned disengagement from the process as a whole.[40] In the case of juveniles, this risk of disengagement or poor decision-making is amplified because of the unique cognitive attribute they possess at their stage of development.[41]

II. A DEVELOPMENTAL APPROACH TO JUVENILE JUSTICE

A. Supreme Court Jurisprudence

A central tension in the development of juvenile criminal law and procedure is whether the juvenile defendant should be treated more like an adult—thus receiving the increased procedural protection of the criminal court—or acknowledging that juveniles are different from adults in many ways, especially from a developmental standpoint. The Supreme Court has grappled with this tension on numerous occasions, and the policies undergirding those decisions provide guidance on how the law should treat juveniles during the plea negotiation process.

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[35] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1326 (2014) ("Legal scholars, judges and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences.").

[36] *See* Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQUETTE L. REV. 9, 9–10 (2007).

[37] Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, CRIM. JUST., Fall 2008, at 61, 62.

[38] Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–91 (2018) (arguing that prosecutors may rely on proxies, such as race, as a proxy for criminal attributes given the limited information, times, and resources they possess); *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1140–41 (arguing that the lack of accountability for prosecutors charging decisions, combined with wide prosecutorial discretion, creates a risk of implicit biases impacting prosecutorial decision-making).

[39] *See* Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 85–87 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

[40] *See* Redlich & Shteynberg, *supra* note 9, at 622 ("Further, observers noted that 'many of the children looked bewildered or disengaged during the plea colloquy . . . .'").

[41] *See infra* p. 14.

The Court's seminal decision, *In re Gault*, exemplifies this tension.[42] *Gault* concerned the due process rights owed to a juvenile defendant in a delinquency hearing.[43] The Court held that children must be afforded the same due process protections as adults in a criminal case.[44] Central to the Court's reasoning was the majority's disavowal of the paternalistic model of juvenile court proceedings.[45] The Court reasoned that increased procedural protections would increase the rehabilitative efforts of the criminal justice system by ensuring that the defendant is being treated fairly.[46] In the following years, the Court would require that judicial waiver of a juvenile to adult criminal court required a hearing,[47] as well as extend the beyond reasonable doubt standard to delinquency proceedings.[48] The foundational principle underlying this expansion of juvenile procedural rights is that "good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . ."[49]

The emergence of increased procedural safeguards has not been met with universal acceptance. One family of disagreements conceptualizes the juvenile courts as a separate institutional body with different goals and competencies.[50] Under this line of thinking, the procedural safeguards of the adult criminal court are inappropriate for the juvenile court system because the juvenile court is not *supposed* to be adversarial.[51] As such, the implementation of an adversarial process into these proceedings conflicts with the rehabilitative ideals of the juvenile court system.[52]

This category of disagreements is both internally unsound and inapplicable to the discussion of plea bargains.[53] Another family of scholarship provides a more nuanced approach. According to this second body of thought, the importation of procedural safeguards *themselves* poses no institutional harm; but the broader conception of juveniles as analogous to adults for purposes of criminal proceedings poses harmful collateral consequences.[54] In particular, the decline of separate

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[42] 387 U.S. 1 (1967).

[43] *See id.*

[44] *Id.* at 4.

[45] *Id.* at 25–26 ("The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from a downward career.'").

[46] *Id.* at 26.

[47] Kent v. United States, 383 U.S. 541 (1966). The court based its holding on the understanding that a juvenile court does not have unlimited *parens patriae* power and must not act with "procedural arbitrariness." *Id.* at 554–55.

[48] *In re* Winship, 397 U.S. 358 (1970).

[49] *Id.* at 365–66.

[50] *See Gault*, 387 U.S. at 78–79 (Stewart, J., dissenting).

[51] *Id.*

[52] *Id.*

[53] The majority dispenses with the institutional objection of the dissent by reference to the consequences of the juvenile court proceeding. Specifically, delinquent juveniles were confined to an institution and had their liberty restricted; confinement is sufficiently analogous to incarceration, which is a hallmark punishment of adult criminal proceedings. *See id.* at 27 (majority opinion).

[54] *See* Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 46 (2003) (arguing that *Gault* failed to consider how procedural due process rights could be shaped to address the unique needs

juvenile courts led to an increase in the number of juveniles tried as adults, via legislative or judicial waiver.[55] This influx of juveniles into adult courts occurred simultaneously to an increased in severity in sentencing, including the spread of LWOP sentences, the proliferation of mandatory minimums, and the abolition of parole in many states.[56] Thus, a collateral consequence of increasing procedural protections for juveniles by reference to adult criminal proceedings is that an increasing number of juveniles will be punished like adults.

While the latter half of the twentieth century saw the backslide of rehabilitative models of juvenile criminal justice modeled on progressive era moral education, the turn of the millennium saw the emergence of new approaches to juvenile justice reform that rely on cognitive science. One line of thought that recently found its footing in the Supreme Court is a *developmental approach* to juvenile justice. The most important principle to this approach is that criminal choices are, in part, motivated by developmental factors, and, as such, youthful criminal defendants are judged to be less culpable than adults who commit similar crimes because their cognitive development inhibits their decision-making ability.[57]

Justice Kennedy's majority opinion in *Roper v. Simmons* provides an early articulation of this developmental approach.[58] In *Roper*, the Court held that the execution of individuals who were under eighteen years old at the time they committed their offense violated the Eighth Amendment.[59] There, the defendant, Christopher Simmons, had been convicted of murder in the first degree and sentenced to death for planning and committing the murder of Shirley Crook.[60] While Mr. Simmons was eighteen years old at the time he was sentenced, he was seventeen at the time of the crime.[61] Following sentencing, Simmons' defense counsel put on evidence about the defendant's "immature" and "impulsive" behavior in a petition for the court to set aside its judgment.[62] In spite of this, the trial court refused to set aside its judgment and Simmons' lost at each subsequent stage in the appellate process until the Supreme Court agreed to hear the case.[63]

Two related strands of reasoning influenced the Court's decision in *Roper*. First, the Court acknowledged that the question of whether a given punishment violates the Eighth Amendment depends on whether the practice violated society's evolving standards of decency.[64] As such, the definition of cruel and unusual punishment evolves over time and the Court must consider whether a "national consensus"

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of the juvenile courts and created false dichotomy between adult rights or the absence of rights); *see also* ELIZABETH S. SCOTT & LAURENCE STEINBURG, RETHINKING JUVENILE JUSTICE 120–21 (2008).

[55] *See* McCarthy, *supra* note 18, at 670.

[56] Elizabeth S. Scott et al., *The Supreme Court and the Transformation of Juvenile Sentencing*, MODELS FOR CHANGE 1 (Sept. 2015), https://jlc.org/sites/default/files/publication_pdfs/The_Supreme_Court_and_the_Transformation_of_Juvenile_Sentencing%20%281%29.pdf [https://perma.cc/P6DW-8JRQ].

[57] SCOTT & STEINBERG, *supra* note 54, at 130.

[58] *See* 543 U.S. 551 (2005).

[59] *Id.* at 551.

[60] *Id.* at 556.

[61] *Id.* at 557.

[62] *Id.* at 559.

[63] *Id.*

[64] *Id.* at 564.

prohibits the practice in question.[65] In the case of the juvenile death penalty, thirty states had banned the death penalty by the time of the *Roper* decision.[66] The Court relied on this fact to demonstrate a consistent line of thought among the several states, and this fact weighed in favor of the juvenile death penalty's abolishment.[67]

In support of this holding, Justice Kennedy articulated three conclusions of modern social science to support the claim that juveniles should bear less culpability than their adult counterparts. First, the Court stated that juveniles' "underdeveloped sense of responsibility"[68] leads to their being "overrepresented statistically in virtually every category of reckless behavior."[69] Second, the Court acknowledged that juveniles are "more . . . susceptible to negative influences and outside pressures . . ." in part due to the fact that they have less control over their environment.[70] Finally, the Court accepted the premise that a juvenile's "character" is not fully developed.[71] As a result, the "personality traits of juveniles are more transitory, less fixed[,]" than adults.[72] The Court's acceptance of these three premises leads to the conclusion that the "penological justifications" for capital punishment are less well-founded in the case of juveniles than in the case of adults because their incomplete development entails diminished culpability.[73]

The Court developed the idea of juvenile's diminished culpability five years later in *Graham v. Florida*, holding that mandatory LWOP sentences for non-homicide offenses violated the Eighth Amendment.[74] Then in 2012, the Court decided *Miller v. Alabama* and extended the holding of *Graham* to cover homicide.[75] Justice Kagan's majority opinion, in that case, contained the strongest articulation to date of a developmental framework to juvenile sentencing. In *Miller*, the Court emphasized that the central dilemma in each of these cases with the disparity between the severity of the punishment with the culpability of a class of offenders.[76] Alongside this dilemma is the growing scientific consensus that there are "fundamental differences between juvenile and adult minds."[77] For the Court, these cognitive differences warrant "constitutional[] differe[nces]" in the way the law treats juvenile offenders.[78]

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[65] *Id.* The concept of a "national consensus" is gauged in part by the enactments of legislatures that have considered the question at issue. *Id.*

[66] *Id.*

[67] *See id.* at 566–67.

[68] *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[69] *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

[70] *Id.* (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

[71] *Id.* at 570.

[72] *Id.* (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

[73] *Id.* at 571.

[74] 560 U.S. 48, 74 (2010).

[75] *See* 567 U.S. 460, 489 (2012).

[76] *Id.* at 470.

[77] *Id.* at 472 (quoting *Graham*, 560 U.S. at 68). The court noted that "[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Id.* at n.5 (quoting Brief for Am. Psych. Assoc. et al. as Amici Curiae Supporting Petitioners).

[78] *Id.* at 471.

Additionally, the *Miller* Court went further than *Roper* in its reasoning. The *Miller* Court accepts that juveniles are not only more prone to making a rash judgment but further argued that cognitive science supports that juveniles are amenable to rehabilitation.[79] Thus, the Court reasons that mandatory LWOP sentences are not just disproportionate in relation to the level of culpability due to juvenile offenders, but also foreclose a significant possibility that the offender may be rehabilitated through less severe forms of punishment.[80]

The Court's recognition of the impact of juvenile cognition on a defendant's status is not limited to inquiries into their culpability for sentencing purposes. In *J.D.B v. North Carolina*, the Court held that a defendant's age was a factor defining custody for *Miranda* purposes.[81] Relying on *Roper*, the Court stated that age is more than simply a "chronological fact[,]" but is indicative of the way a child thinks.[82] Specifically, children "generally are less mature and responsible than adults," they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," and they "are more vulnerable or susceptible to. . . outside pressures" than adults.[83] Applying the developmental framework set out in *Graham* and *Roper* to the context of police interrogation, the Court reasoned that "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"[84] The majority analogizes to situations in civil contexts, such as contractual incapacity and limited negligence liability, to support the general proposition that children are not simply "miniature adults."[85] In this way, the Court expanded its view of developmental juvenile justice beyond culpability.

While the Court's decisions make explicit their view that juvenile's developing cognition and reduced decision-making competence leaves them more susceptible to committing crimes, implicit in that rationale is a juvenile's lack of ability to effectively participate in the judicial process *after* they have been arrested of the crime.[86] In particular, commentators express concerns that juvenile defendants have a *relative incapacity* to "deal effectively with police, execute plea agreements, or participate competently in their trials."[87] Just as juveniles rashness may escalate petty theft into something more serious, that same rashness might lead to the rejection of a plea offer that should have been taken or a confession that should not have been made.[88]

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[79] *Id.* at 473 ("Life without parole 'forswears altogether the rehabilitative ideal.' . . . It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change.").

[80] *Id.*

[81] 564 U.S. 261 (2011). *J.D.B.* concerned a student who had been questioned by a uniformed police officer, alongside school administrators, in a conference room of the school. *Id.* at 265. At no point did the defendant receive Miranda rights. *Id.* at 266.

[82] *Id.* at 272 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[83] *Id.*

[84] *Id.* (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948)).

[85] *Id.* at 274.

[86] *See* Elizabeth S. Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 679–80 (2016).

[87] *Id.* at 680.

[88] *See id.*

B. Further Research on the Capacity of Juveniles in Legal Contexts

In the years since *Miller*, social science data has continued to accumulate, demonstrating that adolescent decisions are often short-sighted and highly prone to influence by social pressure.[89] In particular, juveniles have been shown to be susceptible to "reward sensitivity[.]"[90] That is to say, if developing adolescents are informed that their decisions are likely to result in positive external responses (e.g., happiness by a parent, approval by a person in authority such as defense counsel or opposing counsel, etc.), then they are more likely to make those decisions.[91]

This is not to say that juveniles are wholly incompetent and that plea bargains should be banned for youthful offenders altogether. In fact, data supports the conclusion that juveniles are capable of making decisions equally as rationally as adults in many contexts.[92] Psychologists divide decision-making into two broad categories: cool cognition and hot cognition.[93] The former involves decisions made in environments which are *non-emotional* or *non-social* contexts (i.e., those that involved deliberation without high stress or social pressure).[94] Most people develop the ability to fully engage in cool cognitive activities by the age of sixteen.[95] Conversely, hot cognition occurs in situations that are very stressful and entail high amounts of social pressure.[96] Individuals do not develop the appropriate cognitive mechanisms to engage in hot cognition until their early to mid-twenties.[97]

Any stage in the process of criminal investigation and adjudication is a *hot* context under the preceding definition. The threat of punishment is inherently stressful and emotional. Regarding the plea negotiation context specifically, juveniles are forced to weigh the threat of punishment against the likelihood of their conviction at trial.[98] Additionally, this process is mediated by and through counsel, often with input from parents and other members of the public service.[99] Given these facts, it would seem that plea negotiations meet both criteria to be considered a hot context: they are both highly stressful and emotional, and the juvenile defendant is subject to multiple vectors of social pressure. As such, it would stand to reason that juveniles lack the fully developed cognitive "tools" to be able to navigate the plea process with the same degree of competency as a similarly situated adult.

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[89] *See* Laurence Steinburg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL., no. 1, 2009, at 459, 468.

[90] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193, 204 (2010).

[91] *See id.* at 204–05.

[92] *See* B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 82, 83–86 (2013).

[93] *Id.* at 83.

[94] *Id.*; *see also* Erika Fountain, Adolescent Plea Bargains: Developmental and Contextual Influences of Plea Bargain Decision Making (May 2, 2017) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

[95] *See* Fountain, *supra* note 94, at 5.

[96] *Id.* at 4–5.

[97] *Id.* at 6.; *see also* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013).

[98] *See* Fountain, *supra* note 94, at 1.

[99] *Id.* at 24.

This analysis of hot and cold cognition and the results drawn from its application to the plea bargain process fit squarely alongside psychological research of juvenile capacity in pre-adjudicative and adjudicative contexts. The Court's decision is *J.D.B.* was supported by a wealth of psychological research that demonstrates juveniles struggles to understand *Miranda* warnings.[100] In particular, a study by Thomas Grisso found that juveniles often failed to comprehend the significance of *Miranda* warnings, as well as the fundamental rights available to them in the justice system.[101] In addition to the failure to comprehend the vocabulary used in *Miranda* warning, Grisso's study found that juveniles struggled to understand the *function* of those rights.[102] That is, over one-fourth of juveniles believed that their attorney worked for the court that was hearing their case; many believed that their attorney would be the ultimate decider of guilt and innocence, and many juveniles believed that invoking their right to silence was a punishable offense.[103] In each instance, the relative number of adults who believed each of those false statements was significantly lower.[104] Essentially, many juveniles struggled mightily with legal decision-making prior to adjudication.

Not a great deal of research has been done on juvenile decision-making in the plea bargain context specifically. One study found that willingness to plead guilty to a hypothetical plea offer decreased as the detained defendants decreased in age.[105] Almost three-fourths of younger adolescents accepted the plea, while only half of the adults did the same. [106] The study's authors drew two observations. First, the difference between the younger adolescents and adult's acceptance of a hypothetical plea is attributable in part to increased compliance with authority figures in the younger group.[107] Second, adolescents are less likely to focus on the overall risks of their choices in plea bargaining or consider the long-term consequences of the legal decisions they make.[108]

Another study, which surveyed juveniles between the ages of eleven and seventeen detained awaiting their trials, found that older adolescents (i.e., late teens) were more likely to make *strategic decisions* related to plea bargaining than their adult counterparts.[109] Adolescents aged fifteen to seventeen were more likely to consider the strength of the evidence against them when considering whether or not to accept a plea.[110]

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[100] *See* J.D.B. v. North Carolina, 564 U.S. 261, 270–73 (2011).

[101] *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1134–37 (1980).

[102] *Id.* at 1148.

[103] *Id.* at 1157–59.

[104] *Id.*

[105] *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 351 (2003).

[106] *See id.*

[107] *See id.* at 357.

[108] *Id.*

[109] *See* Jodi L. Viljoen et al., *Legal Decision of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & HUM. BEHAV. 253, 265, 271 (2005).

[110] *Id.* at 271. Note: The study did not find a difference in the actual rate of proposed acceptance of pleas.

Finally, one study suggests that juveniles struggle to understand that rights afforded to them by law are distinct from, and in fact meant to curtail, authority figures.[111] Rather, they "perceive their rights as privileges afforded by adults."[112] While this phenomenon clearly undermines the ability of a child to truly understand their right to silence and counsel, it also endangers the ability of a juvenile to be a knowing and willing participant in a plea negotiation due to misperception of their right to trial. Each of the preceding studies suggests that the degree to which a juvenile defendant critically examines a plea offer is contingent upon their age. In other words, their decision-making is contingent upon the degree to which they are cognitively developed.

III. SPECIFIC HARMS FACED BY JUVENILE DEFENDANTS

A. Kentucky Juvenile Criminal Procedure

The question of whether a juvenile can be tried in adult criminal court depends on the class of offense the individual was charged with. A child as young as fourteen years old can be tried as an adult if he or she is "charged with a capital offense, Class A felony, or Class B felony."[113] If the child satisfies this definition, then they are designated as a *youthful offender*.[114] Recently, Kentucky has moved to reform its juvenile criminal law, in particular, its sentencing procedure, to match modern standards.[115]

Additionally, Kentucky case law has increasingly moved to recognize that youthful offenders, though tried as adults, are still children in certain contexts. For example, the Kentucky Court of Appeals recognized that age is a factor in assessing a defendant's competency in the context of a *Boykin* colloquy.[116] However, much work remains to be done in order to ensure that juveniles receive a fair criminal procedure which matches their cognitive status.

B. The "Hammer Clause"

Of particular concern is Kentucky's continued acceptance of *hammer clauses*. A hammer clause is a "provision in a plea agreement, which in lieu of bail, allows the defendant, after entry of his guilty plea, to remain out of jail pending final sentencing."[117] If the defendant "complies with all the conditions" of the clause and appears at the sentencing hearing, the Commonwealth will recommend an agreed

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[111] *See* Buss, *supra* note 54, at 48.

[112] *Id.*

[113] KY. REV. STAT. ANN. § 635.020(2) (West 2019).

[114] *Id.* § 640.010.

[115] For example, Kentucky recently amended its statutes to conform with the Court's holdings in *Miller* and *Graham*. *See id.* § 640.040(1); *see also* Shepherd v. Commonwealth, 251 S.W.3d 309, 321 (Ky. 2008).

[116] J.D. v. Commonwealth, 211 S.W.3d 60, 63 (Ky. Ct. App. 2006) (holding that a juvenile's age is to be taken into account when the court considers whether a defendant's guilty plea was entered knowingly and voluntarily).

[117] Knox v. Commonwealth, 361 S.W.3d 891, 893 (Ky. 2012).

upon, and reduced, sentence.[118] If the defendant "fails to appear as scheduled or violates any of the conditions" of the clause, a specific and greater (often the maximum allowable by law) sentence will be sought.[119]

The Kentucky Supreme Court has expressed concern with this practice in cases involving adults. For instance, in *McClanahan v. Commonwealth*, the court struck down a hammer clause imposed sentence on the grounds that the trial judge failed "to exercise independent judicial discretion" when he essentially rubber-stamped the prosecution's agreement without any individualized consideration of the sentence.[120] Moreover, in a later case, the court issued a strongly-worded rebuke of the practice stating that is functioned as "poor man's bail" and was difficult to reconcile with the principle that the "punishment should fit the crime and the criminal."[121] In spite of the Kentucky Supreme Court's strong language, they have expressed reluctance to interfere too far into the plea bargaining process.[122] To date, the court simply requires the trial judge to abstain from committing to a sentence before the sentencing hearing and offer individualized consideration prior to issuing a judgment.[123]

IV. THE WAY FORWARD.

Despite the Kentucky Supreme Court's misgivings, the practice of issuing and adhering to hammer clauses continues on for adults and youthful offenders alike. However, the practice poses specific problems to the latter class of defendants in light of the Supreme Court's acknowledgment of the reduced decision-making competence of adolescents. By permitting teenagers to enter into plea agreements with onerous penalties, we violate the ethos of the growing developmental framework for juvenile criminal law and risk exposing juveniles to harsh penalties disproportionate to their culpability.

Given the growing body of research demonstrating juvenile's reduced capacity in stressful legal scenarios, plea negotiations—where the defendant may be receiving pressure from multiple sources—present a challenging and dangerous scenario for many juvenile defendants.[124] In particular, the impulse to make decisions that result in approval by authority figures increases the likelihood that the juvenile defendant may make a decision against their best interest.[125]

Each of these factors weighs against the likelihood that youthful defendants are competent for complex and highly complex plea negotiations without undue influence from other factors. In the case of hammer clauses specifically, the danger is two-fold. First, the defendant may face pressure to agree to an agreement they will have difficulty complying with and face harsh penalties as a result. Second, the

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[118] *Id.* at 893–94.

[119] *Id.*

[120] 308 S.W.3d 694, 702 (Ky. 2010).

[121] *Knox*, 361 S.W.3d at 900.

[122] *Id.* (emphasizing that the court was not in the position to inform either the prosecution or the defense counsel how to negotiate its plea agreement).

[123] *See id.*

[124] *See supra* Part II.B.

[125] *See supra* notes 90–91 and accompanying text.

adolescent defendant may have more difficulty complying with the condition after it is made, especially if the clause imposes harsh penalties for relatively minor violations. As such, the inclusion of hammer clauses is inappropriate for juvenile defendants, youthful offender or not. The elimination of hammer clauses, however, treats only a symptom of a large illness. A broader solution is necessary to prevent juvenile defendants from incurring harsh penalties that are arguably disproportionate to the offense they committed.

One solution would be to have a statutorily prescribed hearing prior to any judicial proceedings, including plea negotiations, to assess a juvenile defendant's competency. This procedure would differ from the bindover hearing in two primary ways. First, the hearing would incorporate a modern understanding of juvenile decision-making, based on the social science accepted in *Miller* and *Roper*. This would involve examining the record and evidence to assess whether a given defendant is competent to engage in complex plea negotiations. Essentially, immaturity would be a significant factor in determining the defendant's competence. One commentator suggested a multiple-pronged approach in which judicial discretion is balanced against an age-based presumption of incompetence.[126] Under this approach, states would pass a statute that sets an age to serve as a developmental marker which, if the defendant is under, the prosecution *must prove* his competence.[127] If the defendant is above that age, then the burden shifts to the defense, who would have to participate in a hearing to determine if their immaturity suggests incompetence.[128] Such an arrangement would both allow for the defendant's age to be taken care of while also maintain a balance between each side of the adversarial process. Second, the presence of expert scientific and medical testimony should be considered to guide the judge's discretion. In the modern case law, increased reliance on empirical data has supplanted parental common-sense as the primary metric for evaluating juvenile competency. Similar hearings are already employed in sentencing hearings in states with discretionary LWOP sentencing.[129] Given the shared theoretical starting point, and the existence of experts used to testify in similar hearings, it stands to reason that such a solution would be possible to implement.

Another, more radical approach, would be to heavily curtail, if not eliminate, the bindover statutes on their face. In essence, this would be a codification of the strong premise that juveniles are per se incompetent to participate in adult criminal proceedings. While such a solution would provide significant support to the social goal of rehabilitation, it does not provide a satisfying answer to society's concern with justice for heinous crimes. Additionally, it does not take into account that trial

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[126] *See, e.g.*, Kimberly Larson et al., *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, MODELS FOR CHANGE 21–28 (Nov. 2011), https://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_Delinquency_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf [https://perma.cc/WA8C-B8WZ].

[127] *Id.* at 27.

[128] *See id.*

[129] *See* Scott et al., *supra* note 56, at 10, 24.

competence is relative to each defendant.[130] It is entirely possible, if not likely, that two sixteen-year old's will be competent and incompetent in different ways.[131] Given this distinction, a more nuanced approach is necessary.

An ideal, long-term solution would be a system-wide reconsideration of juvenile's place in the criminal justice system that acknowledges their unique status as developing individuals while balancing societies need to punish serious offenders. On one hand, juveniles are underserved by certain procedural protections guaranteed to them by analogy to adults because their developmental status leaves them less equipped to navigate such proceedings.[132] While the holding of *Gault* is focused on the respect of the neutral, dispassionate court,[133] the reality is that the formality of such proceedings is likely to lead to disengagement due to a lack of comprehension.[134]

On the other hand, the shift away from rehabilitation did not arise from the ether. Society does have a strong interest in ensuring that offenders are held accountable for their actions and that communities are secure.[135] Additionally, the concerns of the effectiveness of rehabilitation and indeterminate sentencing expressed by the majority in *Gault* were supported by empirical data concerning both juveniles and adults at the time of the shift.[136] The increase in youthful offenders statutes and bindover laws reflects this decreased emphasis in rehabilitation. That being said, the continued existence of the juvenile court system and related laws supports the conclusion that rehabilitation is still a goal of juvenile criminal law notwithstanding increased skepticism.

Ultimately any procedural change must contend with the two above factors: the developmental status of the child and society's need to punish effectively. Society can only punish effectively—that is, deter future wrongdoing, protect the public, and achieve retribution—if the person they are seeking to punish understands why they are being punished. In the case of a child, this requires teaching "the connection between their prior [bad] acts, [and] the present response . . . ."[137] This will require a more individualized assessment of each juvenile defendant; it will require individual juvenile offenders not as a class of defendants, but as persons with unique developmental challenges.

Finally, the recognition that children, as developing persons, occupy a unique place in the criminal justice system requires the judicial system to become more comfortable with extra-judicial influences, such as psychological, medical, and

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[130] *See* Larson et al., *supra* note 126, at 28.

[131] *See id.* at 10–16.

[132] *See* Buss, *supra* note 54, at 49.

[133] *See* 387 U.S. 1, 26–27 (1967).

[134] *See supra* note 39 and accompanying text; *see also* Buss, *supra* note 54, at 48 ("[T]he . . . professional distance of the judge [is] likely to alienate children from the decisionmaking process.").

[135] *See* Buss, *supra* note 54, at 49.

[136] *See generally* Mistretta v. United States, 488 U.S. 361, 365 (1989) (describing how the Sentencing Reform Act of 1984 sought to deemphasize rehabilitation as a goal of sentencing due to its inconsistent effectiveness); *see also* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22 (detailing the lack of empirical data in support of the premise that rehabilitative efforts in prison had a meaningful effect on recidivism rates in either adults or juveniles).

[137] *See* Buss, *supra* note 54, at 50–51.

family service experts. Given the complex and evolving field of developmental psychology, expert input is required for the judge to accurately communicate with children and to assess their needs.[138] A solution that goes further than the aforementioned burden-shifting approach would be to establish a separate decision-making body, consisting of experts, such as social workers or clinical psychologists, who would approve of plea agreements involving youthful offenders prior to a judicial ruling. Such a body would function as an administrative agency review board and make factual findings regarding a defendant's decision-making ability. From that point, the defendant's capacity is treated as a finding of fact subject to deference by a reviewing court. If a defendant is judged to be of reduced capacity, increased scrutiny would be paid to the plea negotiations and the ensuing sentence. While the ultimate sentence would be handed down by a judge, her sentencing discretion would be further restrained by this factual finding, similar to the way a statutory minimum sentence operates currently. In this way, a defendant would perhaps gain more individualized attention, while the trial court would not have plenary *parens patriae* power of the initial juvenile court system.

In conclusion, the current criminal justice system, despite progress, presents juvenile offenders with numerous obstacles to ensure that they receive fair treatment. Nationally, the Supreme Court has begun to recognize that the culpability of adolescents is inextricably linked to their cognitive development. The aforementioned cases frame the Court's understanding of juvenile's developing cognition as something more than a mitigating factor in a sentencing judge's assessment of culpability. Rather, the Court's opinions seem to frame this fact as a foundational principle of criminal law. Within Kentucky, there has been some progress in ensuring that this scientific truth is reflected in our law, however, much work remains to be done. At the very least, the Commonwealth could ensure that youthful offenders are not presented with onerous plea conditions which put them at risk of harsh penalties for lapses in judgment.

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[138] *Id.* at 51.