2016

Validating *Montgomery's* Recant of *Miller's* Hesitation: An End to LWOP for Juveniles

Elizabeth C. Kingston

Validating Montgomery*'s Recant of* Miller*'s Hesitation: An End to LWOP for Juveniles*

by

Elizabeth C. Kingston

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Barbara O'Brien
Spring 2016

TABLE OF CONTENTS

Validating *Montgomery*'s Recant of *Miller*'s Hesitation: An End to LWOP for Juveniles

Elizabeth C. Kingston

INTRODUCTION

Amidst a rising tide of juvenile violence in the 1990s, American society became entrapped from fear of the superpredator, "a juvenile criminal who is so impulsive, so remorseless, that he can kill, rape, [and] maim without giving it a second thought."[1] Politicians pushed for dramatic changes to the juvenile justice system and advocated for harsher sentencing.[2] Beginning in the 2000s, however, this paranoid rhetoric was replaced with an increasing body of scientific knowledge demonstrating the capacity for rehabilitation and the diminished culpability of juvenile offenders.[3]

Paralleling society's embrace of rehabilitative ideals, the Supreme Court handed down a series of opinions invalidating harsh sentences for juveniles. In 2005, the Court held that the imposition of capital punishment upon juveniles was unconstitutional under the Eighth Amendment.[4] In 2010, the Court invalidated the imposition of life imprisonment without parole (LWOP) sentences for juveniles convicted of non-homicide crimes.[5] Finally, in 2012's *Miller v. Alabama*, the Court held that LWOP sentences automatically imposed upon juveniles convicted of homicide was also unconstitutional.[6]

Unlike its previous cases, in *Miller*, the Court stopped short of implementing a complete, categorical ban.[7] LWOP sentences may still be imposed upon juveniles, but *Miller* now requires

[1] *The Superpredator Scare*, RETROREPORT, http://www.retroreport.org/video/the-superpredator-scare (last visited May 3, 2016).
[2] *See id.*; JUVENILE CRIME, JUVENILE JUSTICE 1 (Joan McCord, Cathy Widom, & Nancy Crowell eds., 2001).
[3] *See infra* Section I.A.
[4] Roper v. Simmons, 543 U.S. 551, 575 (2005).
[5] Graham v. Florida, 560 U.S. 48, 74-75 (2010).
[6] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
[7] *Id.* at 2469.

that individualized consideration be given to their youth during sentencing.[8] The Court's refusal to clearly establish a categorical bar—by allowing LWOP, but only under certain circumstances—led to questions of whether its ruling applied retroactively to juvenile offenders automatically sentenced to LWOP prior to the *Miller* decision.[9] Under existing precedent, new, substantive rules resembling categorical bars are retroactively applied; rules that are procedural are not retroactively applied.[10]

In *Montgomery v. Louisiana*, the Court answered the retroactivity question in the affirmative: *Miller* created a substantive, categorical rule and, as such, must be applied retroactively.[11] However, *Miller* explicitly did not exclude LWOP sentences as a category, holding that LWOP could be imposed constitutionally so long as the sentencer considered the offender's youth and determined him to be incorrigible.[12] In balancing the desires to not overrule precedent but also to provide protections for juveniles, the *Montgomery* Court inappropriately applied *Miller*, creating a jurisprudence that reaches the right results through faulty reasoning.[13]

Miller's hesitation to establish a categorical ban, coupled with *Montgomery*'s support of leniency to juveniles, has created a host of unfortunate consequences.[14] *Teague* retroactivity jurisprudence has become even more complicated.[15] Aggregate term-of-years sentences that realistically result in a life imprisonment are being questioned under *Miller*'s mandate of individualized consideration of youth.[16] *Miller*'s interaction with existing Sixth Amendment precedent has created uncertainty as to who—the judge or the jury—must be the entity

[8] *Id.* at 2467.
[9] *See infra* Section I.B.
[10] *See* Teague v. Lane, 489 U.S. 288, 311 (1989).
[11] Montgomery v. Louisiana, No. 14-280, slip op. at 14 (2016).
[12] *See infra* Section IV.A.
[13] *See infra* Section IV.A.
[14] *See infra* Part III.
[15] *See infra* Part III.
[16] *See infra* Part III.

considering the offender's youth.[17] Under rising costs associated with LWOP sentences, some states have eliminated juvenile LWOP completely or limited its practice.[18] In light of these problems and the logical fallacy of *Montgomery*, the Court should affirmatively rule juvenile LWOP sentences unconstitutional under the Eighth Amendment.[19] This solution is consistent with the reasoning in both *Miller* and *Montgomery* and, unlike the current state of jurisprudence, would lend validity to *Montgomery*'s retroactivity holding.[20]

Part I of this Note will analyze the immaturity of brain development in the prefrontal cortex of juveniles and what practical characteristics result from this lack of development.[21] It will also introduce the first Eighth Amendment Supreme Court decision that embraced these characteristics of immaturity and applied them to capital sentencing.[22] Part II describes the Court's application of juvenile status to LWOP sentencing through *Graham v. Florida* and *Miller v. Alabama* and the issue of retroactive application of these holdings in *Montgomery v. Louisiana*.[23] Part III discusses the practical results of the *Miller* and *Montgomery* decisions, including unexpected interaction with Sixth Amendment jurisprudence, constitutional issues with term-of-years sentencing, and state prohibitions of juvenile LWOP.[24] Part IV advocates that, considering the discrepancy between *Miller* and *Montgomery* and the Court's perpetuation of protectively differentiating juveniles in sentencing, the Court should move to hold juvenile LWOP categorically unconstitutional as to all juveniles.[25]

[17] *See infra* Part III.
[18] *See infra* Part III.
[19] *See infra* Section IV.B.
[20] *See infra* Section IV.B.
[21] *See infra* Section I.A.
[22] *See infra* Section I.B.
[23] *See infra* Part II.
[24] *See infra* Part III.
[25] *See infra* Part IV.

I. "CHILDREN ARE DIFFERENT"[26]

Society has long recognized the difference in cognitive ability between children and adults. As science has progressed, it has validated conventional wisdom regarding juveniles' rash decision-making and poor self-control.[27] Modern neuroscience explains the immaturity of juveniles as a result of the incomplete development of the prefrontal cortex, the area of the brain that is responsible for higher-level cognitive function.[28] In the criminal justice system, early indications of the difference between children and adults include the infancy defense, which prohibited criminal culpability for very young persons, and the creation of a separate juvenile justice system aimed at rehabilitation instead of retribution.[29] Beginning in 2005 with *Roper v. Simmons*, the knowledge that children are different has been used to invalidate the imposition of harsh sentences for juveniles.[30]

A. The Science of Immaturity

The relative immaturity of juveniles is not simply a social construct created by a lack of experience or learning—scientific studies have attributed adolescent characteristics of immaturity to the stages of development of the brain's prefrontal cortex.[31] Recent advances in magnetic resonance imaging (MRI) have allowed scientists to map the development of the human brain throughout childhood and into adulthood.[32] These mapping studies demonstrate the

[26] "[C]hildren are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
[27] *See infra* Section I.A.
[28] *See infra* Section I.A.
[29] *See* JUVENILE CRIMES, JUVENILE JUSTICE, *supra* note 2, at 5.
[30] Roper v. Simmons, 543 U.S. 551, 575 (2005); *see infra* Section I.B.
[31] *See* Bruce Bower, *Teen Brains on Trial*, 165 SCI. NEWS 299, 299 (2004).
[32] *Adolescence, Brain Development and Legal Culpability*, A.B.A. http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf at 1.

process of development of the human brain, but also demonstrate that development occurs more slowly than initially believed.[33]

Two specific processes occurring in the adolescent brain significantly affect the prefrontal cortex: the overproduction of dendrites and synaptic connections, and the process of myelination.[34] Dendrites, extensions of the neuron cells, receive and give information to one another, forming synaptic connections as they do so.[35] This exchange of information and formation of synaptic connections is the scientific description of the process of learning—as one engages in an activity, dendrites communicate with one another, forming synaptic connections holding this newfound knowledge.[36] In adolescence, this process occurs at a much higher rate than that of adults—but it is matched with significant pruning of synaptic connections.[37] Information used less frequently is pruned, creating a more efficient system.[38] This process continues throughout life, but is heavily pronounced during adolescence.[39] The second significant process affecting the development of the adolescent brain is the process of myelination, which occurs during adolescence.[40] Myelin is a fatty tissue that provides insulation to neurons; myelination allows the brain to communicate more quickly and effectively in adulthood.[41]

---

[33] *See id.*
[34] *See id.* at 2.
[35] SHERYL FEINSTEIN, INSIDE THE TEENAGE BRAIN: PARENTING A WORK IN PROGRESS 3 (2010).
[36] *See id.* at 3-4.
[37] *See id.* at 4 ("By the end of adolescence, the brain contains more than 100 billion neurons and another 1,000 billion support cells. The 100 billion neurons form more than 1,000 trillion connections with each other—more than all of the Internet connections in the world.").
[38] *See id.*; *see also Adolescence, Brain Development and Legal Culpability*, *supra* note 32, at 2 ("This process is similar to pruning a tree: cutting back branches stimulates health and growth.").
[39] *See* FEINSTEIN, *supra* note 35, at 4-5 ("In children and adults, about 1 to 2 percent of the brain is pruned each year. During adolescence, pruning happens on a massive scale and about 15 percent of the synaptic connections wither and die.").
[40] *See Adolescence, Brain Development and Legal Culpability*, *supra* note 32, at 2.
[41] *Id.*

These developments of the prefrontal cortex of the brain are especially significant because the prefrontal cortex is responsible for higher-level cognitive function. The prefrontal cortex is essential to "self-control, rational decision making, problem solving, organization, and planning."[42] Researchers also identify the prefrontal cortex as necessary to "regulating aggression, long-range planning, mental flexibility, abstract thinking, the capacity to hold in mind related pieces of information, and perhaps moral judgment."[43] As the prefrontal cortex develops, adolescents are able to better access these higher-level cognitive processes.[44] However, research demonstrates that the prefrontal cortex continues to develop into the twenties, indicating that juveniles are less able than adults to make decisions based on harm reduction or rational risk assessment.[45] The relative lack of ability for juveniles to access these higher-level cognitive functions and make rational decisions has significant consequences for how juveniles should be treated in a criminal justice system generally designed to punish only the culpable.[46]

The studies described are a result of advances in neuroscience, including the ability to map brains, that have occurred within the last twenty years. Prior to these advances in neuroscience, developmental psychologists also indicated that juveniles understand and make moral choices differently.[47] Despite this scientific evidence, the Supreme Court affirmed the constitutionality of the death penalty for juveniles in 1989's *Stanford v. Kentucky*.[48] A seemingly

---

[42] BARRY CORBIN, UNLEASHING THE POTENTIAL OF THE TEENAGE BRAIN: TEN POWERFUL IDEAS 24 (2007).
[43] *See* Bower, *supra* note 31, at 299.
[44] *See* CORBIN, *supra* note 42, at 24.
[45] *Id.* at 24-25.
[46] *See infra* Section I.B.
[47] *See* Kevin W. Saunders, *The Role of Science in the Supreme Court's Limitations on Juvenile Punishment*, 46 TEX. TECH L. REV. 339, 340-43 (2013).
[48] Stanford v. Kentucky, 492 U.S. 361, 377-78 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005). In *Stanford*, the Court rejected the premise that capital punishment for juveniles served no penological goals due to the diminished culpability of minors:

> We also reject petitioners' argument that we should invalidate capital punishment of [juveniles] on the ground that it fails to serve the legitimate goals of penology. According to petitioners, it fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and

clear explanation of the Court's eventual reversal of *Stanford* in 2005's *Roper v. Simmons* is that the development of neuroscience in the intervening sixteen years created a more reliable body of scientific evidence demonstrating the need to treat juveniles differently.[49] However, only one justice from *Stanford* to *Roper* changed his opinion on the matter—Justice Kennedy—and the overall reversal of the Court may be better explained not by scientific advance, but by a change in the dynamic of the Court.[50] The fact that certain justices who embraced scientific studies in *Roper* dismissed similarly established studies and findings in other cases supports this conclusion.[51] Scientific studies demonstrating the differences between adults and juveniles may, therefore, be best understood as useful tools for justices advocating for leniency for juveniles based on common-sense distinctions, not as the direct impetus for change in this area of jurisprudence.[52]

> responsible, are also less morally blameworthy. In support of these claims, petitioners and their supporting *amici* marshal an array of socioscientific evidence concerning the psychological and emotional development of [juveniles]. If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary . . . .

In 2005, the Court reversed course, deciding that juvenile capital punishment did not satisfy any penological purpose because juveniles are less blameworthy due to a lack in independent judgment and because juveniles will not be deterred by such a severe penalty because of their inability to assess consequences and make rational decisions. *Roper*, 543 U.S. at 571; *see infra* Section I.B.

[49] *See* Saunders, *supra* note 47, at 360.

[50] *Id.* at 360-67.

[51] *See id.* at 361 (describing how Justices Ginsburg, Sotomayor, Kennedy, and Kagan rejected scientific studies in *Brown v. Entertainment Merchants Ass'n* demonstrating the negative effect of violent videogames on small children); *see also* J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137 (1990) (describing the Court's rejection of psychological studies in trial practice and evidence cases).

[52] *See* Saunders, *supra* note 47, at 367. Whether this scientific evidence directly changed juvenile jurisprudence aside, subsequent Supreme Court decisions after *Roper* have embraced neuroscientific studies, incentivizing the usage of such data and arguments in juveniles cases and legislative debates surrounding juveniles. Shobha L. Mahadev, *Youth Matters:* Roper, Graham, J.D.B., Miller, *and the New Juvenile Jurisprudence*, 38 CHAMPION 14, 14 (2014).

B. Introducing Juvenile-Adult Distinctions into Eighth Amendment Jurisprudence

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[53] In *Roper v. Simmons*, the United States Supreme Court referenced the unique characteristics and immaturity of juveniles in determining that the Eighth Amendment prohibited the imposition of the death penalty upon offenders who committed murder as juveniles.[54] In *Roper*, the Court analyzed the constitutionality of the death penalty for juveniles by determining whether it was consistent with "evolving standards of decency that mark the progress of a maturing society."[55] In order to do so, the Court surveyed the presence of the juvenile death penalty in the states, finding that states were consistently—though slowly—moving to eliminate this punishment.[56] The growing national consensus on the elimination of the juvenile death penalty indicated that the evolving standards of decency no longer sanctioned sentencing juveniles to death.[57]

While the Court relied on the multitude of states that had eliminated the juvenile death penalty, it also spent a significant amount of time describing the unique severity of the death penalty and how it was a disproportionate sentence for a juvenile.[58] Because of the severity of the death penalty, it may only be used as punishment for the worst offenders who have

[53] U.S. CONST. amend. VIII.
[54] Roper v. Simmons, 543 U.S. 551, 575 (2005). This provision is applied to the states through the Fourteenth Amendment. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).
[55] *Roper*, 543 U.S. at 561 (internal quotation marks omitted). The defendant in *Roper* had, at the age of seventeen, broken in to a family home and kidnapped a woman. *Id.* at 556. Following the kidnapping, he bound her hands and feet, wrapped her face in duct tape, and pushed her off of a bridge into water, where she subsequently drowned. *Id.* at 556-57.
[56] *Id.* at 565-66 ("Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation . . . ."); *see, e.g.*, State v. Furman, 858 P.2d 1092, 1103 (Wash. 1993) (setting the minimum age for capital punishment in Washington at eighteen); Brennan v. State, 754 So.2d 1, 6 (Fla. 1999) (holding that capital punishment imposed upon sixteen-year-olds is unconstitutional).
[57] *See Roper*, 543 U.S. at 565-66.
[58] *See id.* at 568.

committed the worst crimes.[59] Previous cases adhering to this principle eliminated rapists,[60] those who committed unintentional murders,[61] those under sixteen years old,[62] the insane,[63] and the mentally retarded[64] from being sentenced to death.

Roper added all juveniles to this list of persons constitutionally prohibited from receiving the death penalty, citing three key differences between juveniles and adults that made the imposition of the death penalty upon them disproportionate.[65] First, juveniles display a "lack of maturity and an underdeveloped sense of responsibility," leading to "impetuous and ill-considered actions and decisions."[66] In 2005, at the time *Roper* was decided, this tendency of rash decision-making and inability to perceive consequences was conventional wisdom;[67] today, extensive neurological research grounds this assumption in specific stages of development of the prefrontal cortex.[68] The second factor distinguishing juveniles from adults is the susceptibility of juveniles to outside influences.[69] Unlike adults, juveniles have little control over their own environment, and are often more vulnerable to peer pressure and other negative influences.[70]

---

[59] *See id.* ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
[60] Coker v. Georgia, 433 U.S. 584, 598-99 (1977) (holding that the imposition of capital punishment for rape is unconstitutional); Kennedy v. Louisiana, 544 U.S. 407, 412 (2008) (holding that the imposition of capital punishment for rape of a child is unconstitutional).
[61] *See* Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that the imposition of capital punishment upon one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place" is unconstitutional).
[62] Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (holding that the imposition of capital punishment upon a fifteen-year old is unconstitutional).
[63] Ford v. Wainwright, 477 U.S. 399, 410 (1986).
[64] Atkins v. Virginia, 536 U.S. 304, 321 (2002).
[65] *See* Roper v. Simmons, 543 U.S. 551, 569 (2005)
[66] *Id.* (internal quotation marks omitted). This general irresponsibility of juveniles led states to restrict juveniles from voting, serving jury duties, and marrying. *Id.*
[67] *See id.*
[68] *See supra* Section I.A.
[69] *Roper*, 543 U.S. at 569.
[70] *Id.*

Finally, juveniles are still developing their idea of self, making their personality traits "more transitory."[71]

These factors ultimately demonstrated that juveniles were not among the worst of offenders who deserved the death penalty.[72] Due to their immaturity and inability to make rational, independent choices, juveniles have diminished culpability as to their actions.[73] The death penalty may only be rationalized by two penological purposes—retribution and deterrence—and neither purpose is met by an offender with diminished culpability.[74] As to retribution, the blameworthiness of an offender correlates with their independent judgment in taking that action and juveniles are relatively impaired in making independent judgments; as to deterrence, the inability of juveniles to assess consequences and make rational choices means that it is unlikely that maintaining the death penalty would deter any juvenile from committing murder in the future.[75] The demonstrated immaturity of juveniles makes the death penalty a disproportionate punishment for juveniles, and therefore, is unconstitutional.[76] *Roper* eliminated the death penalty as a potential penalty for juveniles; the question remained, however, whether the same characteristics that made the death penalty inappropriate for juveniles also affected the constitutionality of LWOP sentences for juveniles.[77]

II. JUVENILES AND LIFE IMPRISONMENT WITHOUT PAROLE SENTENCES

Following the categorical exclusion of juveniles from the death penalty in *Roper*,[78] the Supreme Court next assessed how the distinct characteristics of juveniles affect the

[71] *Id.* at 570.
[72] *See id.*
[73] *See id.* at 571.
[74] *See id.*
[75] *See id.*
[76] *Id.* at 575.
[77] *See infra* Part II.
[78] *See supra* Section I.B.

appropriateness of LWOP sentences.[79] First, in *Graham v. Florida*,[80] the Supreme Court held that the imposition of LWOP sentences on juveniles accused of non-homicide crimes was unconstitutional.[81] Two years later, a further restriction was implemented in *Miller v. Alabama*;[82] LWOP sentences automatically imposed on juveniles—even those convicted of homicide—violate the Eighth Amendment.[83] However, the Court stopped short of ruling that LWOP sentences for juveniles are unconstitutional; instead, it imposed a procedural requirement to constitutionally validate such a sentence.[84] So long as individualized consideration is given to a juvenile's youth during the sentencing proceeding, LWOP may be constitutionally imposed upon that juvenile.[85] Three years later, in *Montgomery v. Louisiana*,[86] the Court held that *Miller*'s ruling was retroactive as a categorical exclusion, stretching the language of its prior decision.[87]

A. Limitations on the Imposition of LWOP on Juveniles

Five years after *Roper* categorically eliminated juveniles from being sentenced to death, *Graham v. Florida* assessed whether juveniles who committed crimes less serious than murder could be sentenced to LWOP.[88] The Court first acknowledged that neither of the two approaches

[79] *See infra* Sections II.A-.B.
[80] 560 U.S. 48 (2010).
[81] *See infra* Section II.A.
[82] 132 S. Ct. 2455 (2012).
[83] *See infra* Section II.A.
[84] *See infra* Section II.A.
[85] *See Miller*, 132 S. Ct. at 2467.
[86] No. 14-280 (2016).
[87] *See infra* Section II.B.
[88] 560 U.S. 48, 52-53 (2010). The defendant, Graham, was born to two drug-addicted parents. *Id.* at 53. He suffered from attention deficit hyperactivity disorder from an early age, and began drinking alcohol at age nine and smoking marijuana at age thirteen. *Id.* When Graham was sixteen, he participated in an armed robbery of a barbeque restaurant. *Id.* Ultimately, no money was taken, but a co-conspirator struck the restaurant manager with a metal bar; the wound required stitches. *Id.* While on probation from his participation in the armed robbery, Graham committed a second armed robbery. *Id.* at 54. Yet another armed robbery was attempted the same night; however, a co-conspirator was shot during the attempt. *Id.* Graham was eventually detained while seeking medical care for the co-conspirator; the police also discovered three handguns in his vehicle, which was a violation of his probation. *Id.* at 55.

previously used for the application of the Eighth Amendment fit this scenario perfectly.[89] Previously, the Court had either (1) evaluated the length of a term-of-years sentence to determine whether it was grossly excessive and disproportionate to the crime; or (2) evaluated the application of the death penalty to a particular class of offenders to determine whether it was in keeping with society's evolving standards of decency.[90] The challenge in *Graham* to a LWOP sentence fit neatly in neither approach; however, because of the issue's categorical nature—LWOP as applied to all juveniles—the Court determined that the approach used in death penalty sentencing cases like *Roper* was appropriate.[91]

After identifying an emerging consensus against juvenile LWOP in sentencing practices, the Court looked to the special circumstances of juveniles identified in *Roper* to determine whether, in its own opinion, juvenile LWOP is proportionate to non-homicide crimes.[92] With scientific data continuing to support *Roper*'s analysis of juveniles as unable to appreciate consequences and more prone to making rash decisions, *Graham* affirmed that juveniles have diminished culpability compared to adults.[93] In addition to the lower culpability of juveniles, the particular class of crimes at issue was also less deserving of serious punishment.[94]

Juvenile non-homicide LWOP, then, involved a less culpable offender committing a less severe crime who received the second-most severe punishment available.[95] While obviously

---

[89] *See id.* at 59-62.
[90] *See id.*
[91] *See id.* at 61-62 ("This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, 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, specifically *Atkins*, *Roper*, and *Kennedy*.").
[92] *See id.* at 67.
[93] *See id.* at 68-69.
[94] *See id.* at 69 ("Serious nonhomicide crimes may be devastating in their harm [. . .] but in terms of moral depravity and of the injury to the person and to public [. . .] they cannot be compared to murder in their severity and irrevocability.") (internal quotation marks omitted).
[95] *See id.*

distinct from capital punishment, LWOP represents the forfeiture of an offender's entire life.[96] For juveniles, LWOP is especially severe, as they will spend a greater number of years and a greater proportion of their lives in prison, as compared with adult offenders.[97]

Balancing the diminished culpability of juveniles and the less severe non-homicide crimes with the severe penalty of LWOP, the Court concluded that juvenile LWOP for non-homicides was unconstitutionally disproportionate.[98] Due to this disproportionality, juvenile LWOP satisfies no penological justifications for punishment.[99] Retribution is not sufficient to justify such an extreme sentence on a less culpable offender.[100] Deterrence is also inapplicable; the same characteristics of immaturity that make juveniles less culpable also make them less likely to consider possible punishment and refrain from acting because of it.[101] Incapacitation, while relevant, does not apply to non-homicide crimes with as much force as homicide crimes; additionally, the transient nature of juveniles' character indicates that permanent incapacitation is not appropriate.[102] Finally, the principle of rehabilitation supports the elimination of juvenile LWOP because the penalty permanently excludes any possibility of the offender rehabilitating.[103] With these justifications in mind, the Court declared the imposition of juvenile LWOP for non-homicide crimes to be unconstitutional under the Eighth Amendment.[104] However, the Court did not require that eventual release be guaranteed to juvenile offenders, but

[96] *Id.* ("[It] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.") (internal quotation marks omitted).
[97] *Id.* at 71.
[98] *Id.* at 74.
[99] *Id.* at 71.
[100] *Id.*
[101] *Id.* at 72.
[102] *See id.* at 72-73.
[103] *Id.* at 73.
[104] *See id.* at 74-75.

only that these offenders receive "some meaningful opportunity for release based on demonstrated maturity and rehabilitation."[105]

The Court also validated its decision to establish a categorical rule rather than a rule only requiring courts to take youth into account during sentencing.[106] Florida argued that its statutes mandating the consideration of youth during sentencing were sufficient to guard against unconstitutional juvenile sentences; the Court responded that imposing LWOP for armed robbery, even where the sentencing judge determined the offender was "incorrigible," violated the Eighth Amendment.[107] Explaining its finding that Florida's statutes were insufficient, the Court stated:

> [E]xisting state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a [LWOP] sentence for which he or she lacks the moral culpability.[108]

The Court also had significant concerns over whether the sentencer would also be able to identify which offenders truly held capacity for change and which offenders did not at the time of sentencing.[109] As in *Roper*, the Court believed that the nature of the crime committed could easily outweigh the mitigating nature of youth in the subjective analysis of the sentencer.[110] Considering the inability of a subjective sentencer to properly balance the crime with the potential for rehabilitation, the Court imposed a categorical bar on LWOP sentences for juveniles convicted of non-homicide crimes.[111]

---

[105] *Id.* at 75.
[106] *See id.* at 75-79.
[107] *Id.* at 76. The Court referenced an additional example wherein a thirteen year old who committed sexual assault was sentenced to LWOP under Florida's statutory scheme. *See id.* at 76-77.
[108] *Id.* at 77 ("[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.").
[109] *Id.* at 77-78.
[110] *Id.* at 78.
[111] *Id.* at 82.

While *Graham* eliminated juvenile LWOP as a potential punishment for non-homicide crimes, juvenile LWOP remained possible for juveniles convicted of homicides.[112] Two years after *Graham* was decided, the Court heard *Miller v. Alabama*, a challenge to statutes that automatically imposed LWOP upon juveniles convicted of homicide.[113] This automatic imposition meant that the judge or the jury had no discretion under the applicable statute to impose a lesser sentence, even if the judge or jury felt that the offender's characteristics or the facts of the offense made a lesser sentence more appropriate.[114] Ultimately, the Court held that the automatic imposition of LWOP upon juveniles was unconstitutional.[115]

The decision in *Miller* rested on the same recognition as established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing . . . [b]ecause juveniles have diminished culpability and greater prospects for reform."[116] The Court reviewed the same three justifications for the diminished culpability of juveniles first established in *Roper*: (1) immaturity leading to recklessness and inability to perceive consequences; (2) vulnerability to outside influences such as peer pressure; and (3) the transience of juveniles' character.[117] Similarly, the Court confirmed that the lack of penological justifications for punishment applied to mandatory LWOP for homicide crimes as well.[118]

---

[112] *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012).
[113] *Id.* at 2460. *Miller* consisted of two consolidated cases wherein fourteen year old boys were charged with homicide crimes. *See id.* at 2461-62. In the first case, defendant Jackson participated in the armed robbery of a video store wherein his co-conspirator shot and killed the store clerk. *Id.* at 2461. In the second case, defendant Miller attempted to steal a sleeping friend's wallet after they had consumed marijuana; when the friend woke up, Miller hit the friend repeatedly with a baseball bat. *Id.* at 2462. Miller and the other teenagers present decided to burn the trailer, causing the victim to die from smoke inhalation. *Id.*
[114] *See id.*
[115] *Id.* at 2464.
[116] *Id.*
[117] *See id.*
[118] *Id.* at 2465.

Though *Graham* involved non-homicide crimes and *Miller* concerned more severe homicide crimes,[119] the Court stated that "none of what [*Graham*] said about children . . . is crime-specific."[120] The same justifications concerning the importance of taking youth into account during sentencing apply equally to both LWOP and death penalty sentences.[121] However, considering the mandatory nature of the LWOP statutes at issue, the sentencer was completely prohibited from considering the defendant's youth in sentencing.[122] The Court viewed this as incompatible with *Graham*'s comparison of the death penalty to LWOP; just as death penalty jurisprudence mandates the individualized consideration of youth in sentencing, youth should similarly be considered in LWOP.[123]

While the Court reiterated many of the justifications for categorically eliminating sentences that were contained in *Roper* and *Graham*, it did not go so far as to completely eliminate LWOP as a potential sentence for juveniles.[124] Eliminating mandatory juvenile LWOP statutes was sufficient to decide the issue at hand; therefore, the Court did not "foreclose a sentencer's ability" to impose LWOP on a juvenile.[125] While LWOP remains possible for juveniles, the Court cautioned that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[126] After *Miller*, discretion in juvenile LWOP sentencing must be afforded to the sentencer, and the sentencer must take into account the effect of the offender's youth in sentencing.[127]

---

[119] *Id.* (stating that the "moral culpability and consequential harm" is higher with homicide crimes as opposed to non-homicide crimes).
[120] *Id.*
[121] *See id.* at 2466.
[122] *Id.*
[123] *Id.* at 2467.
[124] *Id.* at 2469.
[125] *Id.*
[126] *Id.*
[127] *Id.*

Although *Miller* subscribed to the rationale in *Roper* and *Graham*, establishing the diminished culpability of juveniles, it broke sharply with *Roper* and *Graham*'s embrace of categorical bans as the appropriate solution. In both *Roper* and *Graham*, the Court rejected the prospect of individualized sentencing in favor of a categorical ban due to fears that the sentencer would give greater weight and consideration to the nature of the crime and the harm caused rather than the potential for rehabilitation and the offender's diminished culpability.[128] *Miller* provided no guidance to lower courts concerning how to avoid this balancing issue when it required individualized consideration instead of a categorical bar.[129] Judges are ill-equipped to measure the characteristics of immaturity and equally ill-equipped to compare that measurement to adult maturity and come to a meaningful conclusion about criminal culpability.[130] Where this abstract calculation of level of maturity is balanced with shockingly horrific crimes, it is probable that judges will overwhelmingly side against the juvenile.[131] In attempting to make this consideration, states have reacted by either creating statutes specifying characteristics to be considered or, more simply, implementing statutes eliminating LWOP.[132] Further complicating the implementation of *Miller*'s requirement of individualized consideration was the question of whether this requirement applied only to future offenders and those whose direct appeals were

[128] *See* Roper v. Simmons, 543 U.S. 551, 572-73 (2005) ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."); Graham v. Florida, 560 U.S. 48, 78 (2010) ("Here, as with the death penalty, the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime despite insufficient culpability.") (internal quotation marks omitted).

[129] Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 136 (2013).

[130] *Id.* at 139 ("Culpability is not an objective fact, but a normative conclusion about criminal responsibility. As a result, judges cannot define or identify what constitutes the adult level culpability among offending youths that deserves adult punishment. Clinicians lack tools with which to assess impulsivity, foresight, and preference for risk, and any metric with which to equate those qualities with criminal responsibility.").

[131] *Id.* at 140.

[132] *See infra* Section III.D.

not exhausted in 2012,or whether it also applied to those whose direct appeals were exhausted prior to the *Miller* decision.[133]

B. *Montgomery*: Determination of *Miller*'s Retroactivity

Following *Miller v. Alabama*, a question remained about whether the decision also applied retroactively to juvenile defendants who had been sentenced automatically to LWOP and whose direct appeals were exhausted prior to the 2012 decision. State and federal courts reached opposite decisions on the matter, with some courts holding that *Miller* did apply retroactively and some holding that *Miller* did not apply retroactively.[134] In 2015, the Supreme Court accepted the appeal of Henry Montgomery, a seventeen-year-old who was sentenced to LWOP following his killing of deputy sheriff Charles Hurt, in order to answer the retroactivity question.[135]

According to *Teague v. Lane*, whether a new constitutional rule should apply in *habeas* proceedings to cases that have already become final depends on the characterization of that constitutional rule.[136] In only two situations is a new constitutional rule retroactive in application: (1) if the rule is substantive in that it "places certain kinds of primary, private individual conduct beyond the power of the criminal-law making authority to proscribe"; or (2) if the rule is a "watershed rule[] of criminal procedure."[137] A substantive rule is one that "alters the range of

[133] *See infra* Section II.B.

[134] *See, e.g.*, Williams v. United States, 13-1731 (8th Cir. 2013) (granting motion on grounds that *Miller* is a retroactive rule); In re Morgan, 713 F.3d 1365 , 1367-68 (holding that *Miller* was a procedural rule and therefore does not apply retroactively); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller* applies retroactively).

[135] Montgomery v. Louisiana, No. 14-280, slip op. at 2 (2016). At the time of appeal, Montgomery was sixty-nine years old, and had spent over fifty years in prison with no possibility of ever being released on parole. *Id.*

[136] *See* Teague v. Lane, 489 U.S. 288 (1989). A new constitutional rule is one that "breaks new ground or imposes a new obligation on the States or Federal Government. . . . [A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301. As *Miller* held the Eighth Amendment to change how a juvenile could be sentenced to LWOP, it announced a new constitutional rule. *See* Montgomery v. Louisiana, No. 14-280 (2016) (analyzing *Miller* under *Teague*'s framework to determine the characterization of the new constitutional rule).

[137] *Teague*, 489 U.S. at 311 (internal quotation marks omitted).

conduct or the class of persons that the law punishes."[138] Substantive rules are categorical bans on conduct such as the elimination of the death penalty for juveniles.[139] In contrast, rules that are not substantive are procedural in nature; for example, mandating that a jury, rather than a judge, determine whether aggravating circumstances necessary for the imposition of the death penalty exist is procedural and not retroactive under *Teague*.[140] The Court has never found a new constitutional, procedural rule to fall in *Teague*'s category of a watershed rule of criminal procedure.[141] Ultimately, the decision in *Montgomery* depended entirely[142] on whether *Miller*'s

[138] Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Professor Perry Moriearty of the University of Minnesota Law School has argued that six subcategories exist under the broad umbrella of substantive rules: where a rule (1) "places primary, private conduct beyond the power of the state to proscribe"; (2) "proscribe[s] a 'category' of punishment for a class of individuals"; (3) "restrict[s] the class of individuals who may receive a particular punishment because of their status or offense"; (4) "narrows the scope of a criminal statute by interpreting its terms"; (5) "alter[s] the range of sentencing outcomes that a state may impose"; and (6) "change[s] the 'essential facts' a state must consider before imposing a type of punishment." Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 966 (2015); *see also* Jason Zarrow & 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), available at http://ssrn.com/abstract=2530536.

[139] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).

[140] *Summerlin*, 542 U.S. at 353 (holding that *Ring v. Arizona* "did not alter the range of conduct Arizona law subjected to the death penalty," but instead "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death"); *see generally* Ring v. Arizona, 536 U.S. 584 (2002).

[141] Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001) ("[I]t is unlikely that any of these watershed rules has yet to emerge.") (internal quotation marks omitted). Such a rule must involve procedures that are "implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (internal quotation marks omitted). *Teague*'s discussion of the characteristics of a watershed rule of criminal procedure embrace Justice Harlan's language from *United States v. Mackey*, wherein he opined that the right to counsel at trial would be one such watershed rule:

> Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in 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. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.

Id. (quoting United States v. Mackey, 401 U.S. 667, 693-94 (Harlan, J., concurring)). In 2007, the Court distilled Justice Harlan's opinion into two requirements for a rule to be considered a watershed rule of criminal procedure: (1) "the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction"; and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton v. Bockting, 549 U.S. 406, 418 (2007) (holding that the rule announced in *Crawford v. Washington* regarding admissibility of absent witness' statements was not a watershed rule of criminal procedure).

[142] A question of jurisdiction to answer the retroactivity question was argued by *amicus*, as both parties agreed that jurisdiction existed, and the Supreme Court resolved that jurisdiction did exist. *Montgomery*, No. 14-280, slip op. at 5, 14.

decision was interpreted by the Court as a substantive rule prohibiting the state from acting in a certain way, as a watershed rule of criminal procedure, or neither of the two exceptions.[143]

After analyzing the nature of the *Miller* decision, the Court determined that it was a new constitutional, substantive rule that applied retroactively.[144] First, Justice Kennedy—writing for the majority—emphasized that the foundation of the *Miller* decision was the Court's previous decisions in *Graham* and *Roper*, which categorically excluded juveniles from the death penalty and juveniles convicted of non-homicide crimes from LWOP and were, therefore, new substantive rules.[145] *Miller* rested on *Graham* and *Roper*'s analysis of the culpability and special characteristics of juveniles, which can create unconstitutionally disproportionate sentences when juveniles are sentenced harshly.[146] Based on these justifications, *Miller* held that the sentencing judge must take the defendant's youth into account prior to sentencing him to LWOP.[147]

Despite the fact that *Miller* did not render all juvenile LWOP sentences unconstitutional, the Court determined that it was more similar to a categorical bar of punishment such as *Graham* and *Roper* because the decision also stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[148] *Miller* "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."[149] Following this logic,

[143] *See id.* at 11-12.
[144] *See id.* at 14.
[145] *Id.* ("The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles.").
[146] *See id.* at 14-16.
[147] *Id.* at 16 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'") (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012)).
[148] *Id.* (quoting *Miller*, 132 S. Ct. at 2469) (internal quotation marks omitted).
[149] *Id.* at 17 (internal quotation marks omitted).

because *Miller* limited constitutional LWOP sentences to only extremely rare cases, the Court stated it was more akin to a substantive rule rather than a procedural one.[150]

Still, Justice Kennedy acknowledged that *Miller*'s decision, in application, does require the state to implement a procedure.[151] Under *Miller*, the sentencer must individually consider the defendant's youth before sentencing him to LWOP.[152] However, a procedural component does not transform a substantive rule into a procedural one.[153] For example, where a particular punishment is held unconstitutional for a particular group of people—a substantive rule—there is still a procedural component in that the state must hold a hearing for a defendant to demonstrate that the ruling applies to him.[154] Because *Miller* created a categorical bar to LWOP sentencing for juveniles that have not demonstrated incorrigibility, the Court held it to be a substantive, retroactive rule.[155] Recognizing the high costs of forcing every court to review whether a juvenile offender sentenced to LWOP years ago was incorrigible, the Court also proposed an alternate solution to enacting the retroactivity of *Miller*: allow parole consideration for these offenders.[156]

The holding in *Montgomery* reflects the work of various legal scholars who advocated for the retroactive application of *Miller*. These scholars argued that *Miller* removed the ability of a state to implement a specific punishment on a set class of individuals, thus qualifying as a

[150] *See id.* at 16-18 ("The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.").
[151] *Id.* at 17-18.
[152] *Id.* at 18.
[153] *See id.*
[154] *See id.* at 19.
[155] *See id.* at 16-18.
[156] *See id.* at 21.

substantive rule under *Teague*.[157] Specifically, *Miller* removed the ability of the state to sentence LWOP upon the class of juveniles who do not demonstrate incorrigibility.[158] Additionally, *Miller* relied on both the categorical *Roper* and *Graham* decisions concerning diminished culpability for juveniles and individualized consideration mandates supplied in various death penalty cases; scholars argue that, were *Miller* truly only procedural, it would have rested solely on individualized consideration cases and would not have considered *Roper* and *Graham*.[159]

The majority opinion of *Montgomery* looked to the practical effects and nuances of *Miller* to construe it as a categorical ban; the dissenting opinion is quick to point out that there is no need to go this far.[160] The *Miller* opinion stated, unequivocally, that it "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 sentence *follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[161] The majority opinion used subsequent language from the *Miller* opinion describing the rarity of an

[157] *See* Moriearty, *supra* note 138, at 973-74. Professor Moriearty argues that *Miller* is retroactive under *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), which held substantive and retroactive those rules that "usurp the State's jurisdiction over the substance of its own laws." *Miller*, which "modifies state sentencing laws by changing the 'essential facts' a state must consider before imposing a sentence of life parole," thus usurps the state's authority to impose an LWOP sentence. *See* Moriearty, *supra* note 138, at 974 (quoting *Summerlin*, 542 U.S. at 353).

[158] *See id.* at 974; *see also* Brianna H. Boone, Note, *Treating Adults Like Children: Resentencing Adult Juvenile Lifers After* Miller v. Alabama, 99 MINN. L. REV. 1159, 1176 (2015) (arguing that *Miller* is a substantive alteration of sentencing ranges because it changes a mandatory LWOP sentence to a sentencing range wherein LWOP is the maximum); Tracy A. Rhodes, *Cruel and Unusual Before and After 2012:* Miller v. Alabama *Must Apply Retroactively*, 74 MD. L. REV. 1001, 1022 (2015) (categorizing *Miller* as a categorical ban on mandatory LWOP sentences).

[159] *See* Moriearty, *supra* note 138, at 978-79 ("Were *Miller* only about the procedural right to individualized sentencing, Justice Kagan [the author of *Miller*] could have based the decision on the *Woodsen/ Lockett/ Eddings* line of cases alone. . . . Though *Miller*'s holding . . . 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."). However, others argue that the Court's reliance on cases such as *Woodson v. North Carolina*, 428 U.S. 208 (1976) (plurality opinion), in itself demonstrates that *Miller* should be retroactive. *See* Brandon Buksey & Daniel Korobkin, *Elevating Substance over Procedure: The Retroactivity of* Miller v. Alabama *under* Teague v. Lane, 18 CUNY L. REV. 21, 32-33 (2014) (arguing that individualized consideration mandates like *Woodson*, which required individualized consideration of a defendant's mitigating circumstances prior to being sentenced to capital punishment, and *Miller* are substantive in that "they force states to expand the range of sentences available to those previously eligible for only the harshest sentence . . . [and] they alter the criteria states may permissibly use to impose maximum sentences under the new regime").

[160] *See* Montgomery v. Louisiana, No. 14-280, slip op. at 37 (2016) (Scalia, J., dissenting).

[161] *Id.* (internal quotation marks omitted).

appropriate imposition of LWOP upon a juvenile offender to argue that *Miller* actually represented a categorical bar.[162] According to Justice Scalia, this does "nothing more than express the *reason* why the new, youth-protective *procedure* . . . is desirable."[163] *Miller* examined whether juvenile offenders could be constitutionally sentenced to LWOP for homicide and ruled that they could be, in some cases; to state, as the majority does, that this creates a categorical bar is rewriting *Miller*.[164]

For *Miller* to be a categorical bar, its application must be narrower than juvenile offenders, since some juvenile offenders can be constitutionally sentenced to LWOP.[165] The solution, then, is to say that *Miller* is a categorical bar to juveniles who committed crimes and are not incorrigible.[166] Incorrigibility is unlike most categorical bars previously imposed by the Court in that it is difficult to determine.[167] It is possible to determine the age of an offender to determine if they can be sentenced to death in accordance with *Roper*; it is possible to determine whether the sentencing judge properly considered all mitigating factors in accordance with *Lockett*; but how does a judge determine whether a juvenile is incorrigible?[168] Specifically concerning retroactivity, how can a judge determine whether a juvenile presented as incorrigible years, perhaps decades, ago at the time of sentencing?[169]

Justice Scalia charged the majority of attempting to eliminate LWOP as a sentence for juvenile offenders without explicitly declaring LWOP sentences to be unlawful.[170] Justice Kennedy, the author of the majority opinion, was also the author of the majority opinion in

---

[162] *Id.*
[163] *Id.*
[164] *See id.*
[165] *See id.*
[166] *See id.*
[167] *See id.* at 39 (referring to incorrigibility as a "knotty 'legal' question").
[168] *See id.*
[169] *See id.* ("Under *Miller*, bear in mind, the inquiry is whether the inmate as seen to be incorrigible when he was sentenced—not whether he has proven corrigible and so can be safely paroled today.").
[170] *See id.* at 39-40.

Roper, wherein he justified the elimination of the death penalty for juveniles in part because LWOP was still a valid, available punishment.[171] Instead of backtracking on these statements, according to Justice Scalia, the majority narrowed the holding of *Miller* as much as possible, and then suggested a solution to *Miller*'s retroactivity that essentially eliminates the practice of imposing LWOP on juveniles.[172] In this way, the Court was able to practically eliminate LWOP for juveniles without appearing inconsistent or raising controversy.[173]

Miller's solution—a procedural requirement to assess incorrigibility of youth—was ultimately held to be retroactive despite clear language in its opinion stating that it was not a categorical bar.[174] *Montgomery*, perhaps more invested in the fairness of the final result than its fit with *Teague* jurisprudence, determined that because *Miller* stated that constitutional juvenile LWOP sentences would be rare and rested on the same rationale of diminished culpability as *Roper* and *Graham*, *Miller* was a substantive rule.[175] *Miller*'s unwillingness to create a categorical bar and *Montgomery*'s determination that, regardless, *Miller* was a substantive rule under *Teague*, has led to an array of escalating problems among the states.[176]

III. THE FALLOUT OF *MILLER* AND *MONTGOMERY*

Miller's elimination of automatically imposed juvenile LWOP represents a continuation of the rationale used in *Roper* and *Graham* concerning the diminished culpability of children.[177] At the same time, however, *Miller* also departed from *Roper* and *Graham* in refusing to impose a categorical ban.[178] Despite this refusal, *Montgomery* still interpreted *Miller* as a substantive new

[171] *See id.* at 40.
[172] *See id.* ("How could the majority—in an opinion written by the very author of *Roper*—now say *that* punishment is *also* unconstitutional?").
[173] *See id.*
[174] *See Miller*, 132 S. Ct. at 2469.
[175] *See Montgomery*, No. 14-280, slip op. at 14-16.
[176] *See infra* Part III.
[177] *See supra* Section II.A.
[178] *See supra* Section II.A.

rule, requiring retroactive application to offenders who had previously been sentenced to LWOP under mandatory sentencing statutes.[179]

In their practical application, *Miller* and *Montgomery* have resulted in a variety of negative consequences. First, states have struggled to create a system for handing the retroactive application of *Miller*.[180] While *Montgomery*'s suggestion of offering parole to all affected offenders may be cost-effective, state prosecutors and legislatures have significant interest in the finality of previous LWOP convictions for the sake of the victims and their constituents.[181] Second, *Miller*'s requirement of individualized consideration has had an unexpected interaction with Sixth Amendment jurisprudence requiring that all factors increasing the ceiling or decreasing the floor of an offender's possible sentence be determined by a jury, not the judge.[182] Third, the application of *Miller* to aggregate term-of-years sentences which result in the juvenile offender spending his life in prison is unclear, further complicating the issue of *de facto* LWOP.[183] In the face of these consequences, states have reacted in a variety of ways, including new legislative procedures regulating LWOP and completely eliminating LWOP.[184]

A. The Cost of Retroactivity

Montgomery requires that offenders who were sentenced to LWOP through mandatory sentencing statutes receive a meaningful opportunity for release—such as parole consideration—or to be resentenced with individualized consideration of their youth at the time of the crime.[185] This requirement applies to over 2,000 juveniles who were sentenced to LWOP through

[179] *See supra* Section II.B.
[180] *See infra* Section III.A.
[181] *See infra* Section III.A.
[182] *See infra* Section III.B.
[183] *See infra* Section III.C.
[184] *See infra* Section III.D.
[185] Montgomery v. Louisiana, No. 14-280, slip op. at 21 (2016).

mandatory sentencing statutes.[186] Of those 2,000 juveniles, over half are housed in four states: Michigan, Louisiana, Pennsylvania, and California.[187]

In Michigan, where 367 applicable offenders are housed, prosecutors have been asked to review each case, including reports from the Department of Corrections regarding the offender's behavior during his time in prison.[188] This process is especially cumbersome because it involves working with cases that are decades old: witnesses have died, files are missing, and victims' families are more difficult to locate.[189] Prosecutors also have only one hundred and eighty days to complete this process.[190] Following review, if the prosecutor believes that the offender was justifiably sentenced to LWOP, the prosecutor will file a motion seeking imposition of LWOP.[191] If the prosecutor does not do so, the offender will automatically be sentenced to a term of years with a minimum of twenty-five to forty years and a maximum at or over sixty years.[192] While this process preserves the possibility of LWOP for some offenders, it also represents a significant drain of time and resources.[193]

Michigan's system of compliance with the *Montgomery* ruling demonstrates the cost involved for states to preserve LWOP sentences. Other states, mindful of this cost, have instead

---

[186] *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT, http://sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf, at 3.
[187] *Id.* However, most of California's juvenile offenders may be resentenced under § 1170(d), a statute written into law in early 2013. *Id.*
[188] Eric D. Lawrence, *Prosecutors 'Under the Gun' on Juvenile Lifer Decisions*, LANSING ST. J. (May 3, 2016, 6:02 AM), http://www.lansingstatejournal.com/story/news/local/2016/05/03/prosecutors-gun-juvenile-lifer-decisions/83843344/.
[189] *See id.*
[190] MICH. COMP. LAWS § 768.25a(4)(b) (2016).
[191] § 769.25a(4)(b).
[192] § 769.25a(4)(c); § 769.25(9).
[193] Mike Martindale, *Hundreds of Mich. Juvenile Lifer Cases to Be Reviewed*, THE DETROIT NEWS (Apr. 6, 2016, 9:51 AM), http://www.detroitnews.com/story/news/local/michigan/2016/04/05/hundreds-michigan-juvenile-lifer-sentences-reviewed/82640408/ (quoting St. Clair County prosecutor Michael Wendling, who stated in regard to the resentencing procedure: "It will tie up my staff and also challenge our resources — and I have only four cases; some counties have more than a hundred").

taken the more efficient process suggested by *Montgomery*: offering parole eligibility.[194] Louisiana, home to more than 300 offenders affected by *Montgomery*, has pending legislation which would grant parole eligibility to offenders after thirty-five years, provided that certain behavioral requirements are met.[195] California implemented legislation allowing for LWOP offenders to petition the court for resentencing following fifteen years of imprisonment, provided that certain behavioral requirements are met.[196] Similarly, North Carolina offers parole eligibility to LWOP offenders after twenty-five years imprisonment, again under specific conditions.[197] Although Michigan has attempted to preserve some established LWOP sentences, overall, the imposition of retroactivity by *Montgomery* has resulted in the granting of parole eligibility or the replacement of LWOP with term-of-years sentences.

B. Interaction with Sixth Amendment Jurisprudence

Miller requires individualized consideration of youth in order to constitutionally sentence a juvenile offender to LWOP.[198] Following *Miller*, states updated their statutes to reflect this requirement;[199] Michigan's § 769.25 is representative of these statutes.[200] After setting forth procedural requirements for the prosecutor to fulfill in order to seek LWOP, § 769.25 mandates that "the trial court shall consider the factors listed in Miller v. Alabama."[201] These factors

[194] Montgomery v. Louisiana, No. 14-280, slip op. at 21 (2016).
[195] Rebekah Allen, *Louisiana Considers Parole Opportunities for Juvenile Offenders Previously Sentenced to Life*, THE ADVOCATE (Apr. 26, 2016, 2:14 PM), http://theadvocate.com/news/15603523-123/louisiana-considers-parole-opportunities-for-juvenile-offenders-previously-sentenced-to-life-without.
[196] CAL. PENAL CODE § 1170(d)(2)(A) (West 2016).
[197] Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143, 151 (2013).
[198] Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).
[199] Some states updated their statutes to reflect this consideration, but many instead moved to grant parole eligibility and remove juvenile LWOP, avoiding any Sixth Amendment constitutionality issues. *See infra* Section III.D.
[200] MICH. COMP. LAWS § 769.25 (2016).
[201] § 769.25(6).

attendant to youth include "immaturity, impetuosity, and failure to appreciate risks and consequences," as well as the juvenile's home environment and outside influences.[202]

While the statute was enacted as a conservative implementation of *Miller*'s holding, portions were declared unconstitutional under the Sixth Amendment in *People v. Skinner*.[203] Specifically, the statute's mandate that the trial court, not the jury, make determinations of fact as to the factors of consideration under § 769.25 violated the defendant's Sixth Amendment right to a jury.[204] In *Apprendi v. New Jersey*, the Supreme Court ruled that defendants are entitled to jury determination beyond a reasonable doubt of any fact that raises the maximum sentence.[205] In other words, whatever fact that increases the maximum sentence beyond the verdict must be found by the jury, not the judge.[206]

In application to juvenile LWOP, the finding of fact that the juvenile is incorrigible is a fact that increases the potential sentence of the juvenile from a default term-of-years to LWOP.[207] As such, the factual findings concerning youth must be made by the jury, not the judge.[208] To rectify the unconstitutionality of § 769.25, the Michigan Court of Appeals held that, absent a jury waiver by the defendant, the court must impanel a sentencing jury to consider youth in order to impose an LOWP sentence.[209] Currently, a panel of judges from the Michigan Court of Appeals is scheduled to review the issue.[210] This Sixth Amendment crisis may prove instructive for other states that have implemented statutes designating the judge as the fact-finder

---

[202] *Miller*, 132 S. Ct. at 2468.
[203] People v. Skinner, No. 317892, 2015 WL 4945986, at *1 (Mich. Ct. App. Aug. 20, 2015).
[204] *Id.*
[205] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
[206] *See id.*
[207] *Skinner*, 2015 WL 4945986, at *12-13.
[208] *Id.* at *20.
[209] *Id.*
[210] Mike Martindale, *Judge Panel Will Decide Who Resentences Juvenile Lifers*, DETROIT NEWS (Apr. 20, 2016, 5:02 PM), http://www.detroitnews.com/story/news/local/michigan/2016/04/20/juvenile-lifers-resentencing/83302148/.

in relation to the offender's youth as a mitigating factor, including, but not limited to, Pennsylvania, South Dakota, and Washington.[211] Whether this change in sentencer leads to more frequent LWOP sentences or rarer LWOP sentences is unknown; however, the change does force states to adopt a new, and potentially costly, process of sentencing.[212]

C. Application to *De Facto* Juvenile LWOP

Graham, *Miller*, and *Montgomery* concern only juvenile LWOP sentences and when they may be appropriately imposed.[213] This line of LWOP jurisprudence may, however, have special significance for the rising problem of aggregate term-of-years sentences wherein the defendant will undoubtedly die before the possibility of parole arises. For example, sixteen-year-old Roger Caballero was sentenced to 110 years to life for his involvement in a gang-related shooting.[214] Caballero's first opportunity for parole will occur in 2117, long after Caballero himself is dead.[215] Sixteen-year-old Roosevelt Brian Moore, after sexually assaulting and robbing four women, was sentenced to 254 years.[216] Moore's first opportunity for parole will occur when Moore is 144—in other words, "his chance for parole is zero."[217]

Circuit and state courts have disagreed over whether *Graham*, *Miller*, and *Montgomery* apply to these sentences. On one hand, this line of cases refers explicitly to only LWOP sentences; therefore, aggregate term-of-years sentences remain constitutional despite the lack of individualized consideration of youth in sentencing.[218] On the other hand, aggregate term-of-years sentences such as Caballero's and Moore's are effectively LWOP sentences because the

[211] Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 586-92 (2015).
[212] *See id.* at 604-11 (describing how little research exists concerning jury leniency in juvenile cases).
[213] *See supra* Part II.
[214] People v. Caballero, 282 P.3d 291, 293 (Cal. 2012).
[215] *See id.* at 295.
[216] Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013).
[217] *Id.*
[218] *See, e.g.*, *id.* at 1191; Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012); State v. Brown, 118 So. 3d 332, 341-42 (La. 2013).

offender will never live to have parole eligibility.[219] As such, the lack of individualized consideration for offenders convicted of homicide or the imposition of such a sentence on juveniles convicted of non-homicide crimes is unconstitutional.[220]

California, among the states holding aggregate term-of-years sentences to be unconstitutional, implemented a statute, § 3051, providing for tiered parole eligibility for offenders who were convicted under the age of twenty-three.[221] Offenders sentenced to determinate sentences are eligible for parole after fifteen years;[222] offenders sentenced to less than twenty-five years to life are eligible after twenty years;[223] and offenders sentenced to twenty-five years to life are eligible after twenty-five years in prison.[224] By providing parole eligibility, the statute ensures that these sentences are not *de facto* LWOP sentences. Those actually sentenced to LWOP are not eligible for this parole system under § 3051,[225] but may receive parole eligibility after fifteen years under § 1170, enacted directly in response to *Miller*.[226] A petition for resentencing does not have to be granted under § 1170, whereas parole eligibility is automatic under § 3051. Still, some discrepancy appears to exist under this statutory scheme wherein an offender sentenced to LWOP may be released after fifteen years, but a similar offender sentenced to twenty-five years to life is eligible for parole after twenty-five years.

Although the Supreme Court has yet to rule on the issue of *de facto* LWOP, the existing disagreement among state and circuit courts indicates that this may be a continuing issue. The

[219] *Caballero*, 282 P.3d at 295 (stating that such aggregate term-of-years sentences are "materially indistinguishable from a sentence of life without parole").
[220] *See id.* at 294-95; Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014).
[221] CAL. PENAL CODE § 3051 (West 2016).
[222] § 3051(b)(1).
[223] § 3051(b)(2).
[224] § 3051(b)(3).
[225] § 3051(h).
[226] § 1170(d)(2)(A).

lack of a clear categorical ban from *Miller* further complicates the issue: are *de facto* LWOP sentences constitutionally sufficient so long as youth is considered in sentencing, or must they be completely eliminated? Faced with determining where *de facto* LWOP sentences fit in with existing LWOP jurisprudence, states such as California may continue to implement systems of parole eligibility for juveniles. Should the Supreme Court rule aggregate term-of-years sentences to fall under *Graham*, *Miller*, and *Montgomery*, states will face similar problems regarding the implementation of retroactivity as occurred with traditional LWOP sentences.[227]

D. Current State of Juvenile LWOP

States have reacted to *Miller*'s individualized consideration requirement, its retroactive application, and the consequences of both by either eliminating LWOP completely through the implementation of parole eligibility systems or by implementing statutes specifying mitigating factors related to youth to consider during sentencing.[228] Sixteen states currently completely prohibit juvenile LWOP.[229] Of those sixteen, nine have done so in the four years following *Miller*: Connecticut, Delaware, Hawaii, Massachusetts, Nevada, Texas, Vermont, West Virginia, and Wyoming.[230] Of the remaining thirty-four states, five more have significantly limited the class of offenders that may be sentenced to LWOP.[231] Of the remaining twenty-nine states, as of

[227] *See supra* Section III.A.
[228] *See* Feld, *supra* note 129, at 136-37.
[229] John R. Mills, Anna M. Dorn, & Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, THE PHILLIPS BLACK PROJECT, http://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWOP+2.pdf, at 4.
[230] *Juvenile Life Without Parole After* Miller v. Alabama, THE PHILLIPS BLACK PROJECT, http://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf, at 2. Although Delaware has not directly eliminated juvenile LWOP, it provides for judicial sentencing review in every case. *Id.*
[231] *Id.* In North Carolina, juvenile offenders convicted of felony murder or second degree murder are no longer eligible for LWOP. N.C. GEN. STAT. §§ 15A-1340.19A, -1340.19B (2016). In Pennsylvania, juvenile offenders under the age of fifteen at the time the crime was committed are no longer eligible for LWOP, 18 PA. CONS. STAT. § 1102.1 (2016); in Washington, juvenile offenders under the age of sixteen at the time the crime was committed are not eligible, WASH. REV. CODE § 10.95.010(3)(a)(1) (2016). California and Florida statutes provide for judicial

September 2015, an additional seven states and Washington D.C. that authorize juvenile LWOP sentences had no offenders serving such a sentence.[232] Of the remaining twenty-two states, four have five or fewer juvenile offenders serving an LWOP sentence.[233] Of the remaining eighteen states, five have implemented five or fewer LWOP sentences upon juveniles within the past five years.[234] This leaves only thirteen states that have not substantially narrowed the application of LWOP to juveniles through statutory reform or by a lack of sentencing in practice.[235] For these states, such as Michigan, problems remain as to how to implement a system to handle the retroactivity of *Miller*.[236] These states must also determine how *Miller* interacts with *Apprendi* and *Alleyne* and create cost-conscious solutions that preserve Sixth-Amendment constitutionality.[237] Finally, where aggregate term-of-years sentences are utilized, solutions may be needed to ensure that these sentences comport with the Eight Amendment per *Miller* and *Graham*.[238] The movement away from juvenile LWOP and the problems faced by the few states that are currently attempting to preserve juvenile LWOP demonstrate that it is time for juvenile LWOP to be completely banned.[239]

IV. UNCONSTITUTIONALITY OF JUVENILE LWOP SENTENCES

Miller unequivocally "[did] not categorically bar a penalty, but instead require[d] only that the sentence follow a particular process."[240] Despite this clear language, in *Montgomery*, the

---

sentencing review for all but the most serious of offenses. CAL. PENAL CODE § 1170(d)(2) (West 2016); FLA. STAT. §§ 775.081(1)(b), 921.1402 (2016).

[232] Mills, Dorn, & Hritz, *supra* note 229, at 6. These states are Indiana, Maine, New Jersey, New Mexico, New York, Rhode Island, and Utah. *Id.*

[233] *Id*. These states are Idaho, Ohio, New Hampshire, and North Dakota. *Id.*

[234] *Id*. These states are Alabama, Arkansas, Iowa, Maryland, and Minnesota. *Id.*

[235] *See id.*

[236] *See supra* Section III.A.

[237] *See supra* Section III.B.

[238] *See supra* Section III.C.

[239] *See infra* Part IV.

[240] Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012).

Court held *Miller* to be a substantive, categorical new rule, applicable retroactively.[241] *Montgomery* relied heavily on the characteristics that diminish the culpability of juveniles, as detailed in *Roper*, *Graham*, and *Miller*;[242] the Court also relied on *Miller*'s statement that "appropriate occasions for sentencing juveniles to [LWOP] will be uncommon."[243] While *Miller* stopped short of completely eliminating LWOP as a possible punishment for juveniles, *Montgomery*'s recharacterization of *Miller*[244] and the history of Eighth Amendment jurisprudence in relation to juvenile sentencing[245] indicates that the Court should now move to hold juvenile LWOP unconstitutional.[246] Holding juvenile LWOP to be unconstitutional would reflect, as Eighth Amendment jurisprudence necessitates, evolving standards of decency in society, and also cure the discrepancy between *Miller*'s non-categorical bar and *Montgomery*'s characterization of *Miller* as a categorical bar.[247]

A. *Montgomery*'s Expansion of *Miller*

In *Miller*, the Supreme Court refused to issue a categorical, comprehensive ban on the use of LWOP for juveniles, despite its recognition of various justifications for such a categorical ban.[248] As in *Roper* and *Graham*, *Miller* relied on the characteristics of immaturity inherent in juveniles: an "underdeveloped sense of responsibility" allowing for rash decisions, susceptibility to peer pressure and other outside influences, and the transience of their character and personality traits.[249] It affirmed that these traits negate the penological goals of imposing harsh

[241] Montgomery v. Louisiana, No. 14-280, slip op. at 14 (2016).
[242] *Id.* at 14-16.
[243] *Miller*, 132 S. Ct. at 2469.
[244] *See infra* Section III.A.
[245] *See supra* Parts I-II.
[246] *See infra* Section III.B.
[247] *See infra* Section III.B.
[248] *See Miller*, 132 S. Ct. at 2459.
[249] *See* Roper v. Simmons, 543 U.S. 551, 569 (2005); *Miller*, 132 S. Ct. at 2464.

punishment upon juveniles.[250] Retribution is reduced when sentencing youth because of their diminished culpability; in contrast, rehabilitation is an imperative consideration because of the ability of youths to develop and change, something that LWOP prohibits them from doing.[251] While *Roper* dealt with a harsher penalty[252] and *Graham* with less severe crimes, the *Miller* Court stated that "none of what [they] said about children . . . is crime-specific."[253]

Despite the Court's adoption of the reasoning behind *Roper* and *Graham*, it explicitly refused to create a categorical bar on juvenile LWOP in *Miller*.[254] Instead, the Court held only that individualized consideration must be given during sentencing.[255] The Court reasoned that this implementation of procedural requirement was sufficient to resolve the cases at hand.[256] However, the Court did not only neglect to issue a wider ruling, but explicitly stated that juvenile LWOP—in certain cases—is constitutional.[257]

This small portion of *Miller* stands in stark contrast to the Court's language two years earlier in *Graham*, when it explicitly rejected the idea that individualized consideration of incorrigibility could feasibly separate morally culpable juveniles from those with lesser culpability.[258] *Graham* dealt with non-homicide crimes and *Miller* with homicide; *Miller* indicated that the culpability of the offender and harm caused by the offender were both higher in

[250] *See Miller*, 132 S. Ct. at 2464 ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").
[251] *See id.* at 2465.
[252] While *Graham* acknowledged that capital punishment is the most severe punishment allowable by law, it also advocated that juvenile LWOP is a close second. *See* Graham v. Florida, 560 U.S. 48, 69 (2010). Juvenile LWOP "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* (internal quotation marks omitted).
[253] *Miller*, 132 S. Ct. at 2465.
[254] *See id.* at 2469.
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] Graham v. Florida, 560 U.S. 48, 77 (2010).

the case of homicide than non-homicide crimes.[259] This increase in moral culpability may explain the difference in outcome between *Graham* and *Miller*—even an incorrigible juvenile rapist, robber, or assaulter may not constitutionally receive LWOP, whereas LWOP for an incorrigible juvenile murderer is constitutionally proportional according to *Miller*.

At the same time, however, the *Miller* Court affirmatively stated that "none of what [*Graham*] said about children . . . is crime-specific."[260] In the proportionality analysis of the Eighth Amendment, then, the culpability of juveniles remains the same, the punishment remains the most severe currently available to juveniles legally, and only the severity the crime increases. *Miller*'s refusal to create a categorical bar implies that the change in severity of the crime—from, for example, an armed robbery where persons are injured to an armed robbery wherein a person is accidentally killed—is enough to justify the harshest sentence possible.

Miller also diverges from *Graham* in its validation of the sentencer's ability to determine the offender's incorrigibility.[261] *Graham* explicitly rejected a case-by-case analysis depending on incorrigibility not only because of the proportionality argument discussed earlier, but also because the Court rejected the idea that the sentencer would be able to determine, at the time of sentencing, whether the juvenile offender was so depraved that the juvenile could never rehabilitate sufficiently to be allowed back into society.[262] Even if such a prediction about the future was possible, *Graham* and *Miller* also explicitly expressed concern that the sentencer would disproportionately weigh the nature of a horrific crime and fail to give enough weight to the offender's youth and potential for rehabilitation.[263]

---

[259] *See Miller*, 132 S. Ct. at 2465.
[260] *See id.*
[261] *Compare id.* at 2469, *with Graham*, 560 U.S. at 77-78.
[262] *See Graham*, 560 U.S. at 77-78.
[263] *See infra* notes 128-131 and accompanying text.

Miller's adherence to standards advocating for mercy toward juveniles, paired with clear language from the opinion rejecting a categorical barring of all juvenile LWOP sentences, created a convoluted jurisprudence for the *Montgomery* Court to consider when it determined the retroactivity of *Miller*. *Montgomery* stretched the language of *Miller*—and *Teague* retroactivity jurisprudence—in order to get to the right result: that *Miller*'s holding should be retroactive, so as to essentially eliminate juvenile LWOP. *Miller* explicitly stated that it was not a categorical rule: it "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 sentence *follow a certain process* . . . before imposing a particular penalty."[264]

Despite this specific language, *Montgomery* held *Miller* to be a substantive rule because it stated that juvenile LWOP could only be constitutionally imposed rarely and it relied upon similar rationale as *Graham* and *Roper*.[265] Under this interpretation, *Miller* created a categorical prohibition of LWOP upon juveniles who are incorrigible.[266] The difficulty of incorrigibility as a defining category exposes the strain between the *Miller* and *Montgomery* opinions. Incorrigibility is unlike anything previously ruled as a categorical, substantive rule under *Teague*. Most categorical bars involve eliminating a particular crime or a particular type of offender from a punishment. For example, previous cases prohibited the state from executing rapists and unintentional murderers—categories easily definable from the charged crimes.[267]

Categorical, retroactive rules regarding characteristics of offenders are a closer analogy to incorrigibility. In *Atkins v. Virginia*, the Court prohibited the state from executing mentally

[264] *Miller*, 132 S. Ct. at 2471.
[265] Montgomery v. Louisiana, No. 14-280, slip op. at 16-17 (2016).
[266] *See id.* at 37 (Scalia, J., dissenting).
[267] Coker v. Georgia, 433 U.S. 584, 598-99 (1977); Enmund v. Florida, 458 U.S. 782, 797 (1982).

retarded offenders.[268] *Atkins* relied on arguments of diminished culpability of mentally retarded offenders, paralleling the diminished culpability of juveniles in *Miller*.[269] Mentally retarded individuals have difficulty understanding the consequences of their own actions and often act rashly despite some understanding of morality.[270] *Atkins*, similar to *Miller*, also requires the sentencer to make a factual determination about the state of the defendant's mind.[271] In most states, the sentencer must identify below average intellectual function and limitations in social skills, communication, self-reliance.[272] While IQ testing provides some guidance, mental health and development lies on a continuum, and it can be difficult both to place someone on that continuum and to designate a specific spot where a person is legally considered mentally retarded. While this determination shares uncertainty and difficulty of prediction with incorrigibility, it is not directly analogous to incorrigibility. Unlike mental retardation, incorrigibility asks the sentencer to make a determination about how the offender will act in the future. Incorrigibility determinations require the sentencer to consider whether the offender may, at some point after his teenage years and after several transformative years in prison, be

[268] Atkins v. Virigina, 536 U.S. 304, 321 (2002).
[269] *See id.* at 318.
[270] *Id.* ("Mentally retarded persons frequently know the difference between right and wrong . . . . Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."). Compare this information regarding mentally retarded individuals to juveniles:

> [J]uveniles have diminished culpability and greater prospects for reform. . . . First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (internal quotation marks omitted).
[271] *See generally* Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution,* 30 J. LEGIS. 77, 87 (2003) (discussing how states, under guidance from the Court in *Atkins*, should define "mentally retarded).
[272] *See id.* at 88 (discussing how most states have adopted the three criterion proposed by the American Psychiatric Association to define mental retardation).

rehabilitated.[273] Mental retardation asks the sentencer to determine whether an offender is or is not mentally retarded; incorrigibility asks the sentencer to predict the future of the offender. *Miller*'s mandate to consider incorrigibility does not represent a categorical distinction like *Atkins*, or any other categorical ban.[274]

The Court's decision to hold *Miller* as a retroactive, substantive rule, based upon the theoretically categorical distinction between incorrigible defendants and those capable of rehabilitation further complicates *Teague* jurisprudence. Retroactivity generally has been an area of jurisprudence fraught with change and instability.[275] Considering the unpredictability of *Teague*—demonstrated in part by the federal and state court split on *Miller*'s retroactivity prior to *Montgomery*—and its potential for unfair, arbitrary results, the most effective solution may be to create a new method of determining retroactive application.[276] However, assuming that the Court is unlikely to completely overhaul its retroactivity jurisprudence, *Montgomery* makes the future application of *Teague* more difficult because of its stark contrast to the language in *Miller*.

Montgomery is representative of results-driven jurisprudence: despite clear statements to the contrary, *Montgomery* held *Miller* to be a substantive, categorical rule rather than a procedural requirement.[277] This logical fallacy has further complicated *Teague* jurisprudence. It, combined with *Miller*'s refrain from creating a categorical rule, has made the implementation of

[273] *See* Montgomery v. Louisiana, No. 14-280, slip op. at 39 (2016) (Scalia, J., dissenting).
[274] *See id.*
[275] *See generally* Timothy Finley, *Habeas Corpus—Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975 (1994); *see also* Commonwealth v. Cunningham, 81 A.3d 1, 5 n.7 (Pa. 2013) ("[M]odern 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.").
[276] *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, 36-37 (2014) (discussing how *Teague* creates incongruent results); *see also supra* notes 157-159 and accompanying text (demonstrating how *Teague* jurisprudence results in incongruent results).
[277] Montgomery v. Louisiana, No. 14-280, slip op. at 14 (2016).

limitations on juvenile LWOP difficult and costly for states.[278] In order to remedy the logical fallacy created by *Montgomery*, the best remedy is for the Supreme Court to declare a clear, categorical bar on juvenile LWOP completely.[279]

B. To Validate Montgomery, A Categorical Exclusion Is Needed

Montgomery resolved the conflict among federal circuit courts and state courts as to whether *Miller* should have retroactive application, but in so doing, misconstrued *Miller*'s narrow holding. Result-driven jurisprudence may have demanded the retroactivity of *Miller*, but the logical fallacy existing between *Miller* and *Montgomery* creates a questionable juvenile sentencing jurisprudence and further complicates *Teague* retroactivity jurisprudence.[280] Beyond the state of Supreme Court jurisprudence, *Miller*'s refusal to implement a categorical ban of all juvenile LWOP and *Montgomery* have created significant problems across the states.[281] States are incurring serious costs to implement resentencing[282] and to create a system of juvenile sentencing that complies not only with the Eighth Amendment, but the Sixth Amendment as well.[283] *Miller* and *Montgomery* also significantly complicate the issue of whether *de facto* LWOP sentences are subject to the same constitutional restrictions as traditional LWOP sentences.[284] Rather than seeking to solve each of these problems on an individual level, the Court should implement a clear, categorical bar on juvenile LWOP, eliminating the sentence completely from the state's ability to impose. Implementation of such a categorical bar would likely necessitate states creating a system of parole eligibility for juvenile offenders.[285]

[278] *See supra* Part III.
[279] *See infra* Section IV.B.
[280] *See supra* Section IV.A.
[281] *See supra* Part III.
[282] *See supra* Section III.A.
[283] *See supra* Section III.B.
[284] *See supra* Section III.C.
[285] Such a parole eligibility system has already been put into place in many states. *See supra* Part III. For those states that have partial parole eligibility systems, these systems can be extended to cover all juvenile offenders. For

First, a categorical bar would validate *Montgomery*'s retroactivity decision. While retroactively applying *Miller*'s narrowing of LWOP was a positive result for offenders, *Montgomery* struggled to fit *Miller* properly into *Teague* jurisprudence.[286] Advocates exist for removing the *Teague* framework entirely due to its complexity; until such a time as *Teague* is eliminated, however, rectifying *Montgomery* to better fit its framework will help simplify an incredibly complicated field of jurisprudence.

Second, a categorical bar on juvenile LWOP would dramatically decrease the cost associated with implementing retroactivity. States such as Michigan that have attempted to preserve LWOP while complying with *Miller*'s procedural demands have faced significant costs as prosecutors attempt to review and evaluate decades-old cases and prepare for resentencing hearings.[287] Implementing a parole eligibility system utilizes an already existing system—parole review boards. While the workload for these review boards would undoubtedly increase, the number of relevant cases is limited; even in states with large LWOP offender populations, the total cases number approximately three hundred.[288] This increase in cost for parole review boards will also be limited. Under the categorical ban, no new LWOP cases will be introduced. Considering the general trend of declining LWOP sentences in most states, it is also unlikely that many young people are currently serving LWOP.[289] As older LWOP offenders are released or

---

example, California's parole eligibility system provides eligibility to certain offenders after fifteen years; after a true categorical ban is implemented, this eligibility would simply be extended to all offenders. *See* CAL. PENAL CODE § 1170(d) (West 2016). States should be cognizant of the problems posed by the aggregate term-of-years sentences, *see supra* Section III.C, and be sure that the minimum years before parole eligibility still provides the offender with a meaningful opportunity for release. For example, a statute providing for parole eligibility, but only after sixty years, may still run afoul of a categorical ban on LWOP because it is highly unlikely that the offender will live to see parole eligibility.

[286] *See supra* Section IV.A.

[287] *See* Lawrence, *supra* note 188.

[288] *See, e.g.*, *id.*; Allen, *supra* note 195.

[289] *See supra* Section III.D.

die and are not replaced with new LWOP offenders, the workload of the parole review board will swiftly decline.

Third, a categorical ban on juvenile LWOP sentences will remove Sixth Amendment issues from juvenile sentencing. Sixth Amendment jurisprudence requires that any factor increasing an offender's sentence beyond that authorized by the verdict alone be determined by a jury, not a judge.[290] In implementing *Miller*'s requirement of a determination of incorrigibility, some states assigned that determination to a judge, not a jury.[291] Because such a determination increases the possible sentence of an offender, such statutes violate the Sixth Amendment.[292] A complete categorical bar requires a system of parole eligibility; it does not require any factual determination during sentencing that would implicate Sixth Amendment rights.

Finally, although a categorical bar will not resolve the *de facto* LWOP sentencing problem, it will provide clearer policy goals to aid in the resolution. *De facto* LWOP occurs where aggregate term-of-years sentences places the parole eligibility of an offender outside of their possible life expectancy.[293] The resolution in this issue largely relies on whether the judiciary should look at the practical effect of a sentence, or whether the name of the sentence is controlling—i.e., that because the term-of-years sentences are each constitutional, they must also be constitutional in the aggregate. However, a categorical ban of juvenile LWOP indicates to the judiciary the importance of parole eligibility and affirms the justifications behind treating juvenile offenders differently. While courts could still choose to allow for *de facto* LWOP

[290] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
[291] *See, e.g.*, MICH. COMP. LAWS § 769.25 (2016).
[292] *See* People v. Skinner, No. 317892, 2015 WL 4945986, at *20 (Mich. Ct. App. Aug. 20, 2015); Russell, *supra* note 211, at 586-92.
[293] *See* People v. Caballero, 282 P.3d 291, 295 (describing how such sentences are virtually the same as juvenile LWOP sentences because they deny the offender any possibility of parole).

sentences, a categorical LWOP prohibition makes this less likely, as the two concepts are ideologically opposed.

Implementing a complete prohibition upon juvenile LWOP will resolve the problems created by *Miller* and *Montgomery*; it will also comport with existing LWOP jurisprudence. A categorical LWOP ban both comports with the proportionality principle and with evolving standards of decency.[294] *Roper*, *Graham*, and *Miller* all acknowledged the diminished culpability of juvenile offers due to their immaturity and inability to perceive consequence, their vulnerability to outside pressures, and the transience of their character.[295] Advances in neuroscience—specifically the ability to map brains to determine development—continue to demonstrate that, biologically, juveniles are different from adults.[296] The prefrontal cortex is not completely formed during adolescence; this portion of the brain is responsible for high-level cognitive functioning.[297] Juveniles are, therefore, less able to participate in long-term planning, to regulate anger, and to exercise moral judgment, further supporting *Roper*, *Graham*, and *Miller*'s conclusion that juveniles have diminished culpability.[298] Still, *Miller*'s hesitance to enact a categorical ban may be interpreted as an unwillingness to say that, as a matter of rule, the diminished culpability of a juvenile is not enough to render an LWOP sentence disproportionate to homicide.[299] However, *Miller* required an assessment of incorrigibility at the time of sentencing in order to determine whether LWOP would be a proportionate punishment to the

[294] *See* Graham v. Florida, 560 U.S. 48, 59-62 (2010) (discussing how proportionality and evolving standards of decency are relevant to the Eighth Amendment interpretation of juvenile LWOP sentences).
[295] *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012); *Graham*, 560 U.S. at 68-69; Roper v. Simmons, 543 U.S. 569 (2005).
[296] *See Adolescence, Brain Development and Legal Culpability*, *supra* note 32.
[297] *See* Bower, *supra* note 31, at 299.
[298] *See id.*
[299] *See Miller*, 132 S. Ct. at 2469 (explaining that situations are possible wherein juvenile LWOP would be justified and constitutional).

crime.[300] Considering the inability of the sentencer to properly assess incorrigibility at the time of sentencing, a second look is mandated at a later date to determine whether the unique characteristics of youth were central to the offender's criminal actions. Enacting a categorical ban recognizes both how unique characteristics of youth result in diminished culpability and also that these characteristics are unable to be properly assessed at the time of sentencing.

Evolving standards of decency also support the implementation of a categorical ban on juvenile LWOP. Thirty-seven states have either eliminated LWOP completely, enacted significant restrictions on the use of LWOP, or have never or rarely imposed LWOP sentences in the last five years.[301] This leaves only thirteen states that continue to participate in the practice of juvenile LWOP.[302] The fact that many states have moved away from imposing LWOP upon juveniles indicates that the standards of decency in regard to juvenile sentencing are changing and becoming more lenient. Because the evolving standards of decency indicate states are moving away from the imposition of LWOP and scientific advancement continues to bolster the argument for diminished culpability of juveniles in the proportionality calculation, a categorical ban on LWOP would comport with existing Eighth Amendment jurisprudence.

Finally, the implementation of a retroactive, complete ban on juvenile LWOP poses no dramatic negative consequences in implementation. States may initiate a tiered parole eligibility system, wherein juveniles are granted automatic parole eligibility after a certain number of years served in prison.[303] This allows for a better determination of what *Miller* wanted to distinguish—a certain number of years after the crime, the parole board can determine whether a juvenile has matured, and it can do this much better than the sentencer could have at the time of sentencing.

[300] *See id.*
[301] *See supra* notes 228-235 and accompanying text.
[302] *See* Mills, Dorn, & Hritz, *supra* note 232, at 6.
[303] *See supra* note 285 and accompanying text.

Additionally, this solution gives the offender a meaningful opportunity for release without mandating release, protecting society and the victims of the offender's crime from the release of offenders who committed horrific crimes and who proved themselves to be truly incorrigible.[304] Ultimately, a clear categorical ban on juvenile LWOP sentences provides the best solution to correcting the negative consequences of *Miller* and *Montgomery*.

CONCLUSION

In 2012, *Miller* followed a series of Supreme Court decisions invalidating harsh punishments for juveniles.[305] Unlike previous cases that had categorically banned penalties, however, *Miller* only mandated that, in order to sentence a juvenile to LWOP, a sentencer must consider the mitigating qualities of youth when determining punishment.[306] *Miller* expressly stated that it was not a categorical bar on juvenile LWOP and that, while rare, occasions would exist wherein juvenile LWOP would be constitutional.[307] This specification created difficulties for the Court later in *Montgomery*, where it considered the retroactivity of *Miller*.[308] Despite *Miller*'s statement about its ruling not being a categorical bar, *Montgomery* held *Miller* to be a substantive new rule under *Teague* jurisprudence and, thus, retroactive in application.[309]

Montgomery's stretching of *Miller*'s opinion in order to achieve the correct result—retroactive limitations on juvenile LWOP—has created a slew of problems that are best remedied by a complete ban on juvenile LWOP.[310] Considering a ruling that explicitly stated it was not a categorical ban as a substantive rule has made *Teague* jurisprudence, already unwieldy, even more complex. The dramatic cost of implementing *Montgomery*'s retroactive application of

[304] Matthew Razo, Note, *Fair and Firm Sentencing for California's Youth: Rethinking Penal Code Section 190.5*, 41 W. ST. U. L. REV. 429, 465 (2014).
[305] *See Miller*, 132 S. Ct. at 2464.
[306] *See id.* at 2469.
[307] *See id.*
[308] *See generally* Montgomery v. Louisiana, No. 14-280 (2016).
[309] *See id.* at 14.
[310] *See supra* Part IV.

Miller—paying prosecutors and providing resources to evaluate cases that are often decades old—has led many states to simply provide parole eligibility to juvenile offenders instead.[311] States have also faced increased costs due to the interaction between *Miller*'s individualized consideration mandate and Sixth Amendment jurisprudence; under *Apprendi*, the individualized consideration must be made by a jury.[312] Until the Supreme Court chooses to hear a case concerning *de facto* LWOP, an issue that has divided the federal and state courts, it is also unclear to trial courts whether *Miller* and *Montgomery* apply to these sentences as well.[313] In the face of these issues, the best resolution is to implement a complete categorical bar to juvenile LWOP.

[311] *See supra* Section III.A.
[312] *See supra* Section III.B.
[313] *See supra* Section III.C.