ARTICLES

MILLER V. ALABAMA AND THE RETROACTIVITY OF PROPORTIONALITY RULES

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ABSTRACT

In its 2012 decision in the companion cases of Miller v. Alabama *and* Jackson v. Hobbs, *the Supreme Court declared that it was unconstitutional to sentence children to mandatory life without parole because such sentences preclude an individualized consideration of a defendant's age and other mitigating factors. What* Miller *did not address, however, and what has confounded lower courts over the last two years, is whether the ruling applies to the more than 2,100 inmates whose convictions were already final when* Miller *was decided. In all but one case, the question has come down to an exercise in line drawing. If, under the Court's elusive* Teague *retroactivity doctrine,* Miller *articulated a "substantive" rule of constitutional law, it is retroactive; if the rule is merely "procedural," it is not. The Supreme Court is all but certain to decide the issue in the near future.*

I make two primary arguments in this Article. The first adds to the growing body of commentary concluding that, while Miller *has "procedural" attributes, they are components of a constitutional mandate that is fundamentally "substantive." The second argument applies broadly to all new constitutional rules which, like the* Miller *rule, are grounded in the Eighth Amendment's proportionality guarantee. As even those who favor of limitations on retroactivity have acknowledged, there is a normative point at which interests in "finality" simply must yield to competing notions of justice and equality. I argue that finality interests may be at their weakest when the Court announces a new proportionality rule, because the practical burdens of review and theoretical concerns about undermining the consequentialist goals of punishment are simply not as pronounced with sentences of incarceration as they are with convictions. The risks of offending basic notions of "justice" may be at their most pronounced with new proportionality rules, however, because to deny relief to those whose sentences have been deemed "excessive" (or at a high risk of excessiveness) is to undermine the very principles of proportionality and fundamental fairness in which such rules are grounded. Proportionality rules should therefore be afforded something close to a presumption of retroactivity.*

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INTRODUCTION

Quantel Lotts was fourteen years old when he was sentenced to life without parole.[1] By any measure, Lotts' childhood was bleak. He spent the early years of his life in a blighted St. Louis neighborhood and lived in multiple foster homes before he was eventually placed with his father and younger brother.[2] When Lotts was ten, his father married, and the three moved to rural St. Francois County, Missouri. By most accounts, Lotts developed a close relationship with his new step-brother, Michael, who was three years older.[3] On November 13, 1999, however, the boys got into an argument. Michael hit Lotts with a blow dart, Lotts responded with a toy bow and arrow, and a fight ensued.[4] Michael was stabbed and later died.[5] Lotts was in seventh grade and not yet five feet tall when he was charged as an adult with first-degree murder, tried, convicted and sentenced to life without parole.[6] Under Missouri law, his sentence was mandatory: the sentencer was precluded from considering Quantel Lotts' age and maturity, the events that led up to Michael's death, Lotts' dismal childhood, or the likelihood that he might one day be reformed.[7] Over the objections of Michael's mother, Quantel Lotts was sent to spend the rest of his life in a Bonne Terre, Missouri prison.[8]

In June 2012, the Supreme Court held in the companion cases *Miller v. Alabama* and *Jackson v. Hobbs* that sentencing those under the age of eighteen, like Quantel Lotts, to mandatory life without parole violates the Eighth Amendment because it precludes the sentencer from taking into account the juvenile's age or other mitigating fac-

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1 EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR OLD CHILDREN TO DIE IN PRISON 8, 30 (Nov. 2007), *available at* http://www.eji.org/files/20071017cruelandunusual.pdf.

2 Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, CNN.COM (Apr. 8, 2009), http://articles.cnn.com/2009-04-08/justice/teens.life.sentence_1_parole-hearing-parole-for-first-degree-murder-life-sentences?_s=PM:CRIME.

3 *Id.*

4 Ed Pilkington, *Jailed for Life at Age 14: US Supreme Court To Consider Juvenile Sentences*, THE GUARDIAN, (Mar. 19, 2012), www.guardian.co.uk/law/2012/mar/19/supreme-court-juvenile-life-sentences.

5 *Id.*

6 Adam Liptak & Lisa F. Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES (Apr. 20, 2011), http://www.nytimes.com/2011/04/21/us/21juvenile.html?pagewanted=all&_r=0.

7 Mo. Ann. Stat. § 565.020 (West 2012).

8 EQUAL JUSTICE INITIATIVE, *supra* note 1, at 30.

tors.[9] *Miller* became the third Supreme Court decision in seven years to conclude that three fundamental features of youth—lack of maturity, vulnerability to negative influences, and capacity for change—make children "constitutionally different" from adults and "less deserving of the most severe punishments."[10] Mandatory life without parole for juveniles is cruel and unusual, the Court held, because "by making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[11] Though the Court declined to ban juvenile life without parole sentences outright, Justice Elena Kagan's majority opinion makes clear that all such sentences are now suspect.

What *Miller* did not address, however, and what has confounded lower courts in the months since, is whether the ruling applies to the more than 2,100 inmates[12] who were sentenced as juveniles to mandatory life without parole, but whose convictions were already final when *Miller* was decided. More than thirty lower courts[13] have now considered the question, and while the majority of these have ruled, either preliminarily or finally, that *Miller* is retroactive, the question has, in all but one case, come down to an "exercise in line drawing."[14]

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9 Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012); Jackson v. Hobbs, 132 S. Ct. 548 (2011). For the sake of brevity, I refer to the companion cases *Miller v. Alabama* and *Jackson v. Hobbs* as "*Miller*."

10 *Miller*, 132 S. Ct. at 2464 (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2011)). *Miller* was preceded by Roper v. Simmons, 543 U.S. 551, 578–79 (2005), which abolished the death penalty for juveniles in 2005, and Graham v. Florida, 130 S. Ct. 2011 (2010), which banned juvenile life without parole sentences for non-homicide cases in 2010.

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

12 ELIZABETH CALVIN, ET AL., HUMAN RIGHTS WATCH, WHEN I DIE . . . THEY'LL SEND ME HOME: YOUTH SENTENCED TO LIFE IN PRISON WITHOUT PAROLE IN CALIFORNIA, AN UPDATE, 2 (2012), *available at* http://www.hrw.org/sites/default/files/reports/crd0112webwcover.pdf (estimating that there are currently about 2,570 youth offenders serving life without parole in the United States and that approximately 2,100 were sentenced under mandatory statutes).

13 As discussed in Part II, *infra*, thirteen state courts have ruled on *Miller*'s retroactivity, with nine states granting and four states denying retroactive relief. The issue is now pending before at least four other state courts of last resort. The Fourt Circuit is the only federal appeals court to squarely decide *Miller*'s retroactivity, ruling that it does not apply retroactively. The Eighth Circuit is poised to rule on the issue soon as well. In addition, six federal appeals courts have allowed habeas corpus petitions to proceed on the basis that *Miller* presents a *prima facie* case of retroactivity, while two have not. Approximately ten federal district courts have ruled on the issue and are fairly evenly divided.

14 Commonwealth v. Cunningham, 81 A.3d 1, 19 (Pa. 2013) (Baer, J., dissenting) (noting that the process is not "a precise demarcation between rules which are innately substantive versus procedural in character").

If, under the Court's beleaguered *Teague v. Lane*[15] doctrine, *Miller* articulated a "substantive" rule of constitutional law, it is retroactive; if the rule is "procedural," it is not.[16]

At least seven petitions for certiorari challenging state court rulings on *Miller*'s retroactivity have been filed with the Supreme Court over the last fourteen months.[17] Though the first four were denied—two from state court decisions that allowed for retroactivity and two from decisions that had denied it—the Court decided in December 2014 to grant certiorari in a case brought by a Louisiana inmate.[18] The Court was scheduled to hear argument in *Toca v. Louisiana* in March 2015, but the case was dismissed in February as moot after the

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15 In *Teague v. Lane*, 489 U.S. 288, 316 (1989), the Court held that the federal courts may not apply "new rules" of criminal procedure retroactively unless they fall into one of two limited exceptions: rules that place particular conduct or classes of persons beyond the State's power to punish, or those that implicate the fundamental fairness of a proceeding. The Court has since explained that "substantive" rules are not in fact exceptions to the *Teague* bar, they are simply "not subject to the bar." Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004).

16 Under *Teague*, a rule may also be retroactive if it is a "'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 351–52 (2004) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)) ("[W]e give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."). This exception is extremely limited in practice, however. To date, the Supreme Court has identified only one case whose rule would satisfy this standard—*Gideon v. Wainwright*, 372 U.S. 335 (1963)—which held that the Sixth Amendment requires legal representation at the public's expense for indigent defendants. S*ee* Beard v. Banks, 542 U.S. 406, 417 (2004) ("This Court has yet to find a new rule that falls under this exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright,* which altered the Court's understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." (internal quotations and citations omitted) (emphasis in original)). In the *Miller* context, only one lower court has deemed *Miller* a "watershed rule." *See* People v. Williams, 982 N.E.2d 181, 196–97 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic "precept of justice"' by not receiving any consideration of his age from the circuit court in sentencing") (quoting *Miller*, 132 S. Ct. at 2463, *abrogated by* People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014) (holding *Miller* to be "a new substantive rule")). This Article focuses on what I will call for simplicity the "substantive rule exception."

17 Discussed Part II.A *supra*

18 People v. Davis, 6 N.E.3d 709 (Ill. 2014), *cert. denied* 135 S. Ct. 710 (2014) (denying review of Illinois Supreme Court's grant of retroactive application); State v. Mantich, 543 N.W.2d 181 (Neb. 1996), *cert. denied* 135 S. Ct. 67 (2014) (denying review of Nebraska Supreme Court's grant of retroactive application); State v. Toca, 141 So.3d 265 (La. 2014), *cert. granted,* 135 S. Ct. 781 (Dec. 12, 2014); Commonwealth v. Cunningham, 81 A.3d 1, 5 n.7 (Pa. 2013), *cert. denied*, 134 S. Ct. 2724 (2014) (denying review of Pennsylvania Supreme Court's denial of retroactive application); State v. Tate, 111 So. 3d 1013 (La. 2013), *cert. denied* 134 S. Ct. 2663 (2014) (denying review of Louisiana Supreme Court's denial of retroactive application).

state agreed to release Mr. Toca in exchange for a plea to a lesser charge which allowed Mr. Toca to maintain his innocence.[19] Three other petitions are currently pending before the Court, and based on its decision to hear *Toca*, the Court seems likely to decide the issue in the near future.

I make two primary arguments in this Article. The first is doctrinal. While the question of *Miller*'s remedial scope is plainly more complicated than it would have been if *Miller* had simply banned juvenile life without parole outright, the *Miller* rule is fundamentally "substantive." A synthesis of the Court's decisions suggest that "substantive" rules are those that usurp the state's authority to punish its citizens in some elemental way. These include rules which modify state sentencing laws by altering the range of sentencing outcomes that a defendant may receive,[20] or by making the certain facts essential to the imposition of a particular punishment.[21] They also include rules which restrict the "class of persons" that a state law may punish,[22] or proscribe a "category" of punishment for a class of individuals.[23] In contrast, rules that require states merely to alter the method by which they apply a particular law are "procedural."[24] Substantive rules must apply retroactively, according to the Court, because they "'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him."[25]

Miller has the hallmarks of a substantive rule. First, by stripping their authority to mandate life without parole for juveniles, *Miller* compelled twenty-eight states and the federal government to expand the range of sentencing outcomes available to juveniles convicted of

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19 *See* Toca v. Louisiana, 2015 U.S. LEXIS 909 (Feb. 3, 2015) (dismissing certiorari under Supreme Court Rule 46.1); Lyle Denniston, *Juvenile Sentencing Case To End*, SCOTUSBLOG (Feb. 3, 2015), http://www.scotusblog.com/2015/02/juvenile-sentencing-case-to-end/.

20 *Summerlin*, 542 U.S. at 353 (explaining that rules which define "the range of conduct . . . [that may be] subjected to . . . [a specific] penalty" are substantive).

21 *Id.* at 352–53 (explaining that a rule through which the Supreme Court "mak[es] a certain fact essential to the death penalty" is substantive).

22 *Id.* (citing Saffle v. Parks, 494 U.S. 484, 495 (1990) (substantive rules are those which prohibit "the imposition of . . . punishment on a particular class of persons")).

23 Penry v. Lynuagh, 492 U.S. 302, 330 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (substantive rules are those that "deprive[] the State of the power to impose a certain penalty").

24 Schriro v. Summerlin, 542 U.S. 348, 353 (2004) (explaining that "rules that regulate only the *manner of determining* the defendant's culpability are procedural" (emphasis in original)).

25 *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998) (quoting Davis v. United States, 417 U.S. 333, 346 (1974))).

homicide. At least thirteen states have already done so.[26] Wyoming, for example, has elected to abolish the punishment of juvenile life without parole altogether, replacing it with a range of twenty-five years to life with periodic review.[27] *Miller* also imposed upon states new essential factors relating to a defendant's age and life circumstances that sentencers must consider before sentencing a juvenile to life without parole.[28] Hawaii, for instance, now requires sentencing courts to consider fifteen such factors before sentencing any juvenile convicted of homicide.[29] Third, *Miller* restricted the class of individuals—those who may receive life without parole—to only those "rare" juveniles who are sufficiently culpable.[30] Finally, *Miller* can be characterized as a rule that proscribes a "category" of punishment—mandatory life without parole—for a class of individuals—juveniles. Though the final outcome may be the same, mandatory life without parole is in important respects a qualitatively different punishment from discretionary life without parole. It is the product of a conscious decision by lawmakers to make a harsh punishment even harsher by depriving defendants of any form of individualized consideration and, as a result, any prospect of a lighter sentence.

The *Miller* rule has done far more than alter the *method* by which states sentence juveniles; it has created a decision point where there was none, and, in doing so, has altered the extent to which more than half of the states and the federal government punish juveniles convicted of homicide. While several commentators have concluded over the last two years that *Miller* applies retroactively as a "substantive" rule,[31] few have focused as extensively on the nature and magnitude of *Miller*'s impact on state sentencing schemes.[32]

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26 Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, The Sentencing Project (June 2014), *available at* http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

27 H.R. HB0023, 62d Leg., Reg. Sess. (Wyo. 2013).

28 *Miller v. Alabama* held that such a sentence can only be imposed after the sentencer has "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. 2455, 2475 (2012).

29 H.R. 2116, 27th Leg., Reg. Sess. (Haw. 2014).

30 *Miller*, 132 S. Ct. at 2469 (distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption") (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

31 *See* Marsha L. Levick and Robert G. Schwartz, *Practical Implications of* Miller v. Jackson: *Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 385–86 (2013) (arguing that *Miller* is retroactive under *Teague v. Lane* as a substantive rule that is categorical in nature); Eric Schab, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards* 12 OHIO ST. J. CRIM. L. 213 (2014), *available at* http://moritzlaw.osu.edu/students/groups/osjcl/files/2015/01/16-Schab.pdf. ("[*Miller*], when taken together with . . . *Roper v. Simmons*, *Graham v. Florida*, and *J.D.B*

The second primary argument in this Article applies broadly to all new constitutional rules which, like the *Miller* rule, are grounded in the Eighth Amendment's proportionality guarantee. As Justice John Harlan, one of *Teague*'s early architects, long ago acknowledged, there is a normative point at which society's interest in preserving final judgments simply must yield to competing notions of justice and equality.[33] Finality interests are at their weakest when the Court announces a new Eighth Amendment proportionality rule, such as *Miller*'s, because neither the practical burdens of review nor theoretical concerns about undermining the consequentialist objectives of punishment are as pronounced with sentences of incarceration as they are with convictions. Yet, the risk of offending constitutional norms and undermining fundamental notions of "justice" are at their most pronounced with new proportionality rules, because to deny relief to those whose sentences are "excessive" (or at high risk of excessive-

v. North Carolina, creates a watershed rule that 'kids are different' and must be treated differently throughout the criminal trial process."); *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 276, 286 (2012) (concluding that "an implementation of procedural safeguards true to *Miller*'s underlying premises amounts to something close to a de facto substantive holding"); Jason Zarrow and William Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, IND. L. REV (forthcoming 2015) (manuscript at 5), *available at* http://ssrn.com/abstract=2530536 (arguing *Miller* "has both a procedural and a substantive component," and the substantive component should be applied retroactively); Molly Martinson, Note, *Negotiating* Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179 (2013) (arguing that *Miller* represents a substantive change in Eighth Amendment jurisprudence and therefore, must be applied to defendants whose sentences are already final); Erwin Chemerinsky, Chemerinsky: *Juvenile Life-Without Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. (Aug. 8, 2012), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ ("[T]he *Miller* court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively."). *Cf.* Beth A. Colgan, Alleyne v. United States*, Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L. REV. DISCOURSE 262 (2013) ("*Miller*'s requirement that sentencers consider age and its attendant consequences in cases involving juveniles—making age at the time of the offense a fact that triggers whether the mandatory minimum sentence of life without parole applies—converts age to an element of the underlying offense, rendering *Miller* a substantive rule that must be applied retroactively.").

32 *See, e.g.*, Brandon Buskey and Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of* Miller v. Alabama *Under* Teague v. Lane, 18 CUNY L. REV. (forthcoming 2015) (manuscript at 13) (arguing that *Miller*'s requirement that states alter the range of permissible sentencing outcomes and consider mitigation is substantive).

33 *See* Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., dissenting) (acknowledging that "finality interests should yield" to rules which "place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" because "there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

ness) is to subvert the very principles of proportionality and fundamental fairness on which such rules rest. This may explain why the Supreme Court and lower courts have afforded a broader remedial scope to new proportionality rules than they have to new Fourth, Fifth, Sixth, and Fourteenth Amendment rules[34] and suggests that proportionality rules may merit a presumption of retroactivity.

In many respects, the "new" understanding of adolescence that underlies the Supreme Court's decisions in *Roper*, *Graham*, and *Miller* is not new at all. Indeed, the founding of the first juvenile court more than a century ago was premised on the recognition that children are inherently different from adults. What is new, however, is our understanding of those biological differences between children and adults that make youth more impulsive, impetuous, and impressionable, and, at the same time, more amenable to rehabilitation than adults. This emerging body of scientific research has plainly informed the Supreme Court's establishment in *Roper*, *Graham*, and *Miller* of new constitutional limitations on the state's authority to punish juveniles. As this research continues to accumulate in ways that make adolescent differences ever more clear and particularized, the Court's willingness to tolerate harsh sentences for children will further erode and new "substantive" mandates about the limits of adolescent sentencing under the Eighth Amendment are sure to emerge. It is almost inevitable that adolescent culpability, proportionality, and retroactivity will continue to collide in the years to come.

This Article has three parts. Part I provides requisite background. It first describes the Supreme Court's recent decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, which comprise the Court's modern "kids are different" sentencing jurisprudence, within the context of the Court's historical approach to juvenile lawbreakers. It then turns to the Court's retroactivity jurisprudence, focusing on the development of the substance/procedure dichotomy that has proven so unwieldy to lower courts in the wake of *Miller*. Part II makes the case that, while *Miller* has procedural attributes, these attributes are components of a broader mandate that is fundamentally "substantive." Finally, Part III claims that denying relief under *Miller*, or any such "proportionality rule," is to privilege finality interests at the expense of the fundamental constitutional interests that underlie such rules.

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34 These decisions are discussed in Part III, *infra*.

I. *MILLER* AND *TEAGUE* COLLIDE

With its decisions over the last decade in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the Supreme Court helped set the doctrinal stage to dial back three decades of historically unprecedented severity in punitive treatment of adolescent law breakers. What the Court did not address in any of these decisions, however, is whether they provide relief to those who were already serving the sentences they proscribed. The Court's silence has proven especially problematic in the wake of *Miller*, which has the potential to affect more than 2,100 sentences in twenty-eight states.[35] Over the last two years, the Court's burgeoning "kids are different" jurisprudence has run head-long into the Court's long-maligned "retroactivity" jurisprudence, creating an analytical conundrum. This Part describes the evolution of both bodies of doctrine.

A. Kids are "Different"

The legal notion that juveniles are "different" is not new. Adolescents have long been denied various legal privileges and afforded enhanced legal protections as a result of their developmental immaturity. What has only recently emerged, however, is scientific research documenting the developmental and neurological differences between adolescents and adults and the Court's recognition that "children are constitutionally different from adults for purposes of sentencing."[36]

1. From Parens Patriae *to Get Tough*

The legal recognition that children are developmentally different from adults is long-standing. This basic premise was the impetus for the establishment of the first juvenile court in Chicago in 1899 and informed the ideological and procedural foundations of the American juvenile justice system.[37] Nearly every component of the nascent juvenile system accounted for adolescents' reduced culpability and greater capacity for change: Charges against child lawbreakers were deemed civil rather than criminal, social workers and clinicians re-

35 Marcia Coyle, *States Cling to Life Sentences for Juvenile Offenders*, NAT'L L. J. (June 24, 2014) (noting that two years after *Miller* was decided, less than half of the twenty-eight states affected had reformed their laws).

36 Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

37 Sanford J. Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187, 1229–30 (1970).

placed lawyers, prosecutors, and juries,[38] "crimes" were called "delinquent behavior," young offenders were adjudicated not convicted," and judges issued "'dispositions' rather than 'sentences.'"[39] Formal rules were abandoned in favor of broad discretionary powers,[40] which, it was thought, would best enable the states to carry out their role as "*Parens Patriae*."[41] As Progressive Era reformer Jane Addams observed, the purpose of the U.S. juvenile justice system was to "understand the growing child and [undertake] a sincere effort to find ways for securing his orderly development in normal society."[42]

During the mid-twentieth century, the ideals of treatment and rehabilitation began to give way to concern over the indeterminate and often arbitrary nature of juvenile court sentencing.[43] In response, the Supreme Court imported a series of key constitutional safeguards from the adult system during the 1960s and 1970s,[44] including the right to counsel.[45] Thus came what has been called the "second

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38 *See* Barry Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash*, 87 MINN. L. REV. 1447, 1453–56 (2003) (discussing how the Progressive Movement's "new cultural conception of childhood" led to social welfare and child labor reforms to help address social problems, such as juvenile criminal justice).

39 *See* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667 n.34 (2004) (quoting DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 21.01 (2d ed. 1994)).

40 *Id.* at 668 n.43 ("Judges were given broad discretion to '[take] up the burden of parenthood and [stand] between all children and the manifest dangers of parental laxness and urban temptation.'") (quoting Frederic L. Faust & Paul J. Brantingham, *The Invention of the Juvenile Court*, *in* JUVENILE JUSTICE PHILOSOPHY 550–57 (1974), *reprinted in* ROBERT H. MNOOKIN & KELLY WEISBERG, CHILD, FAMILY AND STATE 1097 (3d ed. 1995)).

41 "*Parens patriae*" literally means "parent of the country" and, within the context of Progressive Era social reforms in the United States, has been defined as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

42 Curtis Heaston et al., *Mental Health Assessment of Minors in the Juvenile Justice System*, 11 WASH. U. J.L. & POL'Y 141, 142 (2003) (quoting JANE ADDAMS, THE CHILD, THE CLINIC AND THE COURT (1925)).

43 *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967) ("In theory the [juvenile] court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's.").

44 In 1967, for example, the Court held that the constitutional rights to notice, to counsel, to confront and cross-examine witnesses, to a fair and impartial hearing, and to protections against self-incrimination all applied equally in juvenile court. *In re* Gault, 387 U.S. 1, 31–58 (1967).

45 *Id.* at 33–34, 41, 55, 57.

wave"[46] of juvenile justice reform—the "constitutional domestication" of the juvenile court.[47] These changes brought a procedural formality and the beginning of an ideological shift in focus from the "best interests" of the child to the gravity of the offense itself. [48]

The legal distinctions between adolescent and adult lawbreakers gave way almost entirely during the "third wave" of reform. With an abrupt rise in the rates of homicide and violent crime among juveniles in the late 1980s came the call for lawmakers to "get tough" on juvenile crime.[49] Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced statutes that made it easier to punish children like adults.[50] Laws like California's Proposition 21, which expanded criminal court jurisdiction over juvenile offenders, transferred discretion from judges to prosecutors to determine which juveniles should be tried as adults, weakened confidentiality laws, toughened gang laws, and expanded California's three-strikes law for both juveniles and adults, proliferated.[51] Adolescent offenders were branded juvenile "super-predators," "morally-impoverished" youth who had grown up "surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."[52] If lawmakers did not do more to incapacitate them, experts

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46 GIUDI WEISS, NAT'L CAMPAIGN TO REFORM STATE JUVENILE JUSTICE SYSTEMS FOR THE JUVENILE JUSTICE FUNDERS' COLLABORATIVE, THE FOURTH WAVE: JUVENILE JUSTICE REFORMS THE TWENTY-FIRST CENTURY (2013), *available at* http://www.theneodifference.org/wp-content/uploads/2014/09/JJ-Whitepaper-Design-Long_Final.pdf. (describing four "waves" of reforms over the past century).

47 Feld, *supra* note 38, at 1461.

48 *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 162–65 (1999) [hereinafter FELD, BAD KIDS] (demonstrating the shift in juvenile rights and explaining that in that context, "procedural reforms cannot compensate for the highly discretionary substantive standards—'best interests of the child' or a 'serious risk' of future crime—that preclude evenhanded enforcement and lend themselves to discriminatory applications").

49 *See id.* at 201 (noting that the juvenile arrest rate for all violent crimes increased 67.3% between 1986 and 1995).

50 Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, U.S. DEP'T OF JUST. 1, 96 (2006), http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf.

51 *See* CAL. WELF. & INST. CODE § 707(d) (West 2010) (dictating when a prosecutor in California can try a juvenile as an adult).

52 John J. DiIulio, Jr., *The Coming of the Super-Predator*, WKLY STANDARD, Nov. 27, 1995, at 25–26, *see also* John DiIulio, *Defining Criminality Up*, WALL ST. J., July 3, 1996, at A10 (demonstrating that inner-city children are more likely to be engaged in crime); Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23 ("The super-predator is upon us"); Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17 (explaining that "drug use and violence among 'super-predators' are actually caused by moral poverty—that is, the poverty of growing up without a loving, responsible parent who can teach right from wrong"). *See generally* Perry L. Moriearty, *Framing Justice: Media,*

predicted, 270,000 more super-predators would be on the streets by 2010.[53] "Unless we act today, we're going to have a bloodbath when these kids grow up," criminologist James Fox warned.[54] Not surprisingly, the number of adolescents sentenced as adults increased abruptly[55] as determinate sentencing, mandatory minimum sentences, truth-in-sentencing laws and so-called habitual offender statutes continued to expand.[56] Life sentences for both adults and juveniles also rose dramatically. In 1992, about 12,500 individuals were serving sentences of life without parole in the United States; by 2008, the number had increased to more than 41,000.[57] More than 2,500 were juveniles.[58]

The profile of the population of those sentenced to life without parole as juveniles was in many ways predictable: more than 75% were youth of color,[59] and according to subsequent surveys, many had experienced childhoods that were marked by highly elevated levels of poverty, abuse, exposure to community violence, familial incarceration, problems in school, engagement with delinquent peers, and were frequently raised in homes with few adult guardians.[60] The majority of their sentences could also be tied directly to "get tough" era measures (most had been imposed in states where the sentences were mandatory, and the majority in just five states: California, Louisiana, Massachusetts, Michigan, and Pennsylvania) and more than 25% of the life without parole sentences were imposed upon juveniles convicted of felony murder or accomplice liability, meaning they were not the primary perpetrators and, in some cases, were not even pre-

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Bias, and Legal Decisionmaking, 69 MD. L. REV. 849, 851–82 (2010) (discussing the "superpredator" era of juvenile justice).

53 Former Princeton Professor John DiIulio was perhaps the most vocal of these experts, coining the term adolescent "superpredator" in a now famous 1995 article in *The Weekly Standard*. JOHN J. DIIULIO, HOW TO STOP THE COMING CRIME WAVE 1 (1996), *see also* WILLIAM J. BENNETT ET AL, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 26 (1996) (charting the projected increase in the United States juvenile population between 1990 and 2010).

54 Laurie Garrett, *Murder by Teens has Soared Since '85*, N.Y. NEWSDAY, Feb. 18, 1995.

55 Ashley Nellis, *The Lives of Juvenile Lifers: Findings From a National Survey*, THE SENTENCING PROJECT (March 2012), 1, 6, *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

56 *See* MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA, 28, 75, 77 (2011) (discussing mandatory sentencing laws and how they bring about racial disparities in the prison system).

57 Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 1, 27 (2010).

58 CALVIN, *supra* note 12.

59 Nellis, *supra* note 55, at 8.

60 *Id.*

sent.[61] Despite these statistics, though the Court was willing through some of its decisions early in the "get tough" era to hold that age was a constitutionally significant mitigating factor,[62] it resisted throughout the twentieth century the call to find juvenile sentences constitutionally excessive.[63]

2. *The* Roper, Graham, *and* Miller *Trilogy*

By the turn of the twenty-first century, crime rates among both juveniles and adults had dropped to their lowest points in thirty years.[64] Concern was growing about the economic costs of incarceration,[65] and, at the same time, researchers had begun to publish studies documenting the developmental and neurological differences between adolescents and adults.[66] A fourth "wave" of juvenile justice reforms

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61 *Facts about Life Without Parole for Children*, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, http://fairsentencingofyouth.org/what-is-jlwop/ (last visited March 21, 2015).

62 *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming that the death penalty was unconstitutional for those under sixteen, but refusing to extend the ban to eighteen); Thompson v. Oklahoma, 487 U.S. 815, 822–23 (1988) (plurality opinion) (holding that juveniles under sixteen lacked sufficient culpability for execution); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (recognizing that "youth is more than a chronological fact" and "minors, especially in their earlier years, generally are less mature and responsible than adults").

63 *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 539, 541 (2003) (noting that "the Court has not set any minimum age for imposing sentences of life without parole on younger offenders" and that courts rarely invalidate juvenile sentences as constitutionally excessive).

64 *See* Jenni Gainsborough & Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s*, THE SENT'G PROJECT 1, 3 (2000), http://www.sentencingproject.org/doc/File/Incarceration/inc_diminishingreturns.pdf ("Beginning in the early 1990s, crime rates began to decline significantly around the nation. In the seven-year period 1991–98 the overall rate of crime declined by 22%, violent crime by 25%, and property crime by 21%.").

65 *See, e.g.*, James Austin & Tony Fabelo, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, THE JFA INST. July 2004, at 1, 2, 8 (explaining the negative effects that heightened incarceration is having on the economy); Sarah Lawrence & Jeremy Travis, *The New Landscape of Imprisonment: Mapping America's Prison Expansion*, URBAN INST. JUST. POL'Y CENTER 1, 1 (Apr. 2004), http://www.urban.org/UploadedPDF/410994_mapping_prisons.pdf (emphasizing how the prison expansion has impacted "state and federal funding allocations, as well as political representation").

66 *See, e.g.*, Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 61 (2001) (differentiating between "cold cognition," which refers to thinking under conditions of low emotion, and "hot cognition," which refers to thinking under conditions of strong feelings or high arousal); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS. 417, 423 (2000) (observing that "unlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving every-

began to take hold, which were aimed at holding child lawbreakers accountable for their offenses in ways that were developmentally appropriate.[67] Amid this groundswell, the Court decided over the course of seven years three cases that have, in many respects, reinvigorated its Eighth Amendment proportionality jurisprudence. To put this in context, a brief synopsis of the Court's approach to such proportionality challenges is warranted.

Prominent detractors notwithstanding,[68] scholars and jurists generally agree that the Eighth Amendment's ban on cruel and unusual punishment contains a proportionality requirement.[69] For the past century, the Supreme Court has repeatedly held that the ban "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense,'"[70] interpreting the requirement to include "not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime and the committed."[71] Since 1910, the "precept" of proportionality

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day stress and time-limited situations than under optimal test conditions"); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) (describing "noncognitive, psychosocial variables that influence the decision-making process" of adolescents) *Macarthur Foundation Research Network On Adolescent Development & Juvenile Justice*, ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *http://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf* (last visited March 21, 2015) (describing a disjunction between youths' cognitive ability and their maturity of judgment).

67 *Issue Brief #3: Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. AND JUVENILE JUSTICE 1, 1, http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Feb. 19, 2014).

68 Several Supreme Court Justices and legal scholars have argued that the Punishments Clause was intended to forbid only barbaric methods of punishment, not disproportionate punishments. Within the Court's own jurisprudence, this criticism began with Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 387 (1910) (White, J., dissenting). More than eighty years later, Justice Scalia would draw upon Justice White's dissent in Harmelin v. Michigan, 501 U.S. 957, 966–85, 991–93 (1991), as well as a prominent law review article by Professor Anthony Granucci, to argue that the Court's textual basis for proportionality review was unsupported. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 843 (1969).

69 *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1064 (2004) (tracing the concept of proportionality to the Magna Carta and arguing that it is inaccurate to base the rejection of proportionality review on history); John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 927, 939 (2011) (arguing that the English Bill of Rights, Anglo-American tradition, and the text of the "Cruel and Unusual Punishments" Clause itself all support a proportionality requirement).

70 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting *Weems*, 217 U.S. at 367).

71 Coker v. Georgia, 433 U.S. 584, 598 (1977) (observing that "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the

articulated by the Court in *Weems v. United States*[72] has evolved into two distinct lines of Eighth Amendment precedent. The first includes cases in which the Court has banned the death penalty for specific categories of offenders or offenses—"categorical" cases—while the second involves cases where the Court has considered whether a particular term-of-years sentence is "grossly disproportionate" to the offender or offense in question—"as-applied" cases.[73]

In 1977, the Court held that it was "grossly disproportionate and excessive punishment" to impose the death penalty for the rape of an adult,[74] and in 2008, extended this prohibition to the rape of a child.[75] The Court has also banned capital punishment for certain classes of offenders based on their cognitive status or their diminished role in the underlying offense. In 2002, the Court deemed the execution of mentally retarded individuals a disproportionate punishment in *Atkins*, explaining that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanctions available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[76] For the same reasons, the Court has banned capital punishment for those declared "insane,"[77] and, in 2005, extended this rationale to juveniles under eighteen in *Roper*.[78] Finally, the Court has held that the death penalty may not be imposed in a way that precludes the sentencer 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 de-

person and to the public, it does not compare with murder, which does involve the unjustified taking of human life").

72 *Weems*, 217 U.S. at 367.

73 Richard Frase, *What's "Different" (Enough) in Eighth Amendment Law?*, 11 OHIO ST. J. OF CRIM. L. 9, 22 (2013) (differentiating between the Court's "categorical (all-cases-of-this-type) approach" and its "as-applied-to-these-facts approach" to proportionality review); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009) (noting that in capital cases, "[t]he Court will scrutinize whether the death sentence is proportionate to the crime and the defendant, exempting certain crimes and certain offenders from a capital sentence to avoid an unconstitutionally excessive punishment").

74 *Coker*, 433 U.S. at 598; *see also Kennedy*, 554 U.S. at 441–45 (striking down the punishment on the ground that it created "risks of overpunishment").

75 *Kennedy*, 554 U.S. at 441–45.

76 Atkins v. Virginia, 536 U.S. 304, 319–20 (2002). The Court also noted that executing the mentally retarded would not "further the goal of deterrence," because murder by those who are mentally debilitated is not the result of premeditation and deliberation. *Id.*

77 *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.").

78 Roper v. Simmons, 543 U.S. 551 (2005). In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court also held that that the Eighth Amendment prohibits capital punishment for those who were not major participants in felony murder.

fendant proffers as a basis for a sentence less than death."[79] This "individualization" requirement in capital cases rejects any statute that mandates death as a punishment for a particular offense.

The Court takes a two-step approach to categorical challenges. First, the Court applies what has become known as the "evolving standards of decency test," which measures a punishment's proportionality according to the "evolving standards of decency that mark the progress of a maturing society," as a threshold inquiry.[80] In *Atkins* and *Roper*, for example, the Court found a societal consensus against putting mentally retarded and juvenile offenders to death.[81]

The Court then turns to an "independent judgment" analysis to determine whether it agrees with the national consensus. Here, the Court weighs the culpability of the offender or offense against the severity of the punishment. In *Coker* and *Kennedy*, for example, the death penalty created an unacceptable risk of disproportionality, because the Court found the offense of rape to be insufficiently severe.[82] The Court then considers whether the particular sentencing practice can be justified by any of the standard theories of punishment. The *Atkins* Court, for example, stated that it was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty,"[83] and in *Roper*, the Court concluded that "[o]nce the diminished culpability of

79 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Nor can a judge exclude mitigating evidence from her sentencing determination; *see* Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) ("[N]either may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) ("[T]he character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death.").

80 Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). The test has been heavily criticized. *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) ("The preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right."); Stinneford, *supra* note 69, at 905 (criticizing the test's limited protection for criminal offenders on the grounds that it "rarely yields an unambiguous showing of societal consensus against a given punishment, for virtually all punishments reviewed by the Supreme Court enjoy significant public support"); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 868 (2009) (noting that, if society were to pivot toward a "a large-scale movement toward executing juveniles or the insane," the Court would have to deem such punishments proportional).

81 *Roper*, 543 U.S. at 562–63; *Atkins*, 536 U.S at 316.

82 *Kennedy*, 554 U.S. at 437–38; Coker v. Georgia, 433 U.S. 584, 592 (1977).

83 *Atkins*, 536 U.S at 321.

juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."[84]

Until very recently, however, the Court has taken a much different approach to non-capital cases, refusing to apply the robust categorical analysis that it utilized in the capital context. Instead, it has applied a "narrow" proportionality inquiry which requires the Court to determine only whether the sentence is "grossly disproportionate" to the offense.[85] Under this deferential standard, as long as the state has a "reasonable basis for believing" that the sentence in question serves some penological goal, the Court will not find it grossly disproportionate and will not even turn to its inter- and intra-jurisdictional inquiry.[86]

In 1980, in *Rummel v. Estelle*, the Court made clear that "death is different" for purposes of Eighth Amendment proportionality analysis, noting that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[87] Yet, three years later, in *Solem v. Helm*, the Court unexpectedly reversed as excessive a life without parole sentence for a repeat non-violent offender who had passed bad checks.[88] Reaffirming the "principle that a punishment should be proportionate to the crime" as one "deeply rooted and frequently repeated in common-law jurisprudence," the Court made clear that proportionality review does in fact apply to term-of-years sentences. [89] Nonetheless, the Court refused to overrule *Rummel*.[90]

In 1991, the Court reversed course yet again in *Harmelin v. Michigan*, where it upheld a life without parole sentence for a first-time drug offender.[91] In rejecting the defendant's argument that a sentence of life without parole could not be imposed without a consideration of mitigating factors, the Court made clear that it would not require individualized sentencing in non-capital cases. Writing for the majority, Justice Antonin Scalia also attempted to confine the Court's

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84 *Roper*, 543 U.S. at 571; *see also Kennedy*, 554 U.S. at 442, 445 (finding that "the death penalty for child rape would not further retributive purposes" and that "punishment by death may not result in more deterrence or more effective enforcement").

85 *See* Harmelin v. Michigan, 501 U.S. 957, 998–1001 (1991) (Kennedy J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.").

86 Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion).

87 Rummel v. Estelle, 445 U.S. 263, 272 (1980).

88 Solem v. Helm, 463 U.S. 277, 284 (1983).

89 *Id.*

90 *Id.* at 297–98.

91 Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991).

proportionality review to capital cases, noting that the death penalty gives rise to "protections that the Constitution nowhere else provides."[92] *Solem v. Helm* was wrongly decided, Justice Scalia argued, because the Eighth Amendment does not contain a proportionality guarantee.[93] In his concurrence, however, Justice Anthony Kennedy disagreed, affirming that the Court's Eighth Amendment jurisprudence recognizes a "narrow" proportionality requirement in non-capital cases which "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[94]

Harmelin signaled the Court's apparent willingness to uphold virtually any term-of-years sentence, and in its 2003 decisions in *Ewing v. California* and *Lockyer v. Andrade*, the Court did just that, affirming sentences of twenty-five years to life under California's "Three-Strikes" law for of a man who stole three golf clubs worth $1,200 from a golf pro shop and life in prison for a defendant who stole $153 worth of videotapes from K-Mart.[95] In both cases, the Court professed penal agnosticism, maintaining that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."[96]

a. Roper v. Simmons

It was against this backdrop that the Court decided *Roper v. Simmons* in 2005.[97] Advocates had been preparing for a challenge to the juvenile death penalty for years, marshaling an arsenal of science and social science research on child development and comparative statistics from the international community, which highlighted the fact that the United States was the only western country still putting ado-

92 *Id.* at 994.

93 *Id.* at 965.

94 *See id.* at 997–1001 (Kennedy J., concurring). Justice Kennedy explained:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Id. at 1001.

95 Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion); Lockyer v. Andrade, 538 U.S. 63 (2003).

96 *Ewing*, 538 U.S. at 25.

97 *See* Roper v. Simmons, 543 U.S. 551, 559 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of a juvenile offender for commiting a capital crime).

lescents to death.[98] The case of Chris Simmons, who was convicted of first-degree murder and sentenced to death in Missouri at age seventeen, proved timely.[99] In the wake of the Court's 2002 decision in *Atkins v. Virginia*—that, by virtue of their diminished culpability, it was unconstitutional to execute "mentally retarded" offenders[100]—Simmons filed for post conviction relief with the Missouri Supreme Court, arguing that his death sentence violated the Eighth Amendment.[101] The Missouri Supreme Court agreed.[102]

In 2004, the Supreme Court agreed to hear the case.[103] Simmons' lawyers were joined by a cadre of *amici*, including the American Medical Association and the American Psychiatric Association, who argued that the developmental differences between juveniles and adults rendered juveniles inherently less culpable and therefore less deserving of the ultimate punishment.[104] The Supreme Court agreed. Writing for the majority, Justice Kennedy began by observing that something akin to a "national consensus" against the death penalty for juveniles was emerging in the United States,[105] and had already

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98 *See, e.g.*, *Juvenile Life Without Parole (JLWOP)* in *Juvenile and Criminal Justice*, JUVENILE LAW CENTER, http://www.jlc.org/current-initiatives/promoting-fairness-courts/juvenile-life-without-parole-jlwop (last updated Nov. 26, 2013) ("The United States is the only country in the world that currently sentences juveniles to life without the possibility of parole.").

99 State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) (en banc), *habeas corpus granted and rev'd en banc sub nom.* State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), *aff'd sub nom. Roper*, 543 U.S. 551.

100 Atkins v. Virginia, 536 U.S. 304, 306–07, 320–21 (2002). *Atkins* overturned the Court's 1989 decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Penry* had been decided together with Stanford v. Kentucky, 492 U.S. 361, 380 (1989), a case in which the Court upheld capital punishment for juveniles under eighteen. *Atkins* was widely viewed as a sign of the Court's willingness to overturn *Stanford*.

101 State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc), *aff'd sub nom.* Roper v. Simmons, 543 U.S. 551, (2005).

102 *Id.*

103 *Roper*, 543 U.S. 551.

104 *See Roper*, 543 U.S. at 569–71 (discussing the numerous developmental differences between juveniles and adults raised by Simmons and his *amici* and concluding that these "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders"); Brief for Am. Med. Ass'n et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) ("This Court has concluded that [] adolescents who are under age 16 . . . exhibit characteristics . . . that categorically disqualify them from the death penalty. Offenders at age 16 and 17 exhibit those characteristics as well."); Brief for Am. Psychological Ass'n & Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) ("The unformed nature of adolescent character makes execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. Developmentally immature decision-making, paralleled by immature neurological development, diminishes an adolescent's blameworthiness.").

105 *Roper*, 543 U.S. at 564, 568.

emerged in other countries.[106] Then, drawing upon the same categorical analysis that it had employed in *Atkins*, the Court identified three fundamental features of youth that make juveniles constitutionally different from adults for purposes of capital sentencing: first, juveniles' immaturity and limited self-control often causes them to act impulsively and without appreciation of the consequences of their actions, Justice Kennedy noted; second, juveniles' increased susceptibility to peer pressure and inability to escape criminogenic environments diminishes their responsibility for unlawful behavior; and third, the transient nature of adolescent personality development means that it is harder to determine which juveniles are truly depraved, he concluded.[107]

Justice Kennedy went on to explain that the developmental differences between juveniles and adults also diminished the penological justifications for imposing the death penalty. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity," Justice Kennedy noted, and "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[108] In a 5-4 decision, the Court set aside Simmons' sentence and declared the death penalty unconstitutional for offenders who committed their crimes under the age of eighteen overruling *Stanford v. Kentucky* and marking the first time that the Court had applied proportionality principles to juveniles as a class.[109] The Court's modern "kids are different" jurisprudence was born.

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106 The Court observed that only the United States and Somalia had not ratified Article 37 of the Convention on the Rights of the Child, which expressly prohibits capital punishment for crimes committed by juveniles. *Id.* at 576.

107 *See id.* at 569–71 (discussing these three distinctive features of adolescence). Justice Kennedy's decision to rely on a "categorical" rather than an "as-applied" approach was met with considerable opposition. In her dissent, Justice Sandra Day O'Connor decried the Court's use of a "categorical age-based rule" rather than an "individualized sentencing" methodology, *id.* at 602–03 (O'Connor, J., dissenting), while Justice Scalia argued that the majority's "startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with 'mak[ing] the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.'" *Id.* at 620 (Scalia, J., dissenting) (quoting McCleskey v. Kemp, 481 U.S. 279, 311 (1987)).

108 *Id.* at 571.

109 *Id.* at 578–79.

b. Graham v. Florida

Just four years after *Roper* was decided, the Court granted certiorari in *Graham v. Florida*.[110] *Graham* presented a distinct but related question: did the same reduced culpability that precluded the state from imposing the death penalty on juveniles also preclude the state from sentencing juveniles who had not killed to the next harshest punishment—life without parole? Terrence Graham, who was sentenced to life without parole for the commission of armed robbery, an attempted armed robbery, and a subsequent parole violation that occurred when he was seventeen years old,[111] argued that *Roper*'s diminished culpability rationale should be extended to juveniles who had been sentenced to life without parole for non-homicide offenses. Graham's categorical challenge to a non-capital sentence created a methodological conundrum for the Court: would the Court invoke the narrow, "gross disproportionality" framework that it had used in the past for challenges to term-of years sentences, or would it rely on *Roper*'s "categorical" ban analysis?

Justice Kennedy again wrote for the majority, and as he had in *Roper*, began with an inquiry into the "evolving standards of decency."[112] Noting that the practice of sentencing juvenile, non-homicide offenders to life without parole was "exceedingly rare,"[113] Justice Kennedy turned to the Court's "independent judgment," which, he said, required "consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[114] Declaring that "the concept of proportionality is central to the Eighth Amendment," Justice Kennedy went on to summarize the Court's two distinct lines of proportionality jurisprudence.[115] The first includes cases in which the Court has banned the death penalty for specific categories of offenders or offenses—"categorical" cases—while the second involves cases where the Court has considered whether a particular term-of-years sentence is "grossly disproportionate" to the offender or offense in question—"as-applied" cases.[116] Acknowledging the difficulty of establishing a

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

111 *Id.* at 2019–20.

112 *Id.* at 2023 (quoting Estelle v. Gamble, 429 U. S. 97, 102 (1976)).

113 *Id.* at 2026.

114 *Id.*

115 *Id.* at 2021.

116 *See* Frase, *supra* note 73, at 9–10 (differentiating between the Court's "categorical (all-cases-of-this-type) approach" and its "as-applied-to-these-facts approach" to proportionality review).

constitutional violation under the "narrow," non-capital approach, Justice Kennedy proceeded to the Court's "categorical" prohibition cases.[117] "The appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*," Justice Kennedy affirmed.[118]

Justice Kennedy first revisited the three major distinguishing features of youth that he had identified in *Roper*, concluding that because "[j]uveniles are more capable of change than are adults . . . [f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[119] He then turned to the severity of the punishment itself. Like the death penalty, life without parole "alters the offender's life by a forfeiture that is irrevocable," he observed.[120] Finally, Justice Kennedy considered whether sentencing juveniles who had not killed to life without parole "serves legitimate penological goals," and concluded that it did not.[121] The lack of penological justification, the diminished culpability of juvenile offenders, and the severity of life without parole sentences led Kennedy to conclude that sentencing juvenile nonhomicide offenders to life without parole is disproportionate and therefore barred by the Eighth Amendment.[122]

If *Roper* was groundbreaking, *Graham* was seismic. Central to *Graham*'s holding was the Court's determination that juveniles are categorically less culpable than adults, doubly so when they had not killed, and as a result, they are categorically less deserving of the sentence of life without parole—a punishment which the Court expressly noted in *Graham*, was akin to death for juveniles.[123] The Court also

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117 *See Graham*, 130 S. Ct. at 2022–23 ("[A] threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach . . . .").

118 *Id.* at 2023.

119 *Id.* at 2026–27 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

120 *Id.* at 2027.

121 *Id.* at 2026 (citing Kennedy v. Louisiana, 554 U.S. 407, 441–47 (2008); *Roper*, 543 U.S. at 571–72; Atkins v. Virginia, 536 U.S. 304, 318–20 (2002)); *Graham*, 130 S. Ct. at 2030 (concluding that "penalogical theory is not adequate to justify life without parole for juvenile nonhomicide offenders").

122 *Id.* at 2030.

123 Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

> A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

explicitly dispensed with the stance of penal agnosticism that it had taken just seven years earlier in the companion cases of *Ewing v. California* and *Lockyer v. Andrade*, in which it had affirmed that, as long as the state has a reasonable basis for believing that the sentence in question serves some penological goal, the Court would not find it grossly disproportionate.[124] The Court pivoted abruptly in *Graham,* holding that the sentence of life without parole for juveniles convicted of non-homicide offenses, like the death penalty in *Atkins* and *Roper,* was disproportionate because it did not advance any legitimate goals of punishment. [125] Juveniles who did not kill had "twice diminished moral culpability," Justice Kennedy noted, and none of the rationales for punishment could justify imposing upon them a sentence of life without parole.[126] The significance of the Court's methodological approach was immediately evident to scholars, advocates, and jurists.[127] *Graham* had all but eviscerated the Court's "death is different" approach to proportionality review.[128]

In the aftermath of *Graham*, questions abounded about whether the Court was prepared to take the next logical step and ban juvenile life without parole outright.[129] At the time, forty-two states permitted judges to impose life without parole sentences on juveniles convicted

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Id. at 2032–33.

124 Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003).

125 *Graham*, 130 S. Ct. at 2027–28.

126 *Id.*

127 *See, e.g.*, Richard S. Frase, Graham*'s Good News—and Not*, 23 FED. SENT'G REP. 54 (2010) (suggesting that Kennedy's approach in *Graham* offered a more unified approach to proportionality review than the Court's earlier "two-track distinction between prison and death sentences"); Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010) (describing the *Graham* Court's departure from prior Eighth Amendment jurisprudence and its implications); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79 (2010) (discussing the implications of the *Graham* decision for capital and non-capital Eighth Amendment challenges).

128 *See Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting). Justice Clarence Thomas complained that the majority's reliance on its capital proportionality analysis "impose[s] a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances." *Id.* at 2047 (emphasis in original).

129 *See, e.g.*, Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 263–64 (2013) (discussing "how *Graham* altered the Court's non-death penalty proportionality framework of young non-homicide offenders").

of homicide,[130] and in twenty-seven of these states, the sentence was mandatory.[131] When just a year after the Court decided *Graham* it granted certiorari in the cases of *Miller v. Alabama* and *Jackson v. Hobbs*, both advocates and scholars were stunned.[132]

c. Miller v. Alabama *and* Jackson v. Hobbs

Evan Miller and Kuntrell Jackson were both fourteen years old and accompanied by co-defendants when they committed their underlying offenses.[133] In July 2003, Mr. Miller and another boy assaulted and robbed a neighbor near Mr. Miller's trailer home in Alabama.[134] The neighbor later died after the boys set fire to his house.[135] Though Alabama law required Mr. Miller to be charged as a juvenile, it allowed the prosecutor to seek removal of the case to adult court.[136] He did so, charging Mr. Miller as an adult with murder in the course of arson.[137] Mr. Miller was convicted in 2006, and, under Alabama law, sentenced to a mandatory term of life imprisonment without the possibility of parole.[138] The Alabama Court of Criminal Appeals affirmed the conviction,[139] and the Alabama Supreme Court denied review.

Mr. Jackson was with two friends in 1999 when the trio decided to rob a video store in Arkansas.[140] Mr. Jackson waited outside and later entered to find one of the other boys demanding money from the

130 HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES, 1, 2 (2005), *available at* http://www.hrw.org/en/node/11578/section/2.

131 *Id.* at 4.

132 *See, e.g.*, Scott Hechinger, *Another Bite at the* Graham *Cracker: The Supreme Court's Surprise Revisiting of Juvenile Life Without Parole in* Miller v. Alabama *and* Jackson v. Hobbs, GEO. L.J. ONLINE, http://georgetownlawjournal.org/glj-online/another-bite-at-the-graham-cracker-the-supreme-court%E2%80%99s-surprise-revisiting-of-juvenile-life-without-parole-in-miller-v-alabama-and-jackson-v-hobbs (last visited March 1, 2015) ("The Supreme Court's decision this week to review the constitutionality of life-without-parole sentences imposed upon individuals convicted of homicide crimes committed at age fourteen and younger in *Miller v. Alabama* and *Jackson v. Hobbs* stunned sentencing law advocates and Court watchers, myself included.").

133 Miller v. Alabama, 132 S. Ct. 2455, 2461–62 (2012).

134 Miller v. State, 63 So. 3d 676, 683 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012); *Miller*, 132 S. Ct. at 2462.

135 *Miller*, 132 S. Ct. at 2462.

136 *Id.* (citing Ala. Code § 12–15–34 (1977)).

137 *Id.* at 2462–63.

138 *Id.* at 2463.

139 *Id.* at 2463.

140 *Id.* at 2461.

store clerk.[141] When the clerk threatened to call the police, the boy shot and killed her. [142] Mr. Jackson was convicted by an Arkansas jury of capital felony murder and aggravated robbery and subsequently sentenced to the "only one possible punishment"—mandatory life without parole.[143] Mr. Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed his conviction.[144] Mr. Jackson then filed a Petition for Writ of Habeas Corpus arguing that the Court's holding in *Roper v. Simmons* should be extended to sentences of life without parole.[145] This argument was rejected.[146]

In 2011, the Supreme Court granted certiorari in both Mr. Jackson and Mr. Miller's cases. At the time, Mr. Miller's case was pending on direct review from the Alabama Supreme Court, and Mr. Jackson's case was already final. Despite their different procedural postures, the Court elected to consider both cases together. Like *Graham*, *Miller* and *Jackson* were framed as categorical challenges to non-capital sentences.[147]

The cases were decided on June 25, 2012, and Justice Kagan wrote for the majority. Though, in many respects, *Miller* picked up where *Graham* left off methodologically, Justice Kagan was not as explicit about the Court's application of a "categorical" approach as Justice Kennedy had been in *Graham*. Instead of beginning with a "national consensus" assessment, Justice Kagan began by reiterating *Graham*'s declaration that "proportionality is central to the Eighth Amendment."[148] *Miller* brought together "two strands" of Eighth Amendment precedent, she explained,[149] and, without identifying them as such, promptly turned to the Court's "categorical" ban line of cases.[150] *Atkins, Kennedy, Roper*, and *Graham* were controlling, Justice Kagan explained, because each case banned a category of punishment (the

141 *Id.*

142 *Id.*

143 *Id.* at 2461 (citing Ark. Code Ann. § 5-4-104(b) (1997)).

144 Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004), *cert. granted sub nom.* Jackson v. Hobbs, 132 S. Ct. 548 (2011), *rev'd sub nom. Miller*, 132 S. Ct. 2455.

145 Jackson v. Norris, 378 S.W.3d 103, 106 (Ark. 2011).

146 *Id.* at 106.

147 *See* Petition for Writ of Certiorari at 7, *Jackson*, 132 S. Ct. 2455 (No. 10-9647) ("*Graham* confirmed [*Jackson*'s] basic submission that juveniles sentenced to life imprisonment without parole could maintain categorical challenges to their sentences under the Eighth and Fourteenth Amendments."); Petition for Writ of Certiorari at 8–10, *Miller*, 132 S. Ct. 2455 (No. 10-9646) ("[Miller] continued to raise his categorical challenge to the constitutionality of sentencing a fourteen-year-old child to life imprisonment without parole . . . .").

148 *Miller*, 132 S. Ct. at 2455, 2463 (quoting Graham v. Florida, 130 S. Ct. 2011, 2021 (2010)).

149 *Id.* at 2463.

150 *Id.*

death penalty in *Atkins, Kennedy* and *Roper*; life without parole in *Graham*) because either the class of defendants (mentally retarded individuals in *Atkins*; juveniles in *Roper*; and juveniles who had not killed in *Graham*) was insufficiently culpable, or the class conduct (rape of a child in *Kennedy*) was insufficiently severe.[151] "By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[mandatory sentencing] laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender," Justice Kagan concluded.[152] "That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children."[153]

The second strand of cases included those "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[154] These decisions were implicated, Kagan explained, because the *Graham* Court had drawn a direct comparison between life without parole for juveniles and the death penalty.[155] While *Roper*, *Graham*, and *Atkins* focused principally on the vulnerability of the class of defendants in question, *Woodsen, Lockett*, and *Eddings* had focused on the severity of the punishment, engrafting an individualization requirement into capital sentencing because it is uniquely harsh.[156] Because mandatory life-without-parole sentences for juveniles "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," including "immaturity, impetuosity, and failure to appreciate risks and consequences," as well as the juvenile's "family and home environment," and the circumstances of

151 *Id.* at 2463–65.

152 *Id.* at 2466.

153 *Id.*

154 Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).

155 *Id.* at 2463–64 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion)) (requiring individualized sentencing in the death penalty context); Sumner v. Shuman, 483 U.S. 66 (1987) (same); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (same).

156 *See Woodson*, 428 U.S. at 293 (1976) (citing consensus of jurisdictions rejecting mandatory death sentences as "unduly harsh and unworkably rigid"); *see also* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (holding "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances"); Roberts v. Louisiana, 428 U.S. 325, 332 (1976) (noting "unacceptable severity of the common-law rule of automatic death sentences").

the offense,[157] they "pose[ ] too great a risk of disproportionate punishment," Justice Kagan warned.[158]

Though Kagan brushed rapidly past the threshold "objective indicia" inquiry, she did go through the motions.[159] She then considered and rejected each of the major penological justifications for imposing mandatory life without parole on juveniles. Retribution could not justify the practice, because, by definition, a mandatory penalty precludes a sentencer from considering a juvenile's diminished culpability; deterrence was inapplicable, as it was in *Roper* and *Graham*, because the same developmental characteristics that make juveniles less culpable also make them less deterrable. Incapacitation cannot justify mandatory life without parole, because juveniles cannot be said to be beyond repair; and rehabilitation is inapposite because life without parole "foreswears altogether the rehabilitative ideal."[160]

Though Justice Kagan declined to ban juvenile life without parole sentences outright, she took pains to make clear that all such sentences are now suspect. "[G]iven all that we have said in *Roper*, *Graham* and this decision about children's diminished culpability, and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," she cautioned.[161]

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157 *See Miller*, 132 S. Ct. at 2467–68.

158 *Id.* at 2469.

159 Some commentators have seen this as a signal that the Court is moving away from its "objective indicia" analysis. *See, e.g.*, Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303 (2013), *available at* http://yalelawjournal.org/2013/03/14/farrell.html (arguing that Justice Kagan's opinion in *Miller* suggests that the Court "may be poised to abandon objective indicia [when applying the Cruel and Unusual Punishments Clause]" in favor of a "suspect categories" approach).

160 *Miller*, 132 S. Ct. at 2465.

161 *Id.* What the Court did not articulate, however, is how legislatures, courts, and review boards should incorporate the mitigating qualities of youth into sentencing and release decisions. Because they have been so deeply divided over *Miller*'s retroactivity, most state and federal courts have yet to address resentencing, while legislatures across the country are racing to amend their mandatory sentencing statutes. *See, e.g.*, ALA. CODE § 13A-5-51 (2013) (delineating general mitigating factors to be considered when juveniles are convicted of capital crimes); N.C. GEN. STAT. ANN. § 15A-1340.19A (West 2012) (a juvenile convicted of first degree felony murder shall be sentenced to "life imprisonment with parole" and become eligible for parole release after a minimum of 25 years imprisonment). In July 2012, in an effort to avoid *Miller*'s resentencing quagmire altogether, Iowa Governor Terry Branstad commuted the mandatory life without parole sentences of thirty-eight juveniles to mandatory sixty-year prison terms. *See Branstad commutes life sentences in North Iowa Cases*, THE GLOBAL GAZETTE (July 16, 2012), *available at* http://globegazette.com/news/iowa/branstad-commutes-life-sentences-in-north-iowa-cases/article_14955d06-cf59-11e1-81f2-001a4bcf887a.html.

Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito all issued strong dissents, and Justice Scalia joined all three. All three dissents argued that the majority's holding had broken from precedent in significant respects. "[T]he Court's holding does not follow from *Roper* and *Graham*," Chief Justice Roberts claimed bluntly.[162] *Graham* was about non-homicide offenses, Chief Justice Roberts maintained, and "a case that expressly puts an issue in a different category from its own subject . . . cannot fairly be said to control that issue."[163] *Roper* was even less helpful than *Graham*, Roberts reasoned, because it had "expressly invoke[ed] 'special' Eighth Amendment analysis for death penalty cases."[164]

Justice Thomas argued that *Miller* was wrongly decided, because the Court's decision in *Harmelin v. Michigan* had already made clear that mandatory life without parole *was* constitutional.[165] In response, Justice Kagan revisited the Court's conclusion in *Roper* and *Graham* that "kids are different" for purposes of sentencing: "We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. . . . So if (as *Harmelin* recognized) 'death is different,' children are different too."[166] Justice Alito argued that, because multiple states allow mandatory life without parole for juveniles, no national consensus against it existed.[167] To this, Justice Kagan responded with a passage that has loomed large in the debate over *Miller*'s retroactivity: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[168] The doctrinal implications of this passage are explored in detail in Part II. But first, an overview of the Court's retroactivity jurisprudence is warranted.

B. Retroactivity, Substance, and Procedure

The Supreme Court's retroactivity jurisprudence has been well-documented over the last half century in a number of excellent arti-

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162 *Miller*, 132 S. Ct. at 2480 (Roberts, C.J., dissenting).
163 *Id.* at 2481.
164 *Id.*
165 *Id.* at 2485–86 (Thomas, J., dissenting).
166 *Id.* at 2470.
167 *Id.* at 2489.
168 *Id.* at 2471. The significance of this passage is discussed in Part III.C, *infra*.

cles.[169] The summary provided here is condensed and focuses principally on the emergence of the Court's decision to limit the retroactive application of new rules of constitutional law to those that are "substantive."

1. Linkletter v. Walker *and the Birth of "Non-Retroactivity"*

During the 1960s, the Supreme Court dramatically expanded the constitutional rights of criminal defendants[170] as its decisions in cases like *Miranda v. Arizona*[171] and *Mapp v. Ohio*[172] began to call into ques-

169 *See, e.g.*, RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25 (5th ed. 2005); Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1565–66 (1975) (questioning the Court's retroactive approach to cases applying *Miranda* and *Escobedo*); John Blume, *The Changing Face of Retroactivity*, 58 UMKC L. REV. 581, 584–91 (1990) (analyzing the Court's historical approach to retroactivity); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 33–38 (1991) (discussing retroactivity in the *Teague* and *Linkletter* decisions); Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 190 (2005) (pointing out the interesting questions that arise from *Teague* including how the Court can determine at the outset whether its decision will be an application of precedent or whether it will overturn precedent and establish a new rule); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–53 (1991) (sketching the development of the retroactivity doctrine); James B. Haddad, *Retroactivity Should be Rethought: A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. & CRIMINOLOGY, 417, 417 (1969) (tracing the development of the retroactivity doctrine and concluding that the doctrine should be abandoned); Christopher Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV 1, 3–4 (2009) (outlining the history of the doctrine and also predicting its future); Paul Mishkin, *Foreword, The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965) (noting the potential future impact of *Linkletter)*; Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1081–1103 (1999) (analyzing the main question of retroactivity: "what rules should govern the transitions between legal regimes"); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*," 95 CALIF. L. REV. 1677, 1678–87 (2007) (arguing that retroactivity should not apply per se to all sentences that followed the federal sentencing guidelines later deemed unconstitutional by *United States v. Booker*); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 764 (1966) (arguing that both *Miranda* and *Escobedo* should apply retroactively); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 210–25 (1998) (laying out the history of retroactivity of the Court's decisions through *Teague*).

170 *See e.g.*, William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006) (discussing how the Supreme Court "constitutionalized criminal procedure" during the 1960s).

171 Miranda v. Arizona, 384 U.S. 436 (1966).

tion the legitimacy of thousands of convictions. At the same time, the availability of federal habeas corpus relief was expanding. As Justice Lewis Powell would later comment, the Court's 1963 decision in *Fay v. Noia*[173] removed "[the] final barrier to broad collateral reexamination of state criminal convictions . . . ."[174] These expansions drove the Court to confront for the first time how to cabin the new rules it was so readily promulgating.[175]

The case of *Linkletter v. Walker* seemed to provide the ideal vehicle. The question in *Linkletter* was whether the Court's 1961 decision in *Mapp v. Ohio*,[176] which had made the exclusionary rule binding on state courts, would affect convictions that had become final before *Mapp* was decided.[177] Concerned by the prospect of reversing "thousands"[178] of cases, and insisting that the Constitution was indifferent to the issue, the Supreme Court declared for the first time that it had discretion to give full or partial retroactive effect to a decision creating a new constitutional rule.[179] The Court devised a three-part inquiry which based a rule's remedial scope on its "prior history," its "purpose and effect," and whether retrospective application would "further or retard its operation."[180] Under this new test, *Mapp* did not apply retroactively, the Court concluded.[181]

Linkletter sparked immediate criticism, most notably from University of Pennsylvania Law Professor Paul Mishkin. Characterizing the decision as "basically unwise," Mishkin criticized the Court's apparent rejection of the Blackstonian "declaratory" theory of judicial review—that courts interpret and declare the law, not create it—in favor of the approach endorsed by British philosopher John Austin—that courts may, at times, serve a legislative function.[182] He argued that

172 Mapp v. Ohio, 367 U.S. 643 (1961).

173 Fay v. Noia, 372 U.S. 391 (1963).

174 Stone v. Powell, 428 U.S. 465, 477 (1976).

175 While "[t]here were flickers of [federal non-retroactivity earlier], . . . it was not until the late 1960s that these sparks found tinder. It was then that the Court found a need to engage in prospective overruling; it was then that the question of retroactivity truly emerged." Roosevelt, *A Little Theory*, *surpra* note 169 at 1089 (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring) and Mosser v. Darrow, 341 U.S. 267, 275 (1951) (Black, J., dissenting)).

176 *Mapp*, 367 U.S. at 657.

177 Linkletter v. Walker, 381 U.S. 618 (1965).

178 *Id.* at 636.

179 *Id.* at 620.

180 *Id.* at 629.

181 *Id.* at 640.

182 Mishkin, *supra* note 169. Several scholars have explored Mishkin's critique in depth. *See* Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 115

new rules of constitutional law should be fully retroactive to cases on direct review, but should apply retroactively to cases on collateral review only to rectify constitutional errors.[183] In many respects, Mishkin "recast the problem from one of retroactivity versus prospectivity to one of the availability of habeas corpus relief."[184] Nonetheless, the Warren Court continued to invoke the *Linkletter* test to minimize the impact of its rights-expanding changes to the law. [185]

Two years later, in *Stovall v. Denno*,[186] the Court somewhat modified its approach. At issue in *Stovall* was whether the Court's holdings in *United States v. Wade*[187] and *Gilbert v. California*,[188] which guaranteed an accused the right to counsel at any critical points of pretrial confrontation and required the exclusion of identification evidence that had been tainted by faulty procedures, applied retroactively. The Court held that that decisions need not be given retroactive effect,[189] reasoning that that, though "the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice," they were not indispensible to a fair trial. [190]

2. Justice Harlan and the Importance of Finality

Like *Linkletter v. Walker, Stovall v. Denno* prompted swift criticism. The chief critic this time was Justice John Harlan, who began through several concurrences and dissents to develop his own approach to retroactivity.[191] Justice Harlan agreed with Professor Mishkin that because pure prospectivity would violate the "case and controversy" re-

(2010); Blume, *supra* note 169; Lasch, *supra* note 169; Roosevelt, *A Retroactivity Retrospective*, *supra* note 169 at 1678–87.

183 Mishkin, *supra* note 169, at 86–87 (describing why new rules of constitutional law should apply retroactively to cases on collateral review only to rectify constitutional errors).

184 Lasch, *supra* note 169, at 14.

185 *See* Toby Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 605 (2011) (discussing the Warren Court's use of non-retroactivity doctrine to cabin the reach of its law-changing rulings in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Katz v. United States*, 389 U.S. 347 (1967), *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967)).

186 Stovall v. Denno, 388 U.S. 293 (1967).

187 388 U.S. 218 (1967).

188 388 U.S. 263 (1951).

189 *Stovall*, 388 U.S. at 296.

190 *Id.* at 299.

191 *See e.g.*, Williams v. United States, 401 U.S. 646, 675 (1971) (Harlan, J., dissenting); Elkanich v. United States, 401 U.S. 646, 675 (1971) (Harlan, J. concurring); Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

quirement, and selective prospectivity would offend principles of equality, new constitutional rules should always apply to cases on direct review.[192] It was permissible, however, for the Court to treat cases on collateral review differently, he argued.[193] Habeas review had always been more limited in scope than direct review, Justice Harlan noted, largely because of "[t]he interest in leaving concluded litigation in a state of repose."[194]

In a lengthy dissent in *Mackey v. United States*, Justice Harlan expanded upon what he viewed as the paramount importance of "finality."[195] "Finality in the criminal law is an end which must always be kept in plain view," he counseled.[196] "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[197] In Harlan's view, society's interest in finality could outweigh even the reliability interest that would be served by retroactively applying constitutional rules "purportedly aimed at improving the factfinding process." [198]

In support of these views, Justice Harlan drew heavily upon an influential 1963 article by Professor Paul Bator and a 1970 article by Judge Henry J. Friendly. Professor Bator questioned the expansion of federal habeas corpus review, urging resistance to the "the impulse . . . to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are 'true' and the law applied 'correct.'"[199] Bator's opposition to relitigating federal constitutional questions that had already been decided by state courts was animated primarily by concerns about finality. Finality, is critical to the "conservation of resources," he wrote, "not only simple eco-

192 *Mackey*, 401 U.S. at 679 (Harlan, J., dissenting) (arguing that "fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from th[e] model of judicial review . . . .").

193 *Desist*, 394 U.S. at 262–63 (Harlan, J., dissenting) (arguing that the "threat of habeas serves as a necessary additional incentive for trial and appellate courts . . . to conduct their proceedings in a manner consistent with established constitutional standards" and that "[i]n order to perform this deterrence function, the habeas court need not . . . necessarily apply all 'new' constitutional rules retroactively").

194 *Mackey*, 401 U.S. at 683 (Harlan, J., dissenting).

195 *Id.* at 690.

196 *Id.*

197 *Id.* at 691.

198 *Id.* at 694–95.

199 *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 443 (1963).

nomic resources, but all of the intellectual, moral, and political resources involved in the legal system."[200] In a 1970 article, Judge Friendly took Bator's arguments one step further, arguing that expanding opportunities for collateral review would not only expend resources, but would also harm the criminal law's consequentialist objectives.[201] Justice Harlan embraced these rationales, arguing that this paramount interest in finality counseled a general rule of nonretroactivity for cases pending on collateral review.[202]

Justice Harlan did concede, however, that there were two exceptions to this general rule. The first was for constitutional rules which place "certain kinds of primary private individual conduct beyond the power of the criminal law making authority to proscribe," and the second, for rules that recognize a new right of procedure that is "implicit in the concept of ordered liberty"—these should apply retroactively to cases on collateral review.[203] These cases "represent[] the clearest instance where finality interests should yield," he noted, because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[204]

3. Teague*,* Summerlin *and the Substance/Procedure Dichotomy*

Nearly two decades later, the Supreme Court would adopt Justice Harlan's approach. In 1987, in *Griffith v. Kentucky*, the Court held that all new rules of constitutional law must apply retroactively to cases on direct review,[205] and, just a year later, in *Teague v. Lane*, declared that such rules would not apply retroactively to cases on collateral review except in limited circumstances.[206] Writing for a plurality of the Court in *Teague*, Justice Sandra Day O'Connor embraced Justice Harlan's view that the proper focus of the retroactivity inquiry was not the purpose and predictability of the new rule, but rather the pur-

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200 *Id.* at 451.

201 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146 n.15 (1970).

202 *Mackey*, 401 U.S. at 688–89 (arguing that "it is sounder . . . generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation").

203 *Id.* at 692–93.

204 *Id.* at 693.

205 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases.").

206 Teague v. Lane, 489 U.S. 288, 305–14 (1988) (O'Connor, J.) (plurality opinion) ("[T]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*.'" (emphasis in original)).

pose of habeas corpus in the criminal justice system.[207] Agreeing with Justice Harlan that the role of habeas corpus was to deter misconduct rather than to ensure an error-free trial, Justice O'Connor maintained that blanket, retroactive amelioration was unnecessary to serve that end.[208] With this in mind, and in the "interests of comity and finality," Justice O'Connor concluded that new constitutional rules would not apply retroactively to cases on collateral review, subject to two exceptions: the first was for rules that "place[ ] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'";[209] and the second, much narrower exception was for watershed rules of criminal procedure that are "implicit in the concept of ordered liberty" and affect the accuracy of the conviction.[210] The Court extended these exceptions several months later in *Penry v. Lynaugh* to include rules that "deprive[] the [s]tate of the power to impose a certain penalty" as well as those that deprive the state of the "power to punish at all."[211]

Not surprisingly, *Teague* came under fire almost immediately in a series of articles.[212] Over the years, critics have assailed what they characterized as *Teague's* self-contradictory definition of a "new

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207 *Id.* at 308.

208 *Id.* at 305–07 (quoting Justice Harlan arguing that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final").

209 *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692) ("[I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." (emphasis in original)). This was subsequently found to include decisions that place a certain class of persons outside of a state's power to punish;. *See also* Penry v. Lynaugh, 492 U.S. 302, 339 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (urging courts to rely on the concept of "mental age" when sentencing).

210 *Teague*, 489 U.S.at 311.

211 *Penry*, 492 U.S. at 330, *abrogated on other grounds by Atkins*, 536 U.S. 304.

212 *See, e.g.*, Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991); Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453 (1993); John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1990–91); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992); Fallon & Meltzer, *supra* note 169; Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990–91); Marshal J. Hartman, *To Be Or Not To Be A "New Rule": The Non-retroactivity of Newly Recognized Constitutional Rights After Conviction*, 29 CAL. W. L. REV. 53 (1992); Patrick E. Higginbotham, *Notes on* Teague, 66 S. CAL. L. REV. 2433 (1993); James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990–91) (presenting a version of this chapter); Recent Developments, *The Court Declines in Fairness*—Teague v. Lane, 29 HARV. C.R.-C.L. L. REV. 164 (1990).

rule,"[213] its extraordinarily restrictive second exception for "watershed" rules of criminal procedure,[214] and its treatment of retroactivity as a "threshold test."[215] *Teague's* first exception—for rules that place certain categories of people and offenses outside the state's power to punish—did not draw as much sustained attention, however, until the Court's 2004 decision in *Schriro v. Summerlin*.

In *Summerlin*, the Court was asked to determine whether its 2002 decision in *Ring v. Arizona*,[216] that the Sixth Amendment requires a jury (not a judge) to find aggravating factors necessary for imposition of the death penalty, applies retroactively to cases on federal habeas review.[217] Writing for the majority, Justice Scalia took the opportunity to recast *Teague*'s first exception—for rules that place certain classes of persons and types of conduct outside of a state's power to punish—as an exception for "substantive" rules.[218] Justice Scalia defined substantive rules as those that "narrow the scope of a criminal statute by interpreting its terms" and "place particular conduct or persons covered by the statute beyond the state's power to punish."[219] They "generally apply retroactively," he explained, because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." [220]

Procedural rules are treated differently, Justice Scalia wrote, because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have

213 *See, e.g.*, Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 212 (2005) ("As fifteen years of *Teague* have taught, the new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular."); Yin, *supra* note 169, at 287 ("*Teague* and its progeny have failed to provide sufficient guidance for determining when a rule is new, thus leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims.").

214 *See, e.g.*, Roosevelt III, *A Retroactivity Retrospective*, *supra* note 169, at 1694 ("[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.").

215 *See, e.g.*, Lasch, *supra* note 169, at 11 (citing HERTZ & LIEBMAN, *supra* note 169, at § 25.4, 1170 n.24).

216 Ring v. Arizona, 536 U.S. 584, 589 (2002).

217 Schriro v. Summerlin, 542 U.S. 348, 349 (2004).

218 *Id.* at 352.

219 *Id.* at 351–52.

220 *Id.* (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).

been acquitted otherwise."[221] The only procedural rules that should apply retroactively are "'watershed rules of criminal procedure'" which implicate the "fundamental fairness and accuracy of the criminal proceeding" and "without which the likelihood of an accurate conviction is seriously diminished."[222] *Gideon v. Wainwright*,[223] is the "prototypical example" of such a rule, he noted.[224] The rule articulated in *Ring* was merely "procedural," Justice Scalia concluded, because it did not substantively modify Arizona law, but simply obligated the state to prove the Arizona statute's aggravating factors to a jury.[225] "Rules that allocate decisionmaking authority," Justice Scalia insisted, "are prototypical procedural rules."[226]

4. The Definition of a "Substantive" Rule

A recent article by Jason Zarrow and William Milliken, which examines the interplay between *Teague*, § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA), and *Miller v. Alabama,* makes the case that the Supreme Court "has acted like a common-law court" when it comes to retroactivity, "expanding the doctrine on a case-by-case basis."[227] The Court's definition of "substantive rules" is actually an amalgam of three to four "sub-rules," the authors contend, which were promulgated by the Court in a series of decisions stretching over fifteen years.

First, a rule is substantive if it places primary, private conduct beyond the power of the state to proscribe.[228] Second, a rule is substantive if it prohibits a certain category of punishment for a certain class of defendant because of their status or offense.[229] Third, a rule is sub-

221 *Id.* at 352.

222 *Id.* (quoting Teague v. Lane, 489 U.S. 288, 311, 313 (1988) (plurality opinion)).

223 Gideon v. Wainwright, 372 U.S. 335 (1963).

224 Schriro v. Summerlin, 542 U.S. 348, 352–53 (2004) (citing Saffle v. Parks, 494 U.S. 484, 495 (1990)); O'Dell v. Netherland, 521 U.S. 151, 171 n.4 (1997) (stating that *Gideon* is the "paradigmatic example" of a watershed rule); *Teague*, 489 U.S. at 311–12 (plurality opinion) (noting that the rule announced in *Gideon* recognized a right that is a "necessary condition precedent to any conviction for a serious crime").

225 *Summerlin*, 542 U.S. at 353.

226 *Id.*

227 Zarrow & Milliken, *supra* note 31, at 38.

228 *Id.* at 39 (citing *Saffle*, 494 U.S. at 494). This was the entirety of the substantive-rule exception as first articulated in *Teague*. *See Teague*, 489 U.S. at 311 (citing Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). An example of this type of substantive rule would be the holding of *Lawrence v. Texas*, which prohibited the criminalization of sodomy. 539 U.S. 558, 578 (2003)).

229 Zarrow & Milliken, *supra* note 31, at 39 (citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

stantive if it narrows the scope of a criminal statute by interpreting its terms[230] or, fourth, modifies the elements of the offense for which the individual was convicted or punished.[231]

Zarrow and Milliken's approach to the "substantive" rule exception provides analytical clarity that has been largely missing from the academic commentary on retroactivity. Where Zarrow and Milliken see four sub-rules, however, I see six. The second and fourth rules identified by Zarrow and Milliken can themselves be subdivided. The *Penry* sub-rule, which defines substantive rules as those that "prohibit of a certain category of punishment for a certain class of defendant because of their status or offense," can be further divided into those rules which (1) proscribe a "category" of punishment for a class of individuals,[232] (which is what the Court did in *Atkins* and *Roper* when it banned the death penalty for "mentally retarded" defendants and juveniles); and which (2) restrict the class of individuals who may receive a particular punishment because of their status or offense,[233] (which is what the Court did in *Graham* when it restricted life without parole to only those juveniles who committed homicide). Similarly, the *Summerlin* sub-rule—that substantive rules are those that "modify the elements of the offense for which the individual was convicted or punished"—can be divided into those which: (1) alter the range of sentencing outcomes that a state may impose;[234] and those which (2) change the "essential facts" a state must consider before imposing a type of punishment.[235] These are fine distinctions, to be sure (and might amount to distinctions without a difference in another context), but, as Part II illustrates, these distinctions have proven critical as lower courts attempt to define the remedial scope of new constitutional rules.

Zarrow and Milliken also make the case that, while the substantive rule exception has plainly been expanded from its original scope—which applied only to those rules that place private conduct beyond the state power to punish—it remains moored to its roots in the

230 *Id.* (citing Bousley v. United States, 523 U.S. 614, 620–21 (1998)).

231 *Id.* (citing Schriro v. Summerlin, 542 U.S. 348, 354 (2004)).

232 Penry, 492 U.S. at 330 (substantive rules are those that "deprive[] the State of the power to impose a certain penalty").

233 Schriro v. Summerlin, 542 U.S. 348, 352–53 (citing *Saffle*, 494 U.S. at 495) (substantive rules are those which prohibit "the imposition of . . . punishment on a particular class of persons").

234 *Id.* At 353 (explaining that rules which define "the range of conduct . . . [that may be] subjected to . . . [a specific] penalty" are substantive).

235 *Id.* at 352-53 (explaining that a rule through which the Supreme Court "mak[es] a certain fact essential to the death penalty" is substantive).

Court's habeas corpus jurisprudence.[236] As habeas corpus relief was historically available for prisoners challenging the state's jurisdiction to impose punishment, the substantive rule exception counsels that such protections ought to be available whenever the Court articulates new constitutional protections which substantially alter the state's power to punish. While Zarrow and Milliken insist that the "Court has not deviated from a categorical understanding of the substantive-rule exception,"[237] however, I argue in Part II that the substantive rule exception should be understood to apply more broadly to any rule that compels the state to alter its substantive laws in fundamental ways, irrespective of whether the rule bans a distinct category of punishment.

II. *MILLER*'S RETROACTIVITY

Almost as soon as the Supreme Court issued its opinion in *Miller v. Alabama* and *Jackson v. Hobbs* on June 25, 2012, questions arose about the remedial scope of the ruling. "The court did not specify whether the ruling was retroactive or how states should comply, and the legal ramifications remain unclear," *Boston Globe* reporters lamented just hours after the decision came down.[238] Over the last two years, this initial uncertainty has taken on a life of its own as courts, legislators, and advocates across the country have wrestled with the question of whether *Miller* applies retroactively to the more than 2,100 individuals sentenced to mandatory life without parole for juvenile offenses, but whose cases were final when *Miller* was decided. This Part traces the post-*Miller* retroactivity litigation that has consumed and divided both federal and state courts for the last two and a half years. *Miller* has "procedural attributes," but these attributes are components of a broader mandate that is fundamentally "substantive" in at least two respects.

A. An Exercise in "Line-Drawing"

Since June 2012, dozens of federal and state courts have been asked to determine whether *Miller* applies retroactively to cases on

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236 *Id.* at 40, 45.

237 Zarrow & Milliken, *supra* note 31, at 45 n.202 ("We use the word categorical as it is used in *Penry*—a rule is categorical if it *per se* prohibits a conviction or type of punishment regardless of the procedures followed.").

238 Peter Schworm and John R. Ellement, *High Court Rules Out Life Without Parole for Youths*, BOSTON GLOBE (June 25, 2012), http://www.bostonglobe.com/2012/06/25/juveniles/oo7WFHAH0ltbNJAnfVdapJ/story.html.

collateral review. As of the writing of this Article, thirteen state courts of last resort had ruled on the merits of *Miller's* retroactivity. Nine of these (Iowa, Mississippi, Massachusetts, Nebraska, New Hampshire, Texas, Wyoming, Illinois, and South Carolina) have ruled that *Miller* applies retroactively, while four (Minnesota, Pennsylvania, Louisiana, and Michigan) have concluded that it does not. Just one United States court of appeal, the Fourth Circuit, has squarely decided *Miller*'s retroactivity, ruling that *Miller* does not apply retroactively. Five federal appeals courts (the First, Second, Third, Fourth, and Eight Circuits) have allowed habeas corpus petitions to proceed on the basis that *Miller* presents a *prima facie* case of retroactivity, while the Fifth and Eleventh Circuits have dismissed such petitions on the basis that *Miller* does not apply retroactively. These decisions are laid out briefly.

In every decision issued to date, the question has, for the most part, come down to the court's application of the *Teague* substance/procedure inquiry, albeit with varied analytics. Those courts finding the *Miller* rule to be substantive have articulated three primary rationales. The most widely invoked rationales rely on the *Penry* sub-rules: that *Miller* is substantive because it banned a specific category of punishment—mandatory life without parole—for a specific class of offenders—juveniles—because of their status. The Supreme Courts of Mississippi,[239] Iowa,[240] Massachusetts,[241] Nebraska,[242] Illinois,[243] Texas,[244] and South Carolina[245] have all based their decision to

239 Jones v. State, 122 So. 3d 698, 702 (Miss. 2013) (stating that *Miller* is substantive because it "explicitly foreclosed the imposition of a mandatory sentence of life without parole on juvenile offenders").

240 State v. Ragland, 836 N.W.2d 107, 115 (Iowa 2013) ("[*Miller*'s] procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people.").

241 Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 270, 281 (Mass. 2013) (finding *Miller* retroactive because it "forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants" and because the Supreme Court retroactively applied *Miller* in *Jackson*).

242 State v. Mantich, 842 N.W.2d 716, 730 (Neb. 2014) ("In essence, *Miller* amounts to something close to a de facto substantive holding, because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability." (internal quotations and footnotes omitted)).

243 People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014) (stating that *Miller* is substantive because it "places a particular class of persons covered by the statute—juveniles—constitutionally beyond the State's power to punish with a particular category of punishment—mandatory sentences of natural life without parole.").

244 *Ex parte* Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) ("We conclude that [the *Miller* rule] is a new substantive rule that puts a juvenile's *mandatory* life without parole sen-

apply *Miller* retroactively on some version of this reasoning. The Mississippi Supreme Court relied on a related rationale, concluding that *Miller* was substantive because it narrowed the class of juveniles who can be subjected to life without parole. The court noted:

> Prior to *Miller*, everyone convicted of murder in Mississippi was sentenced to life imprisonment and was ineligible for parole. Following *Miller*, Mississippi's current sentencing and parole statutes could not be followed in homicide cases involving juvenile defendants. Our sentencing scheme may be applied to juveniles only after applicable *Miller* characteristics and circumstances have been considered by the sentencing authority. As such, *Miller* modified our substantive law by narrowing its application for juveniles.[246]

The second less frequently invoked rationale is that *Miller* affected a substantive change to state sentencing laws. The Supreme Courts of Wyoming[247] and New Hampshire[248] have relied on this argument. Several of these courts have also cited as supportive of their holdings the fact that the Supreme Court applied the *Miller* rule in *Miller's* companion case, *Jackson v. Hobbs*.[249] This was significant because unlike Evan Miller's case, Kuntrell Jackson's case was on collateral rule review when *Miller* was decided. In *Diatchenko v. District Attorney for Suffolk County*, the Massachusetts Supreme Judicial Court noted:

> Our conclusion is supported by the fact that in *Miller* . . . the Supreme Court retroactively applied the rule that it was announcing in that case to

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tence outside the ambit of the State's power." (internal quotations omitted) (emphasis in original)).

245 Aiken v. Byars, 410 S.C. 534 (2014) (holding that "[t]he [*Miller*] rule plainly excludes a certain class of defendants—juveniles—from specific punishment-life without parole absent individualized considerations of youth).

246 Jones v. State, 122 So. 3d 698, 702 (Miss. 2013).

247 State v. Mares, 335 P.3d 487, 507 (Wyo. 2014) (holding that while *Miller* "certainly has a procedural component" it is a substantive rule because it "has effected a substantive change in the sentencing statutes applicable to juvenile offenders").

248 Petition of State of New Hampshire, 166 N.H. 659, 667–68 (2014), *petition for cert. dockted sub nom.* New Hampshire v. Michael Soto, No. 14-639 (U.S. Dec. 1, 2014) ("By prohibiting the imposition of mandatory sentences and requiring that the sentencing authority 'have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,' . . . *Miller* changed the permissible punishment for juveniles convicted of homicide.").

249 State v. Mantich, 287 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 . . . . [W]e are not inclined to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review."); State v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013) ("The procedural posture of the *Miller* decision further supports retroactive application . . . . [T]he Supreme Court specifically held the new rule applied not only to the defendant in *Miller*, but also to the defendant in *Jackson* on collateral review . . . . There would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review.").

> the defendant in the companion case who was before the Court on collateral review. . . . After holding that the imposition of sentence on a juvenile homicide offender was unconstitutional because it constituted "cruel and unusual punishment," the Supreme Court applied this "new" rule to Jackson's case. [*Miller*] at 2469, 2473–2475. As the Court stated in *Teague*, 489 U.S. at 300, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[250]

Though a decision is imminent in the Eighth Circuit,[251] no federal appeals court has yet to find *Miller* retroactive. However, the United States Courts of Appeal for the First, Second, Third, Fourth, and Eighth Circuits have all authorized successive habeas corpus petitions on the grounds that *Miller* either applies retroactively to cases on collateral review or presents a prima facie case of retroactivity. In each case, the Courts have found, in fairly perfunctory orders, that *Miller* articulated a "substantive rule."[252]

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250 Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 655, 666–67 (Mass. 2013).

251 Martin v. Symmes, No. 10-cv-4753, 2013 WL 5653447 (D. Minn. Oct. 15, 2013), *appeal filed*, No. 13-3676 (8th Cir. Dec. 12, 2013).

252 *See* Evans-Garcia v. United States, 744 F.3d 235, 238 (1st Cir. 2014) ("We need not answer [the question of whether Miller is retroactive] because the government has also conceded that Miller has been made retroactive, at least under the prima facie standard."); Wang v. United States, No. 13-2426, 2013 U.S. App. LEXIS 20386, at *1–2 (2d Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition after finding that the petitioner had made a successful prima facie showing that *Miller* is substantive and therefore retroactive); Stone v. United States, No. 13-1486 (2d Cir. June 7, 2013) (same); *In re* Pendleton, 732 F.3d 280, 283 (3d Cir. 2013) (same); *In re* James, No. 12-287 (4th Cir. May 10, 2013) (same); Johnson v. United States, 720 F.3d 720, 720 (8th Cir. 2013) (same). Several federal district courts have summarily concluded that the *Miller* rule applies retroactively as a new substantive rule. *See, e.g.*, Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *1–2 (E.D. Mich. Jan. 30, 2013) (holding the *Miller* rule is retroactive to 42 U.S.C. § 1983 plaintiffs who challenged the constitutionality of a Michigan statute that prohibits the Michigan parole board from considering for parole those sentenced to life in prison for first-degree murder). The court noted that "if ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice." *Id.* at *2 (emphasis in original). In a footnote, the court stated it "would find *Miller* retroactive on collateral review, because it is a new substantive rule, which 'generally applies retroactively.'" *Id.* at *2 n.2 (citation omitted); *see also* Songster v. Beard, No. 04-5916, 2014 WL 3731459, at *3 (E.D. Pa. July 29, 2014) ("[*Miller*] eliminated the 'significant risk' that a punishment that the law cannot impose would be imposed—a juvenile would be sentenced to die in prison when he would not otherwise be sentenced because of his peculiar characteristics associated with his youth."); Flowers v. Roy, 13-cv-01508, at 13–14 (D. Minn. May 1, 2014) (applying *Miller* retroactively to case on collateral review both because "the Supreme Court has already made the *Miller* rule retroactive to cases on collateral review" by granting relief in *Jackson*, and because "*Miller* is a substantive rule because it puts juveniles as a class beyond the reach of criminal statutes like Minn. Stat. § 609.106 . . ."); Alejandro v. United States, No. 13-4364, 2013 WL 4574066, at *1–2 (S.D.N.Y. Aug. 22, 2013) (granting petitioner's successive motion to set aside sentence of life imprisonment

By contrast, every court denying retroactive application to *Miller* has done so on the grounds that *Miller* is a procedural rule that does not rise to the level of a "watershed rule." In each case, courts have leaned heavily upon Justice Kagan's now-well-cited assurance that "*Miller* does not categorically bar a penalty for a class of offenders or type of crime" but "mandates only that a sentencer follow a certain process . . . ."[253] The Supreme Courts of Minnesota,[254] Louisiana,[255] Pennsylvania,[256] and Michigan[257] have all deemed *Miller* procedural on this basis.

In March 2015, the Fourth Circuit became the first federal appeals court to rule squarely on the merits of *Miller*'s retroactivity. In *Johnson v. Ponton*, the Court held that *Miller* was not a substantive rule because it did not categorically bar life without parole for juveniles, and did not rise to the level of a watershed rule of criminal procedure.[258] The panel also explicitly rejected the argument that the Supreme Court's application of the *Miller* rule to *Jackson* was sufficient to establish its retroactivity.[259] In addition, the United States Court of Appeals for the Fifth Circuit held in an unpublished opinion in 2013 that *Miller* was

for conviction of murder in aid of racketeering and related charges committed when petitioner was fifteen years old, pursuant to 28 U.S.C. § 2255, and concluding that *Miller* was retroactive on collateral review as a substantive rule).

253 Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

254 Chambers v. State, 831 N.W.2d 311, 328 (Minn. 2013) (reasoning that *Miller* is procedural because it did not "eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release," but merely mandated that "a sentencer follow a certain process—considering an offenders's youth and attendant characteristics—before imposing a sentence of life imprisonment without the possibility of parole").

255 State v. Tate, 130 So. 3d 829, 837 (La. 2013) ("[Miller] simply altered the range of permissible methods for determining whether a juvenile could be sentenced to life imprisonment without parole for such a conviction, mandating only that a sentence follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty.").

256 Commonwealth v. Cunningham, 81 A.3d 1, 10 (Pa. 2013) (*Miller* is procedural because, "by its own terms, the *Miller* decision does not categorically bar" the sentence of life without parole for juveniles).

257 People v. Carp, 828 N.W.2d 685, 711 (Mich. App. 2012) ("It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.").

258 Johnson v. Ponton, No. 13-7824, 2015 WL 924049 (4th Cir. March 5, 2015).

259 *Id.* at *4.

not retroactive because was not a categorical rule,[260] and the Eleventh Circuit barred a successive habeas petition on the same basis.[261]

What has been apparent to jurists on both sides of the issue, however, is that the "modern application of the *Teague* doctrine . . . [is] more an exercise in (perhaps necessary) line drawing than as a precise demarcation between rules which are innately substantive versus procedural in character, or as an effort to address the treatment of the vast range of rules having both attributes in varying degrees."[262] In all probability, it is the extreme variation in analytical approaches taken and outcomes reached by these lower courts that prompted the Court on December 12, 2014 to grant certiorari in the case of *Toca v. Louisiana*. Mr. Toca's petition was the fifth presented to the Court in the last year. The Court had already denied two from states that had deemed *Miller* retroactive—Illinois and Nebraska—and two that had reached the opposite conclusion—Pennsylvania and Louisiana.[263]

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260 *See* Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) ("*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme. Therefore, the first *Teague* exception does not apply." (citations omitted)).

261 *In re* Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013) ("*Miller* changed the procedure by which a sentencer may impose a sentence of life without parole on a minor by requiring the sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. And the Court declined to consider a categorical bar on life without parole for juveniles, or at least those 14 and younger." (citations and internal quotations omitted)).

Several federal district courts have also deemed *Miller* a procedural rule. *See, e.g.*, Thompson v. Roy, No. 13-cv-1524, 2014 WL 1234498, at *1 (D. Minn. Mar. 25, 2014) ("Although the issue is a close, the Court finds . . . that the new rule announced in *Miller* is procedural, not substantive."); Sanchez v. Vargo, No. 3:13-cv-400, 2014 WL 1165862, at *4–6 (E.D. Va. Mar. 21, 2014) (noting the plain language of *Miller* indicates the Supreme Court intended it to be procedural); Contreras v. Davis, No. 1:13-cv-772, 2013 WL 6504654, at *3 (E.D. Va. Dec. 11, 2013) ("Indeed, the Supreme Court's language indicates that it intended the *Miller* rule to be procedural, rather than substantive." (citing *Miller*, 132 S. Ct. at 2471)); Johnson v. Ponton, No. 3:13-cv-404, 2013 WL 5663068, at *5 (E.D. Va. Oct. 16, 2013) ("The Supreme Court's language indicates that it intended the *Miller* rule to be procedural, rather than substantive."); Martin v. Symmes, 2013 WL 5653447, *15 (D. Minn. Oct. 15, 2013) (noting that *Miller* could not be a substantive rule as that would be an extension of the Supreme Court's holdings); Ware v. King, No. 5:12-cv-147, 2013 WL 4777322, at *3 (S.D. Miss. Sept. 5, 2013) ("For the reasons set forth by the Fifth Circuit in *Craig*, *Miller* is not retroactively applicable to cases on collateral review.").

262 *See, e.g.*, Commonwealth v. Cunningham, 81 A.3d 1, 5 n.7 (Pa. 2013).

263 *See, e.g.*, *Cunningham*, 81 A.3d 1, *cert. denied*, 134 S. Ct. 2724 (2014) (denying review of Pennsylvania Supreme Court's denial of retroactive application); State v. Tate, 111 So. 3d 1013 (La. 2013), *cert. denied* 134 S. Ct. 2663 (2014) (denying review of Louisiana Supreme Court's denial of retroactive application); People v. Davis, 6 N.E.3d 709 (Ill. 2014), *cert. denied* 135 S. Ct. 710 (2014) (denying review of Illinois Supreme Court's grant of retroac-

Toca v. Louisiana was dismissed on February 3, 2015, however, after Mr. Toca was released by the state of Louisiana unexpectedly after thirty years in prison.[264] Three other petitions are currently pending before the Court,[265] and based on its decision to hear *Toca*, the Court seems likely to decide the issue in the near future.

B. The Substance of Miller

While *Miller*'s mandate that states engraft into their sentencing schemes a mechanism through which sentencers can take an individualized look at each juvenile convicted of homicide has "procedural" attributes, I agree with those courts and commentators who have concluded that *Miller* is a fundamentally "substantive" decision. This conclusion relies on the *Penry* and *Summerlien* "sub-rules", which themselves can be broken into two types. Perhaps the stronger argument relies on *Summerlin*, which decision was, ironically, a *non*-retroactivity decision. In *Summerlin*, Justice Scalia identified what was ever-expanding, but nameless set of exceptions to the *Teague* ban and divided them into two categories. The first included constitutional rules that require states merely to alter the *method* by which they apply a particular law, which he deemed "procedural," and the second, rules which "modify the elements of an offense," which he labeled "substantive."[266] Unlike procedural rules, whose purpose is to enhance the fairness and accuracy of state sentencing processes by requiring states to shore up the methods through which they determine guilt and administer punishment, he implied, substantive rules do something more fundamental—they usurp the State's jurisdiction over the substance its own laws.[267]

Under *Summerlin*, *Miller* is a substantive rule because it modifies state sentencing laws by changing the "essential facts" a state must consider before imposing a sentence of life without parole,[268] and by

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tive application); State v. Mantich, 543 N.W.2d 181 (Neb. 1996), *cert. denied* 135 S. Ct. 67 (2014) (denying review of Nebraska Supreme Court's grant of retroactive application).

264 Lyle Deniston, *Juvenile Sentencing Case to End*, SCOTUSBLOG (Feb. 3, 2015), http://www.scotusblog.com/2015/02/juvenile-case-to-end/.

265 State v. Montgomery, 181 So. 2d 756 (La. 1966), *petition for cert. filed sub nom.* Montgomery v. Louisiana, No. 14-280, 2014 WL 4441518 (U.S. Sept. 5, 2014) (filed by a pro se inmate in Louisiana); New Hampshire v. Soto, 34 A.3d 738 (N.H. 2011), *petition for cert. docketed* I No. 14-639 (U.S. Dec. 1, 2014) (filed by the state of New Hampshire); People v. Carp, 828 N.W.2d 685 (Mich. 2012), *petition for cert. docketed sub nom.* Carp v. Michigan, No. 14-824 (U.S. Jan. 13, 2014) (filed on behalf an inmate in Michigan).

266 Schriro v. Summerlin, 542 U.S. 348, 354 (2004).

267 *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

268 *Id.* at 352–53.

expanding the range of sentencing outcomes available to juveniles convicted of homicide.[269] The other rationales, which have been invoked in some form by six of the nine state supreme courts to hold *Miller* retroactive, rely on the *Penry* sub-rules.[270] Under *Penry*, *Miller* is substantive both because it strips states of their authority to impose a distinct "category" of punishment—mandatory life without parole—on a class of individuals,[271] and because it narrows the class of juveniles eligible for such punishment.[272] I address each rationale in turn.

1. Modifying State Sentencing Laws

Miller modified state sentencing laws by imposing upon states new factors that sentencers must consider before imposing a sentence of life without parole and by expanding the range of sentencing outcomes available to juveniles convicted of homicide. Prior to *Miller*, a juvenile convicted of homicide in states with mandatory sentencing provisions was not afforded any individualized consideration. Without any acknowledgment of his age, role in the offense, maturity, mental acuity, history of trauma and abuse or family background, the sentencer did little more than order the juvenile to serve out the mandated sentence. After *Miller,* before she can impose a life without parole sentence, state sentencers must consider factors that relate to the youth's overall culpability.[273] According to *Miller*, factors must include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation."[274] Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,"[275] the Court has

269 *Id.* at 353.
270 *See supra* text accompanying notes 239–45.
271 Penry v. Lynaugh, 492 U.S. 302, 330 (2002).
272 *Summerlin*, 542 U.S. at 352–53 (citing Saffle v. Parks, 494 U.S. 484, 495 (2002)).
273 Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012).
274 *Id.* at 2468.
275 *Id.* at 2469.

made consideration of these factors "essential" to imposing life without parole on juveniles.

States have begun to comply with this mandate. Hawaii, for example, now requires that a sentencing court consider the following factors when sentencing a juvenile convicted of homicide:

> (a) Age of the defendant at the time of the offense; (b) Impetuosity of the defendant at the time of the offense; (c) Family and community environment of the defendant; (d) Ability of the defendant to appreciate the risks and consequences of the conduct; (e) Intellectual capacity of the defendant; (f) The outcome of any comprehensive mental health evaluation conducted by an adolescent mental health professional licensed in the State of Hawaii; (g) Family or peer pressure on the defendant; (h) Level of the defendant's participation in the offense; (i) Ability of the defendant to participate meaningfully in the defendant's defense; (j) Capacity for rehabilitation; (k) School records and any special education evaluations of the defendant; (l) Trauma history of the defendant; (m) Community involvement of the defendant; (n) Involvement in the child welfare system; and (o) Any other mitigating factor or circumstance the court deems relevant to its decision.[276]

Miller has also compelled states to expand the range of sentencing outcomes available to juveniles convicted of homicide. Before *Miller*, juveniles convicted of first-degree homicide in the states in question were given a single sentence—mandatory life without parole. *Miller* stripped twenty-eight states and the federal government of their authority to impose this sentence and required them to formulate an alternative range of sentences. In the months since *Miller* was decided, the magnitude of this mandate has become plain. At least thirteen states have now replaced their automatic first-degree murder sentencing provisions for juveniles with a range of alternatives.[277] Five states have opted for an alternative sentencing range of twenty-five years to life in prison with periodic review,[278] for example. Others have selected a determinate sentence of forty to life.[279] In doing so, states were necessarily required to consider juveniles' reduced culpability and decide whether, given all the Supreme Court has said about the incomparable severity of life without parole, to continue to im-

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276 H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014).

277 Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, The Sentencing Project (June 2014), *available at* http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

278 S. 319, 97th Leg., Reg. Sess. (Mich. 2014); S. 9, 147th Gen. Assembl., Reg. Sess. (Del. 2013); S. 5064, 63rd Leg., Reg. Sess. (Wash. 2014); H. 23, 62nd Leg., Reg. Sess. (Wyo. 2013); S. 635, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012).

279 Leg. 44, 103rd Leg., 1st Sess. (Neb. 2013); S. 2, 83rd Leg., Reg. Sess. (Tex. 2013). As I have argued elsewhere in this Article, many of these laws are likely to fall prey to future proportionality challenges based on adolescents' diminished culpability.

pose discretionary life without parole sentences upon juveniles. In *Miller*'s aftermath, at least three state legislatures have decided to abolish juvenile life without parole altogether.[280]

In more than half of the twenty-eight affected states, *Miller* has already done far more than alter a single *method* of administering a sentence; it has entirely reshaped both how and *how much* these states punish juveniles convicted of homicide. This readily distinguishes *Miller* from the rule at issue in *Summerlin*. In *Summerlin*, the Court found that the rule announced in *Ring v. Arizona*, which held that a jury rather than a judge must find the aggravating factors necessary to impose the death penalty, was "procedural." [281] Justice Scalia based this conclusion on the fact that *Ring* merely "allocate[d] decisionmaking authority" without altering state law.[282] In contrast to *Ring*, however, *Miller* does not simply reallocate decision-making authority, it creates decision-making authority where there was none. *Miller* can also be distinguished from *United States v. Booker*, which held that the Federal Sentencing Guidelines were not binding on federal courts under the Sentencing Reform Act.[283] While both *Booker* and *Miller* restored sentencing discretion to the trial courts and in doing so, expanded the range of sentences courts could impose, *Miller* did something more—it compelled states to incorporate into this new discretionary decision-point a series of factors that explicitly "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[284]

2. Narrowing the Class and Proscribing the Punishment

Miller may also be deemed substantive because it narrowed the class of juveniles who may be subjected to life without parole. Before *Miller*, every juvenile convicted of first-degree murder in states with such mandatory statutes was sentenced to life without parole. Yet, *Miller* explicitly counseled that, "[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'" [285] While the Court did not eliminate states' authority to impose life without parole, it made clear

280 H. 2116 27th Leg., Reg. Sess. (Haw. 2014); H. 23, 62nd Leg., Reg. Sess. (Wyo. 2013); S. 2, 83rd Leg., Reg. Sess. (Tex. 2013)

281 Schriro v. Summerlin, 542 U.S. 348, 353–54 (2004).

282 *Id.*

283 543 U.S. 220 (2005).

284 132 S. Ct. at 2469.

285 *Id.* at 2464 (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).

that such sentences should henceforth be "uncommon."[286] Thus, after *Miller*, even discretionary life without parole sentences are suspect. It also stands to reason that if, as Justice Scalia maintained in *Summerlin*, a metric for substance is the relative "risk" that an offender is serving an unconstitutional sentence, the narrowing of this class of defendants by the Court to the "rare" juvenile increases the possibility that many of those already serving life without parole are subject to "a punishment that the law cannot impose upon [them]."[287]

Miller also proscribes a distinct "category" of punishment for a class of offenders because of their status Mandatory life without parole sentences are qualitatively harsher than alternative sentencing schemes in which life without parole is a discretionary alternative. As the Supreme Court explained in 2013 in *Alleyne v. United States*, "[m]andatory minimum sentences increase the penalty for a crime," and it is "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime."[288] "Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime," the Court stated.[289] Mandatory life without parole for a juvenile is substantively harsher than a discretionary life without parole sentence because it forecloses the possibility that a juvenile could receive a reduced sentence. It is also conceptually harsher. Mandatory life without parole is a punishment that gained favor in the "get tough" era of the 1990s[290] as the ultimate expression of society's view that certain offenders are so culpable and irredeemable, and their offenses so heinous, that they do not deserve the individualized consideration normally afforded defendants in this country. It ascended during the so-called super-predator era of juvenile justice—a time when the Progressive ideals of care and rehabilitation gave way almost entirely to the goal of incapacitation.[291] Other than death, there is no punishment more incapacitating than life without parole and no more inhumane way to impose it than automatically.

This argument, of course, runs squarely into Justice Kagan's characterization of *Miller* as a decision that "does not categorically bar a penalty for a class of offenders or type of crime" and instead "requires

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286 *Id.* at 2481.

287 *Summerlin*, 542 U.S. at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

288 Alleyne v. United States, 133 S. Ct. 2151, 2155, 2160 (2013).

289 *Id.* at 2161.

290 Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, The Sentencing Project, 2010, at 27, *available at* http://www.sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf.

291 Perry Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 Md. L. Rev. 849, 877–78 (2010).

only that a sentencer follow a certain process."[292] A cynical reading of this passage would be that it reflects little more than the judicial bartering sometimes required to attract majority support for a decision. But, this seems unlikely. What makes the passage especially curious is that it is in direct conflict with other aspects of the decision. Even as Justice Kagan assured *Miller*'s dissenters that *Miller* did not categorically bar a penalty, she also took pains to craft *Miller*'s holding from the Court's categorical and individualization proportionality jurisprudence.[293] Unlike rules arising under other constitutional provisions, which premise their prophylactic mandates on the need for accuracy, reliability and fairness, *Miller* bases the elimination of mandatory life without parole for juveniles on the reduced culpability of adolescents as a class, the harshness and irrevocability of life without parole as a category, and the fact that mandatory sentences do not allow decision-makers to take either of these into account.

Two independent strands of the Court's proportionality jurisprudence factor into the result.[294] The first, the *Roper/Graham* strand, established that juveniles are categorically different from adults and less deserving of harsh punishment, while the second, the *Woodsen/Lockett/Eddings* line, established that, when the most severe available punishments are at stake,[295] the state must give individual defendants the opportunity to mitigate.[296] It was the "confluence" of the individualization cases and the categorical prohibition cases that drove the result.[297] Were *Miller* only about the procedural right to individualized sentencing, Justice Kagan could have based the decision on the *Woodsen/Lockett/Eddings* line of cases alone.[298] She did not do that. Justice Kagan also positioned *Miller* as a classic proportionality decision in the mold of the Court's capital jurisprudence—"a categorical, all-cases-of-this-type ruling, explicitly modeled after *Graham*, *Roper*, and the Court's earlier cases imposing substantive limits on

292 *Miller*, 132 S. Ct. at 2455, 2459.

293 *See* Part I, *supra*.

294 *Id.* at 2463.

295 Woodson v. North Carolina, 428 U.S. 280, 293 (citing consensus of jurisdictions rejecting mandatory death sentences as "unduly harsh and unworkably rigid"); Roberts v. Louisiana, 428 U.S. 325, 332 (1976) (noting "unacceptable severity of the common-law rule of automatic death sentences").

296 *Miller*, 132 S. Ct. at 2463–64.

297 Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

298 Interestingly, at least some, if not all of these individualization cases, have also been applied retroactively by lower courts. *See e.g.*, Thigpen v. Thigpen, 541 So. 2d 465, 466 (Ala. 1989) (applying *Sumner* retroactively); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (applying *Lockett* retroactively).

death penalty eligibility."[299] As in *Graham*, the Court could have, but elected not to, apply a narrow proportionality framework,[300] and instead invoked the same robust proportionality review that it had used in its capital cases. Though *Miller*'s holding—that mandatory life without parole for juveniles violates the Eighth Amendment—also draws from the Court's "individualization" cases, it is grounded in concerns about juveniles' diminished capacity and the relative harshness of mandatory life without parole.

Miller also has other features that align it with the Court's categorical cases. As in *Roper* and *Graham*, Justice Kagan dispensed with the stance of penal agnosticism the Court had so explicitly adopted in *Ewing* and *Andrade*.[301] Though Justice Kagan refused to classify *Miller* as a retributive holding, the Court's emphasis on reduced culpability suggests that it has strong retributive strains. "Ultimately, proportionality is a retributive concept, not a utilitarian one and *Roper*, *Graham*, and *Miller/Jackson* rest firmly on retributive grounds—reduced culpability—after examining and rejecting utilitarian justifications for punishment," juvenile justice expert Barry Feld has argued.[302]

Related to this is the Court's apparent willingness to depart from the posture of legislature deference that it had taken in *Harmelin* and *Ewing*. Justice Kagan describes in detail the practical realities of juvenile justice decision-making in the modern era.[303] The mechanism through which juveniles are transferred to adult court—a process once envisioned as an individualized, evidentiary hearing—is now legislatively mandated in many states.[304] Even the discretion that ju-

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299 *See* Frase, *supra* note 73, at 12.

300 As Chief Justice Roberts noted in his concurrence in *Graham*, Terrence Graham had raised both a "categorical" and an "as-applied" challenge, and Chief Justice Roberts believed that the majority could have and should have chosen to rule on that basis. Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring). In *Miller*, without even identifying it as a threshold methodological choice, Justice Kagan simply launched into a categorical analysis.

301 *See, e.g.*, Smith & Cohen, *supra* note 127 (describing the *Graham* Court's departure from prior Eighth Amendment jurisprudence and implications); Steiker & Steiker, *supra* note 127 (discussing implications of *Graham* decision for capital and noncapital Eighth Amendment challenges).

302 *See* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. OF CRIM. L. 9, 145 (2013). *But see* Frase, *supra* note 73, at 22 (discussing *Graham* and *Miller*'s non-retributive principles).

303 Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

304 Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 412 (2013) (citing Martha Rossiter, Comment, *Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society*, 27 J. JUV. L. 123, 126, 128–31 (2006) (reviewing and critiquing mandatory waiver laws)); Melissa A. Scott, Comment, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who*

venile court judges have retained has "limited utility," Kagan noted, because judges have incomplete and inadequate information about the youth before them.[305] *Miller* and *Graham* represent "the Court's first, tentative steps to restore some checks and balances to the [juvenile justice] system, much as the Court groped its way toward a similar end in its early capital-punishment cases."[306]

III. PROPORTIONALITY AND RETROACTIVITY

Comity and federalism concerns notwithstanding,[307] the primary rationale for denying relief to the 2,100 individuals sentenced to mandatory life without parole as juveniles is that preserving the finality of criminal judgments is essential to the efficiency, accuracy, legitimacy, and consequentialist objectives of the criminal process.[308] Yet, as even *Teague*'s proponents have acknowledged, there is a normative point at which society's interest in preserving final judgments simply must yield to competing notions of justice and equality.[309] I argue

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Should Decide?, 50 LOY. L. REV. 711, 712, 728–29 (2004) (noting that Louisiana's waiver laws are very similar to laws of other states).

305 *Miller*, 132 S. Ct. at 2474.

306 Bierschbach & Bibas, *supra* note 304, at 413 (citing Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 364–66, 372–78 (1995) (discussing the Court's goal of ensuring deserved punishment in capital sentencing and its doctrinal efforts to implement it).

307 Courts and scholars considering the proper scope of collateral review have long raised concerns about comity and federalism. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 178 (2001) (explaining that the purpose of the statutory habeas bars are to "further the principles of comity, finality, and federalism" (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)); *see also* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577–79 (1993) (discussing how finality, comity, and federalism interests are invoked in theories on the proper scope of the habeas writ). Because federalism and comity considerations are unique to federal habeas review of state convictions rather than state post-conviction proceedings, *see* Danforth v. Minnesota, 552 U.S. 264, 279–80 (2007) (noting that "[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*"), they are not the focus of this Article.

308 *See, e.g.*, Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) ("Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."); Bator, *supra* note 199, at 452 n.21 (1963) (emphasizing the importance of the finality of criminal judgments); Friendly, *supra* note 201 (citing finality concerns as a basis for limited habeas review).

309 *See* Mackey v. United States, 401 U.S. 667, 692–93 (1971). (Harlan, J., dissenting) (acknowledging that "finality interests should yield" to rules which "place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making author-

that finality interests are at their weakest when the Court announces a new Eighth Amendment proportionality rule, such as *Miller*'s, because neither the practical burdens of retrial nor theoretical concerns about undermining the consequentialist objectives of punishment are as pronounced with sentences of incarceration as they are with convictions. The risk of offending fundamental notions of "justice," however, may be at their most pronounced with new proportionality rules, because to deny relief to those whose sentences have been deemed "excessive" (or at high risk of excessiveness) is to undermine the very principles of proportionality and fundamental fairness on which such rules rest. This may explain why the Supreme Court and lower courts have afforded a broader remedial scope to new proportionality rules than they have to new Fourth, Fifth, Sixth, and Fourteenth Amendment rules.[310]

A. Diminished Finality Concerns

In *Mackey v. United States*, Justice Harlan worried that reviewing cases on collateral review would threaten the accuracy of convictions and jeopardize scant judicial resources. Revisiting cases would compel parties to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed," he wrote.[311] It would also "seriously distort the very limited resources society has allocated to the criminal process [and] expend[] substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."[312]

Yet, "different conceptual, policy and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction," Doug Berman noted in a recent symposium issue devoted to the topic.[313] Unlike trials, which require extensive resources and de-

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ity to proscribe" because "there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

310 This decisions are discussed in Part II.B, *infra*.

311 *Mackey*, 401 U.S. at 691.

312 *Id.*

313 *See* Douglas Berman, *Re-Balancing Fitness, Fairness and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 165–76 (2014) ("Sentence finality, in short, has gone from being a non-issue to being arguably one of the most important issues in modern American criminal justice systems."); Sarah French Russell, *Reluctance to Resentence: Courts, Congress and Collateral Review*, 91 N.C. L. REV. 79, 88–89 (2012) (noting the weakness of finality interests at stake compared to requests for sentence correction). *But see* Ryan W. Scott, *In Defense Of*

pend on evidentiary preservation and presentation, sentencing is at least as prospective as it is retrospective. The risks of inaccuracy, spoiled evidence, and procedural illegitimacy are simply not as great during re-sentencing as they are during retrial. Trials also have different objectives than sentencing hearings. While trials "are designed and seek only to determine the binary question of a defendant's legal guilt," sentencing hearings "are structured to assess and prescribe a convicted offender's future and fate."[314] Accuracy concerns are even further diminished with mandatory sentences, because evidence was never presented at the original sentencing phase. Resentencing will be the first time the court considers a juvenile's mitigating characteristics. Moreover, reducing a sentence of incarceration may actually save resources that otherwise would have been spent on the operation of corrections systems.

Take Quantel Lotts. While conducting a new sentencing hearing for Lotts under *Miller* would likely require a court to consider mitigating evidence relating to his age, maturity, and life circumstances at the time of offense, much of the evidence would be gathered from existing documents—perhaps child protection documents regarding trauma history and family circumstances, medical records documenting his mental health history, schools records discussing his educational progress, trial records detailing the offense itself, and witness testimony about Lotts' maturity, relationship with the victim and level of remorse. The proceeding would plainly be less burdensome than retrying the case, and there would be far less emphasis on hard-to-preserve items like forensics and ballistics. Moreover, a significant portion of the proceeding would likely focus on Lotts' recent institutional history and current psychological profile as evidence of his "rehabilitation" and projected risk of recidivism.

Nor would resentencing individuals like Quantel Lotts undermine the "deterrent effect" of criminal punishment, as the *Teague* Court warned.[315] Unlike a reversed conviction, the reduction of an excessive sentence cannot reasonably be seen or described as a free-pass to would-be criminals.[316] Moreover, as the Court observed in both *Roper*

The Finality of Criminal Sentences on Collateral Review, 4 WAKE FOREST J.L. & POL'Y 181 (2014) (arguing in defense of the finality of criminal sentences on collateral review).

314 Berman, *supra* note 313, at 167.

315 Teague v. Lane, 489 U.S. 288, 309 (1989).

316 *See* Bator, *supra* note 199, at 452 n.21 (observing that the "certainty and immediacy of punishment are more critical elements than its severity").

and *Graham*, juveniles, by virtue of their impulsivity an impetuosity, are less deterrable anyway.[317]

Interests in finality may be even less compelling in the case of proportionality rules than they are with other sentencing rules. No sentence of incarceration, after all, is ever really *final* until it has been fully served.[318] Since the Court's modern proportionality decisions have proscribed only the harshest sentences for the narrowest classes of individuals, such decisions are more likely to apply to active prisoners than decisions grounded in the Fourth, Fifth, and Sixth Amendments. Those standing to benefit from the retroactive application of new proportionality rules are, as a conceptual matter, the least likely to have final sentences.

B. Enhanced Justice Concerns

By contrast, the risk of offending constitutional norms and undermining fundamental notions of justice may be at their most pronounced with new proportionality rules, because denying a second look to those whose sentences are "excessive" is to offend the constitutional principles that underlie these rules. This may explain why the Supreme Court and lower courts have afforded a broader remedial scope to new proportionality rules than they have to new Fourth, Fifth, Sixth, and Fourteenth Amendment rules[319] and suggests that proportionality rules merit a presumption of retroactivity.

1. The Principle of Proportionality

Like *Atkins, Roper*, and *Graham* before it, *Miller* is grounded in the Court's proportionality jurisprudence, which holds that, by virtue of their reduced culpability, certain offenders (because of age, mental capacity or offense) are less deserving of the harshest punishments.[320]

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317 *See* Graham v. Florida, 130 S. Ct. 2011, 2028–29 (2010) (noting juveniles "are less likely to take a possible punishment into consideration when making decisions"); Roper v. Simmons, 543 U.S. 511, 571 (2005) (noting that "juveniles will be less susceptible to deterrence").

318 Berman, *supra* note 314, at 167.

319 This decisions are discussed in Part I.B, *infra*.

320 *Graham*, 560 U.S. at 29, 31 (holding that life without parole sentences for non-homicide offenses committed by juvenile offenders violate the Eighth Amendment); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (holding that a death sentence is "not a proportionate punishment" for raping a child); *Roper*, 543 U.S. at 568 (holding that a death sentence for juvenile offenders under age eighteen violates the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that a death sentence for a mentally-retarded offender is "excessive," thereby violating the Eighth Amendment).

Miller is, in other words, a proportionality rule. It can be argued that new proportionality rules are retroactive by definition, because the continued imposition of the proscribed (or highly suspect) punishment upon any member of that class, irrespective of when she was sentenced, would violate the Eighth Amendment (or create a serious risk of such a violation). While those who oppose applying *Miller* retroactively might argue that, because the Court did not ban juvenile life without parole outright, we cannot be sure that any of the 2,100 inmates is serving a disproportionate sentence, the question then is whether our collective interest in the finality of these sentences should outweigh the constitutional risks of foreclosing the inquiry. In the wake of *Atkins*, would it be constitutionally tolerable for states to insist on executing mentally-impaired death row inmates on the grounds that *Atkins* did not proscribe capital punishment, but merely required states to impose a "process" to determine which offenders were "mentally retarded" enough to be spared? It seems unlikely.

This may, in part, explain the distinctions between those rules that the Court has deemed retroactive and those it has not. Since *Teague*, the Court has considered the retroactivity of fourteen new rules of criminal procedure and has yet to find that any of them fall within either of the *Teague* exceptions. Eight of these new rules have involved the regulation of sentencing in some way; four of these were grounded in the Eighth Amendment's individualization and reliability requirements,[321] one in the Fifth Amendment's Double Jeopardy Clause,[322] two in the Fourteenth Amendment's Due Process Clause,[323] and one in the Sixth Amendment's jury trial guarantee.[324]

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321 *See* Beard v. Banks, 542 U.S. 406, 408 (2004) (holding that the new rule announced in *Mills v. Maryland*, 486 U.S. 367, 384 (1988), which held that capital sentencing schemes that require juries to disregard mitigating factors not unanimously found violate the Eighth Amendment, is not a watershed rule); Graham v. Collins, 506 U.S. 461, 478 (1993) (holding that a proposed new Eighth Amendment rule barring jury instructions that forbid a sentencing jury to consider mitigating evidence would not be watershed); Saffle v. Parks, 494 U.S. 484, 486 (1990) (holding that a new Eighth Amendment rule which forbids the trial court from "telling the jury to avoid any influence of sympathy" is not a watershed rule); Sawyer v. Smith, 497 U.S. 227 (1990) (holding that the new rule announced in *Caldwell v. Mississippi*, 474 U.S. 320, 328–29 (1985), which held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer who "has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere" is not a watershed rule).

322 *See* Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (holding that the application of the Double Jeopardy Clause to noncapital sentencing proceedings constituted a new rule that is not a watershed rule).

323 *See*; O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (holding that the new rule announced in *Simmons v. South Carolina*, 512 U.S. 154, 168–69 (1994), which held that a defendant has a right arising under the Fourteenth Amendment's Due Process Clause to in-

Five have been non-sentencing cases and have denied retroactive application to rules rooted in the Fifth, Sixth, and Fourteenth Amendments.[325] In addition, though the Supreme Court has never itself addressed the retroactivity of the *Apprendi-Booker-Blakely* line of Sixth Amendment cases, several lower courts have and, with a few exceptions, have denied retroactivity.[326]

Over the last twelve years, however, the Court has announced four new rules—the *Atkins*, *Kennedy*, *Roper,* and *Graham* rules—which have been deemed "substantive" and applied retroactively by *lower* courts. Each of these was a "proportionality rule." Although *Atkins* was decided on direct appeal, courts have uniformly applied it retroactively to cases on collateral review because, according to lower courts, it announced a new, substantive categorical rule.[327] *Roper*, which was on collateral review when it was decided, has been applied retroactively

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form a sentencing jury contemplating capital punishment that he is parole-ineligible and therefore not a future danger, is not a watershed rule); Gray v. Netherland, 518 U.S. 152, 170 (1996) (holding that the new rule arising under the Fourteenth Amendment Due Process Clause, which requires the state to give adequate notice of the evidence it intends to use in the sentencing phase, is not a watershed rule).

324 Schriro v. Summerlin, 542 U.S. 348, 355, 358 (2004) (holding that the new rule announced in *Ring v. Arizona*, 536 U.S. 584, 589, 609 (2002), which held that aggravating factors which make a defendant eligible for the death penalty must be proved to a jury rather than a judge under the Sixth Amendment, is not a watershed rule).

325 Chaidez v. United States, 133 S. Ct. 1103 (2013) (holding that the new rule announced in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas, was not a watershed rule); Whorton v. Bockting, 549 U.S. 406, 417–21 (2007) (holding that the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), which held that the Confrontation Clause bars the introduction into evidence of testimonial evidence from a non-testifying defendant, is procedural and does not "qualify as a watershed" for *Teague* purposes because it "d[oes] not 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding'" (emphasis omitted)); Goeke v. Branch, 514 U.S. 115 (1995) (per curiam) (holding that a new rule which gave a recaptured fugitive a right to appeal under the Fourteenth Amendment's Due Process Clause is not a watershed rule); Gilmore v. Taylor, 508 U.S. 333 (1993) (holding that the new rule announced in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which held that jury instructions that allowed murder convictions without consideration of a diminished mental state violated the Fourteenth Amendment's Due Process Clause, is not a watershed rule); Butler v. McKellar, 494 U.S. 407 (1990) (holding that the new rule announced in *Arizona v. Roberson*, 486 U.S. 675 (1988), which held that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel, is not watershed).

326 *See, e.g.*, U.S. v. Gentry, 432 F.3d 600 (5th Cir. 2005) (holding that U.S. v. Booker, 543 U.S. 220 (2005) does not apply retroactively).

327 *See, e.g.*, Simpson v. Norris, 490 F.3d 1029, 1035 (8th Cir. 2007); Ochoa v. Sirmons, 485 F.3d 538, 540 (10th Cir. 2007); *In re* Holladay, 331 F.3d 1169, 1172–73 (11th Cir. 2003); *In re* Morris, 328 F.3d 739, 740 (5th Cir. 2003).

for the same reason.[328] Lower courts have also found that *Graham* articulated a new, substantive rule which applies retroactively because it "bar[red] the imposition of a sentence of life imprisonment without parole on a juvenile offender."[329]

Surprisingly, the correlation between the constitutional roots of a rule and where on the substance/procedure spectrum it falls is something that only a few jurists and scholars have explored. In an article published shortly after *Teague* was decided, Richard Fallon and Daniel Meltzer alluded to the connection.[330] Fallon and Meltzer argue that the Warren Court's "new law" doctrine raises issues that are best resolved through a "constitutional remedies" framework, and apply this framework to some of the Warren Court's most well known decisions.[331] A blanket bar to the application of new rules to cases on collateral review is "too unbending," they argue, and the inquiry should

328 *See* Loggins v. Thomas, 654 F.3d 1204, 1206, 1221, 1231 (11th Cir. 2011) (noting *Roper* applied retroactively to cases on collateral review as a case "prohibiting a certain category of punishment for a class of defendants because of their status or offense" (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989))); Lee v. Smeal, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (noting the seventeen-year-old appellant's murder conviction was later commuted into two consecutive life sentences under *Roper*); Horn v. Quarterman, 508 F.3d 306, 308 (5th Cir. 2007) (noting the appellant's pre-*Roper* death sentence was vacated on appeal); LeCroy v. Sec'y, Florida Dept. of Corr., 421 F.3d 1237, 1239–40 (11th Cir. 2005) ("[T]he Florida Supreme Court vacated the defendant's death sentence based on [*Roper*] because he was 17 years old at the time of his offenses."); Sharikas v. Kelly, No. 1:07CV537CMHTCB, 2008 WL 6626950, at *2 (E.D. Va. Apr. 7, 2008) ("*Roper* recognized a new constitutional right for juveniles sentenced to *death* prior to its issuance and that the ruling is retroactive on collateral review . . . ."); Holly v. Mississippi, No. 3:98CV53-D-A, 2006 WL 763133 (N.D. Miss. Mar. 24, 2006) (vacating the petitioner's death sentence based on the retroactive application of *Roper*); Little v. Dretke, 407 F. Supp. 2d 819, 823–24 (W.D. Tex. 2005) ("*Roper* is clearly substantive, rather than procedural, in nature."); Baez Arroyo v. Dretke, 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005) ("*Roper* applies retroactively to all cases involving offenders under the age of eighteen at the time of the offense, including those cases on collateral review . . . ."), *aff'd sub nom.* Arroyo v. Quarterman, 222 F. App'x 425 (5th Cir. 2007) (per curiam); Sims v. Commonwealth, 233 S.W.3d 731, 733 (Ky. Ct. App. 2007) (holding the rule in *Roper*, while retroactive, only applies to death sentences, not life imprisonment without the possibility of parole); Duncan v. State, 925 So. 2d 245, 252 (Ala. Crim. App. 2005) (vacating the appellant's death sentence pursuant to *Roper*).

329 *In re* Sparks, 657 F.3d 258, 262 (5th Cir. 2011); *see also In re* Evans, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (noting the government "properly acknowledged" *Graham* applies retroactively on collateral review); State v. Dyer, 77 So. 3d 928, 929 (La. 2011) (holding compliance with *Graham* required removal of the defendant's parole eligibility restriction); Bonilla v. State, 791 N.W.2d 697, 700–01 (Iowa 2010) (holding *Graham* applies retroactively); Kleppinger v. State, 81 So. 3d 547, 550 (Fla. Dist. Ct. App. 2012) (applying *Graham* on collateral review); Manuel v. State, 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010) (vacating a sentence of life without parole on collateral review pursuant to *Graham*).

330 Fallon & Meltzer, *supra* note 169.

331 *Id.* at 1733.

instead be able to "accommodate a variety of practical pressures."[332] An inquiry into the "nature and purpose of the right" at stake is one appropriate metric for assessing a new rule's remedial scope.[333] "At one end [of the spectrum] lie rules and decisions that hold a defendant's conduct constitutionally immune from punishment," while "at the other end of the spectrum stand rules whose purposes are substantially deterrent," such as the "exclusionary rule."[334] The nature and purpose of the former "clearly calls for retroactive application even of surprising holdings," while the "argument for retroactive application" of the latter is "relatively weak."[335] "Occupying the "middle of the spectrum are rules that involve procedural protections, rather than constitutional immunities from prosecution."[336] Though not explicit, Fallon and Meltzer seemed to be distinguishing between proportionality rules, which should be applied retroactively, Fourth and Fifth Amendment rules, for which the argument was weak, and Sixth Amendment rules, which could go either way.

2. Fundamental Unfairness

In 2010, the Washington, D.C.-based Sentencing Project surveyed 1,579 of the 2,500 juveniles serving life without parole in the United States.[337] The results were predictable, but nonetheless, deeply sobering. Mirroring other statistical portraits of youth incarcerated in adult prisons, 77.3% were of color,[338] and many reported childhoods that were marked by highly elevated levels of poverty, abuse, exposure to community violence, familial incarceration, problems in school, engagement with delinquent peers, and were frequently raised in homes with few adult guardians—facts which, because many were waived to adult court without hearings, did not make their way into court proceedings.[339] The report also revealed that over 60% of juvenile lifers were not participating in rehabilitation programming in prison[340] largely because of restrictions placed by corrections systems.[341]

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332 *Id.* at 1807.
333 *Id.* at 1808.
334 *Id.*
335 *Id.*
336 Fallon & Meltzer, *supra* note 169, at 1808.
337 Nellis, *supra* note 55, at 2.
338 *Id.* at 8.
339 *Id.*
340 *Id.* at 23.
341 *Id.*

As the Court has repeatedly acknowledged, allowing one petitioner to be the "'chance beneficiary' of a new rule" while denying that benefit to others based upon nothing more than an accident of timing results in "*actual inequity*."[342] That is precisely what happens in a non-retroactivity regime. It is conceivable that two defendants convicted of the same crime on the same day might have entirely different prospects for release if the direct appeal process for one was sufficiently delayed.

The inherent inequity is even more pronounced with proportionality rules whose historical function has been, in part, to serve as a check on states' propensity to overreact in times of moral panic.[343] The majority of mandatory life without parole statutes were enacted during the "get tough" era of the 1990s—a period that, in the words of one scholar, "witnessed the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts."[344] Lawmakers on both sides of the political spectrum are now rethinking the policies of the "get tough" era. To refuse to take a second look at these sentences is to, in essence, proclaim these 2,100 individuals be to the unfortunate casualties of an era of extreme punitiveness. In the words of Erwin Chemerinsky, "It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial."[345]

CONCLUSION

With its decision in December 2014 to grant certiorari in *Toca v. Louisiana,* the Supreme Court signaled that it wants to resolve the issue of *Miller*'s retroactivity in the near term. Given all that *Miller* has already done to redefine the sentencing of juveniles convicted of homicide in this country—altering the range of sentencing outcomes

342 *Id.* (emphasis original) (quoting United States v. Johnson, 457 U.S. 537, 556 n.16 (1982); *see also* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (citing Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting)) (conceding that the "[s]elective application" of new rules of criminal procedure necessarily "violates the principle of treating similarly situated defendants the same").

343 Stinneford, *supra* note 69, at 907 (noting that the historical focus was not on punishments that were '"cruel and rare" but on those that are "cruel and new," which suggests "the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis").

344 Franklin Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260 (1999).

345 *See* Chemerinsky, *supra* note 31.

that over half the states may impose upon them, changing the facts that these states must now consider before sentencing them, significantly narrowing the class of juvenile homicide offenders who are likely to receive sentences of life without parole, and eliminating sentences of mandatory life without parole for juveniles in their entirety—it is hard to imagine how the Court could deem *Miller* anything but a "substantive" rule. That *Miller* is, in most respects, a classic proportionality rule only bolsters this conclusion, because denying relief to those, like Quantel Lotts, whose sentences are, at the very least, likely to be disproportionate is to undermine the very principles of proportionality on which such rules rest.

Understandably, the question of *Miller*'s retroactivity has preoccupied jurists, advocates, and scholars for the last two and a half years. Once this question is resolved, however, attention will move to *Miller*'s mandates. If juveniles can no longer be sentenced "as though they are not children,"[346] what then will become of the forty-year minimums established by states like North Carolina and Texas in *Miller*'s wake? These lengthy fixed term sentences will likely become the next frontier for those challenging the proportionality of juvenile punishment. As this happens, the ideological pendulum will continue to swing back toward the original purpose of the juvenile court, and, in doing so, bring this country more fully in line with the rest of the western world. The United States is also among just 16% of countries worldwide that try to sentence children as adults, a practice that many countries flatly ban,[347] and remains the only country in the world to sentence a juvenile to life without parole in practice.[348] In fact, the majority of countries prescribe sentences for juvenile offenders to a maximum of twenty-five years.[349] And while international treaties require that countries have a minimum age of criminal liability, thirty-three states in the United States have no such requirement at all.[350] Indeed, the vast majority of countries have long recognized that "kids are different." As our scientific understanding of adolescent difference becomes even more refined, "substantive" mandates about the minimum age of culpability, adult transfer, and the limits of adolescent sentencing under the Eighth Amendment are sure to emerge.

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346 Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).

347 *See Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, UNIVERSITY OF SAN FRANCISCO, CTR. FOR L. AND GLOBAL JUST. 59 (May 2012) (noting that eight countries have been identified as having laws that could allow for a sentence of juvenile life without parole, but there are no known cases of the sentence being imposed).

348 *Id.* at 55–56.

349 *Id.* at 58.

350 *Id.* at 49.

And with these mandates will come the inevitable questions about whether they apply retroactively.