Eighth Amendment — Retroactivity of New Constitutional Rules — Juvenile Sentencing — Montgomery v. Louisiana

When the Supreme Court announces a constitutional rule — such as *Miranda*'s warning or *Gideon*'s right to counsel — courts must decide whether to undo already-final criminal convictions that would violate the new rule. *Teague v. Lane*[1] created a general presumption that new rules are not retroactive on collateral review, but with two exceptions: (1) substantive rules — those preventing criminalization of particular conduct[2] — and (2) "watershed" procedural rules.[3] In *Miller v. Alabama*,[4] the Court prohibited mandatory life-without-parole (LWOP) sentences for juveniles.[5] After *Miller*, courts divided over whether the new rule qualified for retroactivity.[6] Last Term, in *Montgomery v. Louisiana*,[7] the Supreme Court held that states are constitutionally required to give retroactive effect to new substantive rules and that *Miller* announced a substantive rule. But *Miller* is more naturally read as a procedural rule of individualized sentencing for juveniles. *Montgomery*'s treatment of *Miller* illuminates *Teague*'s central failing: an impossible bar for procedural rules. To recalibrate retroactivity doctrine to better balance fairness against finality, the Court might have instead held that *Miller* was animated by a watershed principle — that "kids are different" under the Eighth Amendment — and should apply retroactively for *that* reason.

The Eighth Amendment demands proportionality between crime and punishment.[8] *Roper v. Simmons*,[9] which banned the death penal-

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[1] 489 U.S. 288 (1989).

[2] *Id.* at 311 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)). *Penry v. Lynaugh*, 492 U.S. 302 (1989), expounded the first exception, observing that it "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 330. A clear example is *Roper v. Simmons*, 543 U.S. 551 (2005), where the Court ruled that no offender who was a juvenile at the time of their crime may be executed — the category of capital punishment may not be applied to that class of defendants. *Id.* at 573–75.

[3] *Teague*, 489 U.S. at 311–12 (plurality opinion).

[4] 132 S. Ct. 2455 (2012).

[5] *Id.* at 2469.

[6] *Compare, e.g.*, People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014) (holding that *Miller* announced a new substantive rule that applies retroactively), *with, e.g.*, State v. Tate, 130 So. 3d 829, 841 (La. 2013) (holding that *Miller* announced a new nonwatershed rule of criminal procedure that does not apply retroactively).

[7] 136 S. Ct. 718 (2016).

[8] Graham v. Florida, 560 U.S. 48, 59 (2009) ("[P]roportionality is central to the Eighth Amendment.").

[9] 543 U.S. 551 (2005).

ty for juvenile offenders,[10] launched a subset of proportionality analysis that focuses on the unique characteristics of youth: because of their impulsivity and inability to appreciate consequences, the death penalty is categorically disproportionate to their crimes.[11] Then, in *Graham v. Florida*,[12] the Court found it categorically cruel and unusual to sentence a juvenile to LWOP for a nonhomicide offense. By analogizing juvenile LWOP to the death penalty, *Graham* drew from the Eighth Amendment cases that mandated individualized sentencing in the death penalty context.[13] *Miller*, in turn, extrapolated from *Graham* and ruled that *mandatory* LWOP for juveniles is cruel and unusual, even for juveniles convicted of homicide. Under *Miller*, as in death penalty sentencing, courts must consider mitigating factors, including youth.[14] But the rule's retroactivity was unclear. Enter *Montgomery*.

Henry Montgomery was seventeen at the time of his crime, a tenth-grade truant caught in a park by Charles Hurt, a deputy sheriff. While being frisked, Montgomery pulled out a pistol and shot and killed the deputy.[15] He was initially sentenced to death, but because "public prejudice had prevented a fair trial" of the black teenager, he was retried.[16] In the second trial, the verdict was "guilty without capital punishment," automatically triggering an LWOP sentence.[17] Thus, no separate sentencing phase offered Montgomery a chance to introduce mitigating evidence,[18] such as his age's effect on both his impulse

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[10] *Id.* at 578. Earlier Eighth Amendment jurisprudence on youth offenders and capital crimes found it cruel and unusual to execute offenders whose crimes had been committed under the age of sixteen, *see* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion), but not between the ages of sixteen and eighteen, *see* Stanford v. Kentucky, 492 U.S. 361, 380 (1989). *Roper* overturned *Stanford*. *See Roper*, 543 U.S. at 574–75.

[11] *Roper*, 543 U.S. at 569–71. The Court analogized to *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibited executing a "mentally retarded offender." *See Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. at 319).

[12] 560 U.S. 48, 82.

[13] *See id.* at 69–70, 74–75; *see also* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion). In this way, "*Graham* breached the capital versus non-capital divide." Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 38 (2013). *Graham* "imported the proscription against disproportionate punishment from the Court's capital jurisprudence into its non-capital jurisprudence and transformed a 'death-is-different' doctrine into a more general limitation on excessive sentences." *Id.*

[14] Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (holding that because "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," the mandatory sentencing schemes "violate [the] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment").

[15] *See* Naureen Khan, *After 52 Years in Prison, SCOTUS May Help Set Henry Montgomery Free*, AL JAZEERA AM. (Oct. 13, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/10/13/after-52-years-scotus-may-help-set-henry-montgomery-free.html [https://perma.cc/YZ2G-X7GS]; *see also* State v. Montgomery, 181 So. 2d 756, 757 (La. 1966).

[16] *Montgomery*, 136 S. Ct. at 725 (citing *Montgomery*, 181 So. 2d at 762).

[17] *Id.* at 725–26 (quoting State v. Montgomery, 242 So. 2d 818, 818 (La. 1970)).

[18] *Id.* at 726.

control and ability to reform. After *Miller*, Montgomery, then in his sixties, sought collateral review in state court. State courts denied his petition, refusing to apply *Miller* retroactively.[19] The U.S. Supreme Court granted certiorari to review the Louisiana Supreme Court's retroactivity analysis.

The Court held that the Federal Constitution requires retroactive application of new substantive rules and that *Miller*'s prohibition on mandatory LWOP for juveniles was substantive. Writing for the majority, Justice Kennedy[20] first analyzed the Court's jurisdiction to review the retroactivity analysis on state habeas, an inquiry that boiled down to whether retroactivity is a *constitutional* mandate. *Danforth v. Minnesota*[21] suggested that *Teague*'s prescription "was an exercise of [the] Court's power to interpret the federal habeas statute,"[22] and by implication *not* a constitutional mandate. But Justice Kennedy argued that *Danforth* considered only *Teague*'s general presumption against retroactivity and never addressed the distinct question whether its two exceptions were constitutionally required.[23] Now the Court held that *Teague*'s first exception for substantive rules *is* a constitutional mandate.[24] The Court reasoned that unlike procedural rules, which "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability,'"[25] substantive rules are "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose."[26] And whether a conviction became final before a new substantive rule was announced is irrelevant: "There is no grandfather clause that permits States to enforce punishments the Constitution forbids."[27] The principle applies to states by virtue of the Supremacy Clause; if a state allows collateral review, it must apply substantive constitutional rules retroactively.[28]

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[19] *See id.* at 727.

[20] Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[21] 552 U.S. 264 (2008).

[22] *Montgomery*, 136 S. Ct. at 728 (quoting *Danforth*, 552 U.S. at 278).

[23] *Id.* at 729.

[24] *Id.* ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule . . . regardless of when a conviction became final.").

[25] *Id.* at 730 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).

[26] *Id.* at 729. To the majority, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* For support, Justice Kennedy claimed precedent dating back to 1880 in *Ex parte Siebold*, 100 U.S. 371 (1880), in which the Court famously declared that a conviction under an unconstitutional statute "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Montgomery*, 136 S. Ct. at 730 (quoting *Siebold*, 100 U.S. at 376–77).

[27] *Montgomery*, 136 S. Ct. at 731.

[28] *Id.*

Having established its jurisdiction, the majority turned to *Miller*'s retroactivity. First, the majority situated *Miller* as a natural extension of *Roper* and *Graham*, grounded in the idea that children are different: their immaturity leads to impulsivity, they are more easily influenced by family and peers and less able to avoid criminogenic social settings, and above all, they have greater capacity for rehabilitation.[29] These factors combine to reduce culpability and to lessen the force of the traditional justifications for the harshest punishments — retribution, deterrence, and incapacitation. *Miller* held that, because of the special characteristics of youth, mandatory LWOP sentences for juveniles "pos[e] too great a risk of disproportionate punishment"; thus, the Eighth Amendment requires individualized sentencing.[30] But, according to the majority, beyond a procedural requirement of individualized sentencing, *Miller* "established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth'" and that "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'"[31] Thus, *Miller* was substantive: "[I]t rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' — that is, juvenile offenders whose crimes reflect the transient immaturity of youth."[32]

Justice Kennedy acknowledged that *Miller* seemed plainly procedural, that it explicitly required only "a certain process" and did not categorically bar LWOP for juveniles.[33] He argued, however, that the seemingly procedural rule becomes substantive when one focuses on the relevant class for which *Miller does* categorically bar LWOP: "[A]ll but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[34] Justice Kennedy held that *Miller*'s procedural mandate merely operationalized a substantive rule by identifying that subset class. Finally, he explained that *Miller*'s retroactivity would not overburden states, which may simply offer parole hearings.

In dissent, Justice Scalia[35] denounced the majority's "astonishing" jurisdictional analysis as the "conscription into federal service of state postconviction courts."[36] The history of retroactivity provided no support for the idea that *Teague*'s rules are constitutionally compelled,[37]

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[29] *See id.* at 733.

[30] *Id.* (alteration in original) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012)).

[31] *Id.* at 734 (quoting *Miller*, 132 S. Ct. at 2465, 2469).

[32] *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

[33] *Id.* (quoting *Miller*, 132 S. Ct. at 2471).

[34] *Id.*

[35] Justice Scalia was joined by Justices Thomas and Alito.

[36] *Montgomery*, 136 S. Ct. at 737 (Scalia, J., dissenting).

[37] Justice Scalia traced the evolution to *Teague*'s substantive-rule exception: from the *Linkletter v. Walker*, 381 U.S. 618 (1965), "equitable rule-by-rule approach" that proved "unwork-

and the Supremacy Clause argument merely restated the question whether old or new federal law should govern.[38] He criticized the majority's "sleight of hand" and use of "cherry picked" dicta, concluding that "[a]ll that remains to support the majority's conclusion is that all-purpose Latin canon: *ipse dixit*."[39] Justice Scalia argued that *Teague*'s central aim was to protect finality and that the majority's jurisdictional analysis undermined that policy entirely.[40] By finding that *Teague*'s substantive exception is a constitutional requirement, the majority "not only forecloses Congress from eliminating this expansion of *Teague* in federal courts, but also foists this distortion upon the States."[41]

Justice Scalia then turned to the merits, arguing that "[h]aving distorted *Teague*, the majority simply proceeds to rewrite *Miller*."[42] He highlighted *Miller*'s explicit procedural language and rejected the majority's argument that *Miller* made juvenile LWOP unconstitutional in all but the rarest cases.[43] Justice Scalia lamented that the "rewriting" of *Miller* means that even if a sentencing court determines that a crime *does* reflect permanent incorrigibility, a juvenile defendant may continue to protest that the sentencing court simply got it wrong, that the crime reflected only "transient immaturity," and therefore that the sentence violates the Eighth Amendment.[44] He criticized the majority's "not-so-subtle invitation" to remedy *Miller* violations not via resentencing, which would be a "practical impossibility," but instead by offering parole hearings.[45] He contended that a justification for *Roper*'s elimination of the death penalty was states' ability to sentence juveniles to LWOP and accused the majority of disingenuously refusing to

able," *Montgomery*, 136 S. Ct. at 738 (Scalia, J., dissenting), to its abrogation in *Griffith v. Kentucky*, 479 U.S. 314 (1987), to its final rejection in *Teague*. He argued that *Griffith*'s requirement that all new rules be applied to cases pending on direct review was a constitutional mandate for courts to play by existing rules until a conviction becomes final. *Montgomery*, 136 S. Ct. at 739 (Scalia, J., dissenting).

[38] *Montgomery*, 136 S. Ct. at 739 (Scalia, J., dissenting). Justice Thomas wrote separately that the majority's elevation of *Teague* to constitutional command was flatly atextual and ahistorical. *Id.* at 744 (Thomas, J., dissenting). The Supremacy Clause "merely supplies a rule of decision: *If* a federal constitutional right exists, that right supersedes any contrary provisions of state law." *Id.* at 745. Justice Thomas warned that because states are not required to entertain federal law claims in postconviction proceedings but must follow the majority's mandate if they do, states may simply refuse to hear such claims on collateral review in the first place. *Id.* at 749–50.

[39] *Id.* at 740–41 (Scalia, J., dissenting).

[40] *Id.* at 742.

[41] *Id.*

[42] *Id.* at 743.

[43] *Id.* ("[T]o say that a punishment might be inappropriate and disproportionate for certain juvenile offenders is not to say that it is unconstitutionally void.").

[44] *Id.* at 743–44 (quoting *id.* at 735 (majority opinion)).

[45] *Id.* at 744.

outright ban the sentence for juveniles, while effectively making that sentence impossible to impose.[46]

Montgomery constitutionally embeds *Teague* while simultaneously illuminating a twofold problem: the fiction of a clear substance-procedure divide and the impossibility of the watershed exception. While the Court rightly applied *Miller* retroactively, it failed to acknowledge these doctrinal difficulties. To rebalance fairness concerns with long-dominant finality concerns and to acknowledge the shortcomings of the substance-procedure divide, the Court should pry open the impossible retroactivity standard for procedural rules. The *Montgomery* Court, for instance, might have acknowledged that *Miller* is most naturally read as a procedural rule and held that where a watershed principle of fairness revealed in cumulative cases — such as that "kids are different" — animates a significant procedural rule,[47] that rule should apply retroactively.

Retroactivity is about the scope of postconviction review — whether a defendant may challenge a conviction or sentence with law announced after the conviction or sentence became final. The difficulty lies in balancing competing interests: states' interests in finality and autonomy in the federal system against criminal defendants' interests in accurate convictions and fair sentences.[48] On the one hand, finality in criminal proceedings might be defensible as protective of both states' and defendants' rights. By conserving state resources, finality is fair to sovereign states in the federal system,[49] and channeling resources to

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[46] *Id.*

[47] *See* Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to* Teague*'s Collateral Review Killer*, 74 MO. L. REV. 1, 2–3 (2009) ("While a single case . . . may not rise to watershed status, . . . a *line* of cases could be considered watershed."); Eric Schab, Commentary, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 227–31 (2014) (applying Ezra Landes's line-of-cases approach to *Miller* and concluding that, because the "kids are different" line of cases goes to the accuracy of a conviction and alters our understanding of the bedrock elements of fair proceedings, *id.* at 231, *Miller* is watershed and should apply retroactively).

[48] *See, e.g.*, Jon D. Levy, *Balancing Fairness with Finality: An Examination of Post-Conviction Review*, 64 ME. L. REV. 377, 378 (2012) ("While it is clear that the post-conviction review process is essential to ensure the vindication of constitutional rights, the process is not without great social costs. Post-conviction review introduces uncertainty to the finality of criminal convictions and calls into question the integrity of the criminal process.").

[49] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–53 (1963) (cataloguing the benefits of finality, including administrative-resource conservation, efficiency, and deterrence credibility); *cf.* Engle v. Isaac, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."); Brown v. Allen, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in the result) ("[A]ny state court conviction, disapproved by a majority of this Court, thereby becomes unconstitutional and subject to nullification by habeas corpus. This might not be so demoralizing if state judges could anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them. But they cannot." (footnote omitted)). Professor Paul Bator's sem-

trials themselves, rather than to posttrial review, may increase both accuracy and efficiency.[50] Further, this resource conservation may ultimately promote the recognition of new rights, which courts may otherwise hesitate to recognize if they fear expansive retroactivity's burden on states.[51] Yet weighty values also militate against strict finality. Above all, it is arguably unfair to punish in a manner that is now understood to be inconsistent with the Constitution, and it is likewise unfair to subject one defendant to punishment from which a similarly situated future defendant will be spared simply by virtue of timing.[52]

But the doctrine has veered too far toward finality and away from fairness. Before *Teague*, retroactivity was governed by a multifactor inquiry.[53] Concerned about predictability, the *Teague* Court sought to create a bright-line framework for retroactivity on collateral review.[54] The Court approximated a bright line by delineating substance from procedure and sharply limiting the retroactivity of procedural rules. The *Teague* Court envisioned that the narrow watershed exception would encompass only "procedures without which the likelihood of an accurate conviction is seriously diminished" and called it "unlikely that many such components of basic due process have yet to emerge."[55]

Two and a half decades later, *Teague* has done more than paint bright lines on the retroactivity highway; it has closed down most of the lanes.[56] In twenty-seven years, the Court has never declared a new

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inal defense of finality inspired *Teague*. *See* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 509 (1996) ("Bator's article . . . profoundly influenced the habeas jurisprudence of the Rehnquist Court.").

[50] *Cf.* Wainwright v. Sykes, 433 U.S. 72, 90 (1977) ("Any procedural rule which encourages the result that [trial] proceedings be as free of error as possible is thoroughly desirable . . . .").

[51] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1734 (1991) ("Even the Warren Court might have hesitated to move as far and as fast as it did if each decision recognizing a 'new' right required opening the prison gates for all victims of past violations.").

[52] *See* William W. Berry III, *Normative Retroactivity*, U. PA. J. CONST. L. (forthcoming 2016) (manuscript at 10–11) (on file with the Harvard Law School Library) (explaining these two facets of fairness in retroactivity).

[53] Under *Linkletter*, *Teague*'s predecessor, a court would consider (1) whether the purpose of the new rule would be advanced through its retroactive application, (2) the reliance interest in the prior rule, and (3) the effect of retroactive application on the administration of justice. *See* Linkletter v. Walker, 381 U.S. 618, 636 (1965).

[54] *See* Tiffani N. Darden, *Juvenile Justice's Second Chance: Untangling the Retroactive Application of* Miller v. Alabama *Under the* Teague *Doctrine*, 42 AM. J. CRIM. L. 1, 1 (2014) ("Interestingly, the *Teague* test sought . . . to create consistent guidelines for applying new rules to postconviction appellants.").

[55] Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion).

[56] *See* Kendall Turner, Note, *A New Approach to the* Teague *Doctrine*, 66 STAN. L. REV. 1159, 1183 (2014) ("While the *Linkletter* regime . . . may have been problematic because it did not deliver 'consistent results,' the *Teague* regime . . . delivers results that are *too* consistent." (footnote omitted) (quoting *Teague*, 489 U.S. at 302 (plurality opinion))).

procedural rule "watershed."[57] A year after *Teague*, the Court held that the rule announced in *Caldwell v. Mississippi*[58] prohibiting prosecutors from characterizing the jury's role in death penalty sentencing as merely advisory was not watershed.[59] A rule going to accuracy in sentencing, in other words, was insufficient. Rather, to constitute a watershed, the rule must "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding."[60] More recently, in *Schriro v. Summerlin*,[61] the Court held that the new rule that a jury, rather than a judge, must find the aggravating factors making a defendant eligible for the death penalty was not watershed.[62] Writing for four dissenting Justices, Justice Breyer argued that the majority's rote application of *Teague* failed to account for the competing interests that *Teague* attempted to balance.[63] And academic criticism has likewise centered on the Court's overly harsh restriction on the retroactivity of new procedural rules — that is, on the justifiability of the fairness-finality balance it has struck.[64]

Forced to characterize new rules as substantive in order to fairly grant retroactivity, the Court has engaged in unnatural readings of precedent, both opening itself to criticisms of "sleight of hand"[65] and

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[57] *See, e.g.*, Beard v. Banks, 542 U.S. 406, 417–20 (2004); Schriro v. Summerlin, 542 U.S. 348, 355–56 (2004); *see also* Landes, *supra* note 47, at 2 ("On fourteen occasions the Court has been asked to determine whether or not a new rule is watershed. All fourteen times the Court has found the rule not to be watershed."). In light of *Montgomery*'s declaration that retroactivity is sometimes a constitutional mandate, its *Teague* analysis is perhaps unsurprising: the minimalist and incrementalist tendencies of the Court would counsel against simultaneously applying an exception that had never been found and declaring that exception a constitutional command. *Cf. id.* at 18 ("[The Roberts] Court's commitment to narrowness means that we are unlikely to ever see a revolutionary Warren Court style holding like a *Gideon* . . . , which in turn augurs ill for the watershed rule exception ever being satisfied under the current regime.").

[58] 472 U.S. 320 (1985).

[59] *See* Sawyer v. Smith, 497 U.S. 227, 244 (1990).

[60] *Id.* at 242 (quoting *Teague*, 489 U.S. at 311 (plurality opinion)).

[61] 542 U.S. 348.

[62] *Id.* at 353, 358. The rule examined in *Summerlin* originated in *Ring v. Arizona*, 536 U.S. 584 (2002).

[63] *See Summerlin*, 542 U.S. at 362, 364 (Breyer, J., dissenting).

[64] Professors Richard Fallon and Daniel Meltzer lay two fundamental criticisms of *Teague*'s balance: First, the Court's definition of "new law" as anything that is not dictated by prior precedent "is far too expansive." Fallon & Meltzer, *supra* note 51, at 1816. Second, "[e]qually troubling is the narrowness of the exceptions to *Teague*'s rule barring consideration of new law claims." *Id.* at 1817. Professor Barry Friedman calls *Teague* "the decision that spelled the end of federal habeas corpus as we had come to know it." Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 804 (1992). Friedman takes particular issue with *Teague*'s assertion that fundamental rules of criminal procedure are unlikely to emerge: "What hubris!" *Id.* at 824.

[65] Indeed, the Court's analysis left Justice Scalia and a prominent sentencing-reform advocate to agree that the opinion displayed the hallmarks of judicial "sleight of hand." *Compare Montgomery*, 136 S. Ct. at 740 (Scalia, J., dissenting), *with* Douglas A. Berman, Montgomery*'s Messy Trifecta* 6 (The Ohio State Univ. Moritz Coll. of Law Pub. Law & Legal Theory Working Paper Series, No. 338, 2016).

perpetuating an oversimplified dichotomy between substance and procedure. *Miller*, for example, resists easy classification. In one sense, the decision prohibited a type of punishment altogether for a class of persons — that is, if you consider mandatory LWOP to be the punishment and juveniles to be the class. In another sense — the one Justice Kennedy focused on — *Miller* prohibited a broader type of punishment (LWOP) for a narrower class of persons (non–permanently incorrigible juveniles). And in yet another sense, "mandatory" might simply be procedural scaffolding on "life without parole" — a punishment expressly *not* prohibited by *Miller* — and thus purely procedural. Given *Miller*'s declaration that it required only "a certain process," it is most naturally read this third way.[66] If a rule can be read as procedural, substantive, or both — as *Miller* seemingly allows — *Teague* provides insufficient guidance. And if the procedural category is functionally unavailable, the important retroactivity determination is dependent on whether the rule can be plausibly crammed into the substantive exception, not on whether fairness outweighs finality.

One way for the *Montgomery* Court to improve the *Teague* doctrine would have been to credit an animating watershed principle: for instance, "children are different."[67] This watershed principle reflects a greater appreciation of juvenile psychology.[68] Neurological adolescence is associated with diminished capacity for "planning, motivation, judgment, and decision-making, including the evaluation of future consequences, the weighing of risk and reward, the perception and control of emotions, and the processing and inhibition of impulses."[69] As *Miller* recognized,[70] family and home environments can exacerbate

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[66] *See* Sherry F. Colb, *What* Montgomery v. Louisiana *Portends for Future Juvenile Sentencing*, JUSTIA: VERDICT (June 22, 2016), https://verdict.justia.com/2016/06/22/montgomery-v-louisiana-portends-future-juvenile-sentencing [https://perma.cc/JAW7-5PCT] ("*Montgomery* . . . re-characterized what was essentially a procedural case (about the opportunity to present mitigating evidence of youth) into a substantive rule (that almost no juveniles may be sentenced to life without parole). . . . *Montgomery* is, at the moment, somewhat disingenuous.").

[67] *E.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) ("[I]f . . . 'death is different,' children are different too."). A watershed-principle theory is functionally the same line-of-cases analysis urged by Landes, *supra* note 47, and Schab, *supra* note 47.

[68] *See* Darden, *supra* note 54, at 6 (noting the Court's reliance "on social science evidence to rebut legislative schemes passed in a different era of criminal justice").

[69] Brief for the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 26, *Miller*, 132 S. Ct. 2455 (No. 10-9646).

[70] Although the *Miller* Court relied on the "kids are different" principle, it opted against the categorical prohibition of juvenile LWOP urged by the plaintiffs. Some have argued that the *Miller* Court's minimalism failed to "live up to the promise of *Roper* and *Graham*'s *kids are different* Eighth Amendment jurisprudence," Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 493 (2013), leaving "those who seek resentencing under *Miller* [to] face a head-on collision with everything those cases warned against," *id.* at 507.

those problems.[71] Troublingly, juveniles sentenced to LWOP disproportionately experience difficult childhoods: 79% regularly witnessed violence in their homes, 40% had been enrolled in special-needs education, and 47% were physically abused.[72] Severe juvenile punishment is thus more difficult to justify under any penological theory. Retribution is less justified in light of diminished culpability, deterrence is less likely to be effective given what we now know about juvenile brain development and impulse control, and children's greater capacity for change makes indefinite incapacitation simply unnecessary. "*Miller* demonstrate[s] that our societal understanding of fairness in the realm of juvenile sentencing has fundamentally changed."[73] Where the very foundations of fairness itself have so changed and a procedural rule is necessary to implement that watershed principle of fairness — as individualized sentencing is necessary to treat children like children, capable of change — fairness dictates that the rule apply retroactively.

While the Court got to the just result here, its uncharacteristically expansive jurisdictional analysis[74] may have constitutionally embedded[75] a broken doctrine. An overly harsh retroactivity standard undermines already incremental legal protections, and the law becomes twofold "a barrier to reform rather than a facilitator of it."[76] Applying a watershed-principle theory would have allowed the Court to acknowledge that *Teague*'s substance-procedure dichotomy is imperfect, to counsel lower courts to conduct the *best* categorization of a new rule, and to apply retroactively those procedural rules where fairness interests outweigh finality. "*Miller*'s central intuition," the Court acknowledged, is that children who commit even heinous crimes are capable of change."[77] That premise is novel; its application in *Miller*, watershed.

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[71] *Miller*, 132 S. Ct. at 2468.

[72] JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE 4, http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf (last updated July 2016) [https://perma.cc/S2HL-FDUJ].

[73] Beth Caldwell, Miller v. Alabama *as a Watershed Procedural Rule: The Case for Retroactivity*, 10 HARV. L. & POL'Y REV. S1, S6 (2015).

[74] The Court ignored a much more straightforward and minimalist route to jurisdiction. Under *Michigan v. Long*, 463 U.S. 1032 (1983), a state court basing its decision on federal law creates federal jurisdiction. *Id.* at 1044. More striking still, the parties agreed on jurisdiction under that precise theory. *Compare* Brief for Petitioner at 37, *Montgomery*, 136 S. Ct. 718 (No. 14-280), *with* Brief of Respondent State of Louisiana at 8–11, *Montgomery*, 136 S. Ct. 718 (No. 14-280).

[75] *See* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. (forthcoming) (manuscript at 17–18) (on file with the Harvard Law School Library) ("[T]he Court in *Montgomery* consciously rested its jurisdictional holding on broader grounds, with full awareness of the fact that it was constitutionalizing *Teague*'s exceptions."); *see also id.* (manuscript at 18–33) (arguing that, read together with the Court's Supremacy Clause jurisprudence, *Montgomery* guarantees state and federal prisoners a right to collateral review based on new constitutional rules).

[76] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 308 (2011).

[77] *Montgomery*, 136 S. Ct. at 736.