

Cruel and Unusual Before and After 2012: Miller v. Alabama Must Apply Retroactively

Tracy A. Rhodes

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Juveniles Commons](#)

Recommended Citation

74 Md. L. Rev. 1001 (2015)

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

CRUEL AND UNUSUAL BEFORE AND AFTER 2012: *MILLER V. ALABAMA* MUST APPLY RETROACTIVELY

TRACY A. RHODES*

In *Miller v. Alabama*,¹ the United States Supreme Court declared that mandatory juvenile life without parole (“JLWOP”) sentencing schemes violated the Eighth Amendment’s ban on cruel and unusual punishment.² These schemes prohibited any discretion in sentencing and required “that each juvenile die in prison,” regardless of whether a defendant’s “youth and its attendant characteristics, along with the nature of his crime,” made a less severe sentence more suitable.³ In the three years since *Miller*, state and federal courts have come to different conclusions about whether the *Miller* Court’s ruling applies retroactively in the twenty-nine jurisdictions where mandatory JLWOP sentences were imposed.⁴ Approximately 2,500 juveniles had been sentenced under such schemes,⁵ and their lives hang in the balance as courts address the issue of retroactivity.

As one state supreme court noted, “[t]he primary point of dissension [regarding retroactivity] is whether the rule announced in *Miller* is substantive” or procedural.⁶ Retroactive application of *Miller* turns on this substantive/procedural dichotomy: if the rule is substantive, it must apply retroactively, but if the rule is procedural, it can only apply prospectively.⁷ Because *Miller* created a substantive rule, courts considering challenges to

© 2015 Tracy A. Rhodes.

* The author wishes to thank the *Maryland Law Review* staff, particularly Megan Raker, Robert Baker, Susan Schipper, Alyssa Domzal, and Elizabeth Clark Rinehart, for their suggestions and superior Bluebooking; Professors Renée Hutchins and Lee Kovarsky for their insights and assistance; her parents, William and Kathy Rhodes, for their support and enthusiasm; and Jonathan Salmon for his unconditional love, patience, and encouragement.

1. 132 S. Ct. 2455 (2012).

2. *Id.* at 2469.

3. *Id.* at 2460.

4. Compare, e.g., *Jones v. Mississippi*, 122 So.3d 698, 703 (Miss. 2013) (holding *Miller* created a substantive rule that must apply retroactively), with *People v. Carp*, 828 N.W.2d 685, 709 (Mich. Ct. App. 2012) (finding *Miller* created a procedural rule that cannot apply retroactively).

5. Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 1 (Apr. 2014), available at http://www.sentencingproject.org/doc/publications/jj_Juvenile%20Life%20Without%20Parole.pdf [hereinafter *JLWOP: An Overview*].

6. *Nebraska v. Mantich*, 842 N.W.2d 716, 726 (Neb. 2014).

7. See *infra* Part I.C.

mandatory JLWOP sentences should apply *Miller* retroactively to prevent the injustices of upholding unconstitutional sentences previously imposed upon juveniles.⁸

Section I.A of this Comment examines the United States Supreme Court's Eighth Amendment jurisprudence. Section I.B discusses the principal case, *Miller v. Alabama*, which establishes a substantive rule to be applied retroactively to cases on collateral review. Retroactivity analysis is discussed generally in Section I.C.1, and specific state decisions regarding the retroactivity of *Miller* are reviewed in Section I.C.2. In Section II.A, this Comment asserts that a thorough analysis of the substantive rule exception to non-retroactivity, as it has been modified over time, supports the conclusion that *Miller* created a substantive rule. Section II.B explains the various reasons that *Miller* created a substantive rule that must apply retroactively. Section II.C argues that concerns about finality and deterrence are irrelevant in the realm of juvenile sentencing because juveniles are unlikely to consider potential punishments before engaging in criminal behavior. Finally, Section II.D discusses the Court's recent acceptance of a certiorari petition to resolve the issue of *Miller*'s retroactivity.

I. BACKGROUND

A. *The Eighth Amendment Prohibits Cruel and Unusual Punishments*

The Eighth Amendment forbids the infliction of "cruel and unusual punishments"⁹ and requires the government to "respect the dignity of all persons."¹⁰ The United States Supreme Court has two relevant strands of precedent concerning cruel and unusual punishments: proportional sentencing and individualized sentencing.¹¹ Proportional sentencing mandates that a sentence fit the crime.¹² These cases fall within two categories: challenges to the length of a sentence for a particular crime and challenges to a sentence based on the culpability of a specific class of

8. See *infra* Part II.

9. U.S. CONST. amend. VIII. The amendment states, in full, that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

10. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

11. The *Miller* Court explained, "The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama*, 132 S. Ct. 2455, 2462 (2012). The second "prohibit[s] mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 2462–63. This Comment refers to the former as "proportional sentencing precedent" and the latter as "individualized sentencing precedent."

12. See *infra* Part I.A.1.

offenders.¹³ The other line of precedent, individualized sentencing, requires a sentencer to consider the personal characteristics and experiences unique to each criminal defendant before imposing a sentence.¹⁴ It is against this dual-strands-of-precedent backdrop that the *Miller* Court held mandatory JLWOP sentences cruel and unusual.

1. Proportional Sentencing Precedent: A Sentence's Severity Must Correspond to the Culpability of a Class of Offenders and to the Gravity of the Offense

The Eighth Amendment requires that a punishment be “graduated and proportioned to [the] offense”¹⁵ and forbids “grossly disproportionate” sentences.¹⁶ The concept of proportionality is not viewed “through a historical prism,” but rather, is analyzed “according to ‘the evolving standards of decency that mark the progress of a maturing society.’”¹⁷ Under this standard, the United States Supreme Court has struck down as cruel and unusual a variety of punishments, such as a fifteen-year sentence of hard labor for falsifying a public document,¹⁸ ninety days imprisonment for narcotics addiction,¹⁹ a death sentence for rape,²⁰ and, of relevance to this Comment, mandatory JLWOP sentences for any crime.²¹ Proportionality cases generally fall within two categories: challenges to the length of a sentence and cases involving “categorical restrictions on the death penalty.”²²

13. *See infra* Parts I.A.1.a–b.

14. *See infra* Part I.A.2.

15. *Weems v. United States*, 217 U.S. 349, 367 (1910); *see also* *Solem v. Helm*, 463 U.S. 277, 284 (1983) (explaining a punishment is cruel and unusual if it is “disproportionate to the crime committed”).

16. *Graham v. Florida*, 560 U.S. 48, 59–60 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01 (1991) (Kennedy, J. concurring in part and concurring in judgment) (internal quotation marks omitted)).

17. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

18. *Weems*, 217 U.S. at 362–63, 380–81.

19. *Robinson v. California*, 370 U.S. 660, 667 (1962).

20. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

21. *Miller*, 132 S. Ct. at 2460.

22. *Graham v. Florida*, 560 U.S. 48, 59 (2011).

a. Challenges to the Length of a Sentence: Sentence Duration Must Correspond to the Severity of a Crime

The first category of proportionality cases—challenges to the length of a sentence²³—considers the duration of a criminal sentence compared to the seriousness of an offense to determine whether there is “an inference of gross disproportionality.”²⁴ In considering the gravity of the offense, “[c]omparisons can be made in light of the harm caused . . . to the victim or society, and the culpability of the offender.”²⁵ Next, courts must consider the defendant’s sentence in light of those given to similarly situated offenders²⁶ in the same jurisdiction and those “imposed for the same crime in other jurisdictions.”²⁷ If more severe offenses receive the same or less serious punishments, then the punishment in question may be excessive.²⁸

In *Solem v. Helm*,²⁹ the Supreme Court applied this length-of-sentence analysis to consider the constitutionality of a life without parole sentence for writing a fraudulent check.³⁰ The ordinary sentence for this crime was a maximum of five years imprisonment and a \$5,000 fine, but under South Dakota’s recidivist statute, the defendant was sentenced to life without parole and received a \$25,000 fine.³¹ The *Helm* Court explained the defendant received the second harshest sentence available, second only to the death penalty, despite engaging in “relatively minor criminal conduct.”³² The defendant received a harsher sentence than others in the state who committed “more serious crimes” and was treated “more harshly than he would have been in any other jurisdiction.”³³ Therefore, the

23. The Court refers to this strand of proportionality cases as “length of term-of-years sentences,” but this Comment will discuss it as “challenges to the length of a sentence.” *See id.* (referring to this line of precedent as “length of term-of-years sentences”).

24. *Graham*, 560 U.S. at 60 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J. concurring in part and concurring in judgment)) (internal quotation marks omitted).

25. *Solem v. Helm*, 463 U.S. 277, 292 (1983); *see id.* at 292–94 (explaining “nonviolent crimes are less serious than crimes marked by violence” and that to determine the culpability of the offenders, courts can consider factors such as motive and intent).

26. “Other offenders” include those who committed different offenses than the crime charged. *See id.* at 291 (explaining the Court considers “more serious crimes” in its analysis).

27. *Graham*, 560 U.S. at 60 (citing *Harmelin*, 501 U.S. at 1005 (Kennedy, J. concurring in part and concurring in judgment)); *see also Helm*, 463 U.S. at 290–92 (“First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”).

28. *Helm*, 463 U.S. at 291.

29. 463 U.S. 277 (1983).

30. *Id.* at 281, 284, 291. The defendant “utter[ed] a ‘no account’ check for \$100.” *Id.* at 281.

31. *Id.*

32. *Id.* at 303.

33. *Id.*

sentence was grossly disproportionate to the crime and violated the Eighth Amendment.³⁴

b. The Eighth Amendment Requires Categorical Restrictions for Less Culpable Offenders

The second category of proportionality cases—categorical challenges to a type of sentence—contemplates “the characteristics of the offender” and follows a two-pronged approach.³⁵ Courts first determine the nation’s “contemporary values” by considering relevant state and federal legislation.³⁶ This national consensus, while important, does not “wholly determine” the outcome, however, as the Constitution requires the judiciary to determine whether a punishment is permitted by the Eighth Amendment.³⁷ Therefore, proportionality analysis turns on a court’s own judgment regarding the constitutionality of the punishment.³⁸ In this inquiry, courts consider an offender’s culpability, the severity of the punishment, and “whether the challenged sentencing practice serves legitimate penological goals.”³⁹ These goals include: retribution, which provides that society can inflict punishment to express moral disapproval of

34. *Id. Helm* was the first successful challenge to the length of a non-capital sentence since *Robinson v. California*, 370 U.S. 660 (1962) and was the only successful challenge between 1983 and 2010 when *Graham v. Florida* was decided. See, e.g., Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 87–89 (2010), available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1052&context=mlr_fi (“Following *Robinson*, the nine justices traded blows for the next three decades over the existence and scope of the proportionality principle in non-capital Eighth Amendment cases. . . . [I]n *Harmelin v. Michigan*, . . . the Court expressly cabined the concept of excessiveness under the Eighth Amendment to its capital jurisprudence. However, in a separate concurring opinion, Justice Kennedy . . . concluded that ‘[t]he Eighth Amendment proportionality principle also applies to noncapital sentences.’ . . . [T]he approach articulated in Justice Kennedy’s concurring opinion in *Harmelin* appears to have won the day in *Graham*.”). This infrequency is likely because the Court has stated that successful proportionality challenges outside the capital context are “exceedingly rare.” See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”).

35. *Graham v. Florida*, 560 U.S. 48, 60–61 (2011). More precisely, categorical-restrictions cases can be divided into two categories: “one considering the nature of the offense, the other considering the characteristics of the offender.” *Id.* at 60. Only the latter, however, is relevant to this Comment.

36. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

37. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

38. *Id.* at 313 (“[I]n cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” (citation omitted) (quoting *Coker*, 433 U.S. at 597)).

39. *Graham*, 560 U.S. at 67 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 441–46 (2008), *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005), and *Atkins*, 536 U.S. at 318–20).

a crime; deterrence, which states that the threat of punishment will prevent people from engaging in criminal activity; incapacitation, which seeks to remove a person from society to prevent that person from committing a future crime; and rehabilitation, which seeks to help an offender reenter society as a productive individual.

Atkins v. Virginia,⁴⁰ in which the Court considered the constitutionality of death sentences for developmentally disabled offenders,⁴¹ demonstrates this categorical restriction analysis. The *Atkins* Court first inquired into the nation's "contemporary values" as reflected in federal and state legislation.⁴² In 1988, Congress forbade death sentences for such offenders, and by 2001, nineteen states also forbade the practice.⁴³ The number of states prohibiting such sentences offered convincing evidence that modern society considered offenders with developmental disabilities to be "categorically less culpable than the average criminal."⁴⁴ Furthermore, the states allowing the practice rarely used it.⁴⁵

While the national consensus regarding the decency of a punishment is persuasive, it is ultimately the Court's duty to determine a sentence's constitutionality.⁴⁶ The *Atkins* Court determined that its death penalty jurisprudence confirmed "the legislative consensus" that offenders with developmental disabilities "be categorically excluded from execution."⁴⁷ The Court explained that the death penalty justifications of deterrence and retribution do not apply to the developmentally disabled.⁴⁸ Furthermore, "[t]he reduced capacity" of offenders with developmental disabilities increases "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"⁴⁹ Therefore, the Court concluded that the Eighth Amendment prohibits capital punishment for developmentally-disabled offenders.⁵⁰

40. 536 U.S. 304 (2002).

41. *Id.* at 310 ("[W]e granted certiorari to revisit the issue that we first addressed in the *Penry* case.").

42. *Id.* at 312 (quoting *Penry*, 492 U.S. at 331); *see also id.* at 314–16 (examining federal and state legislation).

43. *Id.* at 314–15. Those states include Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. *Id.*

44. *Id.* at 315–16.

45. *Id.* at 316.

46. *Id.* at 312.

47. *Id.* at 318.

48. *Id.* at 318–20.

49. *Id.* at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

50. *Id.* at 321.

Relying on *Atkins*, the Court later struck down death sentences for juvenile offenders in *Roper v. Simmons*.⁵¹ The Court identified several characteristics that made juveniles, like those with developmental disabilities, “‘categorically less culpable than the average criminal.’”⁵² The Court explained that juveniles are irresponsible and immature, are more easily persuaded by “negative influences and outside pressures,” and have “more transitory” personalities than adults.⁵³ Like offenders with developmental disabilities, the “diminished culpability of juveniles” detracts from the punishment’s penological justifications of retribution and deterrence.⁵⁴ Therefore, the Court found the Eighth Amendment prohibits the death penalty for all juvenile offenders.⁵⁵

c. *Graham v. Florida: The Court’s First Categorical Challenge to a Term-of-Years Sentence*

These proportional sentencing issues—challenges to the length of a sentence, and categorical challenges by a class of offenders—came to a head in *Graham v. Florida*.⁵⁶ Prior to *Graham*, the Court had never prohibited a term of years sentence from being imposed on an entire class of offenders.⁵⁷ The *Graham* Court specifically considered whether a life without parole sentence for a non-homicide juvenile offender violated the Constitution.⁵⁸ As an issue of first impression, the Court determined that because “a sentencing practice itself is in question,” the proper analysis came from cases involving the categorical approach, such as *Atkins* and *Roper*.⁵⁹ Therefore, the Court considered “objective indicia of society’s standards,” such as legislation and state practice, but was ultimately guided by “the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”⁶⁰

51. 543 U.S. 551, 563–64, 578 (2005).

52. *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

53. *Id.* at 569–70 (citing generally E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) and *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

54. *Id.* at 571–72; *see id.* at 571 (explaining that retribution is disproportionate when “the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”). It is also highly unlikely that a juvenile engages in cost-benefit analysis before committing a crime, and therefore, “it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles.” *Id.*

55. *Id.* at 578.

56. 560 U.S. 48, 61 (2010).

57. *Id.*

58. *Id.* at 52–53.

59. *Id.* at 61–62.

60. *Id.* at 61 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) and *Roper v. Simmons*, 543 U.S. 551, 563 (2005)) (internal quotation marks omitted).

Looking to the national consensus, the Court found only eleven jurisdictions actually imposed JLWOP sentences for non-homicide crimes.⁶¹ Twenty-six states, the District of Columbia, and the federal government did not impose such sentences, despite statutory authorization to do so.⁶² Therefore, the Court concluded, the nation viewed JLWOP sentences for non-homicide crimes contrary to modern standards of decency.⁶³

Under the next prong of the analysis—the Court’s own judgment—the Court considered “the culpability of the offenders at issue, . . . the severity of the punishment, . . . and whether the challenged sentencing practice serves legitimate penological goals.”⁶⁴ Mirroring its discussion in *Roper*, the Court reiterated the differences between juveniles and adults, and found that, “compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁶⁵ Next, the Court likened the severity of JLWOP to the death penalty, as both sentences deny the offender “the most basic liberties without giving hope of restoration.”⁶⁶ Because juveniles serve more time in prison than adult offenders, the Court explained that life without parole “is an especially harsh punishment for a juvenile.”⁶⁷

Turning to penological theories, the Court found the penal justifications of retribution, deterrence, incapacitation, and rehabilitation do not work for juvenile offenders.⁶⁸ Retribution is inapplicable because juvenile offenders are less culpable than adults.⁶⁹ Deterrence cannot be accomplished because juveniles are unlikely to consider potential punishments when deciding to act.⁷⁰ Incapacitation is inappropriate because it requires a finding that “the juvenile is incorrigible,” but such

61. *Id.* at 64.

62. *Id.*

63. *See id.* at 67 (“The sentencing practice now under consideration is exceedingly rare. And ‘it is fair to say that a national consensus has developed against it.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002))).

64. *Id.* (citing *Kennedy*, 554 U.S. at 441–46, *Roper*, 543 U.S. at 571–72, and *Atkins* 536 U.S. at 318–20).

65. *Id.* at 69. The *Graham* Court also mentioned that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Id.* at 68.

66. *Id.* at 69–70 (citing *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)).

67. *Id.* at 70.

68. *Id.* at 71–74.

69. *Id.* at 71–72.

70. *Id.* at 72.

“incorrigibility is inconsistent with youth.”⁷¹ Finally, rehabilitation fails because a life without parole sentence “forfeits altogether the rehabilitative ideal.”⁷² Juvenile offenders sentenced to life without parole are frequently denied access to rehabilitative services, despite the fact that juveniles are “most in need of and receptive to rehabilitation.”⁷³ Because JLWOP for non-homicide crimes lacks “any legitimate penological justification,” it is inherently disproportionate.⁷⁴ Therefore, the *Graham* Court held the sentencing practice at issue violated the Eighth Amendment.⁷⁵

2. *Individualized Sentencing Precedent: Consideration of Mitigating Factors Is Crucial to Capital Sentencing Determinations*

The Court’s individualized sentencing precedent, which involves a number of death penalty cases, is also vital to its Eighth Amendment jurisprudence.⁷⁶ The Court has previously stated that the death penalty is this country’s most severe punishment, followed by life without parole.⁷⁷ Because capital punishment is “qualitatively different” from a prison sentence, death must be the “appropriate punishment in [each] specific case.”⁷⁸ As such, the consideration of individual factors in death penalty determinations is crucial, and mandatory imposition of the death penalty is unconstitutional.⁷⁹

71. *Id.* at 72–73 (quoting *Workman v. Commonwealth*, 429 S.W. 2d 374, 378 (Ky. Ct. App. 1968)) (internal quotation marks omitted).

72. *Id.* at 74.

73. *Id.* (citing Brief for J. Lawrence Aber et al. as Amici Curiae at 28–31, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412)).

74. *Id.* at 71 (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”).

75. *Id.* at 82. The Court also discussed international practices to further support its holding. *See id.* at 80 (explaining that international practices “are not dispositive as to the meaning of the Eighth Amendment,” but that these practices are also “not irrelevant” (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) with internal quotation marks omitted). Furthermore, while eleven nations allow JLWOP to be imposed, only two—the United States and Israel—ever impose such a punishment.).

76. Because *Graham* compared JLWOP to the death penalty, the *Miller* Court considered this line of precedent as well. *See Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) (“*Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, the Court has required sentencing authorities to consider the characteristics of a defendant and the details of the offense before sentencing him to death.”).

77. *Graham*, 560 U.S. at 69 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

78. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

79. *Id.* at 304–05. “Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.” *Id.* at 304.

In addition to foreclosing mandatory capital punishment, the Constitution requires that mitigating factors be considered before imposing the death penalty.⁸⁰ For example, in *Eddings v. Oklahoma*,⁸¹ a sixteen-year-old defendant charged with first degree murder successfully challenged his death sentence by pointing to numerous factors his sentencing judge ignored.⁸² Although the sentencing judge considered the defendant's youth as a mitigating factor, he failed to recognize that "youth is more than a chronological fact."⁸³ Youth is a vulnerable time in which "a person may be most susceptible to influence and to psychological damage."⁸⁴ Therefore, evidence of a troublesome family history, a physically abusive father, and severe emotional disturbance "is particularly relevant" for mitigation.⁸⁵ The case was remanded for the sentencing judge to consider all mitigating factors beyond the defendant's chronological age.⁸⁶

B. Miller v. Alabama Established That Mandatory Juvenile Life Without Parole Is Cruel and Unusual, and Therefore, Is Unconstitutional

In *Miller v. Alabama*, the Court considered the situations of two fourteen-year-old offenders charged as adults and sentenced to mandatory JLWOP.⁸⁷ Relying on its proportional sentencing and individualized sentencing precedents, the Court found mandatory JLWOP sentencing unconstitutional under the Eighth Amendment⁸⁸

Looking to its proportional sentencing precedent, the Court found that juveniles, as a class of offenders, have lesser culpability and "greater prospects for reform" than adults.⁸⁹ Reiterating the observations of the

80. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

81. 455 U.S. 104 (1982).

82. *Id.* at 107–09.

83. *Id.* at 115.

84. *Id.*

85. *Id.*

86. *Id.* at 117.

87. The first, Kuntrell Jackson, was charged as an adult with capital felony murder and aggravated robbery. *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012). Per Arkansas law, upon conviction, he was sentenced to life without parole. *Id.* The second, Evan Miller, was charged as an adult with murder in the course of arson. *Id.* at 2462–63. As per Alabama law, he was also sentenced to life without parole. *Id.* at 2463.

88. *Id.* at 2463–64.

89. *Id.* at 2464 (citing *Graham v. Florida*, 560 U.S. 48, 68 (2011)); see also *id.* at 2458 ("Two strands of precedent reflecting the concern with proportionate punishment come together here.").

Roper and *Graham* Courts, the *Miller* Court explained that there are scientifically-proven differences between juvenile and adult brains.⁹⁰ Juveniles lack maturity, are more susceptible to harmful influences and peer pressure, have little control over their environments, and are unable to remove themselves from “horrific, crime-producing settings.”⁹¹ Furthermore, their personalities are “less fixed” than adults’, and their conduct is “less likely to be ‘evidence of irretrievabl[e] deprav[ity].’”⁹² These differences between juveniles and adults weaken penological justifications, as discussed by the *Graham* Court.⁹³ Thus, the Court concluded, mandatory life without parole is uniquely disproportionate to all juvenile offenders.⁹⁴

Relying on the *Graham* Court’s comparison of JLWOP to the death penalty, the Court next turned to its individualized sentencing precedent.⁹⁵ This line of cases struck down mandatory capital punishment for disregarding an offender’s “character and record” and ignoring the circumstances surrounding a crime.⁹⁶ Similarly, mandatory JLWOP sentences fail to consider “the mitigating qualities of youth.”⁹⁷ These qualities include a defendant’s “chronological age,” as well as one’s upbringing and “mental and emotional development.”⁹⁸ By disregarding the qualities of youth, a mandatory sentencing scheme “poses too great a risk of disproportionate punishment.”⁹⁹ Therefore, like mandatory imposition of the death penalty, mandatory JLWOP violates the Eighth Amendment.¹⁰⁰

The dissenting justices argued that “most States” sentence juveniles to mandatory JLWOP, and therefore, the punishment is not “unusual” for purposes of the Eighth Amendment.¹⁰¹ The majority countered this argument by explaining that most states impose mandatory JLWOP “through the combination of two independent statutory provisions”—one

90. *Id.* (citing *Graham*, 560 U.S. at 68).

91. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

92. *Id.* (quoting *Roper*, 543 U.S. at 570) (internal quotation marks omitted).

93. *See supra* notes 68-72 and accompanying text.

94. *Miller*, 132 S. Ct. at 2469.

95. *Id.* at 2467 (“Graham’s [t]reat[ment] [of] juvenile life sentences as analogous to capital punishment makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.”) (citation and internal quotation marks omitted).

96. *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

97. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (internal quotation marks omitted)).

98. *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)).

99. *Id.* at 2469.

100. Specifically, the Court stated, “[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Id.*

101. *Id.* at 2478 (Roberts, C.J., dissenting).

permitting transfer of a juvenile to adult court and one prescribing penalties for those tried there.¹⁰² The majority posited that legislatures may not have intended the harsh consequences that result from these statutes.¹⁰³ When these statutes interact, there is no “separate penalty provision[] for . . . juvenile offenders,” many of whom are automatically transferred to adult court, without individualized considerations.¹⁰⁴ When discretion is permitted, it often belongs to the prosecutor and lacks judicial oversight.¹⁰⁵ In the rare instances when judges can intervene, they often have limited information, so these oversight mechanisms have “limited utility.”¹⁰⁶ Ultimately, the Court explained, judicial discretion regarding juvenile transfer to adult court, when available, “cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.”¹⁰⁷ Therefore, the dissent’s argument did not sway the majority’s finding that mandatory JLWOP is cruel and unusual.

*C. New Substantive Rules and Watershed Rules of Criminal Procedure
Must Be Applied Retroactively to Cases on Collateral Review*

In 2012, *Miller v. Alabama* outlawed mandatory JLWOP sentencing schemes in twenty-nine jurisdictions.¹⁰⁸ Since *Miller* was decided, courts have differed on whether the rule applies retroactively to the thousands of juveniles sentenced under these schemes.¹⁰⁹ Many of these courts engaged in a similar analysis by following *Teague v. Lane*’s¹¹⁰ “non-retroactivity doctrine,” but their conclusions have been inconsistent.¹¹¹

1. Teague’s Non-Retroactivity Doctrine

Retroactivity analysis has changed significantly over the past five decades. In 1965, *Linkletter v. Walker*¹¹² announced the first test to determine whether a new constitutional rule applies retroactively. The

102. *Id.* at 2472 (majority opinion).

103. *Id.* at 2472–73.

104. *Id.* at 2473–74.

105. *Id.* at 2474.

106. *Id.*

107. *Id.* at 2475.

108. *Id.* at 2471, 2475; see also Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, THE SENTENCING PROJECT, 1, available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf [hereinafter *Slow to Act*].

109. The Sentencing Project estimates that more than 2,500 juveniles had been sentenced under mandatory JLWOP sentencing schemes. *Slow to Act*, *supra* note 108, at 4.

110. 489 U.S. 288 (1989).

111. See *supra* note 4.

112. 381 U.S. 618 (1965).

Linkletter analysis required courts to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective [application] will further or retard its operation.”¹¹³ *Linkletter* proved to be problematic, however, and Justice Harlan proposed a new retroactivity test in his dissenting opinion in *Desist v. United States*¹¹⁴ and his concurring opinion in *Mackey v. United States*.¹¹⁵ Justice Harlan declared that cases on direct review should always benefit from retroactive application of new rules.¹¹⁶ However, cases on collateral review—including “any form of post-conviction relief other than a direct appeal”¹¹⁷—should only benefit from retroactive application of new rules in two instances.¹¹⁸ Justice Harlan’s first exception for cases on collateral review covers “[n]ew substantive due process rules,’ that is, those that place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”¹¹⁹ Justice Harlan’s second exception includes procedural rules that “are ‘implicit in the concept of ordered liberty.’”¹²⁰

In *Teague v. Lane*, the Court adopted Justice Harlan’s test¹²¹ with two minor caveats. First, while the *Teague* plurality adopted Justice Harlan’s first exception to retroactivity—rules that place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”—the Court did not explicitly label this exception as covering substantive rules.¹²² However, Justice Harlan’s language in *Mackey* explained that rules governing primary conduct are substantive.¹²³ Second, the *Teague* plurality specified that Justice Harlan’s second exception—procedural rules that are fundamental to the concept of ordered liberty—referred to “watershed rules of criminal procedure.”¹²⁴ The same

113. *Id.* at 629.

114. 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (“I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. ‘Retroactivity’ must be rethought.”).

115. 401 U.S. 667, 681 (1971) (Harlan, J., concurring).

116. *Id.* (“I continue to believe that a proper perception of our duties as a court of law . . . mandates that we apply the law as it is at the time, not as it once was.”).

117. *Wall v. Kholi*, 131 S. Ct. 1278, 1284 (2011) (quoting WASH. REV. CODE § 10.73.090(2) (2008)).

118. *Mackey*, 401 U.S. at 692–93 (Harlan, J., concurring).

119. *Id.* at 692.

120. *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

121. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) (“[W]e now adopt Justice Harlan’s view of retroactivity for cases on collateral review.”).

122. *Id.* at 307, 310 (quoting *Mackey*, 401 U.S. at 692).

123. *See Mackey*, 401 U.S. at 692 (Harlan, J., concurring).

124. *Teague*, 489 U.S. at 311 (plurality opinion).

year *Teague* was decided, the Court in *Penry v. Lynaugh*¹²⁵ clarified *Teague*'s first exception by explaining that a new rule removing a class of individuals from the State's criminal law-making authority "is analogous to a new rule placing certain conduct beyond the State's power to punish."¹²⁶ Thus, *Teague*'s substantive rule exception includes rules excusing primary conduct from criminal punishment, as well as rules that eliminate a type of punishment "for a class of defendants because of their status or offense."¹²⁷

Modern retroactivity analysis follows the *Teague* plurality's framework, as clarified in *Penry*.¹²⁸ To have retroactive effect, a constitutional rule must be new, in that it "breaks new ground or imposes a new obligation on the States or the Federal Government."¹²⁹ A rule is new if precedent did not require the outcome "at the time the defendant's conviction became final."¹³⁰ To apply retroactively to cases on collateral review, this new rule must be either substantive or a watershed rule of criminal procedure.¹³¹ Years after *Penry*, the Court in *Schriro v. Summerlin*¹³² confirmed that substantive rules are those "that place particular conduct or persons covered by the statute beyond the State's power to punish."¹³³ As the *Schriro* Court explained, these substantive rules apply retroactively because they "necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."¹³⁴ Watershed rules of criminal procedure, on the other hand, "implicat[e] the fundamental fairness and accuracy of the criminal proceeding."¹³⁵

125. 492 U.S. 302 (1989).

126. *Id.* at 330.

127. *Id.*

128. *See, e.g., Saffle v. Parks*, 494 U.S. 484, 494–95 (1990) (citations omitted) (citing *Teague*, 489 U.S. at 311; *Penry*, 492 U.S. at 329, 330) ("The first [non-retroactivity] exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a 'substantive categorical guarant[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" (quoting *Penry*, 492 U.S. at 330)).

129. *Teague*, 489 U.S. at 301 (plurality opinion) (citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987)).

130. *Id.*

131. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004).

132. 542 U.S. 348 (2004).

133. *Id.* at 351–52 (citing *Saffle*, 494 U.S. at 494–95; *Teague*, 489 U.S. at 311 (plurality opinion)).

134. *Schriro*, 542 U.S. at 352 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted)).

135. *Id.* (quoting *Saffle*, 494 U.S. at 495) (internal quotation marks omitted). Because this Comment argues that *Miller v. Alabama*'s rule falls under the substantive rule exception, this Comment will not discuss watershed rules of criminal procedure further.

2. *The Supreme Court's Retroactivity Jurisprudence as Applied to the States*

The *Teague* doctrine does not “limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.”¹³⁶ *Teague* involved a federal habeas corpus issue, and was designed to “minimiz[e] federal intrusion into state criminal proceedings.”¹³⁷ Though states are not required to follow the *Teague* analysis, many choose to do so.¹³⁸

a. *A Minority of Courts Have Found Miller to be Procedural and Have Refused to Apply It Retroactively*

The Eleventh Circuit and highest state courts in Pennsylvania, Louisiana, and Minnesota, as well as some lower state and federal courts, have held that *Miller* does not apply retroactively to cases on collateral review.¹³⁹ Although some of these courts turned to state precedents that resemble *Linkletter v. Walker*,¹⁴⁰ many relied heavily on *Teague v. Lane*.¹⁴¹ For example, the Supreme Court of Minnesota expressed the need for a “bright-line rule for when relief is to be retroactive” and looked to *Teague* to provide such a rule.¹⁴² Other courts with similar positions especially focused on *Teague*'s language that retroactivity “seriously undermines the principle of finality which is essential to the operation of our criminal

136. *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008).

137. *Id.* at 280.

138. *See, e.g., Pennsylvania v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013) (“This Court, however, generally has looked to the *Teague* doctrine in determining retroactivity of new federal constitutional rulings.”); *see also Ex Parte Maxwell*, 424 S.W.3d 66, 70–71 (Tex. Crim. App. 2014) (“Although the United States Supreme Court held in *Danforth v. Minnesota* that state courts need not utilize the *Teague* retroactivity rule, we follow *Teague* as a general matter of state habeas corpus . . .”).

139. *See Ex Parte Maxwell*, 424 S.W.3d at 71, n.20 (listing courts that have not applied *Miller* retroactively); *In re Morgan*, 717 F.3d 1186, 1189 (11th Cir. 2013) (rejecting the notion that *Miller* should apply retroactively); *Chambers v. Minnesota*, 831 N.W.2d 311, 331 (Minn. 2013) (same); *Louisiana v. Tate*, 130 So.3d 829, 841 (La. 2013) (same); *Cunningham*, 81 A.3d at 9 (same).

140. In considering the retroactivity of *Miller*, Florida and Michigan courts considered: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of a retroactive application of the new rule.” *Geter v. Florida*, 115 So.3d 375, 378 (Fla. Dist. Ct. App. 2012) (quoting *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980)); *see also Michigan v. Carp*, 828 N.W.2d 685 713–14 (Mich. Ct. App. 2012) (implementing the same test). Both courts found the *Miller* rule to be procedural and declined to apply it retroactively. *Geter*, 115 So.3d at 384–85; *Carp*, 828 N.W.2d at 723.

141. *See, e.g., Tate*, 130 So.3d 829, 834 (La. 2013) (“[O]ur analysis is directed by the *Teague* inquiry.”); *Carp*, 828 N.W.2d at 709 (“If, however, *Miller*'s new rule is procedural only and fails to meet any of the delineated *Teague* exceptions, then we cannot apply it retroactively . . .”).

142. *Chambers*, 831 N.W.2d at 324.

justice system. Without finality, the criminal law is deprived of much of its deterrent effect.”¹⁴³

Walking through the *Teague* analysis, most courts in this camp conceded that *Miller* announced a new rule.¹⁴⁴ However, these courts found the *Miller* rule to be procedural for a number of reasons. First, the rule did not implement a categorical ban,¹⁴⁵ but rather, imposed a “[t]argeted prohibition[.]”¹⁴⁶ Because the *Miller* Court focused solely on mandatory sentencing schemes and did not foreclose JLWOP sentences altogether, these courts found the rule to be procedural.¹⁴⁷ Second, as the Supreme Court of Pennsylvania explained, *Miller* “does not place any conduct beyond the State’s power to punish,” and therefore, it cannot fit into the first *Teague* exception to nonretroactivity.¹⁴⁸ Finally, in mandating a sentencer to consider a defendant’s “youth and attendant characteristics,” these courts argued that *Miller* did not announce an obligation that is “the functional equivalent of an element.”¹⁴⁹ Because *Miller* did not alter the

143. *Teague v. Lane*, 489 U.S. 288, 309 (1989); see, e.g., *In re Morgan*, 717 F.3d 1186, 1190 (11th Cir. 2013) (“[T]he distinction between substantive and procedural rules reflects the interest of the state and federal courts in the finality of judgments.” (citing *Teague*, 489 U.S. at 308)); *Chambers*, 831 N.W.2d at 324 (“[W]e have consistently recognized the need to safeguard the important principles underlying the [*Teague*] doctrine, including finality . . .”).

144. See, e.g., *Tate*, 130 So.3d at 835 (“[W]e find, and the parties do not dispute, *Miller* establishes a new rule.”); *Carp*, 828 N.W.2d at 708 (“[I]t is uncontested that *Miller* falls within the definition of a ‘new rule’ because it ‘was not *dictated* by precedent existing at the time the defendant’s conviction became final.”) (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)); *Chambers*, 831 N.W.2d at 325 (“The parties do not dispute that *Miller* announced a new rule . . .”).

145. *Tate*, 130 So.3d at 837 (“[*Miller*] did not alter the range of conduct or persons subject to life imprisonment without parole for homicide offenses, nor did it eliminate a State’s power to impose such a sentence on a juvenile offender . . .”); *Cunningham*, 81 A.3d at 10 (“[B]y its own terms, the *Miller* holding ‘does not categorically bar a penalty for a class of offenders . . .’”) (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012)).

146. *Carp*, 828 N.W.2d at 710 (explaining the *Miller* rule is procedural because “it *mandates only that a sentence follow a certain process*—considering an offender’s youth and attendant characteristics—before imposing a particular penalty. Targeted prohibitions are by definition less restrictive than a categorical ban.”) (footnote and citation omitted) (quoting *Miller*, 132 S. Ct. at 2471) (internal quotation marks omitted).

147. *In re Morgan*, 717 F.3d at 1189 (“[T]he Supreme Court made clear that its decision ‘d[id] not foreclose a sentencer’s ability to make [he] judgment [that a juvenile offender should be sentenced to life imprisonment without the possibility of parole] in homicide cases.’”) (quoting *Miller*, 132 S. Ct. at 2469); *Chambers*, 831 N.W.2d at 328 (“[T]he [*Miller*] rule . . . does not eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense.”); *Tate*, 130 So.3d at 837; *Cunningham*, 81 A.3d at 10.

148. *Cunningham*, 81 A.3d at 10 (citing *Miller*, 132 S. Ct. at 2471); see also *Carp*, 828 N.W.2d at 711 (“[T]he [*Miller*] ruling does not place ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”) (quoting *Teague*, 489 U.S. at 307)).

149. *Chambers*, 831 N.W.2d at 329 (quoting *Ring v. Arizona*, 536 U.S. 584, 609 (2002)) (internal quotation marks omitted).

elements necessary for a homicide conviction, these courts found it did not create a substantive change in the law.¹⁵⁰ For the above reasons, these courts held that the new rule announced in *Miller* is procedural and cannot apply retroactively to cases on collateral review.

b. Most Courts Considering the Issue Have Applied Miller Retroactively to Cases on Collateral Review

Most other courts, on both the federal and state levels, have found *Miller* to be a substantive rule that must apply retroactively to cases on collateral review. The First, Second, Third, Fourth, and Eighth Circuits found habeas applicants made a prima facie case that *Miller* applies retroactively,¹⁵¹ and thus, have granted motions to file habeas corpus petitions on *Miller* grounds.¹⁵² Habeas is available if “the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”¹⁵³ By allowing these habeas petitions to proceed, these courts recognized that *Miller* created a substantive rule that should apply retroactively. On the state level, offenders previously sentenced to mandatory JLWOP can seek post-conviction relief. Post-conviction is a state form of collateral review that mirrors habeas relief in the federal system, though its requirements vary by state. Considering post-conviction petitions raising *Miller* claims, supreme courts in Mississippi,

150. *Carp*, 828 N.W.2d at 711; see *Chambers*, 831 N.W.2d at 329 (“[T]he *Miller* rule does not announce a new ‘element.’”); see also *Tate*, 130 So.3d at 837 (“[I]t did not alter the elements necessary for a homicide conviction. Rather, it simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life imprisonment without parole for such a conviction . . .” (citing *Miller*, 132 S. Ct. at 2471)).

151. A person who is “in custody pursuant to the judgment of a State court” can seek relief through habeas corpus if his or her incarceration violates the Constitution or federal law. 28 U.S.C. § 2254(a) (2012). Most circuits require a defendant to show “possible merit to warrant a fuller exploration by the district court” to establish a prima facie case. *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013) (per curiam) (internal quotation marks omitted) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997); see also *In re Pendleton*, 732 F.3d 280, 282 (3d Cir. 2013) (per curiam) (quoting *Goldblum v. Klem*, 510 F.3d 204, 220 (3d Cir. 2007) (“Under our precedent, a ‘prima facie showing’ in this context merely means ‘a sufficient showing of possible merit to warrant a fuller exploration by the district court.’”) (citation and internal quotation marks omitted).

152. See *Ex Parte Maxwell*, 424 S.W.3d 66, 71, 71 n.21 (Tex. Crim. App. 2014) (naming the circuit courts granting habeas petitions); *Evans-Garcia v. United States*, 744 F.3d 235, 236 (1st Cir. 2014) (certifying *Evans-Garcia*’s habeas petition raising a *Miller* claim); *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013); *Pendleton*, 732 F.3d at 282–83 (per curiam) (“[W]e conclude that Petitioners have made a prima facie showing that *Miller* is retroactive. In doing so, we join several of our sister courts of appeals.”); *In re James*, No. 12-287 (4th Cir. May 10, 2013); *Johnson*, 720 F.3d at 720 (internal citation omitted) (finding petitioner made a prima facie case that *Miller* created a new rule that was previously unavailable).

153. 28 U.S.C. § 2254(e)(2)(A)(i) (2012).

Massachusetts, Nebraska, and Iowa have found that *Miller* applies retroactively to cases on collateral review.¹⁵⁴

Following the *Teague* analysis, these courts asked first whether *Miller* announced a new rule, and second whether the new rule was substantive or procedural. Each of these courts determined that *Miller* created a new rule.¹⁵⁵ Most found the rule to be substantive because it “explicitly forecloses the imposition of a certain category of punishment . . . on a specific class of defendants,”¹⁵⁶ and thus, “narrow[ed] the scope of a criminal statute.”¹⁵⁷ These courts particularly focused on *Schriro*’s language that substantive rules “apply retroactively because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.”¹⁵⁸

Two courts have found that *Miller* did not announce a purely substantive rule, but held the rule still applies retroactively. The Superior Court of New Hampshire explained *Miller* has both substantive and procedural elements in that it “affects a particular class of persons” and “mandates a process that may lead to the same outcome.”¹⁵⁹ Despite *Miller*’s procedural elements, the court found the scales tipped in favor of *Miller* announcing a substantive rule because “it alters the range of . . . punishments that may be imposed on juvenile homicide offenders.”¹⁶⁰ Similarly, the Supreme Court of Nebraska stated that the *Miller* rule “does not neatly fall into the existing definitions of either a procedural rule or a

154. *Iowa v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013); *Jones v. Mississippi*, 122 So.3d 698, 703 (Miss. 2013); *Nebraska v. Mantich*, 824 N.W.2d 716, 731 (Neb. 2014).

155. *See, e.g., Diatchenko*, 1 N.E.3d at 278–79 (explaining that prior to *Miller*, “judicial precedent did not compel a conclusion that it was unconstitutional to impose a mandatory sentence of life in prison without the possibility of parole on a juvenile homicide offender.”); *Jones*, 122 So.3d at 702 (explaining that when *Miller* held mandatory JLWOP sentencing schemes unconstitutional, the Court imposed “a new obligation prohibiting the application of our existing substantive law, [and thereby,] it modified Mississippi substantive law.”); *Mantich*, 824 N.W.2d at 724 (“It is very clear that *Miller* announced a new rule . . . because the rule announced in *Miller* was not dictated by precedent existing at the time *Mantich*’s first degree murder conviction became final.”) (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)).

156. *Diatchenko*, 1 N.E.3d at 281.

157. *Jones*, 122 So.3d at 702 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004)).

158. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998) (internal quotation marks omitted); *see Diatchenko*, 1 N.E. at 281 (explaining retroactive application of *Miller* “ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them” (citing *Schriro*, 542 U.S. at 352)); *see also Jones*, 122 So.3d at 702 (“By prohibiting the imposition of a mandatory sentence, the new [*Miller*] obligation prevents ‘a significant risk that a [juvenile] . . . faces a punishment that the law cannot impose on him.’” (quoting *Schriro*, 542 U.S. at 351–52)).

159. *Tulloch v. Gerry*, No. 12-CV-849, 2013 WL 4011621, at *6 (N.H. Super. Ct. July 29, 2013) (Trial Order).

160. *Id.*

substantive rule.”¹⁶¹ However, the court found *Miller* to be “more substantive than procedural,”¹⁶² because it made “a certain fact (consideration of mitigating evidence) essential to imposition of a sentence.”¹⁶³ Despite some disagreement amongst these courts regarding whether *Miller* is purely or partially substantive, all agree that the substance outweighs the procedure, and that *Miller* must apply retroactively to cases on collateral review.

II. ANALYSIS

In establishing a new rule that bans a certain punishment for a class of offenders, the *Miller* prohibition on mandatory JLWOP is substantive and should apply retroactively. Courts finding otherwise improperly focused on *Teague*, both in its description of substantive rules and its concern with the finality of judgments. Furthermore, a cursory reading of *Miller* itself indicates that it should apply retroactively: most of its cited authority has been applied retroactively, the dissent believed *Miller* to be retroactive, and the Court’s holding applied equally to both defendants—one of whom was before the Court on collateral review.

A. *Reliance on a Strict Teague Analysis Is Misplaced Because Subsequent Decisions Have Expanded Teague’s Substantive Exception, and Under This Refinement, Miller Clearly Announced a Substantive Rule*

Miller created a substantive rule because it forbids a certain punishment for a class of offenders.¹⁶⁴ Courts finding *Miller* to be procedural improperly focused on *Teague v. Lane* without addressing subsequent refinements to the *Teague* doctrine. The *Teague* plurality described the substantive rule exception as covering rules placing certain *conduct* outside the scope of the criminal law, but the Court later explained this exception includes rules placing *certain categories of individuals* beyond the government’s power to punish.¹⁶⁵ The *Schiro* Court further explained that substantive rules “apply retroactively because they

161. *Nebraska v. Mantich*, 842 N.W.2d 716, 729 (Neb. 2014).

162. *Id.* at 731.

163. *Id.* at 730.

164. *See supra* Part I.C.2.b.

165. *See Schiro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (“We have sometimes referred to rules . . . [that place particular conduct or persons beyond the State’s power to punish] as falling under an exception to *Teague*’s bar on retroactive application of procedural rules”); *see also* *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004) (“Rules that fall within what we have referred to as *Teague*’s first exception ‘are more accurately characterized as substantive rules not subject to [*Teague*’s] bar.’” (quoting *Schiro*, 542 U.S. at 352 n.4)).

necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.”¹⁶⁶ In other words, substantive rules protect defendants from receiving unconstitutional sentences, as the *Miller* rule does.

Despite refinement to the *Teague* analysis—most importantly, *Schriro v. Summerlin*¹⁶⁷—courts declaring that *Miller* does not apply retroactively relied more heavily on *Teague* than on *Schriro*.¹⁶⁸ These courts reasoned that because *Miller* did not create “a categorical ban,”¹⁶⁹ nor place certain *conduct* beyond the criminal-law-making authority, it pronounced a procedural rule.¹⁷⁰ However, the modern meaning of *Teague*’s non-retroactivity doctrine can only be understood by considering the Court’s language in *Schriro*. Rather than focusing primarily on conduct, these courts should have focused on the class of offenders facing a particular punishment.¹⁷¹ Although these courts were correct that *Miller* did not categorically ban JLWOP, they failed to recognize that in prohibiting mandatory JLWOP sentences, *Miller* “alters . . . the punishments that may be imposed on juvenile homicide offenders.”¹⁷² In doing so, *Miller*’s rule “prevents ‘a significant risk that a [juvenile] . . . faces a punishment that the law cannot impose on him.’”¹⁷³ Furthermore, as JLWOP and mandatory JLWOP entail different sentencing structures, the *Miller* Court *did* impose a categorical ban of sorts by outlawing all mandatory JLWOP schemes.

166. *Schriro*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)) (internal quotation marks omitted).

167. *See Nebraska v. Mantich*, 842 N.W.2d 716, 723 (Neb. 2014) (“Since *Teague*, the Court has refined the retroactivity analysis. The most significant refinement occurred in *Schriro v. Summerlin*.” (citing *Schriro*, 542 U.S. 348)).

168. *See Ex Parte Maxwell*, 424 S.W.3d 66, 72–74 (Tex. Crim. App. 2014) (explaining those courts declaring *Miller* is not retroactive narrowly interpret *Teague*’s first exception, while courts declaring *Miller* is retroactive focus on *Schriro v. Summerlin*’s language that “[n]ew substantive rules include ‘constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.’” (quoting *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013))).

169. *See supra* text accompanying note 145.

170. *See supra* Part I.C.2.a.

171. *Ex Parte Maxwell*, 424 S.W.3d at 75 (“*Miller* is driven, first and foremost, by the conclusion that ‘children are constitutionally different from adults for purposes of sentencing.’” (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012))).

172. *Tulloch v. Gerry*, No. 12-CV-849, 2013 WL 4011621, at *6 (N.H. Super. Ct. July 29, 2013) (Trial Order) (“*Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who would could otherwise receive only natural life imprisonment.’ In this way, the *Miller* rule is substantive because it alters the range of outcomes of a criminal proceeding—or the punishments that may be imposed on juvenile homicide offenders.” (quoting *Illinois v. Morfin*, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012))); *see also Ex Parte Maxwell*, 424 S.W.3d at 75 (“[*Miller*] provides a sentencing court with decision making authority where there once was none”).

173. *Jones v. Mississippi*, 122 So.3d 698, 702 (2013).

Because the *Miller* rule ended unconstitutionally disproportionate sentencing schemes for a class of offenders, *Miller* neatly fits into the substantive rule exception.¹⁷⁴

B. Because Miller Protects Juveniles from Receiving Unconstitutional Sentences, It Created a Substantive Rule That Must be Applied Retroactively

As constitutional law scholar Erwin Chemerinsky explains, *Miller* did not merely change procedure but found the Constitution forbids a punishment.¹⁷⁵ This is a “substantive change in the law which puts matters outside the scope of the government’s power.”¹⁷⁶ As such, *Miller* should apply retroactively.¹⁷⁷ This is so because the authority relied upon by the *Miller* Court consists of retroactively-applied substantive rules;¹⁷⁸ the *Miller* Court did not distinguish between the two juveniles before the Court, despite the different procedural postures of their cases;¹⁷⁹ and Chief Justice Roberts’s dissent reveals his understanding that *Miller* was intended to apply retroactively.¹⁸⁰

1. Many of the Cases Cited by Miller Apply Retroactively, and Miller Should Receive the Same Treatment

As the Supreme Court of Iowa explained, “[i]f a substantial portion of the authority used in *Miller* has been applied retroactively, *Miller* should logically receive the same treatment.”¹⁸¹ Because the proportional and individualized sentencing cases relied upon by the *Miller* Court announced retroactively-applied substantive rules, *Miller* should likewise apply retroactively.

The Court’s proportional sentencing cases—*Atkins*, *Roper*, and *Graham*—which all “prohibit[] a certain category of punishment for a [certain] class of defendants because of their status or offense,” have each

174. The *Miller* Court itself explained that mandatory JLWOP sentencing schemes “pose[] too great a risk of disproportionate punishment.” *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

175. Erwin Chemerinsky, *Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, ABA JOURNAL (Aug. 8, 2012), http://www.abajournal.com/%20news/%20article/Chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/.

176. *Id.*

177. *Id.*

178. *See infra* part II.B.1.

179. *See infra* part II.B.2.

180. *See infra* part II.B.3.

181. *Iowa v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013).

been applied retroactively to cases on collateral review.¹⁸² *Atkins*, which held that imposing the death penalty on offenders with developmental disabilities is cruel and unusual, was decided on direct review, but has since been applied retroactively to cases on collateral review as a substantive rule.¹⁸³ *Roper*, which relied heavily on *Atkins* and found that capital punishment for juveniles violates the Eighth Amendment, became retroactive when it was announced because it was decided on collateral review.¹⁸⁴ *Graham*, which struck down JLWOP sentences for non-homicide crimes, has been applied retroactively to cases on collateral review in the Fourth, Fifth, and Eleventh Circuits.¹⁸⁵ Like the Court's proportional sentencing cases, the Court's individualized sentencing cases have also been applied retroactively to cases on collateral review.¹⁸⁶ Both *Eddings v. Oklahoma* and *Lockett v. Ohio*,¹⁸⁷ which require that mitigating factors be considered before imposing the death penalty, were decided on direct review, and both have subsequently been applied retroactively.¹⁸⁸

Since much of the authority in *Miller* has been applied retroactively, the rules announced in these cases are substantive. Like the proportional and individualized sentencing cases, *Miller* eliminates an entire class of offenders from receiving a certain punishment and requires the consideration of mitigating factors at sentencing. Opponents of retroactivity point out that much of the retroactively-applied authority concerned the death penalty, and therefore, they argue, the retroactivity of

182. *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

183. Brief of Juvenile Law Center, et. al., as Amici Curiae on Behalf of Petitioner at 8, *In re Pendleton*, 732 F.3d 280 (3d Cir. 2013) (No. 12-3996) [hereinafter Brief of Juvenile Law Center]; see also *In re Sparks*, 657 F.3d at 272 (citing, for example, *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (“[T]he Supreme Court’s decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect . . .”). In fact, in *Penry*, decided before *Atkins*, the Court stated, “[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.” 492 U.S. at 330.

184. Brief of Juvenile Law Center, *supra* note 183, at 8; see also *In re Sparks*, 657 F.3d at 272 (explaining *Roper* has been applied retroactively to cases on collateral review).

185. See *In re Evans*, 449 Fed. Appx. 284 (4th Cir. 2011); *In re Sparks*, 657 F.3d at 262; *Loggins v. Thomas*, 654 F.3d 1204, 1221 (11th Cir. 2011).

186. Brief of Juvenile Law Center, *supra* note 183, at 9–10.

187. 438 U.S. 586 (1978) (plurality opinion).

188. *Id.* at 10; see also *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (applying *Eddings* retroactively to a habeas petition); see also *Jordan v. Arizona*, 438 U.S. 911, 911–12 (1978) (vacating a death penalty judgment and remanding to the Supreme Court of Arizona to proceed according to *Lockett*); *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (per curiam) (“There is no doubt today . . . *Lockett* is retroactive.”).

those cases does not indicate *Miller* should be retroactive.¹⁸⁹ However, the *Miller* Court explained that, “if . . . ‘death is different,’ children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children.”¹⁹⁰ The fact that the Court’s earlier cases concerned capital punishment does not diminish *Miller*’s retroactivity. Because *Miller* announced a rule similar to those announced in both strands of precedent, *Miller* likewise announced a substantive rule that should apply retroactively to cases on collateral review.¹⁹¹

2. *Courts Declaring Miller Is Not Retroactive Neglected to Mention That One of the Petitioners in Miller Was Before the Court on Collateral Review*

Because the *Miller* Court’s holding applied equally to Evan Miller, who was before the Court on direct review, as it did to Kuntrell Jackson, who was before the Court on collateral review, the *Miller* opinion itself indicates that it applies retroactively to cases like Jackson’s.¹⁹² When the United States Supreme Court granted certiorari for Miller and Jackson in tandem, the Court did not distinguish between the two juveniles based on the status of their respective cases.¹⁹³ Because *Miller*’s holding applied equally to both Miller and Jackson, it can be inferred that the Court intended *Miller* to apply retroactively,¹⁹⁴ as a new rule becomes retroactive

189. Opposition to Petition for Writ of Certiorari at 19, *Toca v. Louisiana*, 135 S. Ct. 781 (2014) (No. 14-6381) [hereinafter Opposition to Petition].

190. *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

191. Brief of Juvenile Law Center, *supra* note 183, at 10 (“*Miller* articulates a new rule typical of the two lines of precedent it relies on and should receive the same retroactive application.”).

192. Jackson was convicted of capital felony murder and aggravated robbery in 2001 and was sentenced to life without parole. *Miller*, 132 S. Ct. at 2461. On appeal, Jackson did not challenge his sentence, and the Arkansas Supreme Court upheld his conviction. *Id.* After *Roper v. Simmons*, Jackson filed a state habeas corpus petition, challenging his sentence on Eighth Amendment grounds to no avail. *Id.* While Jackson appealed his petition denial, the United States Supreme Court in *Graham v. Florida* ruled JLWOP was unconstitutional for non-homicide crimes. *Id.* Jackson raised this argument in his appeal, but the Arkansas Supreme Court ruled that “*Roper* and *Graham* were ‘narrowly tailored’ to their contexts,” and upheld Jackson’s petition denial. *Id.* Therefore, Jackson’s conviction was final by 2012, and he was before the *Miller* Court on collateral review.

193. *Id.* at 2462–63.

194. See, e.g., *Louisiana v. Tate*, 130 So.3d 829, 848 (La. 2013) (Johnson, C.J., dissenting) (“[T]he Court’s ruling in [*Miller*] fully supports that the Court’s ban on mandatory life without parole sentences is fully retroactive to all defendants on collateral review.”); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013); *Nebraska v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) (“We also find it noteworthy that the Court applied the rule announced in *Miller* to Jackson, who was before the Court on collateral review. Years ago, the Court stated that it would not announce or apply a new constitutional rule in a case before it on collateral review unless that rule would apply to all defendants on collateral review.”); *Tulloch v. Gerry*, 12-CV-849, 2013 WL 4011621 *4 (N.H. Super. Ct. July 29, 2013) (Trial Order) (explaining that when the

“by the action taken by the Supreme Court in the case announcing the new rule.”¹⁹⁵ Otherwise, courts would treat similarly situated defendants differently, which “hardly comports with the ideal of ‘administration of justice with an even hand.’”¹⁹⁶ It would be “terribly unfair” to offenders similarly situated to Kuntrell Jackson, whose sentences became final before *Miller*, to remain in prison without the possibility of parole “based on the accident of the timing of the trial.”¹⁹⁷ When the *Miller* Court remanded Jackson’s case for further proceedings consistent with the *Miller* holding, the Court made the rule retroactive to all cases on collateral review.

3. *Chief Justice Roberts’s Dissent Suggests the Majority Intended Retroactive Application, and Concerns About Burdening the Judiciary with Resentencing Hearings Are Unwarranted*

Chief Justice Roberts’s dissent suggests the *Miller* Court intended its decision to apply retroactively. In his dissenting opinion, Chief Justice Roberts stated that the majority’s opinion is “an invitation to overturn life without parole sentences imposed by juries and trial judges.”¹⁹⁸ This points to his understanding that *Miller* was intended to apply retroactively.¹⁹⁹ As the Supreme Court of Iowa pointed out, “the dissent would not have raised this concern if the Court did not believe its holding applied to cases on collateral review.”²⁰⁰ Therefore, the dissent indicates the Court intended *Miller* to apply retroactively.

Like Chief Justice Roberts, opponents of retroactivity argue that it creates a strain on judicial resources. If *Miller* applies retroactively, the defendants previously sentenced to mandatory JLWOP must be afforded resentencing or parole hearings. This will create only a temporary burden, however, as a fixed number of defendants—only those who fit the specific criteria of *Miller*—can challenge the constitutionality of their previously-imposed sentences. Once these defendants are afforded new hearings, the burden on the judiciary will end.

Furthermore, the temporary strain on judicial resources is negligible compared to the extensive cost of housing the thousands of juvenile inmates serving mandatory JLWOP sentences. To illustrate, Pennsylvania houses

Miller Court considered Jackson’s case in tandem, “this was a retroactive application of the rule to a collateral review and, thus, implies an intent of applying the rule retroactively.”)

195. *Diatchenko*, 1 N.E.3d at 281 (quoting *State v. Ragland*, 836 N.W.2d 107, 114 (Iowa 2013)).

196. *Teague v. Lane*, 489 U.S. 288, 315 (1989) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring)).

197. Chemerinsky, *supra* note 175.

198. *Miller v. Alabama*, 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting).

199. *Tate*, 130 So.3d at 848 (Johnson, C.J., dissenting).

200. *Iowa v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013).

472 juvenile inmates previously sentenced to mandatory JLWOP²⁰¹ and spends approximately \$42,339 per inmate annually.²⁰² Of these 472 juveniles, 18 were 13 or 14 years old when they were sentenced.²⁰³ If these juveniles live to be 76 years old (the average life expectancy of an American male),²⁰⁴ their life sentences will cost the State approximately \$47,250,324 to \$48,012,426. This astonishing figure considers only the cost of incarcerating 18 juveniles and does not consider the other 454 juveniles sentenced to die in Pennsylvania's prisons.

In addition to the obscene cost of incarcerating juvenile offenders, the Eighth Amendment provides an important protection that should not be overshadowed by judicial conservation concerns. The Constitution tasks the judiciary with upholding the Constitution, but if courts refuse to apply *Miller* retroactively, such decisions “would allow the state to impose *unconstitutional* punishment[s] on some persons but not others, an intolerable miscarriage of justice.”²⁰⁵ When the *Miller* Court found an Eighth Amendment violation, “it inescapably deem[ed] the same punishment, albeit imposed before the decision, similarly cruel and unusual.”²⁰⁶ While preserving judicial resources is important, this concern should not prevent courts from putting an end to these unconstitutional sentences.

Opponents of retroactivity also argue that resentencing hearings will be “problematic” due to a lack of certain psychological evidence.²⁰⁷ They claim that without a psychological examination prior to a defendant's conviction, it would be impossible for resentencing courts to determine that defendant's capacity for change and prospects of reform.²⁰⁸ Opponents are correct that determining a defendant's prospects for reform *before* sentencing will be difficult. However, there exists tangible evidence, such as a defendant's accomplishments in prison, showing the actual occurrence

201. *JLWOP: An Overview*, *supra* note 5, at 1.

202. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INSTITUTE OF JUSTICE 10 (July 20, 2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

203. *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison*, EQUAL JUSTICE INITIATIVE 20 (Nov. 2007), available at <http://www.eji.org/files/20071017cruelandunusual.pdf>.

204. *Actuarial Life Table*, SOC. SEC. ADMIN., (2010) <http://www.ssa.gov/oact/STATS/table4c6.html> (last visited Jan. 16, 2015).

205. Brief of Juvenile Law Center, *supra* note 183, at 20 (quoting *Hill v. Synder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. January 30, 2013)) (internal quotation marks omitted).

206. *Id.* at 3.

207. Opposition to Petition, *supra* note 189, at 20.

208. *Id.*

of such reform. Opponents argue that such evidence is irrelevant because *Miller* requires a sentencer to consider a defendant's "youth and attendant characteristics" at the time of sentencing.²⁰⁹ The fact that offenders sentenced to JLWOP actually do change, however, despite there being no tangible benefits for doing so, reveals their great capacities for reform. JLWOP sentences mean "that good behavior and character improvement are immaterial, . . . that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."²¹⁰ That juvenile defendants do change in such conditions speaks volumes to their capacities for reform. Furthermore, the United States Supreme Court has stated post-sentencing conduct is relevant for resentencing purposes.²¹¹ Therefore, a lack of certain psychological evidence due to the unfortunate timing of a defendant's sentencing should not prevent reformed offenders from being released.

C. Reliance on the Finality of Judgments and the Deterrent Effect of Criminal Law Is Irrelevant in Determining Miller's Retroactivity Because Deterrence Theories Are Inapplicable to Juveniles

Opponents of retroactivity argue that retroactive application of a new rule undermines the finality of judgments, and therefore, interferes with the deterrent effect of the criminal law. Many of the courts that found *Miller* does not apply retroactively relied heavily on *Teague's* language that retroactive application of constitutional rules "seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."²¹² However, the Supreme Court has previously stated that typical penological justifications, including deterrence, do not apply to juveniles as they do to adults.²¹³ It is highly unlikely that juveniles employ a cost-benefit analysis or consider potential punishments before engaging in criminal activity.²¹⁴ They lack maturity, exhibit impetuosity, and are more

209. *Id.* at 21 (internal quotation marks omitted).

210. *Graham v. Florida*, 560 U.S. 48, 70 (2010) (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).

211. *Wasman v. United States*, 468 U.S. 559, 571–72 (1984).

212. *Teague v. Lane*, 489 U.S. 288, 309 (1989); *see, e.g., Chambers v. Minnesota*, 831 N.W.2d 311, 324 (Minn. 2013) ("[W]e have consistently recognized the need to safeguard the important principles underlying the [*Teague*] doctrine, including finality").

213. *See Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (explaining the differences between juveniles and adults weaken penological justifications); *Graham*, 560 U.S. at 71–73 (explaining penological justifications do not work for juvenile offenders); *Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("[I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles").

214. *Roper*, 543 U.S. at 571–72.

easily influenced by negative forces and peer pressure, making them less likely to consider the consequences of their actions.²¹⁵

Outside forces have an enormous impact on juvenile behavior. Youth is not just one's chronological age; "[i]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage."²¹⁶ The Sentencing Project, an organization dedicated to a fair and effective criminal justice system, conducted a study of juveniles sentenced to JLWOP and found that "79% witnessed violence in their homes; 40% had been enrolled in special education classes; [f]ewer than half were attending school at the time of their offense; [and] 47% were physically abused."²¹⁷ These juveniles lived in "horrific, crime-producing settings,"²¹⁸ at a time when they were most susceptible to negative influences. As victims of their environments, these defendants should not be left to die in prison.

Scientific studies have also revealed that deterrence theories are less applicable to juveniles than to adults. Behavioral studies show that juveniles "often undervalue the true consequences of their actions. Instead, adolescents, as a group, often value impulsivity, fun-seeking, and peer-approval more than adults do."²¹⁹ Furthermore, the "executive area of the brain is one of the last parts of the brain to reach maturity."²²⁰ Disruption in this area of the brain "may lead to impairments of foresight, strategic thinking, and risk management."²²¹ Therefore, juveniles are unlikely to be deterred from engaging in criminal conduct by the threat of punishment. In fact, "research has failed to establish that the threat of adult criminal punishment . . . has had any deterrent effect on adolescent misconduct."²²²

Reliance on *Teague*'s language regarding finality and deterrence is misplaced due to the unique characteristics of juveniles. As the court in *Chambers v. Minnesota* explained, when a new rule is substantive, "the Constitution itself deprives the State of *the power to impose a certain penalty*, and the finality and comity concerns' underlying the retroactivity

215. *Miller*, 132 S. Ct. at 2465, 2475 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)).

216. *Roper*, 543 U.S. at 569.

217. *Slow to Act*, *supra* note 108, at 4.

218. *Miller*, 132 S. Ct. at 2464 (citing *Roper*, 543 U.S. at 569).

219. Brief for the Am. Psychological Assoc., et. al., as Amici Curiae Supporting Respondent at 6–7, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) [hereinafter Brief for the Am. Psychological Assoc.].

220. *Id.* at 10.

221. *Id.*

222. *Id.* at 14 (citing Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & SOC'Y REV. 521, 529–32 (1988); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 100–02 (1994)).

doctrine ‘have little force.’”²²³ As the characteristics of juveniles render finality and deterrence inapposite, the concerns underlying *Teague*’s non-retroactivity doctrine are irrelevant in determining *Miller*’s retroactivity.

D. Toca v. Louisiana: A Missed Opportunity for the Court to Declare Miller Applies Retroactively

Because courts have been disparate in their conclusions regarding *Miller*’s retroactivity, the Court granted certiorari on December 12, 2014 to answer this important question.²²⁴ The Court in *Toca v. Louisiana* agreed to consider: first, whether the *Miller* rule applies retroactively to George Toca, a prisoner sentenced to mandatory JLWOP, and second, whether “a federal question [is] raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception.”²²⁵ However, Mr. Toca was released from prison on January 29, 2015 after entering a plea agreement with the prosecutor.²²⁶ As such, his case is moot and has been dismissed.²²⁷ That the Court granted certiorari to Mr. Toca reveals the importance of resolving the issue of *Miller*’s retroactivity. Hopefully, another opportunity to resolve the issue will present itself soon.²²⁸

III. CONCLUSION

Miller v. Alabama announced a substantive rule because it protects juveniles, as a class of offenders, from receiving a sentence that the government cannot impose upon them. Courts declaring otherwise ignored

223. *Chambers v. Minnesota*, 831 N.W.2d 311, 326 (Minn. 2013) (citations and internal quotation marks omitted).

224. *Toca v. Louisiana*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/toca-v-louisiana/> (last visited Mar. 20, 2015).

225. Lyle Denniston, Court to Look Again at Juvenile Life Sentences, SCOTUSBLOG (Dec. 12, 2014), <http://www.scotusblog.com/2014/12/court-to-look-again-at-juvenile-life-sentences/>.

226. *George Toca Freed After Nearly 31 Years of Wrongful Incarceration*, THE INNOCENCE PROJECT, <http://ip-no.org/george-toca-freed-after-nearly-31-years-wrongful-incarceration> (last visited Feb. 8, 2015).

227. Lyle Denniston, Juvenile Sentencing Case to End, SCOTUSBLOG (Feb. 3, 2015), <http://www.scotusblog.com/2015/02/juvenile-sentencing-case-to-end/>; see also Letter from Leon A. Cannizzaro, Jr., Dist. Attorney for Orleans Parish, et. al., to Scott S. Harris, U.S. Supreme Court Clerk (Feb. 2, 2015), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/02/14-6381-dismissal-motion.pdf>.

228. As luck would have it, the Supreme Court granted certiorari on March 23, 2015 in *Montgomery v. Louisiana*. *Montgomery v. Louisiana*, 2015 WL 1280236 (U.S. Mar. 23, 2015) (No. 14-28). The Court agreed to consider “[w]hether *Miller v. Alabama* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison.” *Montgomery v. Louisiana*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/montgomery-v-louisiana/> (last visited April 12, 2015). The Court also requested that the parties brief and argue whether the Court has jurisdiction to determine whether the Supreme Court of Louisiana properly refused to apply *Miller* retroactively in this case. *Id.*

important refinements to the *Teague* doctrine, while disregarding the unique characteristics of youth that make deterrence concerns inapplicable to juveniles. Refusing to apply *Miller* retroactively is at odds with modern notions of decency, scientific proof that juveniles are different, and even-handed justice. Continuing to incarcerate these individuals wastes an enormous amount of human potential and taxpayer money. As a vulnerable group subjected to horrific settings, completely outside of their control, defendants sentenced to mandatory JLWOP should not be left to die in prison.