

# ELEVATING SUBSTANCE OVER PROCEDURE: THE RETROACTIVITY OF *MILLER V. ALABAMA* UNDER *TEAGUE V. LANE*

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*This Article proposes a unique framework establishing that the United States Supreme Court’s decision in Miller v. Alabama, which forbids states from automatically sentencing juveniles to life imprisonment without any meaningful opportunity for release, must apply retroactively to hundreds of juveniles whose convictions and life sentences were already final at the time of the decision. Such a framework is timely and critical. The lower state and federal courts are divided on the question, and the Supreme Court is likely to settle the issue within the next year.*

*The Article reviews how, absent guidance from the Supreme Court, a host of states, led most recently by Michigan, have invoked the Miller majority’s statement that it was merely requiring states to follow a “certain process” before sentencing a juvenile to life imprisonment without parole. By this reasoning, Miller is not retroactive under the Supreme Court’s federal retroactivity doctrine established by Teague v. Lane. The Court has always applied new substantive rules retroactively under Teague, while it has never done so for a new procedural rule.*

*The Article rejects this “process” language as a basis for resolving whether Miller is retroactive. It concludes that Miller in fact has little to do with process and is instead primarily concerned with sentencing outcomes for youth. In striking down mandatory life without parole for juveniles, Miller adapted the individualized sentencing requirement from Woodson v. North Carolina, which invalidated the mandatory death penalty. This individualized sentencing requirement obligates states to always offer juveniles a sentencing outcome carrying the possibility of release and to consider the essential, mitigating fact of youth before imposing an irrevocable life sentence. These obligations are inherently substantive. By contrast, Miller’s alleged procedural component is undefined and collateral to its substantive altering of juvenile sentencing. Miller therefore announces a substantive rule that must apply retroactively.*

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INTRODUCTION

“Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”<sup>1</sup>

This excerpt comes from Justice Kagan’s majority opinion in the United States Supreme Court’s decision in the companion cases *Miller v. Alabama* and *Jackson v. Hobbs*,<sup>2</sup> which announced for the first time that imposing mandatory life imprisonment without the possibility of release on a juvenile offender constitutes cruel and unusual punishment in violation of the Eighth Amendment.<sup>3</sup> *Miller* voided the authority of twenty-eight states and the federal government that required this sentence for juveniles convicted of murder. By the Court’s conservative estimate, over 2,000 juveniles

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<sup>1</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2469.

had been condemned to die in prison under such regimes.<sup>4</sup>

*Miller* dismantled these sentencing schemes in three specific ways. States must now provide more lenient sentencing alternatives to life imprisonment without parole for all juveniles.<sup>5</sup> They must also engage in meaningful, individualized consideration of the essential, mitigating fact of youth before imposing a sentence, and they must do so in a manner that ensures that juveniles will rarely be imprisoned for life without any meaningful hope for release.<sup>6</sup> *Miller* adapted these functional components for juveniles from the Court's prior decision in *Woodson v. North Carolina*,<sup>7</sup> which struck down the mandatory death penalty and ushered in the modern era of individualized sentencing in capital cases.<sup>8</sup> The *Miller* Court invoked *Woodson* on the grounds that, for the purposes of Eighth Amendment analysis, imprisoning juveniles for life without the possibility of parole is analogous to the death penalty.<sup>9</sup>

Given *Miller's* radical reorientation of juvenile sentencing, Justice Kagan's framing of the decision as requiring only a "certain process" seems curiously timid. Read in context, the majority intended the statement to deflect the dissent's critique that the Court had never before invalidated as cruel and unusual a sentencing practice imposed on so many individuals in so many states.<sup>10</sup> However, the majority's couching of its decision in "process" terms has catalyzed significant controversy over which of the 2,000 juvenile offenders identified in *Miller* are entitled to relief from the mandatory life without parole sentences they are currently serving.

The crux of the issue is the doctrine of retroactivity, or whether states must reopen the cases of those juveniles who have finished their state appeals and whose convictions are final. Here, another central character in this national drama emerges: the Supreme Court's 1989 decision in *Teague v. Lane*.<sup>11</sup> *Teague* draws a line for retroactivity purposes between those decisions that are "procedural" and those that are "substantive." Under *Teague*, the Supreme Court has never applied a rule only governing procedure retroactively, while it has always applied substantive criminal rules

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<sup>4</sup> *Id.* at 2477 (Roberts, C.J., dissenting).

<sup>5</sup> *Id.* at 2467, 2469.

<sup>6</sup> *Id.*

<sup>7</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

<sup>8</sup> *Id.* at 301.

<sup>9</sup> *Miller*, 132 S. Ct. at 2463-64, 2466-67.

<sup>10</sup> *Id.* at 2471.

<sup>11</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

retroactively.<sup>12</sup> The significance of Justice Kagan's quote therefore becomes readily apparent. If *Miller* is, as the quote suggests, solely about process, it is almost certainly not retroactive. If *Miller* is substantive, it almost certainly is.

The lower courts are irreconcilably divided on the issue. Nine states have ruled *Miller* retroactive;<sup>13</sup> five have ruled it is not.<sup>14</sup> Additionally, four of the six federal courts that have addressed the issue have denied retroactivity.<sup>15</sup> Despite the obvious split among the lower courts in the two years since *Miller*, the Supreme Court has yet to resolve the dispute. The Court first denied *certiorari* review in two cases that squarely presented the issue.<sup>16</sup> The Court then granted *certiorari* on the question, only to dismiss the case weeks later after the parties reached a plea agreement freeing the petitioner and mooting his appeal.<sup>17</sup> Most recently, the Court agreed to hear a second case likely to be argued this fall and decided in early 2016; however a jurisdictional question the Court raised *sua sponte* leaves some doubt as to whether it will decide retroactivity.<sup>18</sup>

<sup>12</sup> See *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

<sup>13</sup> *Falcon v. State*, \_\_ So.3d \_\_, 2015 WL 1239365 (Fla. Mar. 19, 2015); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014), *cert. denied*, 135 S. Ct. 710 (Dec. 1, 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270 (Mass. 2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014), *cert. denied*, 135 S. Ct. 67 (Oct. 6, 2014); *In re State*, 103 A.3d 227 (N.H. Aug. 29, 2014); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014).

<sup>14</sup> *Ex parte Williams*, \_\_ So.3d \_\_, 2015 WL 1388138 (Ala. Mar. 27 2015); *People v. Carp*, 852 N.W.2d 801 (Mich. 2014); *State v. Tate*, 130 So. 3d 829 (La. 2013); *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), *cert. denied*, 134 S. Ct. 2724 (June 9, 2014).

<sup>15</sup> *Compare Songster v. Beard* 35 F.Supp.3d 657 (E.D. Pa. 2014) (finding *Miller* retroactive) and *Alejandro v. United States*, No. 13 Civ. 4364, 2013 WL 4574066, at \*1-2 (S.D.N.Y. Aug. 22, 2013) (same) with *Johnson v. Ponton*, \_\_ F.3d \_\_, 2015 WL 924049 (4th Cir. Mar. 5, 2015) (finding *Miller* is not retroactive); *Craig v. Cain*, No. 12- 30035, 2013 WL 69128, at \*2 (5th Cir. Jan. 4, 2013) (per curiam) (same); *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (same), reh'g en banc denied, 717 F.3d 1186 (11th Cir. 2013); *Thompson v. Roy*, No. 13-cv-1524, 2014 WL 1234498 (D. Minn. Mar. 25, 2014) (same).

<sup>16</sup> *Cunningham v. Pennsylvania*, 134 S. Ct. 2724 (2014); *Tate v. Louisiana*, 134 S. Ct. 2663 (2014); *Toca v. Louisiana*, No. 14-6381(R46-005); 2015 WL 507612 (Feb. 3, 2015).

<sup>17</sup> *Toca v. Louisiana*, No. 14-6381(R46-005); 2015 WL 507612 (Feb. 3, 2015).

<sup>18</sup> *Montgomery v. Louisiana*, No. 14-280, 2015 WL 1280236 (Mar. 23, 2015). Along with *Miller's* retroactivity, the Court certified a second question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U. S. \_\_ (2012)?" The question appears directed at resolving whether the Court can apply *Teague* to cases on appeal from the denial of state, rather than federal, collateral review. See generally *Danforth v. Minnesota*, 552 U.S. 264 (2008).

Perhaps nowhere is settling this dilemma more pivotal than in the State of Michigan. Michigan has approximately 350 juvenile offenders mandatorily sentenced to life without parole.<sup>19</sup> After *Miller*, the legislature amended its unconstitutional sentencing scheme. Juveniles convicted of first degree murder now receive a sentencing range between a minimum term of twenty-five to forty years, and a maximum term of not less than sixty years.<sup>20</sup> The revisions expose a juvenile to life without parole only after the prosecutor moves to seek the sentence and the court holds an individualized sentencing hearing in compliance with *Miller*.<sup>21</sup> But the legislation contains a catch. Juveniles finished with their state appeals, fully 334 of the 360 juveniles condemned to die in Michigan prisons,<sup>22</sup> cannot be resentenced unless the Michigan Supreme Court or the United States Supreme Court declares *Miller* retroactive.<sup>23</sup>

Subsequently, the Michigan high court denied retroactive application of *Miller* in *People v. Carp*.<sup>24</sup> The court effectively declared that *Miller* provides no hope of release under the revised statutes for nearly every juvenile offender automatically sentenced to life without parole in Michigan. Resting the result squarely on the *Miller* majority's procedural framing, the court "concluded that *Miller* established a new procedural rule that does not 'categorically bar a penalty,' but instead requires 'only that a sentencer follow a certain process.'"<sup>25</sup>

*Carp* does not represent the end of the tale in Michigan. In 2013, a federal district court in Michigan added its own twist. The court, in a civil rights suit under 42 U.S.C. § 1983 challenging Michigan's prior sentencing scheme as applied to juveniles, found *Miller* retroactive in the civil and criminal contexts.<sup>26</sup> In the court's view, "[t]o hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."<sup>27</sup> Rather than ordering resentencings—a remedy unavailable in § 1983 suits<sup>28</sup>—the district court mandated that Michigan reform its parole system to afford inmates

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<sup>19</sup> Brief On Appeal of Attorney General Bill Schuette as Intervenor at 3, *People v. Carp*, 828 N.W.2d 685 (Mich. Ct. App. 2012) (No. 307758), 2014 WL 929519.

<sup>20</sup> MICH. COMP. LAWS § 769.25(9) (2014).

<sup>21</sup> *Id.* § 769.25(6).

<sup>22</sup> *Carp*, 852 N.W.2d at 838.

<sup>23</sup> MICH. COMP. LAWS § 769.25a(2).

<sup>24</sup> *Carp*, 852 N.W.2d 801.

<sup>25</sup> *Id.* at 832 (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012)).

<sup>26</sup> *Hill v. Snyder*, No. 10-14568, 2013 WL 364198 at \*2 (E.D. Mich. Jan. 30, 2013).

<sup>27</sup> *Id.* at \*2.

<sup>28</sup> *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

whose convictions were final the meaningful opportunity for eventual release guaranteed by *Miller*. The case is pending before the Sixth Circuit. If successful, the suit would offer a lifeline for the 334 juvenile offenders left behind by the Michigan Legislature and Michigan Supreme Court.

This Article seeks to undo the morass in Michigan and across the country by constructing a sound framework for evaluating *Miller's* mandate of individualized sentencing under *Teague's* retroactivity doctrine. Reduced to essentials, the question is whether individualized sentencing is concerned principally with substantive sentencing outcomes or solely with sentencing procedures. To answer this question, the Article identifies the three basic obligations that *Miller* tailored from *Woodson* to strike down mandatory life imprisonment without parole: 1) altering the range of sentences available to juveniles charged with murder; 2) requiring consideration of the mitigating effects of youth for juveniles exposed to life imprisonment without parole; and 3) compelling appropriate procedures for the individualized sentencing of youth. From this analysis, the Article concludes that Justice Kagan's description of *Miller* as requiring *only* a certain process is inaccurate with respect to *Teague*. Instead, *Miller* announces a substantive rule of individualized sentencing that is integrally concerned with sentencing outcomes for youth. It should therefore apply retroactively under *Teague* to all juveniles inflexibly sentenced to die in prison, regardless of when their appeals ended.

Part I reviews the test for retroactivity under *Teague*. Part II explores how the Supreme Court's lack of guidance on substantive rules of criminal law under *Teague* has led directly to the current confusion over *Miller's* retroactivity. Part III identifies and evaluates *Miller's* three operational components and concludes that the first two—altering the range of sentences and requiring consideration of youth—are outcome-determinative rules of substance, and that the third component, while procedural, is undefined and left to the states. Thus, though subsequent Supreme Court decisions expounding on *Miller*-compliant procedures may not be retroactive, *Miller* itself is.

## I. THE SUPREME COURT'S RETROACTIVITY DOCTRINE UNDER *TEAGUE V. LANE*

When the Supreme Court announces a new constitutional rule in a criminal case, not every defendant affected by the invalidated practice can benefit from the change. "The past," even the

unconstitutional past, “cannot always be erased by a new judicial declaration.”<sup>29</sup> The doctrine of retroactivity governs whether new constitutional pronouncements apply to past cases. *Teague v. Lane* sets forth the Supreme Court’s modern retroactivity jurisprudence. By the Court’s account, the evil of always applying new rules to old cases is that it “*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.”<sup>30</sup> The Court developed the *Teague* doctrine to protect the states’ interest in the finality of criminal judgments from being undermined by endless federal review.

Under this commitment to finality, *Teague* draws a dividing line between the stages of direct review and collateral review following criminal trials.<sup>31</sup> New rules always apply retroactively to criminal cases still on direct review,<sup>32</sup> a process typically encompassing the first round of appeals granted to defendants as a matter of right, as well as the additional time within which a state supreme court or the United States Supreme Court could review the criminal judgment as a matter of discretion. Once direct review ends, a defendant’s conviction and sentence are considered final. The defendant then has the option of “collaterally” challenging his conviction or sentence by seeking post-conviction relief in the state trial court and, after exhausting state-court options, filing a petition for habeas corpus in federal court. Under *Teague*, defendants are generally not entitled to the benefit of new constitutional rules on collateral review.<sup>33</sup>

The general norm against retroactivity on collateral review yields if the decision announces a new “substantive” rule. The Court classifies rules as substantive if they either prohibit the state from criminalizing certain private behavior,<sup>34</sup> or if they “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.”<sup>35</sup> Substantive rules may also categorically prohibit a punishment for a class of defendant based either on the defendant’s status or some characteristic of the offense

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<sup>29</sup> *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion) (quoting *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

<sup>30</sup> *Id.* at 310.

<sup>31</sup> *Id.* at 307-10.

<sup>32</sup> *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

<sup>33</sup> *Teague*, 489 U.S. at 310 (plurality opinion).

<sup>34</sup> *Id.* at 307 (plurality opinion) (discussing *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

<sup>35</sup> *Summerlin*, 542 U.S. at 352 (quotations and citations omitted).

itself.<sup>36</sup> A prototypical example of a substantive rule would be the Court's decision in *Atkins v. Virginia*,<sup>37</sup> which barred the death penalty for the intellectually disabled.<sup>38</sup> New substantive rules of criminal law such as this have always been considered retroactive.

By contrast, new procedural rules, which "regulate only the manner of determining the defendant's culpability,"<sup>39</sup> do not apply retroactively on collateral review unless they are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."<sup>40</sup> To qualify, the new criminal procedure rule must remedy an intolerably high risk of convicting the innocent.<sup>41</sup> *Teague* warned that the discovery of new watershed rules was highly unlikely.<sup>42</sup> The Court has since never expressly recognized a watershed rule, though it has suggested that the Sixth Amendment right of an indigent person to appointment of counsel expressed in *Gideon v. Wainwright*<sup>43</sup> may meet the standard.<sup>44</sup> The Court has also not provided an analogous example of a watershed rule in the sentencing context. Judging from this precedent, to label a constitutional rule "procedural" is tantamount to declaring it non-retroactive, while the opposite is true for substantive rules.

## II. THE SUPREME COURT HAS FAILED TO PROVIDE ADEQUATE GUIDANCE ON THE NATURE OF SUBSTANTIVE RULES AND INDIVIDUALIZED SENTENCING UNDER *TEAGUE*

Subsequent to *Teague*, the Court's guidance on distinguishing between substantive rules and procedural rules has been incomplete. In *Schriro v. Summerlin*, the Court explained that the universe of substantive rules "*includes* decisions that narrow the scope of a

<sup>36</sup> *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>37</sup> *Atkins*, 536 U.S. 304 (2002).

<sup>38</sup> *Compare Penry*, 492 U.S. at 330 (classifying as substantive a decision "that held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . regardless of the procedures followed"), *with Atkins*, 536 U.S. at 321 (holding that the Eighth Amendment prohibits the execution of mentally disabled persons).

<sup>39</sup> *Summerlin*, 542 U.S. at 353 (emphasis omitted) (citations omitted); *see also* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (finding that rule regulates procedure where it "governs only the manner and the means by which the litigants' rights are enforced") (quotations omitted).

<sup>40</sup> *Summerlin*, 542 U.S. at 352 (quotations and citations omitted).

<sup>41</sup> *Teague v. Lane*, 489 U.S. 288, 312 (1989) (plurality opinion).

<sup>42</sup> *Id.* at 313 (plurality opinion).

<sup>43</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>44</sup> *Saffle v. Parks*, 494 U.S. 484, 495 (1990).



criminal statute by interpreting its terms” and “constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.”<sup>45</sup> Taken at face value, this statement leaves open the possibility of other sorts of substantive rules, yet without offering any definitive way to identify these rules.

Complicating matters, the Supreme Court often announces new rules while failing to address explicitly whether they are substantive or procedural. This development is somewhat surprising. The Court initially announced in *Teague* that retroactivity should be addressed as a threshold matter. The Court did so on the understanding that once the Court applies a new rule to a defendant on collateral review, “evenhanded justice requires that [the rule] be applied retroactively to all who are similarly situated.”<sup>46</sup> On this analysis, *Miller* should be applied retroactively because the Court also announced the rule in the companion case *Jackson v. Hobbs*, whose petitioner was on state collateral review at the time of the decision.<sup>47</sup> A number of courts have invoked this circumstance to support the conclusion that *Miller* is retroactive.<sup>48</sup>

However, the Court changed course soon after *Teague* on whether to treat retroactivity as a threshold issue. Beginning with *Collins v. Youngblood*, the Court has demoted retroactivity to an affirmative defense to be raised or waived by the state, rather than a jurisdictional question or one the Court must otherwise address *sua sponte*.<sup>49</sup> This retreat from addressing retroactivity as a threshold matter has arguably returned the Court to its pre-*Teague* days, when it applied new rules to cases on collateral review without analyzing retroactivity.<sup>50</sup> Today, unless the state invokes the non-retroactivity defense, or the new rule is of a type previously found to apply retroactively,<sup>51</sup> the fact that the Court applies a novel rule to

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<sup>45</sup> *Summerlin*, 542 U.S. at 351-52 (emphasis added) (citations omitted).

<sup>46</sup> *Teague*, 489 U.S. at 300 (plurality opinion).

<sup>47</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

<sup>48</sup> See, e.g., *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) (“[W]e are not inclined to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review.”).

<sup>49</sup> *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); see also *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008).

<sup>50</sup> See *Danforth*, 552 U.S. at 272-73.

<sup>51</sup> See *Tyler v. Cain*, 533 U.S. 656, 668-69 (2001) (O’Connor, J., concurring) (observing that multiple Court holdings may “logically dictate” retroactivity where Court makes clear over a series of decisions “that a particular type of rule applies retroactively to cases on collateral review . . .”).

a case on collateral review cannot necessarily affirm that the rule fits within one of the exceptions to non-retroactivity.

With respect to *Miller*, the Court's limited post-*Teague* jurisprudence bears responsibility for the disarray among the lower courts. The debate has largely centered on whether the rule in *Miller* prohibits "a certain category of punishment for a class of defendants because of their status or offense," as such rules are always regarded as substantive under *Teague*.<sup>52</sup> Primarily at issue is what constitutes a class of defendants' "category of punishment" for retroactivity purposes. Courts finding *Miller* retroactive tend to characterize mandatory-life-imprisonment-without-the-possibility-of-parole as a distinct category of punishment that can no longer be imposed on juveniles as a class.<sup>53</sup> Courts declaring *Miller* non-retroactive instead insist that, irrespective of whether the sentence is mandatory or discretionary, the defendant's real punishment is simply life-without-parole.<sup>54</sup> Returning to Justice Kagan's quote, these courts then invoke the fact that *Miller* does not categorically prohibit juveniles from being sentenced to life imprisonment without parole, and only requires states to follow a "certain process" to impose the sentence.<sup>55</sup> Viewed this way, the defendant's "category of punishment" is life-without-parole, and its "mandatory" nature simply reflects the state's failure to follow "a certain process" before imposing it.

The Supreme Court has not provided a definitive basis on which to resolve this divide. On the one hand, Chief Justice Roberts in dissent stated that "[t]he sentence at issue is statutorily mandated life without parole."<sup>56</sup> This framing supports classifying mandatory sentences as distinct forms of punishment.<sup>57</sup>

The Supreme Court's treatment of mandatory sentences in

<sup>52</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

<sup>53</sup> See, e.g., *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) ("We conclude that [*Miller*] is a new substantive rule that puts a juvenile's *mandatory* life without parole sentence outside the ambit of the State's power.") (internal quotations omitted).

<sup>54</sup> See, e.g., *People v. Carp*, 852 N.W.2d 801, 826-27 (Mich. 2014).

<sup>55</sup> See, e.g., *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013), *cert. denied*, 134 S. Ct. 2724 (2014) ("Since, by its own terms, the *Miller* holding does not categorically bar a penalty for a class of offenders . . . it is procedural and not substantive for purposes of *Teague*." (citations omitted)).

<sup>56</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2479 (2012) (Roberts, C.J. dissenting).

<sup>57</sup> See *Penry*, 492 U.S. at 330 ("The Eighth Amendment categorically prohibits the infliction of cruel and unusual *punishments*") (emphasis added); see also *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion) ("The Eighth Amendment stands to assure that the State's power to punish is exercised within the limits of civilized standards.") (internal quotation marks omitted).

other Eighth Amendment decisions lends additional corroboration to this position. The Court has repeatedly characterized mandatory death sentences, which the Court struck down in *Woodson v. North Carolina*, as uniquely punitive.<sup>58</sup> In *Miller*, the Court relied heavily on *Woodson* and its progeny, ruling that because juvenile life without parole is “akin to the death penalty,” mandatory life without parole for a juvenile is likewise cruel and unusual.<sup>59</sup>

The opposing view is that a mandatory sentence describes the means for arriving at the underlying sentence, rather than a unique type of sentence. The Michigan Supreme Court adopted this stance in *Carp*, though without confronting any of the Supreme Court’s pre-*Miller* Eighth Amendment caselaw on mandatory sentences.<sup>60</sup> The court’s underlying assumption is that, while it may be true that a mandatory sentencing *scheme* is uniquely harsh and rigid, it does not necessarily follow that individual sentences *resulting* from that scheme are harsher than their discretionary counterparts, or that the difference between the schemes is a matter of substance rather than procedure.

Adding to this confusion, the Supreme Court has never struck down a mandatory sentencing scheme under the Eighth Amendment outside of *Woodson* and *Miller*. And, in part because *Woodson* itself was decided thirteen years before *Teague*, the Supreme Court has not grappled directly with the question of whether *Woodson* is substantive. The Court has, however, struck down capital sentencing practices under *Woodson*’s Eighth Amendment rule and subsequently deemed these decisions procedural and non-retroactive under *Teague*.<sup>61</sup> That the Court has declared some of its capital sentencing decisions as procedural indirectly undercuts the assertion that Eighth Amendment limitations on sentencing invariably impose a categorical bar on a specific punishment. It does not, however, answer the question of whether a non-categorical limitation

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<sup>58</sup> See *Woodson*, 428 U.S. at 293 (plurality opinion) (citing consensus of jurisdictions rejecting mandatory death sentences as “unduly harsh and unworkably rigid”); see also *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (plurality opinion) (finding automatic death sentences to be of “unacceptable severity”).

<sup>59</sup> See *Miller*, 132 S. Ct. at 2463-66.

<sup>60</sup> *People v. Carp*, 852 N.W.2d 801 (Mich. 2014).

<sup>61</sup> See *Beard v. Banks*, 542 U.S. 406 (2004) (denying retroactive relief to post-*Woodson* holding that a capital sentencing scheme could not require the jury to disregard a mitigating element unless the jury found the element unanimously); see also *Sawyer v. Smith*, 497 U.S. 227 (1990) (denying retroactive relief to post-*Woodson* holding that a sentencer cannot be led into a false belief that the responsibility for imposing death rests elsewhere).

on a punishment can be substantive and thus retroactive under *Teague*.

This doctrinal stalemate suggests that the key to articulating a definitive basis for whether *Miller* is substantive or procedural lies not in the differences between mandatory and discretionary life imprisonment without parole. Rather, the key lies in identifying and classifying the mechanisms through which *Miller* forces states to abandon mandatory life imprisonment without parole and adopt an individualized sentencing scheme. The following Part addresses these mechanisms and their implications for *Miller*'s retroactivity.

### III. THE SUPREME COURT'S EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IN *MILLER* IS SUBSTANTIVE UNDER *TEAGUE*

*Miller*'s invalidation of mandatory life imprisonment without parole for juveniles and its requirement that sentencers consider the mitigating circumstances of youth stem directly from the Court's decision in *Woodson v. North Carolina*.<sup>62</sup> *Woodson* struck down the mandatory death penalty and required individualized consideration of a defendant's mitigating circumstances before a state may impose the ultimate punishment.<sup>63</sup> *Miller* and *Woodson*'s implementation of individualized sentencing share three fundamental components: 1) they force states to expand the range of sentences available to those previously eligible for only the harshest sentence; 2) they alter the criteria states may permissibly use to impose maximum sentences under the new regime; and 3) they require states seeking to retain the maximum sentence to implement new sentencing procedures to comply with the individualized sentencing mandate.

With these functional similarities it stands to reason that courts must afford the same treatment under *Teague* to the individualized sentencing rules in both *Woodson* and *Miller*. Unfortunately, as noted above, the Supreme Court has never expressly announced whether *Woodson*'s requirement of individualized sentencing should apply retroactively. Filling this void requires ascertaining if these fundamental components of individualized sentencing are substantive or procedural. As discussed below, although the third component is undeniably procedural, the first two components are

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<sup>62</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

<sup>63</sup> *Id.* at 304 (plurality opinion); see also *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987).

inherently substantive. Individualized sentencing, then, is primarily a substantive imperative, not merely a procedural requirement. *Miller* hence must apply retroactively.

A. *Miller's Requirement That States Alter the Range of Permissible Sentencing Outcomes for Juveniles Is Substantive*

The first necessary requirement of striking down a mandatory penalty and implementing individualized sentencing is that states must alter the range of sentencing outcomes available to those subjected to the punishment. Prior to *Woodson* and *Miller*, states made exactly one sentence available to the class of defendants at issue: life imprisonment with no opportunity for release. Following *Woodson* and *Miller*, these states had to offer at least one more lenient sentencing option. Requiring individualized consideration before sentencing would be meaningless otherwise.

Changing the potential outcomes of a given proceeding is a classic function of substantive law. This is true whether a state alters the amount of damages available in a civil suit,<sup>64</sup> or shifts the available penalties in a criminal prosecution. For *Miller*, verification of this principle lies in the fact that changing sentencing outcomes may occur altogether independently of any particular process: it is an end unto itself. Because *Miller* requires states to 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.<sup>65</sup>

This basic observation exposes the fallacy of the argument set forth by the Michigan Supreme Court and others that eliminating the “mandatory” element of a life-without-parole sentence is procedural since defendants can still receive the same sentence, so long as states follow a different process. What this argument obscures is that prohibiting a mandatory sentence by definition requires the state to enact different sentencing outcomes, not simply different sentencing procedures. This injunction remains regardless of whether one views a mandatory sentence as a particular category of punishment or simply a means of arriving at a particular sentence.

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<sup>64</sup> See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (acknowledging that statutory cap on damages qualified as substantive law under *Erie* doctrine).

<sup>65</sup> *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998); see also *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (“[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would [be substantive].”).

To further illustrate why altering the range of possible sentencing outcomes is substantive under *Teague*, it is useful to compare *Miller* to *Roper v. Simmons*,<sup>66</sup> the Supreme Court's Eighth Amendment decision that categorically bars the death penalty for juveniles. *Roper's* categorical ban on capital punishment for juveniles is undeniably substantive under *Teague*.<sup>67</sup> But *Roper's* categorical bar represents only part of its function. By outlawing the death penalty for juveniles, *Roper* also altered and narrowed the range of permissible punishments for youth. *Miller*, though lacking a categorical bar on juvenile life without parole, nonetheless announced a rule requiring states to alter and *expand* the range of permissible punishments for juveniles to always include one sentencing option that carries the possibility of release. Logic cannot support the proposition that a constitutional rule narrowing the range of allowable punishments (*Roper*) is substantive, but a constitutional rule expanding the range of punishments (*Miller*) is not. Both species of rules require states to rewrite their substantive sentencing laws.<sup>68</sup>

The Michigan Supreme Court in *Carp* dismissed this argument on the ground that "a new rule only 'alters the range' of punishments available to the sentencer if it shifts the upper limits of the range of punishments downward such that the previously most severe punishment to which defendants have been sentenced is no longer a punishment that the sentencer may constitutionally impose."<sup>69</sup> Curiously, shifting the lower limits of the range would not "alter the range of punishments" under this formulation. The court's aim is transparent. Shifting the upper limits of a sentencing range necessarily requires a categorical ban on the previous maximum sentence, while lowering the range can never categorically ban a particular sentence. The court's response merely recycles the position that *Miller* is not substantive because it does not categorically prohibit life imprisonment without parole.

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<sup>66</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>67</sup> *Penry*, 492 U.S. at 330 (classifying as substantive "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"); see also *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) ("[T]he new rule announced in *Roper* is clearly substantive in nature and, therefore, applies retroactively . . .").

<sup>68</sup> For this general reason, the United States government has conceded that *Miller* is substantive in federal habeas proceedings. See Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion under 28 U.S.C. § 2255 at 10-17, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744).

<sup>69</sup> *People v. Carp*, 852 N.W.2d 801, 823 (Mich. 2014).

The Michigan Supreme Court reaches this facially dubious conclusion through clumsy sleight of hand. Quoting the Supreme Court's decision in *Summerlin*, the court asserts that a sentencing rule qualifies as substantive only if "the defendant 'faces a punishment that the law cannot [any more] impose upon him' in light of the new rule."<sup>70</sup> However, this quotation is incomplete. A categorical prohibition on the maximum sentence is sufficient for a rule to be substantive, but *Summerlin* does not say it is a necessary condition. Properly invoked, *Summerlin* makes clear that substantive sentencing rules apply retroactively because they "necessarily carry a significant risk" that the defendant "faces a punishment that the law cannot impose upon him."<sup>71</sup>

*Miller* mandated the expansion of sentencing outcomes for juveniles to reduce this very risk. Despite allowing states to retain life without parole for juveniles, the Court unequivocally announced that imposing the sentence on a juvenile will rarely pass constitutional muster. The Court declared: "[G]iven all we have said in *Roper*, *Graham* [*v. Florida*], and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."<sup>72</sup> The Court further instructed that it is "the rare juvenile offender whose crime reflects irreparable corruption."<sup>73</sup> Consequently, refusing to give *Miller* retroactive effect "necessarily carr[ies] a significant risk" that juveniles serving mandatory life without parole sentences are "fac[ing] a punishment that the law cannot impose upon [them]."<sup>74</sup> Indeed, the *Miller* Court recognized precisely this point. It noted that, because mandatorily incarcerating a juvenile for life without release removes youth from the sentencing decision "such a scheme poses too great a risk of disproportionate punishment."<sup>75</sup>

The Supreme Court's recent decision in *Alleyne v. United States*<sup>76</sup> also undermines *Carp*'s suggestion that a new rule alters the range of punishments only if it shifts the upper limits of a sentencing range. Prior to *Alleyne*, the Court ruled in *Apprendi v. New Jersey*

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<sup>70</sup> *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)).

<sup>71</sup> *Summerlin*, 542 U.S. at 352 (quotations and citations omitted) (emphasis added).

<sup>72</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

<sup>73</sup> *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

<sup>74</sup> *Summerlin*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

<sup>75</sup> *Miller*, 132 S. Ct. at 2469.

<sup>76</sup> *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

that, other than a prior conviction, facts that increase a defendant's sentence beyond the maximum set by statute are elements of the underlying offense.<sup>77</sup> Such "elements" must therefore be submitted to a jury and proven beyond a reasonable doubt.<sup>78</sup> The Court reasoned that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."<sup>79</sup> However, the Court subsequently held in *Harris v. United States*<sup>80</sup> that facts which increase the mandatory minimum are merely "sentencing factors," rather than elements of the offense, and there is no need to prove such facts to a jury.<sup>81</sup>

In *Alleyne*, the Court overruled *Harris*. The Court held that facts that increase the mandatory minimum sentence are indeed elements of the offense and must be submitted to the jury.<sup>82</sup> Under *Apprendi*, identical treatment of raising mandatory minimums and statutory maximums is necessary because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment."<sup>83</sup> Although raising a mandatory minimum narrows the range of punishments whereas increasing a statutory maximum expands it, the Court deemed that distinction immaterial. Facts affecting either end of the sentencing range constitute offense elements.<sup>84</sup>

*Alleyne* is not a decision about retroactivity. Nonetheless, the Court's analysis has unmistakable implications for how *Miller* ought to be analyzed under *Teague*. Defining the elements of a criminal offense is a substantive function, in that it determines what "primary, private individual conduct" the state may proscribe.<sup>85</sup> As the Court recognized in *Apprendi* and *Alleyne*, defining the elements of an offense also determines a defendant's sentencing range. *Alleyne* thus impliedly stands for the proposition that rules that either raise the statutory maximum or lower the mandatory minimum are

<sup>77</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 484-85 (2000).

<sup>78</sup> *Id.* at 490.

<sup>79</sup> *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

<sup>80</sup> *Harris v. United States*, 536 U.S. 545 (2002), *overruled by Alleyne*, 133 S. Ct. at 2155.

<sup>81</sup> *Harris*, 536 U.S. at 556.

<sup>82</sup> *Alleyne*, 133 S. Ct. at 2155.

<sup>83</sup> *Id.* at 2158 (plurality opinion); *see also Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

<sup>84</sup> *Alleyne*, 133 S. Ct. at 2160.

<sup>85</sup> *Teague v. Lane*, 489 U.S. 288, 307 (1989) (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).



equally substantive.<sup>86</sup>

This conclusion reveals that *Carp* conflicts with *Alleyne*. Applying *Carp*'s reasoning to the question of whether facts that raise the mandatory minimum are elements of the offense would yield the result *Alleyne* rejected from *Harris*, rather than the result from *Alleyne*. While the *Carp* majority acknowledges that altering the upper limit of a sentencing range is substantive, its reasoning demands that a fact altering the lower limit of a sentencing range would not constitute an element of the substantive offense. *Carp* thereby runs afoul of *Alleyne*'s determination that altering either the minimum or the maximum sentence marks a substantive change to the elements of the offense.

Together, *Roper* and *Alleyne* refute any effort to place a one-way ratchet on the functioning of substantive rules. Whether a sentencing rule affects the upper or lower limits of a sentencing range is irrelevant to classifying the rule as substantive. What is relevant is whether the rule affects permissible sentencing outcomes. *Roper* and *Miller* mitigate punishments by lowering sentencing ceilings and floors, respectively. *Apprendi* and *Alleyne* addressed state sentencing rules that aggravated punishments by requiring the finding of facts that raised sentencing ceilings and floors, respectively. Both sets of rules "alter the prescribed range of sentences to which a defendant is exposed." Both sets of rules are therefore substantive.

*B. Miller's Requirement that States Consider Mitigation before Sentencing a Juvenile to Life without the Possibility of Release Is Substantive*

Along with expanding sentencing outcomes for all juveniles exposed to life without the possibility of parole, *Miller*'s individualized sentencing mandate contains a second component imported from *Woodson*: instituting a new rule of decision for states seeking to impose the ultimate available sentence. *Woodson* forced states to consider a defendant's mitigation before they could permissibly impose a death sentence.<sup>87</sup> *Miller*, in turn, makes consideration of the mitigating effects of youth a necessary prerequisite for a state to irrevocably condemn a juvenile to a lifetime in prison.<sup>88</sup> As with eliminating the mandatory nature of a sentence, the requirement

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<sup>86</sup> This proposition remains true even if the constitutional requirement that juries make such factual findings is procedural, as the Court held in *Summerlin*. Schriro v. Summerlin, 542 U.S. 348, 354 (2004).

<sup>87</sup> *Woodson v. North Carolina*, 428 U.S. 208, 304 (1976) (plurality opinion).

<sup>88</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (holding that before a state may sentence a juvenile to life without parole "we require it to take into account how children

of mitigation may appear procedural on its surface. Both elements speak in part to how states must conduct sentencing. Yet, a review of Court precedent from the civil and criminal realms also reveals that the mitigation requirement is substantive.

i. Rules of Decision in the Civil Context

Just as *Teague* represents the Court's attempt to demarcate the boundaries of federalism in criminal law by resort to the distinction between substantive and procedural rules, the Court has applied this same distinction in civil cases to achieve the proper balance between federal and state interests. In the civil context, as discussed below, regulations that provide the "rules of decision" for adjudicating individual rights are substantive, whereas those that merely provide "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them" are procedural.<sup>89</sup>

The Court's decisions evaluating the use of the Federal Rules of Civil Procedure in diversity cases demonstrate the Court's approach to federalism in civil cases. The Rules Enabling Act prohibits the Supreme Court from issuing rules of civil procedure that "abridge, enlarge or modify any substantive right."<sup>90</sup> As a matter of federalism, this injunction prevents a federal rule of civil procedure from supplanting state substantive law.<sup>91</sup> To this end, a federal rule of civil procedure is valid if it regulates only "the manner and the means" of enforcing individual rights.<sup>92</sup> However, a rule impermissibly encroaches upon substantive law if it alters "the rules of decision" that define the scope of individual rights.<sup>93</sup>

Rules of decision are clearly substantive under this framework. While they do not alter the substantive range of outcomes, they nonetheless control which available outcomes are appropriate. For instance, the Court has deemed substantive so-called "notice-of-claim" statutes, which are rules of decision that require would-be plaintiffs to notify potential defendants of an intended suit within a specified time or face dismissal of the action.<sup>94</sup> This classification

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are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

<sup>89</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

<sup>90</sup> Rules Enabling Act, 28 U.S.C. § 2072(b) (2012).

<sup>91</sup> *Shady Grove*, 559 U.S. at 406-07.

<sup>92</sup> *Id.* at 407 (quoting *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

<sup>93</sup> *Id.* (quoting *Murphree*, 326 U.S. at 447).

<sup>94</sup> *Felder v. Casey*, 487 U.S. 131, 152-53 (1988).

proved crucial in *Felder v. Casey*, which resolved whether a state's notice-of-claim rule was preempted by federal law in a civil rights action brought in state court under 42 U.S.C. § 1983. There, the Court held that a "notice-of-claim statute is more than a mere rule of procedure. . . ; the statute is a substantive condition on the right to sue governmental officials and entities."<sup>95</sup> Thus, federal law preempted the state's notice of claim statute because applying the state rule would "predictably alter[ ] the outcome" of suits and frustrate the federal right.

Outside of the federalism context, where civil plaintiffs have asserted the need for a new rule of decision to prevent the state from arbitrarily depriving them of a fundamental liberty interest, the Court has also categorized these claims as substantive. In *Connecticut Department of Public Safety v. Doe*, the plaintiff contended that his inclusion on the state's sex offense registry violated the procedural component of the Fourteenth Amendment's Due Process Clause, owing to the state's failure to conduct a hearing on "current dangerousness."<sup>96</sup> The Court rejected this contention, finding that because inclusion on the state's registry did not already require a finding of "current dangerousness," the plaintiff should have invoked the *substantive* component of the Due Process Clause to invalidate the law as constitutionally arbitrary.<sup>97</sup> Conversely, the earlier case of *Foucha v. Louisiana* saw the Court rule as a matter of substantive due process that a finding of current mental illness or dangerousness was essential to prevent a state from arbitrarily authorizing involuntary commitment.<sup>98</sup>

Taken together, these civil cases demonstrate that *Miller's* requirement of mitigation is substantive. As in the civil federalism cases, *Miller's* mitigation requirement constitutes an outcome-determinative rule of decision that vindicates juveniles' rights under the federal Constitution against cruel and unusual punishments. *Miller*, by making sentencers treat youth and its attendant circumstances as mitigating factors to arrive at the ultimate sentence, imposes a substantive condition on the state's ability to sentence juveniles to life imprisonment without any hope of release. As in *Doe* and *Foucha*, this substantive prerequisite is specifically aimed at preventing the constitutionally arbitrary sentencing of youth to this harshest of permissible penalties.

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<sup>95</sup> *Id.* at 152.

<sup>96</sup> *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6-7 (2003).

<sup>97</sup> *Id.* at 7-8.

<sup>98</sup> *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

## ii. “Rules of Decision” in the Criminal Context

Criminal cases follow a pattern analogous to civil rules of decision that further supports classifying *Miller*'s mitigation requirement as substantive. Supreme Court precedent establishes that new rules are substantive when they narrow the factual circumstances under which a criminal sentence may be imposed.<sup>99</sup> Similar to rules of decision that alter the outcome of cases in the civil context, substantive criminal rules accomplish this narrowing function when they make consideration of certain facts necessary before a state may impose a particular sentence. As the Court explained in *Summerlin*, one of its holdings would qualify as substantive if it made certain facts essential to imposing the death penalty.<sup>100</sup> The *Summerlin* Court thereby held that its prior ruling in *Ring v. Arizona*,<sup>101</sup> that a jury rather than a judge must find beyond a reasonable doubt the existence of an aggravating factor necessary to the imposition of the death penalty, was procedural.<sup>102</sup> State law already made the finding of certain aggravating facts essential to the death penalty, while *Ring* merely regulated “the procedural requirements the Constitution attaches to [the] trial” of those facts.<sup>103</sup> By contrast, had the Court required the states to find new aggravating facts in order to impose a death sentence, its ruling would be substantive.<sup>104</sup>

Applying *Summerlin*, the *Miller* rule is substantive. Before *Miller*, Michigan's mandatory scheme gave no consideration to juvenile status. *Miller* now makes juvenile status essential to the sentencing scheme. It does so by requiring states like Michigan to consider juvenile status and its attendant mitigating circumstances before a child may permissibly receive a sentence of life imprisonment without parole.<sup>105</sup> Moreover, *Miller* makes plain its narrowing intent. The decision requires sentencers not simply “to take into account how children are different,” but also “how those differences *counsel against* irrevocably sentencing them to a lifetime in prison.”<sup>106</sup> *Miller* thus makes mitigation essential to the punishment, necessarily limiting the factual circumstances under which a state may deny the possibility of release to a juvenile.

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<sup>99</sup> *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

<sup>100</sup> *Id.* at 354.

<sup>101</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>102</sup> *Summerlin*, 542 U.S. at 354.

<sup>103</sup> *Id.*

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

<sup>105</sup> *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2013).

<sup>106</sup> *Id.* (emphasis added).

Expanding on *Summerlin*, Professor Beth Colgan has offered the insightful proposal that this substantive feature of *Miller* is also reinforced by the Supreme Court's recent decision in *Alleyne v. United States*.<sup>107</sup> Recall from above *Alleyne's* holding that if a fact increases the mandatory minimum sentence, it must be considered an element of the offense.<sup>108</sup> And recall that in *Summerlin* the Court held that if a new rule made a certain fact essential to the death penalty, the holding would be substantive for retroactivity purposes.<sup>109</sup> Reading *Alleyne* and *Summerlin* together, Colgan concludes that *Miller* effectively makes adulthood an essential element of any offense that carries a "mandatory minimum" sentence of life without parole.<sup>110</sup> *Miller's* conversion of age into an offense element is therefore substantive and retroactive.<sup>111</sup>

Colgan's reliance on *Alleyne*, though facially dependent on the Court making adulthood an element of an aggravated offense, actually derives from *Miller's* requirement that states alter the range of sentencing outcomes for juveniles. By virtue of being the only available sentence, life without parole was both the mandatory minimum and maximum sentence for juveniles in states like Michigan; there was no sentencing range. *Miller* subsequently required these states to afford juveniles the possibility of at least one additional sentence with a meaningful opportunity for release. It is this alteration of potential sentencing outcomes for juveniles as a class that enables Colgan's argument that adulthood has become an element of an aggravated offense whose "mandatory minimum" is life without parole.

Indeed, Colgan's argument would be valid any time the Court altered a sentencing range by prohibiting a mandatory punishment for a particular class of offenders. Whatever fact defined individuals not in the protected class—i.e., those still subject to the mandatory penalty—would become an element of the aggravated offense. To illustrate, if the Court next rules that those with intellectual disabilities may not receive mandatory life without parole, by Colgan's thesis, that holding would transform being of ordinary intellectual ability into an element of the aggravated offense. In either scenario, the Court is simply removing a class of offenders

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<sup>107</sup> See Beth Colgan, *Alleyne v. United States, Age as an Element, and the Retroactivity of Miller v. Alabama*, 61 UCLA L. REV. DISC., 262, 268-71 (2013), available at <http://www.uclalawreview.org/pdf/discourse/61-17.pdf>.

<sup>108</sup> *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

<sup>109</sup> *Summerlin*, 542 U.S. at 354.

<sup>110</sup> Colgan, *supra* note 105, at 268-71.

<sup>111</sup> *Teague v. Lane*, 489 U.S. 288, 307 (1989) (plurality opinion).

from the mandatory sentencing scheme and obliging states to implement additional sentencing outcomes for that class.

This clarity is necessary to answer fully the question of whether invalidating a mandatory punishment and requiring individualized sentencing is substantive under *Teague*. Colgan's approach presents a persuasive and perhaps complete theory for *Miller's* retroactivity. But it does not fully account for why both *Miller's* and *Woodson's* sentencing rules are substantive. Applying Colgan's reasoning, *Woodson* prohibited states from maintaining the death penalty as a "mandatory minimum." Yet, unlike *Miller*, *Woodson* did not carve out any particular class of defendants from receiving the mandatory minimum. *Woodson* therefore did not make any particular fact defining a class essential to imposing the death penalty in the way that *Miller* arguably makes adult status a prerequisite to applying a mandatory minimum of life without parole. Consequently, although Colgan's theory results in *Miller* being substantive because it makes adulthood an element of a mandatory minimum sentence under *Alleyne*, the theory fails to answer whether *Woodson* is retroactive, despite *Miller* and *Woodson* imposing the same essential requirements of individualized sentencing.

Colgan's thesis also cannot help classify *Miller's* individualized sentencing mandate in situations where neither the mandatory maximum nor minimum is at stake, i.e., where the jurisdiction is not required to alter the range of possible sentencing outcomes. If a non-mandatory sentencing range already exists, an individualized sentencing and mitigation requirement could force states to enact a new scheme that incorporates mitigation to arrive at outcomes without altering the range. This could occur if a state allowed a judge, after considering only the aggravating factors of the offense, to impose a sentence of either life with or without parole. The Supreme Court might then issue a new decision requiring the state to consider a defendant's mitigation before sentencing. In this scenario, there is no mandatory sentence at issue, and thus no argument that the Court made a particular fact an element of an aggravated offense. Still, from the discussion above, the threshold requirement of mitigation would be substantive under *Summerlin*. While Colgan's approach may corroborate the argument that *Miller* is substantive under *Summerlin*, it does not account for the additional conclusion under *Summerlin* that the mitigation requirement, found in both *Miller* and *Woodson*, is itself substantive. Given these omissions, the "adulthood as element" theory is not fully satisfying

as a tool for assessing whether individualized sentencing is substantive or procedural.

From the above discussion, it is plain that *Miller's* mandate of individualized sentencing for juveniles, like *Woodson's*, not only forces states to expand sentencing outcomes beyond the most severe mandatory punishment, its mitigation requirement also provides a critical new rule of decision for arriving at sentencing outcomes under the new regime. Both of these functions are substantive.

*C. Miller's Procedural Component Is Undefined and Collateral to Its Substantive Changes*

Having identified two substantive components of *Miller's* individualized sentencing requirement as adapted from *Woodson*, it cannot be denied that the decision also invokes process. After all, states with mandatory sentencing schemes before *Miller* must develop new procedures for how they will identify “the rare juvenile offender whose crime reflects irreparable corruption.”<sup>112</sup> However, a thorough examination of this supposed procedural dimension further confirms that *Miller* does not merely regulate process.

Although *Miller* prohibits a state from exposing juveniles to life imprisonment without parole unless there is consideration of youth, it in no way addresses “the procedural requirements the Constitution attaches” to the consideration of youth.<sup>113</sup> States remain free to determine “the manner and the means”<sup>114</sup> for the consideration of youth in accordance with *Miller's* expansion of sentencing outcomes and new rule of decision. One therefore should not conflate the Supreme Court's statement in dicta that its decision “requires only that a sentencer follow a certain process,”<sup>115</sup> with the question of whether *Miller* should be considered a substantive or procedural rule under *Teague*.

More to the point, it is objectively inaccurate to state that *Miller* only requires states to follow a certain process. States must do far more. They are required to expand the range of juvenile sentences to always include the possibility of release. They must also consider youth and its attendant circumstances as mitigating

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<sup>112</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

<sup>113</sup> See *Summerlin*, 542 U.S. at 354.

<sup>114</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quotations omitted); see also *Summerlin*, 542 U.S. at 351-52.

<sup>115</sup> *Miller*, 132 S. Ct. at 2471.

factors to ensure that the harshest possible sentence is uncommon and rare.<sup>116</sup> *Miller's* limits on state authority therefore have little to do with sentencing procedure and everything to do with sentencing outcomes.

Further, basing the *Teague* analysis on the Court's dicta would prove too much. Every new substantive rule potentially requires states to follow "a certain process" to enforce the new right. This truism simply expresses the necessary interplay between substance and procedure.<sup>117</sup> Blind adherence to the Court's "certain process" language would eviscerate the very idea of substantive rules.

For example, the Supreme Court's decision in *Atkins v. Virginia* banned the death penalty for the intellectually disabled.<sup>118</sup> The decision's categorical prohibition on the death penalty for this class is indisputably substantive,<sup>119</sup> yet it is equally indisputable that the Court delegated to the states the task of implementing appropriate procedures to identify members of the newly protected class.<sup>120</sup> States seeking to preserve life without parole as a sentencing option for juveniles face a similar task following *Miller*, namely, legislating procedures that satisfy the individualized sentencing mandate.

This interplay between the substantive constitutional rule and the procedures constitutionally required to enforce the rule can be observed in the decisions following *Woodson*. In the wake of *Woodson*, states maintained vastly different procedures for implementing the Court's requirement of individualized sentencing in death penalty cases.<sup>121</sup> A contrast may therefore be drawn between, on the one hand, the Court's rulings outlawing the mandatory death penalty and, on the other hand, the Court's later rulings regulating the processes by which states implemented individualized capital sen-

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<sup>116</sup> See *State v. Ragland*, 836 N.W.2d. 107, 115 (Iowa 2013) ("From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing.").

<sup>117</sup> See *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945).

<sup>118</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>119</sup> *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (classifying as substantive the rule subsequently declared in *Atkins*), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>120</sup> See *Hill v. Humphrey*, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc) ("*Atkins* Left Procedural Rules to States.").

<sup>121</sup> Compare *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion) (upholding Texas capital scheme of posing to sentencing jury three questions because nature of one question allowed defendant to submit any mitigating circumstances), with *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion) (upholding Florida capital scheme of directing judge and advisory jury to consider enumerated mitigating circumstances).



tencing schemes. The analysis advanced in this Article would demand providing *Woodson* full retroactive effect as a substantive rule. It further dictates that the Court correctly held that its latter decisions reviewing *Woodson*'s implementation through specific sentencing schemes were procedural.<sup>122</sup>

*Miller*, as was the case with *Woodson*, recognized the right to individualized sentencing for a class of defendants without dictating specific procedures for vindication of that right. Future debates in the states over *Miller*-compliant processes for considering mitigation are certain to follow. That states must explore these mechanisms does not alter the fact that *Miller* itself articulates a substantive rule, and that states must comply with *Miller* for all of the juveniles whose sentencings that decision rendered unconstitutional.

### CONCLUSION

*Miller* requires that states seeking to incarcerate juveniles without any hope of release do so rarely, and only after conducting an individualized sentencing where the circumstances of youth—immaturity paired with the capacity for change—are given mitigating effect. Prior to *Miller*, this hopeless sentence was anything but rare, having been inflicted on over 2,000 juveniles. Worse still, life imprisonment with no possibility of release was most frequently imposed by judges powerless to consider anything except the bare fact of conviction.

An honest assessment of *Miller* demands that the overwhelming majority of youth condemned to die in prison deserve a meaningful opportunity for release at some point in their lifetimes. Nonetheless, five states, including Michigan, have determined that because the *Miller* majority characterized the decision as only requiring a "certain process," *Miller* announced a procedural rule that is not retroactive under *Teague v. Lane*. Unless the United States Supreme Court declares otherwise, the overwhelming majority of youth that these states have condemned to die in prison may never have an opportunity at redemption.

The discussion in this Article establishes that states like Michi-

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<sup>122</sup> See, e.g., *Beard v. Banks*, 542 U.S. 406 (2004) (denying retroactive relief to post-*Woodson* holding that a capital sentencing scheme could not require the jury to disregard a mitigating element unless the jury found the element unanimously); see also *Sawyer v. Smith*, 497 U.S. 227 (1990) (denying retroactive relief to post-*Woodson* holding that a sentencer cannot be led into a false belief that the responsibility for imposing death rests elsewhere).

gan have proceeded on a false premise. Irrespective of the language used in the *Miller* majority's opinion, the decision does not simply require a "certain process." *Miller*, like its doctrinal predecessor *Woodson*, is principally attuned to sentencing outcomes, not sentencing procedures. *Miller*'s individualized sentencing mandate forces the states to abandon their previously inflexible sentencing regimes in order to drastically reduce the number of juveniles discarded as "throw away" people. *Teague* demands classifying *Miller* as a substantive decision that binds the states retroactively.