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***MONTGOMERY V. LOUISIANA: AN ATTEMPT TO MAKE  
JUVENILE LIFE WITHOUT PAROLE A PRACTICAL  
IMPOSSIBILITY***

*Erin Dunn*\*

**I. INTRODUCTION**

In 2012, the Supreme Court decided the landmark case *Miller v. Alabama*,<sup>1</sup> which held that mandatory life in prison without parole for juveniles violated the Eighth Amendment,<sup>2</sup> even in homicide cases.<sup>3</sup> After the Supreme Court's decision in *Miller*, courts across the country were left to decide if this ruling applied retroactively to all prisoners facing a mandatory life sentence for a homicide committed as a juvenile.<sup>4</sup> Notably, the highest courts in Louisiana, Michigan, Pennsylvania, and Minnesota held *Miller* is procedural and, therefore, should not be applied retroactively.<sup>5</sup> However, nine states held the rule from *Miller* is substantive and therefore does apply retroactively.<sup>6</sup>

As a result of the split among the states, the Supreme Court

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<sup>1</sup> 132 S. Ct. 2455 (2012).

<sup>2</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>3</sup> *Miller*, 132 S. Ct. at 2460.

<sup>4</sup> Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 967, 968 (2015).

<sup>5</sup> *Id.* at 968, 971.

<sup>6</sup> *Id.* at 968 (explaining Mississippi, Nebraska, South Carolina, Iowa, Massachusetts, New Hampshire, Illinois, Wyoming, and Texas have all held *Miller* is retroactive).

granted certiorari in *Montgomery v. Louisiana*<sup>7</sup> in order to decide whether *Miller* should be applied retroactively.<sup>8</sup> The Supreme Court announced its decision on January 25, 2016, holding the new rule from *Miller* is substantive and, therefore, is not subject to the general bar on retroactivity for cases on collateral review.<sup>9</sup>

Over 2,000 people currently serving a mandatory sentence of life in prison without parole for a homicide committed before they were 18 years old will be affected by this decision.<sup>10</sup> Several states have hundreds of prisoners that now must be resentenced.<sup>11</sup> For instance, Pennsylvania alone has 482 prisoners.<sup>12</sup> Even more, many of these cases were sentenced decades ago, with some even dating back as far as the 1950s.<sup>13</sup> Resentencing hundreds of inmates will prove to be problematic for many of these states because the facts needed for a discretionary sentencing hearing were not recorded at the time of the initial sentencing.<sup>14</sup>

The Supreme Court acknowledged this issue in its decision and explained that states do not need to resentence everyone, but could consider these inmates for parole instead; however, the states

<sup>7</sup> 135 S. Ct. 1546 (2015).

<sup>8</sup> *Montgomery v. Louisiana* Question Presented, <http://www.supremecourt.gov/qp/14-00280qp.pdf> (last visited Oct. 23, 2015). This is the second time the Supreme Court has granted certiorari to decide this particular issue. In 2014, the Court granted certiorari in *Toca v. Louisiana*; however, the case was dismissed when the defendant was released early from prison after receiving a new plea deal. 141 So. 3d 265 (L.A. 2014), *cert. granted in part*, 135 S. Ct. 781 (2014) and *cert. dismissed*, 135 S. Ct. 1197 (2015); Lyle Denniston, *Juvenile Sentencing Argument Expanded*, SCOTUSBLOG (Sept. 14, 2015, 3:11 PM), <http://www.scotusblog.com/2015/09/juvenile-sentencing-argument-expanded/> [hereinafter Denniston, *Argument Expanded*].

<sup>9</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 718, 732 (2016).

<sup>10</sup> Transcript of Oral Argument at 35, 38, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Transcript]; Brief of Amici Curiae State of Michigan and 15 Other States in Support of the Respondent at 12, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Brief of Other States]; Richard Wolf, *Supreme Court Considers Reprieve for Kids who Kill*, USA Today (Oct. 11, 2015 9:48 AM), <http://www.usatoday.com/story/news/politics/2015/10/11/supreme-court-juvenile-life-without-parole-murder/73594976/>.

<sup>11</sup> Brief of Other States, *supra* note 10, at 13-15.

<sup>12</sup> Brief of Other States, *supra* note 10, at 13. Additionally, Michigan has 368 prisoners and Louisiana has 202 prisoners who must be resentenced. *Id.* at 14-15.

<sup>13</sup> Brief of Other States, *supra* note 10, at 4, 13-15; Wolf, *supra* note 10. In fact, Pennsylvania has an inmate who was sentenced to life in prison without parole following a 1956 murder. Brief of Other States, *supra* note 10, at 13. In Louisiana, one inmate who was sentenced to life in prison without parole committed murder in 1958. *Id.* at 15.

<sup>14</sup> Brief of Other States, *supra* note 10, at 9.

must address the sentence to ensure the prisoner is not serving a disproportionate sentence.<sup>15</sup> Despite the imposition on the states, the Court made clear that “[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids.”<sup>16</sup> Therefore, a sentence is void even if the sentence was finalized before the Supreme Court held the specific type of sentence was unconstitutional.<sup>17</sup>

Overall, the Court made the correct decision in *Montgomery*; however, the Court was intellectually dishonest in its analysis. In its opinion, the majority found *Miller* to be retroactive by rewriting the holding.<sup>18</sup> Even worse, the Court could have come to the same conclusion without conducting an intellectually dishonest analysis. The Court was swayed by its dislike for juvenile life without parole sentences and the majority tried to make the sentence difficult to impose. This comment asserts the majority had a specific outcome it wanted to reach and tailored its opinion in order to reach that holding.

This comment will explore the Supreme Court’s decision in *Montgomery*. Section II will explore the Court’s decision in *Miller*. Section III will analyze the doctrine for applying a new rule retroactively as set forth in *Teague v. Lane*.<sup>19</sup> Section IV will analyze the Court’s decision in *Montgomery* and the accusations raised by the dissent. Finally, Section V will show how the majority was intellectually dishonest and how it was actively trying to make juvenile life without parole practically impossible.

## II. MANDATORY LIFE WITHOUT PAROLE FOR JUVENILES IS UNCONSTITUTIONAL

The Court in *Miller*, by a 5-4 decision, banned mandatory life in prison without parole for any juvenile offense.<sup>20</sup> This decision by the Supreme Court invalidated the sentencing schemes in the majority of the states and even the federal government.<sup>21</sup>

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<sup>15</sup> *Montgomery*, 136 S. Ct. at 736.

<sup>16</sup> *Id.* at 731.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 743 (Scalia, J., dissenting).

<sup>19</sup> 489 U.S. 288 (1989).

<sup>20</sup> Sara L. Ochs, *Miller v. Alabama: The Supreme Court's Lenient Approach to Our Nation's Juvenile Murderers*, 58 LOY. L. REV. 1073, 1073 (2012).

<sup>21</sup> *Id.* at 1074. Twenty-nine jurisdictions allowed for mandatory life without parole for juveniles at the time. Ioana Tchoukleva, *Children Are Different: Bridging the Gap Between*

*Miller* and its companion case, *Jackson v. Hobbs*,<sup>22</sup> each involved a 14 year old who was sentenced to life in prison without parole following a murder conviction.<sup>23</sup> In Arkansas, Kuntrell Jackson was charged as an adult for felony murder after a co-defendant shot and killed a store clerk while three boys attempted to rob the store.<sup>24</sup> Jackson discovered his co-defendant had the shotgun on the way to the store, and while he initially decided to stay outside, he did go into the store while the robbery was in progress.<sup>25</sup> There was a dispute as to whether Jackson actually knew the other boys were planning to rob the store at gunpoint and actively took part or thought the boys were joking.<sup>26</sup>

In Alabama, Evan Miller was charged as an adult, convicted of murder, and mandatorily sentenced to life without parole.<sup>27</sup> One night, after smoking marijuana and drinking with a friend and a neighbor, Miller tried to steal money from the neighbor's wallet after he passed out.<sup>28</sup> The neighbor woke up and an altercation ensued.<sup>29</sup> In the end, Miller hit the neighbor repeatedly with a baseball bat.<sup>30</sup> Miller then covered the neighbor with a sheet, said, "I am God, I've come to take your life," and then hit him one more time.<sup>31</sup> Miller and his friend eventually set fire to the trailer to destroy any evidence of the crime; the neighbor died from smoke inhalation.<sup>32</sup> Following a mandatory sentence to life in prison without parole, both Miller and Jackson argued their sentences violated the Eighth Amendment of the Constitution based on the reasoning in *Roper v. Simmons*<sup>33</sup> and *Graham v. Florida*.<sup>34</sup>

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*Rhetoric and Reality Post Miller v. Alabama*, 4 CAL. L. REV. CIRCUIT 92, 97 (2013).

<sup>22</sup> 132 S. Ct. 2455 (2012).

<sup>23</sup> *Miller*, 132 S. Ct. at 2461-63.

<sup>24</sup> *Id.* at 2461.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2462-63.

<sup>28</sup> *Miller*, 132 S. Ct. at 2462.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 543 U.S. 551 (2005) (holding the death penalty for anyone under the age of 18 years old violates the Eighth Amendment).

<sup>34</sup> 560 U.S. 48 (2011) (holding juvenile life in prison without parole for a non-homicide offense is unconstitutional); *Miller*, 132 S. Ct. at 2461, 2463.

The Court looked at the Eighth Amendment, which states, “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>35</sup> In its interpretation the Court explained that the “prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’”<sup>36</sup> The Court explained that a punishment must be proportional to the defendant and the crime because “proportionality is central to the Eighth Amendment.”<sup>37</sup> Further, proportionality is examined by “evolving standards of decency that mark the progress of a maturing society.”<sup>38</sup>

Alabama and Arkansas opposed the imposition of individualized sentencing for juveniles facing life without parole.<sup>39</sup> First, the States argued the new rule established by the majority conflicted with Eighth Amendment case precedent.<sup>40</sup> In *Harmelin v. Michigan*,<sup>41</sup> the Court had upheld a mandatory life without parole sentence. The Court explained “that a sentence which is not otherwise cruel and unusual” does not “become so simply because it is ‘mandatory.’”<sup>42</sup> The States argued prohibiting mandatory life in prison without parole overrules *Harmelin*.<sup>43</sup> However, *Harmelin* itself did not involve a juvenile nor did the opinion claim to apply to juvenile offenders.<sup>44</sup> It is well established that appropriate sentences for adults may be unconstitutional for juveniles.<sup>45</sup> Therefore, the ruling in *Miller* did not overrule *Harmelin*.<sup>46</sup>

Justice Kagan, who wrote the majority opinion, wove two strings of precedent together in order to conclude mandatory life without parole was unconstitutional.<sup>47</sup> Specifically, the Court considered *Roper* and *Graham*, which both categorically banned a pun-

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<sup>35</sup> U.S. CONST. amend. VIII; *Miller*, 132 S. Ct. at 2463.

<sup>36</sup> *Miller*, 132 S. Ct. at 2463 (quoting *Roper*, 125 S. Ct. at 1190).

<sup>37</sup> *Id.* (quoting *Graham*, 130 S. Ct. at 2021).

<sup>38</sup> *Id.* (quoting *Estelle v. Gamble*, 429 S. Ct. 285, 290 (1976)).

<sup>39</sup> *Id.* at 2469-70.

<sup>40</sup> *Id.* at 2470.

<sup>41</sup> 501 U.S. 959 (1991).

<sup>42</sup> *Miller*, 132 S. Ct. at 2470 (quoting *Harmelin*, 501 U.S. at 995).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (explaining *Roper* prohibits the death penalty for juveniles and *Graham* prohibits life without parole for non-homicide offenses for juveniles).

<sup>46</sup> *Id.*

<sup>47</sup> Tchoukleva, *supra* note 21, at 96.

ishment for juveniles, and *Woodson v. North Carolina*<sup>48</sup> and *Lockett v. Ohio*,<sup>49</sup> which held a defendant's characteristics must be considered before the death penalty can be imposed.<sup>50</sup>

The Court relied heavily on its reasoning in *Roper* and *Graham*, in which it explained that juveniles are different from adults for sentencing purposes.<sup>51</sup> Juveniles tend to be more immature, reckless, irresponsible, and vulnerable to peer pressure than adults.<sup>52</sup> They also have little control over their surroundings and do not have the capacity to extricate themselves from dangerous situations.<sup>53</sup> The Court stated that these traits found in juveniles "diminish the penological justifications for imposing the harshest sentences on juvenile offenders."<sup>54</sup> Juveniles have the best chance of rehabilitation; however, the penological justifications for rehabilitation are not served by a sentence of life without parole.<sup>55</sup> The differences between juveniles and adults make them "less deserving of the most severe punishments."<sup>56</sup>

Even though the Court in *Graham* limited its holding to non-homicide offenders, juvenile traits that lead to crime are not crime-specific.<sup>57</sup> In fact, juvenile traits are just as relevant in a robbery that results in felony murder as they are in a regular robbery.<sup>58</sup> The traits that distinguish juveniles from adults are universal to all juvenile offenders for all crime categories.<sup>59</sup> Even more, traits attributed to youth weaken the justifications for punishment, which in turn may cause a sentence of life without parole for a juvenile to be disproportionate to his or her crime and status.<sup>60</sup>

The Court in *Miller* explained that removing age as a factor

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<sup>48</sup> 428 U.S. 280 (1976).

<sup>49</sup> 438 U.S. 586 (1978).

<sup>50</sup> Tchoukleva, *supra* note 21, at 96.

<sup>51</sup> *Miller*, 132 S. Ct. at 2464.

<sup>52</sup> *Id.*; Mariko K. Shitama, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 836 (2013).

<sup>53</sup> *Miller*, 132 S. Ct. at 2464; Shitama, *supra* note 52, at 836.

<sup>54</sup> *Miller*, 132 S. Ct. at 2465 (explaining that juvenile life without parole does not satisfy the theories of retribution, deterrence, incapacitation, or rehabilitation).

<sup>55</sup> *Id.* at 2464-65.

<sup>56</sup> *Id.* at 2464 (quoting *Graham*, 560 U.S. at 68).

<sup>57</sup> *Id.* at 2465.

<sup>58</sup> *Id.*

<sup>59</sup> Ochs, *supra* note 20, at 1083.

<sup>60</sup> *Miller*, 132 S. Ct. at 2465-66.

from such severe sentencing procedures “poses too great a risk [a] disproportionate punishment” will be imposed.<sup>61</sup> Age is an important feature in any Eighth Amendment analysis, especially when considering the proportionality of a sentence.<sup>62</sup> It is well established that juveniles are less culpable than adults, and the age of a juvenile offender can play a pivotal role in an Eighth Amendment proportionality analysis.<sup>63</sup>

Next, Alabama and Arkansas argued a mandatory sentencing scheme was constitutional because there were many states with similar mandatory schemes in place.<sup>64</sup> At the time, there were 29 jurisdictions that had mandatory life without parole schemes for juveniles.<sup>65</sup> When considering categorical bars, the Court does consider whether there is a “‘national consensus’ against a sentence for a particular class of offenders.”<sup>66</sup> However, the Court distinguished the *Miller* case from this line of precedent,<sup>67</sup> stating,

[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.<sup>68</sup>

In fact, in *Graham*, the Court barred juvenile life in prison without parole for non-homicide cases, despite the fact that 39 jurisdictions allowed for it.<sup>69</sup> Also, in several death penalty cases, the Court deemed the death penalty unconstitutional for certain classes of people, despite the fact that only a minority of states had chosen to enact similar statutes.<sup>70</sup> Therefore, a “national consensus” does not pre-

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<sup>61</sup> *Id.* at 2469.

<sup>62</sup> *Id.* at 2466 (quoting *Graham*, 560 U.S. at 77).

<sup>63</sup> *Id.* (discussing *Graham*, 560 U.S. at 90 (Roberts, C.J., concurring in the judgment)); see *supra* text accompanying notes 51-60.

<sup>64</sup> *Miller*, 132 S. Ct. at 2470.

<sup>65</sup> *Id.* at 2471.

<sup>66</sup> *Id.* at 2470.

<sup>67</sup> *Id.* at 2471.

<sup>68</sup> *Id.*

<sup>69</sup> *Miller*, 132 S. Ct. at 2471.

<sup>70</sup> *Id.* at 2472. In *Thompson v. Oklahoma*, the Court vacated a death penalty sentence for a 15 year old in its plurality opinion, even though only 18 states had a minimum age requirement for the death penalty, all of which had a minimum of 16 years old. 487 U.S. 815, 819,



clude the Court's holding that mandatory life in prison schemes for juveniles are unconstitutional.<sup>71</sup>

Additionally, mandatory death penalty sentences are unconstitutional because they exclude individual characteristics from being considered.<sup>72</sup> By assessing the mitigating factors, only the most culpable will receive the death penalty.<sup>73</sup> Mandatory life without parole for juveniles excludes a sentencing body from considering mitigating factors, such as age and other traits that accompany age.<sup>74</sup> The Court further explained, "[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered."<sup>75</sup> Mandatory schemes even ignore a juvenile's actual participation in the offense.<sup>76</sup> Even more, mandatory schemes ignore the possibility that a juvenile can be rehabilitated.<sup>77</sup> This is especially important because the "hallmark features" of childhood are transient.<sup>78</sup> Mandatory schemes inherently violate the basic principle set forth in *Graham* and *Roper*, "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."<sup>79</sup>

Ultimately, the Supreme Court held that mandatory life in prison without parole is unconstitutional for juveniles because it violates the Eighth Amendment's ban on "cruel and unusual punishment."<sup>80</sup> Notably, life in prison without parole for juveniles is still

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829, 838 (1988) (Stevens, J., plurality). In *Atkins v. Virginia*, the Court held the death penalty was unconstitutional for the mentally disabled, even though less than half of the states that allowed for the death penalty had a mentally disabled exception. 536 U.S. 304, 321, 342 (2002) (Stevens, J., opinion) (Rehnquist, C.J., dissenting). In *Roper*, the Court held the death penalty was unconstitutional for juveniles, even though only 18 out of the 38 states that allowed for the death penalty had a prohibition for minors. 543 U.S. at 578, 595 (2005) (Kennedy, J., opinion) (Stevens, J., concurring).

<sup>71</sup> *Miller*, 132 S. Ct. at 2472 n.11.

<sup>72</sup> *Id.* at 2467.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2468 (explaining a juvenile may have a dysfunctional home life that he or she cannot remove oneself from due to his or her age).

<sup>75</sup> *Id.* at 2467 (quoting *Eddings v. Oklahoma*, 102 S. Ct. 869, 877 (1982)).

<sup>76</sup> *Miller*, 132 S. Ct. at 2468.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2467. The "hallmark features" of age include, "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468.

<sup>79</sup> *Id.* at 2458.

<sup>80</sup> *Miller*, 132 S. Ct. at 2460.

constitutional<sup>81</sup> and can still be imposed; only now, sentencing bodies must consider factors that make juveniles different from adults.<sup>82</sup> Even though the sentence is still constitutional, the Court did specify that life without parole for juveniles should be uncommon.<sup>83</sup> This is due to the fact that it is difficult to distinguish a juvenile with a transient immaturity from one with an irreparable corruption.<sup>84</sup>

### III. THE RULE FOR RETROACTIVE APPLICATION

The legal principle for when to apply a new rule retroactively was established by a plurality decision in *Teague*.<sup>85</sup> In this plurality opinion, Justice O'Connor adopted Justice Harlan's theory on retroactivity from *Mackey v. United States*.<sup>86</sup> The rule for retroactivity was later adopted and expanded by subsequent cases, including *Penry v. Lynaugh*.<sup>87</sup>

The plurality in *Teague* stated that all new rules, either substantive or procedural, must be applied retroactively when a case is on direct review.<sup>88</sup> In contrast, new criminal procedure rules are gen-

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<sup>81</sup> *Id.* at 2469.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; Lyle Denniston, *Argument Preview: A New Look – Maybe – at Life Sentences for Youths*, SCOTUSBLOG (Oct. 9, 2015, 12:22 AM), <http://www.scotusblog.com/2015/10/a-new-look-maybe-at-life-sentences-for-youths/> [hereinafter Denniston, *Argument Preview*].

<sup>84</sup> *Miller*, 132 S. Ct. at 2469.

<sup>85</sup> *Teague*, 489 U.S. 288; Brief for Petitioner at 13, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Brief for Petitioner]. However, *Teague* was a federal collateral review case. *Montgomery*, 136 S. Ct. at 728.

<sup>86</sup> *Teague*, 489 U.S. at 310 (O'Connor, J., plurality); *Mackey v. United States*, 401 U.S. 667 (1971) (Harlan, J., opinion concurring in judgments in part and dissenting in part).

<sup>87</sup> 492 U.S. 302, 314 (1989) (abrogated on other grounds by *Atkins*, 536 U.S. 304 (2002) (extending *Teague* to capital sentencing cases)); Benjamin P. Cooper, *Truth in Sentencing: The Prospective and Retroactive Application of Simmons v. South Carolina*, 63 U. CHI. L. REV. 1573, 1588 (1996); See also *Sawyer v. Smith*, 497 U.S. 227 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Butler v. Mckellar*, 494 U.S. 407 (1990); Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 25 (2009).

<sup>88</sup> *Teague*, 489 U.S. at 303, 319 (O'Connor, J., plurality, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J. In a concurring opinion Stevens, J., joined by Blackmun, J. in part, agreed new rules should be applied retroactively on direct review). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301. A new rule has also been defined as "not dictated by precedent existing at the time the defendant's conviction became final." *Id.*

erally not applied retroactively on collateral review.<sup>89</sup> This general bar on collateral retroactivity is due to the fact that a case that follows the procedures and rules that are constitutional at the time of the decision will generally be found to be fundamentally fair.<sup>90</sup> The principle of finality is fundamental to the criminal justice system and applying constitutional rules retroactively undermines this principle.<sup>91</sup> However, the plurality clarified that “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.”<sup>92</sup>

There are two exceptions for when a new rule should be applied retroactively on collateral review: 1) “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’ ” and 2) “if it requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’ ”<sup>93</sup> The first exception has evolved to distinguish substantive rules from procedural rules.<sup>94</sup> In fact, in *Montgomery*, the

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<sup>89</sup> *Id.* at 303, 319, 320 (O’Connor, J., plurality, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J. In a concurring opinion, Stevens, J., joined by Blackmun, J. in part, stated he was “persuaded that the Court should adopt Justice Harlan’s analysis of retroactivity for habeas corpus cases as well for cases still on direct review.”). While Justice Stevens agrees to adopt Justice Harlan’s views, he disagrees with the plurality’s interpretation to the fundamental fairness exception. *Id.* at 320 (Stevens, J., concurring). “[F]actual innocence is too capricious a factor by which to determine if a procedural change is sufficiently ‘bedrock’ or watershed’ to justify application of the fundamental fairness exception.” *Teague*, 489 U.S. at 322 (Stevens, J., concurring).

<sup>90</sup> *Id.* at 311 (O’Connor, J., plurality) (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring)).

<sup>91</sup> *Id.* at 309 (O’Connor, J., plurality). “No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.” *Id.* (quoting *Mackey*, 401 U.S. at 691 (Harlan, J., concurring)).

<sup>92</sup> *Id.* at 311 (O’Connor, J., plurality) (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring)) (emphasis omitted).

<sup>93</sup> *Teague*, 489 U.S. at 307, 319-20 (O’Connor, J., Rehnquist, C.J., Scalia, J., and Kennedy, J. In a concurring opinion, Stevens, J., joined by Blackmun, J. in part, agreed to adopt the retroactivity doctrine but rejected the interpretation of the second exception.); *See also Butler*, 494 U.S. at 415-16. Even though the Court in *Teague* described substantive rules as an exception to retroactive application, the Court has since characterized substantive new rules as “not subject to the bar.” *Montgomery*, 136 S. Ct. at 728 (quoting *Schriro*, 542 U.S. at 352 n.4).

<sup>94</sup> Moriearty, *supra* note 4, at 964. The federal government in its brief explained that procedure is how “a case is adjudicated” and substantive is “the possible outcomes of the case.”

Court even described the first exception as “substantive rules of constitutional law.”<sup>95</sup> New substantive rules are retroactively applied on collateral review because these rules “necessarily carry a significant risk that a defendant stands convicted of ‘an act that the law does not make criminal;’ or faces a punishment that the law cannot impose upon him.”<sup>96</sup>

There are several categories of substantive rules.<sup>97</sup> First, substantive rules can alter the conduct criminalized, including changing the elements of a statute.<sup>98</sup> Second, a substantive rule may “place[] a class of private conduct beyond the power of the State to proscribe.”<sup>99</sup> Third, a substantive rule prohibits a type of punishment for a group of defendants based on the crime or their status.<sup>100</sup>

The second exception only applies new rules retroactively when the new rule is a “watershed” rule of procedure that undermines the fundamental fairness of the proceeding.<sup>101</sup> This exception is limited to new procedures that seriously diminish the certainty of a conviction.<sup>102</sup> Procedural rules are generally not retroactive because procedural rules “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.”<sup>103</sup> Procedural rules regulate the manner of determining guilt or who is making the decision.<sup>104</sup> It is still unclear what rules would be classified as watershed for the purposes of this exception because the Court has never actually found a rule to be watershed.<sup>105</sup>

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Denniston, *Argument Preview*, *supra* note 83.

<sup>95</sup> *Montgomery*, 136 S. Ct. at 728.

<sup>96</sup> *Schriro*, 542 U.S. at 352.

<sup>97</sup> Moriearty, *supra* note 4, at 965. It is important to note that in *Montgomery*, the Supreme Court explained “[s]ubstantive rules include ‘rules forbidding criminal punishment of certain primary conduct’ as well as ‘rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.’ ” *Montgomery*, 136 S. Ct. at 728 (quoting *Penry*, 492 U.S. at 330).

<sup>98</sup> *Schriro*, 542 U.S. at 353-54.

<sup>99</sup> *Saffle*, 494 U.S. at 494.

<sup>100</sup> *Penry*, 492 U.S. at 330.

<sup>101</sup> *Schriro*, 542 U.S. at 352.

<sup>102</sup> *Butler*, 494 U.S. at 416 (quoting *Teague*, 489 U.S. at 312-13 (O’Connor, J., plurality)). “[W]e operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt . . . ” *Teague*, 489 U.S. at 313 (O’Connor, J., plurality).

<sup>103</sup> *Schriro*, 542 U.S. at 352.

<sup>104</sup> *Id.* at 353.

<sup>105</sup> Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of Miller v. Alabama under Teague v. Lane*, 18 CUNY L. REV. 21, 28 (2014).

#### IV. **MONTGOMERY HELD THE PROHIBITION ON MANDATORY JUVENILE LIFE WITHOUT PAROLE IS SUBSTANTIVE AND RETROACTIVE**

##### A. **MONTGOMERY'S PROCEDURAL HISTORY**

On November 13, 1963, Henry Montgomery, at age 17, committed murder.<sup>106</sup> He murdered a deputy sheriff in East Baton Rouge, Louisiana<sup>107</sup> and was sentenced to mandatory life in prison without parole following his murder conviction.<sup>108</sup> Montgomery's conviction became final on March 15, 1971, 44 years prior to *Miller*.<sup>109</sup> At the time of Montgomery's conviction, the courts did not consider age and other juvenile traits as a factor for sentencing.<sup>110</sup> Montgomery is 69 years old now and has been in prison since his sentencing.<sup>111</sup>

Following the Supreme Court's decision in *Miller*, Montgomery filed a Motion to Correct an Illegal Sentence, which the District Court denied.<sup>112</sup> The District Court applied *Teague* in order to determine if the new rule from *Miller* should be applied retroactively.<sup>113</sup> The District Court found that in order for a new rule to be applied on collateral review, the rule must fall within one of the exceptions es-

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<sup>106</sup> Brief of Respondent State of Louisiana at 11, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Brief of Respondent]; Wolf, *supra* note 10.

<sup>107</sup> Denniston, *Argument Preview*, *supra* note 83.

<sup>108</sup> Brief of Respondent, *supra* note 106, at 11. Montgomery originally received a death sentence, but it was overturned and he was sentenced to life without parole instead. Wolf, *supra* note 10.

<sup>109</sup> *Miller*, 132 S. Ct. at 2455; Brief of Respondent, *supra* note 106, at 11. Montgomery's case became final when the Supreme Court of Louisiana refused to change his sentence. Denniston, *Argument Preview*, *supra* note 83. In fact, a case is considered "final after the first round of lower court review." *Id.*

<sup>110</sup> Brief for Petitioner, *supra* note 85, at 12.

<sup>111</sup> Wolf, *supra* note 10.

<sup>112</sup> Petition for Writ of Certiorari at App. 1, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter Petition for Writ].

<sup>113</sup> *Id.* The State Court chose to apply *Teague*; however the case *Danforth v. Minnesota* held that states do not have to apply *Teague*. 552 U.S. 264 (2008); Jason M. Zarrow & William H. Milliken, *Retroactivity, The Due Process Clause, and the Federal Question in Montgomery v. Louisiana*, 68 STAN. L. REV. ONLINE 42, 43 (2015). In fact, *Danforth* left it unsettled whether states must use the exceptions set forth in *Teague* in a retroactivity analysis. Zarrow, *supra* note 113, at 43.

established in *Teague*.<sup>114</sup> The District Court explained that *Miller* did not fall into either *Teague* exception because it was neither a categorical bar on a sentence nor a “watershed rule.”<sup>115</sup> The court described the first *Teague* exception as new rules that remove a specific punishment from the available constitutional punishments for a class of people.<sup>116</sup> The court explained that *Miller* was not a categorical bar on life in prison without parole; it only prohibited a mandatory sentencing scheme.<sup>117</sup> Therefore, the *Miller* holding did not fall under the first *Teague* exception.<sup>118</sup> The court then defined the second exception as “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”<sup>119</sup> The court did not explain why the holding in *Miller* is not a “watershed” procedural rule.<sup>120</sup> The court only stated *Miller* did not qualify under the second *Teague* exception.<sup>121</sup>

Montgomery then applied to the Louisiana Supreme Court for a supervisory and remedial writ, which the court granted.<sup>122</sup> The Louisiana Supreme Court affirmed the District Court’s denial of the Motion to Correct and Illegal Sentence.<sup>123</sup> Finally, the United States Supreme Court granted certiorari on March 23, 2015.<sup>124</sup>

## B. THE SUPREME COURT’S DECISION

In *Montgomery*, the Supreme Court was asked to determine an issue splitting the state courts: whether *Miller* should be applied retroactively to juvenile homicide offenders who were sentenced before *Miller* was decided.<sup>125</sup> The majority started the opinion with a description of the procedural history in *Montgomery* and then dis-

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<sup>114</sup> Petition for Writ, *supra* note 112, at App. 1.

<sup>115</sup> *Id.* at App. 2.

<sup>116</sup> *Id.* at App. 1.

<sup>117</sup> *Id.* at App. 2.

<sup>118</sup> *Id.*

<sup>119</sup> Petition for Writ, *supra* note 112, at App. 2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *State v. Montgomery*, 141 So. 3d 264, 264 (L.A. 2014), *cert. granted*, 135 S. Ct. 1546 (Mem) (Mar. 23, 2015) (No. 14-280).

<sup>123</sup> *Id.*

<sup>124</sup> *Montgomery*, 135 S. Ct. at 1546.

<sup>125</sup> *Montgomery*, 136 S. Ct. at 725.

cussed the jurisdictional issue before the Court.<sup>126</sup> During the jurisdictional analysis, the Court briefly described the retroactivity law set forth in *Teague*.<sup>127</sup>

As discussed earlier, the Court in *Montgomery* explained that there are two instances when a new rule will not be subject to the bar on retroactivity: when a new rule is substantive and when a new rule is a watershed procedural rule.<sup>128</sup> Here, the Court only listed two of the categories for substantive exceptions in its analysis.<sup>129</sup> Specifically, the Court referred to “rules forbidding criminal punishment of certain primary conduct,” and “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.”<sup>130</sup> The Court stated that case precedent explained the Constitution requires new substantive rules to be retroactive because substantive new rules introduce “categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.”<sup>131</sup> Therefore, a state cannot enforce a sentence that is deemed unconstitutional.<sup>132</sup> The Court further clarified that “the use of flawless sentencing procedures” cannot “immunize[] the defendant from the sentence imposed.”<sup>133</sup> A sentence that contradicts a substantive rule is void and a court cannot leave a sentence in place that contradicts a substantive rule, regardless of when the sentence became final.<sup>134</sup> Indeed, the Court further emphasized this point by stating, “[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution’s

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<sup>126</sup> *Id.* at 725-32. “[T]he jurisdictional question hinged on whether the Court’s retroactivity precedents are a constitutional mandate.” *Miller v. Alabama rule barring mandatory life imprisonment without parole for juvenile homicide offenders applied retroactively in state cases on collateral review—Supreme Court Decision*, 33 No. 4 WEST’S CRIMINAL LAW NEWS NL 63 (2016).

<sup>127</sup> *Montgomery*, 136 S. Ct. at 728-30.

<sup>128</sup> *Id.* at 728; *see supra* text accompanying notes 85-105.

<sup>129</sup> *Montgomery*, 136 S. Ct. at 728.

<sup>130</sup> *Id.* (quoting *Penry*, 492 U.S. at 302, 330).

<sup>131</sup> *Id.* at 729.

<sup>132</sup> *Id.* at 729-30.

<sup>133</sup> *Id.* at 730.

<sup>134</sup> *Montgomery*, 136 S. Ct. at 731.

substantive guarantees.”<sup>135</sup> Additionally, applying a substantive new rule retroactively does not undermine the principle of finality because a state cannot preserve a sentence that is unconstitutional.<sup>136</sup>

Next, the Court went on to determine if the rule from *Miller* was substantive and, therefore, retroactive.<sup>137</sup> The Court reiterated that *Miller’s* decision was founded on precedent that held particular punishments disproportionate for juveniles, specifically citing *Roper* and *Graham*.<sup>138</sup> The Court explained that, “[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant’s sentence.”<sup>139</sup> The Court emphasized the established principle that children are different with respect to sentencing and the penological justifications for sentencing do not justify juvenile life without parole.<sup>140</sup>

Even though there may be a “rare juvenile offender who exhibits such irretrievable depravity,” the *Montgomery* Court repeated the notion that juvenile life without parole should be uncommon.<sup>141</sup> Due to this reasoning the Court in *Montgomery* viewed the *Miller* holding as more than a simple requirement to hear juvenile mitigating factors before sentencing.<sup>142</sup>

The Court then explained further that simply conducting an individualized sentencing hearing would not make a sentence constitutional if the crime was a result of transient immaturity in the juvenile.<sup>143</sup> In fact, *Miller* found life without parole an excessive punishment for all juveniles, except for the rare juvenile whose crime indicated irreparable corruption.<sup>144</sup> In view of this interpretation, the Court found *Miller* “rendered life without parole an unconstitutional penalty for ‘a class of defendants because of their status’—that is, ju-

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 732.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (explaining *Roper* prohibited the death penalty for juveniles and *Graham* prohibited juvenile life without parole for non-homicide offenses).

<sup>139</sup> *Montgomery*, 136 S. Ct. at 732-33.

<sup>140</sup> *Id.* at 733.

<sup>141</sup> *Id.* at 733-34.

<sup>142</sup> *Id.* at 734.

<sup>143</sup> *Id.* (“Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’”).

<sup>144</sup> *Montgomery*, 136 S. Ct. at 734.



venile offenders whose crimes reflect the transient immaturity of youth.”<sup>145</sup> Under this classification, the *Miller* holding fell squarely within the *Penry* exception for substantive rules, which mandates retroactivity when a type of punishment is prohibited for a group of defendants based on their crime or status.<sup>146</sup> The Court clearly feared that mandatory life without parole posed too significant a risk that a juvenile would receive a sentence that could not be imposed on him or her.<sup>147</sup> In fact, the Court found the risk so significant as to find the “vast majority of juvenile offenders” received a sentence that cannot be imposed on them.<sup>148</sup>

The Court acknowledged the problematic quote from *Miller* that asserted the decision was not a categorical bar on life without parole for juveniles.<sup>149</sup> While *Miller* did not impose a categorical bar for all juveniles, the Court did find the decision barred life without parole for any juvenile whose crime did not reflect permanent incorrigibility.<sup>150</sup> Indeed, the Court interpreted *Miller* as drawing a line between juveniles who are irreparably corrupt and those who were experiencing transient immaturity.<sup>151</sup> Even though life without parole may be the proportionate sentence for those juveniles who are irreparably corrupt, it “does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.”<sup>152</sup>

Interestingly, the Court conceded that an individualized hearing to present juvenile age factors “has a procedural component” in response to the *Miller* Court specifically calling it a process.<sup>153</sup> However, a rule that has a procedural component in order to actualize a substantive guarantee is not the same as a procedural rule under *Teague*.<sup>154</sup> There are circumstances where a substantive rule requires

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 734; *Penry*, 492 U.S. at 330.

<sup>147</sup> *Montgomery*, 136 S. Ct. at 734.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* “Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process . . . .” *Miller*, 132 S. Ct. at 2471.

<sup>150</sup> *Montgomery*, 136 S. Ct. at 734.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* In *Miller*, the Court stated its holding was not a categorical bar, but “[i]nstead, it mandates only that a sentencer follow a certain process . . . .” *Miller*, 132 S. Ct. at 2471.

<sup>154</sup> *Montgomery*, 136 S. Ct. at 734-35.

a procedure in order for a defendant to prove he or she cannot receive a particular sentence.<sup>155</sup> For instance, “when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class.”<sup>156</sup> A procedural requirement necessary to facilitate a substantive rule does not turn a substantive guarantee into a purely procedural rule.<sup>157</sup> Here, an individualized sentencing hearing does not make *Miller* procedural, but instead gives effect to the substantive guarantee against a disproportionate sentence, particularly life without parole for juveniles experiencing transient immaturity.<sup>158</sup>

The Court therefore held that the *Miller* holding is “a substantive rule of constitutional law.”<sup>159</sup> The Court was additionally persuaded to hold *Miller* is a substantive rule considering the fact that there is a grave risk that juveniles are unconstitutionally being held because the vast majority of juvenile homicide offenders received a sentence that was disproportionate to their crime and status.<sup>160</sup>

Next, the Court responded to the justifiable concern that applying *Miller* retroactively would be a burden on the states.<sup>161</sup> The Court clarified that applying *Miller* retroactively does not require resentencing every juvenile offender who has been sentenced to life without parole.<sup>162</sup> In fact, “[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”<sup>163</sup> Allowing juvenile homicide offenders to be eligible for parole protects against a disproportionate sentence because those juveniles whose crimes were an indication of transient immaturity, and who have matured over time, will have the chance of freedom.<sup>164</sup> Even more,

[e]xtending parole eligibility to juvenile offenders  
does not impose an onerous burden on the States, nor

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<sup>155</sup> *Id.* at 735.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Montgomery*, 136 S. Ct. at 736.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Montgomery*, 136 S. Ct. at 736.

does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.<sup>165</sup>

In the end, the Court explained that prisoners must be granted the opportunity to show their crimes were caused by transient immaturity and not irreparable corruption.<sup>166</sup> While the Court did discuss Montgomery's mitigating factors that may show his crime was caused by transient immaturity, the Court did not make a final decision as to whether Montgomery should be released.<sup>167</sup> However, it is clear that if a juvenile offender's crime were a result of transient immaturity then he or she must have the chance of leaving prison one day.<sup>168</sup>

### C. JUSTICE SCALIA'S DISSENT

Justice Scalia<sup>169</sup> wrote a dissenting opinion in *Montgomery* and was joined by Justice Thomas and Justice Alito.<sup>170</sup> The derisive opinion makes several accusations, among them, that the majority rewrote *Miller*, essentially tried to ban life without parole for juveniles, and made a "Godfather" like offer to the states to make juvenile homicide offenders parole eligible.<sup>171</sup>

As noted earlier, the majority described substantive rules as "categorical constitutional guarantees" that make certain punishments

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 736-37.

<sup>169</sup> Justice Scalia passed away while this comment was being written. Bridget Mire, *Locals remember U.S. Supreme Court Justice Antonin Scalia*, DAILYCOMET.COM (Feb. 21, 2016), <http://www.dailycomet.com/article/20160221/articles/160229966>. This dissent in *Montgomery* is one of Justice Scalia's last opinions published. *Id.*

<sup>170</sup> *Montgomery*, 136 S. Ct. at 737 (Scalia, J., dissenting). Justice Thomas also wrote a dissenting opinion in this case, but it will not be discussed in this comment. *Id.* at 744.

<sup>171</sup> *Id.* at 737, 743-44 (Scalia, J., dissenting). "Justice Scalia wrote a scathing dissent." Andrew Cohen, *The Supreme Court May Have Just Granted Thousands of Prisoners a Chance of Freedom: The Montgomery Ruling Says Juveniles Sentenced to Life Without Parole Must Get a Shot at a New Sentence or Parole*, THE MARSHALL PROJECT (Jan. 25, 2016), <https://www.themarshallproject.org/2016/01/25/the-supreme-court-may-have-just-granted-thousands-of-prisoners-a-chance-of-freedom#.RwvMH6lXx>.

and laws “altogether beyond the State’s power to impose.”<sup>172</sup> Justice Scalia declared that *Miller* “simply does not decree” that which the majority claimed *Teague* required in order for a rule to be retroactive.<sup>173</sup> Justice Scalia then boldly accused the majority of rewriting *Miller* to overcome this obstacle.<sup>174</sup>

Justice Scalia strongly opposed the majority’s finding that *Miller* rendered a particular punishment unconstitutional for a certain class of defendants.<sup>175</sup> In his argument, Justice Scalia relied on a specific quote from *Miller*, which stated, “[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”<sup>176</sup> Justice Scalia found the majority’s decision in *Montgomery* to be a clear contradiction to this explicit statement in *Miller*.<sup>177</sup>

Justice Scalia also took exception to the majority’s reliance on quotes from *Miller*, which stated juvenile life without parole should be uncommon and mandatory sentencing schemes posed a significant risk that juveniles will receive a disproportionate sentence.<sup>178</sup> In fact, Justice Scalia alleged that even if a sentence is “inappropriate and disproportionate for certain juvenile[s]” it does not mean a sentence is “unconstitutionally void.”<sup>179</sup> The support the majority relied on to reach its holding actually only shows why the procedure mandated in *Miller* is desirable.<sup>180</sup> Despite the majority’s reliance on dicta from *Miller*, Justice Scalia could not move past the fact that *Miller* affirmatively stated the holding was not a categorical bar, but a process.<sup>181</sup> For a second time, Justice Scalia accused the majority of rewriting

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<sup>172</sup> *Montgomery*, 136 S. Ct. at 729; see *supra* text accompanying note 131.

<sup>173</sup> *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (quoting *Miller*, 132, S. Ct. at 2471).

<sup>177</sup> *Id.*

<sup>178</sup> *Montgomery*, 136 S. Ct. at 743.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (explaining a discretionary sentencing procedure is desirable to deter the imposition of a life sentence for some juvenile offenders).

<sup>181</sup> *Id.* at 743.

*Miller*.<sup>182</sup> Specifically stating, “the majority is not applying *Miller*, but rewriting it.”<sup>183</sup>

Interestingly, Justice Scalia noted in a footnote that he agreed with the majority’s first description of the holding from *Miller*, specifically that a juvenile offender could not be sentenced to life without parole absent a hearing on the juvenile age factors.<sup>184</sup> In fact, the majority initially described the *Miller* holding as “a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile’s special circumstances . . . .”<sup>185</sup> Justice Scalia accused the majority of “softening the reader with 3 pages of obfuscating analysis” in order to change its original interpretation of the *Miller* holding.<sup>186</sup>

Justice Scalia believed this reinterpretation of the *Miller* holding has consequences.<sup>187</sup> Particularly, if states are categorically barred from sentencing juveniles who are not permanently incorrigible to life in prison, then the procedure required by *Miller* may not be satisfied even when in place.<sup>188</sup> The majority asserted in its opinion that the presence of a discretionary hearing does not allow a juvenile “whose crime reflects transient immaturity” to receive a life without parole sentence because this would still violate the Eighth Amendment.<sup>189</sup> Justice Scalia explained that “[i]t remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact ‘reflect permanent incorrigibility.’”<sup>190</sup> Now judges are left to answer the “knotty ‘legal’ question” of whether a prisoner was incorrigible decades ago at the original time of his or her sentencing.<sup>191</sup> Justice Scalia pointed out that *Miller* required an inquiry into whether the juvenile was incorrigible at the time of sentencing, “not whether he has proven corrigible and so can safely be paroled today.”<sup>192</sup> In fact, Justice Scalia went on to call this imposition on the

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<sup>182</sup> *Id.*

<sup>183</sup> *Montgomery*, 136 S. Ct. at 743.

<sup>184</sup> *Id.* at 743 n.1.

<sup>185</sup> *Id.* at 725 (Kennedy, J., opinion).

<sup>186</sup> *Id.* at 743 n.1 (Scalia, J., dissenting).

<sup>187</sup> *Id.* at 743.

<sup>188</sup> *Montgomery*, 136 S. Ct. at 743.

<sup>189</sup> *Id.* at 735.

<sup>190</sup> *Id.* at 743-44.

<sup>191</sup> *Id.* at 744 (Scalia, J., dissenting).

<sup>192</sup> *Id.*

states silly and impossible.<sup>193</sup>

Despite this new incorrigibility standard the majority imposed here, Justice Scalia stated, “[t]he majority does not seriously expect state and federal collateral-review tribunals to engage in this silliness, probing the evidence of ‘incorrigibility’ that existed decades ago when the defendants were sentenced.”<sup>194</sup> As mentioned earlier, the majority suggested states “remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”<sup>195</sup> Justice Scalia strongly questioned this “not-so-subtle invitation” to convert mandatory juvenile life without parole sentences to parole eligible sentences.<sup>196</sup> In fact, Justice Scalia compared the majority to the “Godfather” and called this ‘invitation’ to the state legislatures, which would allow state courts to avoid the serious burden of resentencing, an “offer they can’t refuse.”<sup>197</sup> This ‘invitation’ by the majority actually led the dissent to believe the entire decision was an attempt to eliminate juvenile life without parole. In fact, Justice Scalia asserts, “[t]his whole exercise, this whole distortion of *Miller*, is just a devious way of eliminating life without parole for juvenile offenders.”<sup>198</sup>

Actually, the dissenting opinion alleged the only reason the majority did not affirmatively ban juvenile life without parole in *Montgomery* is to avoid embarrassment.<sup>199</sup> Justice Scalia explained that, in *Roper*, the Court justified banning the death penalty for juveniles because life without parole was an available and severe punishment.<sup>200</sup> Justice Scalia speculated that the only reason the Court did not affirmatively ban juvenile life without parole is because Justice Kennedy, who wrote both the opinions in *Roper* and *Montgomery*, would have to contradict the statement that life without parole is a

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<sup>193</sup> *Montgomery*, 136 S. Ct. at 744.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 736 (Kennedy, J.); see *supra* text accompanying note 163.

<sup>196</sup> *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

<sup>197</sup> *Id.* at 744.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* (“The Court might have done that [eliminate juvenile life without parole] expressly (as we know, the Court can decree *anything*), but that would have been something of an embarrassment.”).

<sup>200</sup> *Id.* “[I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” *Roper*, 543 U.S. at 572.

severe enough alternative to the death penalty.<sup>201</sup> Due to this, the Court did not affirmatively prohibit the sentence; instead Justice Scalia alleged the Court “merely makes imposition of that severe sanction a practical impossibility.”<sup>202</sup>

## V. *MONTOMERY* REACHED THE CORRECT HOLDING FOR THE WRONG REASONS

Broadly, *Miller* did create a new procedure.<sup>203</sup> In fact, the majority agreed there was a procedural element, but still found the holding in *Miller* to be substantive.<sup>204</sup> While a ‘process’ for determining a sentence would be most easily construed as procedural under a *Teague* analysis, *Miller* did not slightly alter the existing process but initiated an entirely new substantive standard.<sup>205</sup> In fact, *Miller* held that state governments could not constitutionally impose a specific punishment.<sup>206</sup> This substantive change caused many states to enact new legislation in order to prevent unjust sentencing among juveniles.<sup>207</sup> By prohibiting mandatory life in prison without parole, many states were forced to change their sentencing laws; they did not simply have to change the process for sentencing a juvenile.<sup>208</sup>

The majority correctly viewed the individualized sentencing hearing as a process necessary to actualize a substantive right.<sup>209</sup> Indeed, the procedural element in *Miller* that requires a sentencing hearing is a direct “result of a substantive change in the law that pro-

<sup>201</sup> *Montgomery*, 136 S. Ct. at 744.

<sup>202</sup> *Id.*

<sup>203</sup> *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013).

<sup>204</sup> *Montgomery*, 136 S. Ct. at 734, 736.

<sup>205</sup> Eric Schab, *Departing from Teague: Miller v. Alabama’s Invitation to the State to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 222-23 (2014).

<sup>206</sup> Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. Law News Now (Aug. 8, 2012, 1:30 PM CDT), [http://www.abajournal.com/news/article/chemerinsky\\_juvenile\\_life-without-parole\\_case\\_means\\_courts\\_must\\_look\\_at\\_sen/](http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/).

<sup>207</sup> Schab, *supra* note 205, at 222-23.

<sup>208</sup> Buskey & Korobkin, *supra* note 105, at 33. When the Supreme Court prohibited mandatory life sentences for juveniles, it required states to “alter and expand the range of permissible punishments” for juvenile homicide offenders. *Id.* at 34 (emphasis omitted). Further, *Miller* mandated states “offer juveniles at least one sentence carrying the possibility of release, irrespective of ‘the fairness of the procedures used to implement them,’ the decision is firmly in the ‘substantive sphere’ as defined by the Supreme Court.” *Id.* at 33.

<sup>209</sup> *Montgomery*, 136 S. Ct. at 734-35.

hibits mandatory life-without-parole sentencing.”<sup>210</sup> Ultimately, *Miller* altered the range of available sentencing options for juvenile homicide offenders, and any change, whether it be expanding or narrowing, to the criminal punishment options is certainly “a classic function of substantive law.”<sup>211</sup>

Actually, a procedure is the only way to ensure juveniles are not facing a disproportionate sentence when their crimes stemmed from transient immaturity.<sup>212</sup> The majority’s decision to extend *Miller* retroactively was the correct and fair decision. Refusal to extend *Miller* retroactively to all juvenile offenders serving a mandatory life without parole sentence would be unjust.<sup>213</sup> For the juvenile whose crime was a result of transient immaturity, “[i]t . . . would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.”<sup>214</sup>

As noted earlier, the dissent accused the majority of trying to effectively ban juvenile life without parole.<sup>215</sup> In fact, Justice Scalia proclaimed the entire decision “is just a devious way of eliminating life without parole for juvenile offenders.”<sup>216</sup> While the majority made the correct decision in the end, Justice Scalia is also correct in his interpretation of the majority’s motives. The majority was trying to make life without parole for juveniles practically impossible, if not eliminate the sentencing option in its entirety.

As explained earlier, the exceptions to the retroactive bar include when a new rule prohibits a specific type of punishment for a specific class of people.<sup>217</sup> The majority found the *Miller* rule to fall within this exception, even though it admittedly did not bar juvenile life without parole for all juveniles.<sup>218</sup> The Court, however, still found the *Miller* rule to qualify as a *Teague* exception because “*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibil-

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<sup>210</sup> *Ragland*, 836 N.W.2d at 115.

<sup>211</sup> Buskey & Korobkin, *supra* note 105, at 33.

<sup>212</sup> *Montgomery*, 136 S. Ct. at 735.

<sup>213</sup> Chemerinsky, *supra* note 206.

<sup>214</sup> *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014); Chemerinsky, *supra* note 206.

<sup>215</sup> *Montgomery*, 136 S. Ct. at 744, (Scalia, J., dissenting); *see supra* text accompanying notes 171, 198.

<sup>216</sup> *Montgomery*, 136 S. Ct. at 744, (Scalia, J., dissenting).

<sup>217</sup> *See supra* text accompanying note 100.

<sup>218</sup> *Montgomery*, 136 S. Ct. at 734.



ity.”<sup>219</sup> This classification by the majority is not in line with the actual holding in *Miller*.

In fact, Justice Scalia asserted several times that the majority rewrote *Miller* in order to reach its ultimate conclusion, and that is indeed what the majority did.<sup>220</sup> As Justice Scalia pointed out, the majority originally described the *Miller* holding as a requirement that sentencing bodies consider the circumstances of youth.<sup>221</sup> Then, only a few pages after the Court initially explained the *Miller* holding, the majority stated, “*Miller* determined that sentencing a child to life without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption.’”<sup>222</sup> This new description of the *Miller* holding is utilized by the majority to fit the holding nicely into a retroactive application exception.<sup>223</sup> The transformed holding immediately precedes the majority’s explanation that *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.”<sup>224</sup> It does appear that the majority was concerned with the outcome of the case to the point that it essentially made *Miller* fit into a *Teague* exception, even if it meant a new interpretation of the *Miller* holding.

However, the majority could have reached its conclusion that *Miller* is retroactive without changing the holding in *Miller*. *Miller* held that a certain type of punishment, mandatory life without parole, could not be imposed on a certain class of people, juveniles.<sup>225</sup> The Court should have found *Miller* retroactive based on ‘mandatory life without parole’ as the prohibited category of punishment, instead of finding it retroactive based on juveniles “whose crimes reflect permanent incorrigibility” as a class of defendants.<sup>226</sup>

Many state courts held *Miller* was retroactive, and even did so under the same retroactive exception the Court used, without reinter-

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (Scalia, J., dissenting). For instance, Justice Scalia states “the majority simply proceeds to rewrite *Miller*” and “[i]t is plain as day that the majority is not applying *Miller*, but rewriting it.” *Id.*

<sup>221</sup> *Id.* at 743 n.1 (Scalia, J., dissenting).

<sup>222</sup> *Montgomery*, 136 S. Ct. at 734.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Miller*, 132 S. Ct. at 2460.

<sup>226</sup> *Montgomery*, 136 S. Ct. at 734.

preting *Miller*.<sup>227</sup> Several state courts found the category of punishment to be *mandatory* life without parole.<sup>228</sup> For instance, in Massachusetts the court found, “[t]he rule explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder.”<sup>229</sup> Also, in Mississippi, the court held “*Miller* explicitly prohibits states from imposing a *mandatory* sentence of life without parole on juveniles.”<sup>230</sup>

Clearly, the Court could have found *Miller* a substantive rule within a *Teague* exception without having to reinterpret *Miller*.<sup>231</sup> Instead of holding *Miller* retroactive based on the original interpretation of the holding, the Court rewrote *Miller*.<sup>232</sup> It is clear that the majority went

beyond the actual scope of the *Miller* ruling, by strengthening the chance that a newly convicted juvenile will be able to show, at the time of sentencing, that he is not beyond rehabilitation to become a law-abiding individual. Life without parole, the Court declared, is always unconstitutional for a juvenile unless he or she is found to be ‘irreparably corrupt’ or ‘permanently incorrigible.’<sup>233</sup>

*Miller* originally held Courts must consider a juvenile’s youth status before sentencing, which is significantly different from the new standard requiring sentencing bodies to determine the incorrigibility of a juvenile.<sup>234</sup> By rewriting the holding, the Court imposed a new

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<sup>227</sup> *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013); *Ragland*, 836 N.W.2d at 115.

<sup>228</sup> *Buskey & Korobkin*, *supra* note 105, at 30.

<sup>229</sup> *Diatchenko*, 1 N.E.3d at 281.

<sup>230</sup> *Jones*, 122 So. 3d at 702.

<sup>231</sup> *See e.g.*, *Davis*, 6 N.E.3d at 722; *Diatchenko*, 1 N.E.3d at 281; *Jones*, 122 So. 3d at 702; *Ragland*, 836 N.W.2d at 115.

<sup>232</sup> *Montgomery*, 136 S. Ct. at 734, 743-44 (Scalia, J., dissenting).

<sup>233</sup> Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBLOG (Jan. 25, 2016, 12:26 PM), <http://www.scotusblog.com/2016/01/opinion-analysis-further-limit-on-life-sentences-for-youthful-criminals/> [hereinafter Denniston, *Opinion Analysis*].

<sup>234</sup> *Id.*

difficult incorrigibility standard on sentencing bodies. This reinterpretation of *Miller*, despite the Court's ability to apply the decision retroactively without rewriting the holding, is intellectually dishonest.

As the dissent pointed out, *Miller* intended for a sentencing body to determine a juvenile's incorrigibility at the time of sentencing.<sup>235</sup> Now, a prisoner will need to show he or she is corrigible and will not be a threat to the community if paroled.<sup>236</sup>

The process of determining a prisoner's incorrigibility as a juvenile, and in some instances these cases will date back decades, may prove impossible.<sup>237</sup> In fact, Louisiana said resentencing is impractical because everyone from the first trial is now dead.<sup>238</sup> Further, juvenile traits were not recorded at the time of the initial sentencing and would now be impossible to discover.<sup>239</sup> Sixteen states, fueled by their concern, filed an amicus brief arguing, "resentencing would not reflect *Miller* at all but would effectively become a parole hearing."<sup>240</sup>

The majority responded to the justifiable concern that resentencing prisoners will be impossible by suggesting "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."<sup>241</sup> Essentially, the Court issued an ultimatum to the states to either make prisoners who were sentenced to mandatory life without parole as a juvenile parole eligible, or begin the impossible process of resentencing hundreds of prisoners.

If a state needs to resentence hundreds of prisoners, making those prisoners parole eligible may be the only way for a state to avoid a significantly onerous burden.<sup>242</sup> Notably, allowing juvenile homicide offenders to become parole eligible, in place of holding resentencing hearings, can save a substantial amount of money and

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<sup>235</sup> *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (referencing Brief for National District Attorneys Assn. et al. as Amici Curiae at 9-17, *Montgomery v. Louisiana*, No. 14-280, (U.S. Aug. 31, 2015)). In fact, Justice Scalia even calls the process of proving a prisoner's corrigibility silly. *Id.*

<sup>238</sup> Wolf, *supra* note 10.

<sup>239</sup> Brief of Other States, *supra* note 10, at 9.

<sup>240</sup> *Id.* at 7.

<sup>241</sup> *Montgomery*, 136 S. Ct. at 736.

<sup>242</sup> *Id.* at 736.

avoid lengthy court proceedings.<sup>243</sup> The majority's 'suggestion' that state legislatures enact statutes allowing for parole after a juvenile has served a specified number of years in prison may be the only option for many states.<sup>244</sup>

The majority specifically referenced a statute in Wyoming, which built in an exception for juvenile homicide offenders allowing for parole after serving 25 years in prison.<sup>245</sup> Wyoming is not the only state to legislatively address the issue of retroactivity. Indeed, several other states also reacted to *Miller* by enacting statutes that allowed for resentencing after a prisoner has served a specific sentence length.<sup>246</sup> Essentially these statutes require a juvenile homicide offender to have his or her sentence reviewed after a specific term of years has passed.

The chance to avoid burdensome resentencing hearings by enacting wide sweeping legislation may be appealing to many states.<sup>247</sup> However, legislative enactments, similar to Wyoming's,

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<sup>243</sup> Liliana Segura, *Supreme Court Gives New Hope to Juvenile Lifers, but Will States Deliver?*, THE INTERCEPT (Jan. 26, 2016), <https://theintercept.com/2016/01/26/montgomery-v-louisiana-supreme-court-gives-new-hope-to-juvenile-lifers-will-states-deliver/> (explaining the Louisiana Center for Children's Rights have estimated resentencing hearings will cost \$3 million for defense attorneys in the first year alone).

<sup>244</sup> *Id.*; *Montgomery*, 136 S. Ct. at 736.

<sup>245</sup> *Montgomery*, 136 S. Ct. at 736; WYO. STAT. ANN. § 6-10-301 (c) (2013). "A person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration . . ." § 6-10-301 (c).

<sup>246</sup> See, e.g., CAL. PENAL CODE § 1170 (d)(2)(A)(i) (2016) ("When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing."); DEL. CODE ANN. TIT. 11, § 4204A (d)(1)(2) (2013) ("[A]ny offender sentenced to a term of incarceration for murder first degree when said offense was committed prior to the offender's eighteenth birthday shall be eligible to petition the Superior Court for sentence modification after the offender has served 30 years of the originally imposed Level V sentence.").

<sup>247</sup> Cristian Farias, *Justice Scalia Calls Out a Colleague for Flip-Flopping on Juvenile Justice*, HUFFPOST POLITICS (Jan. 28, 2016, 5:03 AM), [http://www.huffingtonpost.com/entry/scalia-kennedy-juvenile-justice\\_us\\_56a8ea1fe4b0947efb661ba7](http://www.huffingtonpost.com/entry/scalia-kennedy-juvenile-justice_us_56a8ea1fe4b0947efb661ba7) ("Sending all those lifers to the parole board sounds much easier than trying to conduct proper re-sentencing hearings in so many old cases."). After *Miller* was decided, several states enacted statutes limiting a juvenile's sentence by creating the option for parole or resentencing after a specified sentence length. E.g., CAL. PENAL CODE § 1170 (d)(2)(A)(i) (2016); WYO. STAT. ANN. § 6-10-301 (c) (2013); DEL. CODE ANN. TIT. 11, § 4204A (d)(1)(2) (2013). It is reasonable to expect several more states will enact similar statutes now that *Montgomery* has been decided. Following *Montgomery*,

would have the same effect as if juvenile life without parole was eliminated in its entirety.<sup>248</sup> By issuing an ultimatum to the states to enact this type of legislation, the Court clearly preferred juvenile homicide offenders be eligible for parole and not serve life without parole sentences.<sup>249</sup> Even though the Court did not affirmatively eliminate juvenile life without parole, the Court clearly tried.<sup>250</sup> It essentially told the states to start the onerous burden of resentencing hundreds of prisoners or eliminate juvenile life without parole.<sup>251</sup>

Justice Scalia is correct that the Court had a “devious” plan to eliminate life without parole for juveniles.<sup>252</sup> Justice Kennedy, who wrote the majority opinion in *Montgomery*, is the leading proponent for leniency in juvenile sentencing.<sup>253</sup> In fact, Justice Kennedy consistently chips away at juvenile sentencing laws, finding harsh punishments disproportionate and unconstitutional for anyone under 18 years old.<sup>254</sup> Clearly, Justice Kennedy’s views on juvenile sentencing played a crucial role in this decision.<sup>255</sup> However, while there was

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several states have proposed legislation to change their sentencing laws for juvenile homicide offenders. *See, e.g.*, H.B. 405, 61st Leg., Gen. Sess. (Utah 2016)(adopted Mar. 25, 2016); H.B. 2390, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); S.B. 1147, 200th Gen. Assemb., Reg. Sess. (Pa. 2016).

<sup>248</sup> Notably, the proposed legislation created in the wake of *Montgomery* effectively eliminates life without parole for anyone under 18 years old. *See, e.g.*, H.B. 2390, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (proposing the elimination of life without parole for juveniles); H.B. 405, 61st Leg., Gen. Sess. (Utah 2016)(adopted March 25, 2016) (proposing the elimination of life without parole for juveniles, which was signed by the Governor on Mar. 25, 2016); S.B. 1147, 200th Gen. Assemb., Reg. Sess. (Pa. 2016) (proposing the elimination of life without parole for juveniles and creating a maximum sentence of 45 years or 35 years depending on the age of the juvenile).

<sup>249</sup> *Montgomery*, 136 S. Ct. at 736, 744 (Kennedy, J., opinion)(Scalia, J., dissenting).

<sup>250</sup> *Id.* at 744 (Scalia, J., dissenting).

<sup>251</sup> *Id.* at 736, 744 (Kennedy, J., opinion)(Scalia, J., dissenting).

<sup>252</sup> *Id.* at 744 (Scalia, J., dissenting).

<sup>253</sup> Adam Liptak, *Justices Expand Parole Rights for Juveniles Sentenced to Life for Murder*, N.Y. TIMES (Jan. 25, 2016), [http://www.nytimes.com/2016/01/26/us/politics/justices-expand-parole-rights-for-juveniles-sentenced-to-life-for-murder.html?\\_r=0](http://www.nytimes.com/2016/01/26/us/politics/justices-expand-parole-rights-for-juveniles-sentenced-to-life-for-murder.html?_r=0).

<sup>254</sup> Tamar Birckhead, *Will Supreme Court Decision be Death Knell for Life Without Parole*, JUVENILE JUSTICE INFORMATION EXCHANGE (Jan. 26, 2016), <http://jjie.org/will-supreme-court-decision-be-death-knell-for-life-without-parole/179709/>. In fact, Justice Kennedy also wrote the majority opinion in both *Roper* and *Graham*. *Roper*, 543 U.S. at 554; *Graham*, 560 U.S. at 51.

<sup>255</sup> *See, e.g.*, *Graham*, 560 U.S. at 82 (holding juvenile life without parole for nonhomicide offenders is unconstitutional); *Roper*, 543 U.S. at 578 (holding the death penalty is unconstitutional for juveniles). Justice Kennedy clearly believes juveniles can be rehabilitated and is committed to protecting juveniles in the court system. Tamar R. Birckhead, *Graham v. Florida: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L.

hope, and even encouragement, that the Supreme Court would hold life without parole unconstitutional, the Court did not affirmatively ban the punishment.<sup>256</sup> Instead of affirmatively finding juvenile life without parole unconstitutional, the Court rewrote the *Miller* holding to make the sentence a practical impossibility.<sup>257</sup>

## VI. CONCLUSION

In sum, the awaited decision in *Montgomery* held *Miller* is a substantive rule and must be applied retroactively.<sup>258</sup> The Court extended its juvenile sentencing cases, much to the antipathy of Justice Scalia.<sup>259</sup> In fact, the majority interpreted *Miller* as prohibiting life without parole for juveniles whose crimes reflect transient immaturity, which is not consistent with the Court's initial interpretation of the holding.<sup>260</sup> This decision was beyond the scope of what *Miller* actually held.<sup>261</sup> This change in the *Miller* holding introduced a new standard on state sentencing bodies.<sup>262</sup> Now, sentencing bodies must assess the juvenile's incorrigibility, which is a difficult standard for courts to determine.<sup>263</sup> Justice Kennedy was clearly swayed by his strong dislike of harsh punishments for juvenile offenders.<sup>264</sup> It is clear the majority had a specific outcome in mind when it wrote the opinion, and reached its conclusion by essentially rewriting its holding in *Miller*.

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& PUB. POL'Y 66, 69-70 (2010). Over the last several years, the Court has issued decisions that called for more lenient juvenile sentencing laws, thanks in part to Justice Kennedy, who wrote *Roper* and *Graham*. Fred Lucas, *Going Soft on Juvenile Crime: How the MacArthur and Casey Foundations Distort Youth Offender Policies*, CAPITAL RESEARCH CENTER (May 2013) <https://capitalresearch.org/2013/05/going-soft-on-juvenile-crime-how-the-macarthur-and-casey-foundations-distort-youth-offender-policies/>.

<sup>256</sup> Brief of the Charles Hamilton Houston Institute for Race and Justice and The Criminal Justice Institute as Amici Curiae in Support of Neither Party at 2, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280).

<sup>257</sup> *Montgomery*, 136 S. Ct. at 743-44 (Scalia, J., dissenting).

<sup>258</sup> *Id.* at 732.

<sup>259</sup> Matt Ford, *A Retroactive Break for Juvenile Offenders*, THE ATLANTIC (Jan. 26, 2016), <http://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/>; see *supra* text accompanying note 171.

<sup>260</sup> See *supra* text accompanying notes 185-86.

<sup>261</sup> Denniston, *Opinion Analysis*, *supra* note 233.

<sup>262</sup> *Id.*

<sup>263</sup> *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

<sup>264</sup> See *supra* text accompanying notes 246-47.

The Supreme Court's decision grants thousands of juvenile homicide offenders the opportunity to have their sentences reheard and even a possible chance at freedom.<sup>265</sup> Due to the large number of prisoners this decision affects, and the possible burden it will impose on the states, the Court gave the states an alternative option to resentencing every prisoner.<sup>266</sup> In fact, the majority issued an ultimatum to the states: either judicially resentence every juvenile homicide offender or legislatively convert the sentence to parole eligible.<sup>267</sup> Again, it is clear the majority disfavored juvenile life without parole and would prefer if states eliminated the sentence in its entirety.

Even though the Court conducted an intellectually dishonest analysis by rewriting *Miller* in order to hold the decision retroactive, in the end, the Court made the correct decision. Thousands of prisoners who have been serving a mandatory life without parole sentence will receive the chance to have his or her sentence reviewed. It would be unjust to have over 2,000 people serve a sentence that, today, is unconstitutional. As the majority pointedly stated, "[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids,"<sup>268</sup> and there should not be.

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<sup>265</sup> *Montgomery*, 136 S. Ct. at 736; Transcript *supra* note 10, at 35, 38.

<sup>266</sup> *Montgomery*, 136 S. Ct. at 736.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 731.