CRUEL, UNUSUAL, AND COMPLETELY BACKWARDS: AN ARGUMENT FOR RETROACTIVE APPLICATION OF THE EIGHTH AMENDMENT

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In 2012, the Supreme Court issued a landmark decision substantially altering the long-held view that "death was different" from other punishments under the Eighth Amendment. In Miller v. Alabama*, the majority held that defendants who were under eighteen at the time of their crimes were categorically less culpable than adult offenders, and were constitutionally entitled to individualized hearings before being sentenced to life without parole. Because the majority opinion did not discuss whether the new rule was retroactive,* Miller *raises a question rarely raised throughout our country's judicial history: Once a punishment is found unconstitutionally cruel and unusual, may the states continue to inflict it on those whose sentences were final at the time? This Note posits the idea that our current retroactivity framework, as articulated, does not always lead courts to the correct answer when considering this question, and that an articulated presumption of retroactivity is necessary to ensure Eighth Amendment protections in the context of both capital and noncapital sentences. Part I provides an overview of retroactivity, and then discusses the opinions in* Miller. *Part II explores the evolution of Eighth Amendment jurisprudence, with special attention to how the retroactivity question has been answered in the affirmative through history, and then reports the current divide in the state courts and federal circuit courts regarding* Miller*'s retroactive availability. Part III explains that the reason we have had presumptive retroactivity, and should continue to do so, in the Eighth Amendment context is because the state interests driving the retroactivity doctrine are diminished and ultimately irreconcilable with the guarantee against cruel and unusual punishments.*

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Introduction

In 2012, the Supreme Court issued a landmark decision[1] substantially altering the long-held view that "death was different" under the Eighth Amendment, and thus required heightened procedural protections.[2] Prior to *Miller v. Alabama*, the Court had treated capital and noncapital sentencing differently,[3] holding that other severe punishments, particularly life-without-parole sentences given to minors, did not require the same protections. The 5–4 *Miller* majority crossed this

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

[2] *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree.").

[3] *See* Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 Ohio St. J. Crim. L. 195, 214 (2004) (describing the discretion of juries in noncapital sentencing as compared to capital sentencing).

divide, holding that defendants who were under eighteen at the time of their crimes were categorically less culpable than adult offenders, and were constitutionally entitled to individualized hearings before being sentenced to life without parole.[4] Furthermore, the majority emphasized that in the eyes of judges and juries, not only should death be different, but juveniles should be regarded differently as well.[5] Justice Kagan, writing for the majority, concluded that given the scientific information that had emerged regarding juveniles' brain development and capacity for rehabilitation, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" and reserved for those "whose crime reflects irreparable corruption."[6]

At the time of the decision, more than twenty-five hundred juvenile offenders were serving exactly the type of mandatory life-without-parole sentences that the Court now deemed cruel and unusual, and thus beyond the power of Congress or the states to impose.[7] Twenty-eight states and the federal system required juvenile offenders convicted of certain crimes to be sentenced to life without parole, and mandated that they would spend their entire adult lives in prison without any opportunity for release.[8] For these offenders, many of whom had already spent decades incarcerated, *Miller* provided the only hope they had been given since their sentences became final. After all, how could they continue to serve their life-without-parole sentences, now deemed cruel and unusual punishments, without the kind of sentencing hearings the Court had held were constitutionally required? State post-conviction and federal habeas petitions began to trickle and then pour in as prisoners rushed to meet the applicable statutes of limitations.[9]

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[4] *Miller*, 132 S. Ct. at 2469.

[5] *Id.* at 2470; *see also* Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 72 (2013) ("With increasing clarity, the Court has announced a broad principle grounded in developmental knowledge that 'children are different' from adult offenders and that these differences are important to the law's response to youthful criminal conduct." (quoting *Miller*, 132 S. Ct. at 2470)).

[6] *Miller*, 132 S. Ct. at 2469.

[7] Paul Elias, *Life Sentences for Juveniles: Should 2,500 Serving Life Without Parole Be Released?*, Huffington Post (Aug. 19, 2012, 8:52 AM), http://www.huffingtonpost.com/2012/08/19/life-sentences-for-juveni_n_1806259.html; *see also* Human Rights Watch, World Report 2009: Events of 2008, at 538, http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf (estimating that there are about 2502 juvenile offenders serving life-without-parole sentences in the United States).

[8] *Miller*, 132 S. Ct. at 2471.

[9] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), petitioners whose sentences are final on direct review and who are seeking habeas relief must file within a year of the decision that is the basis for their petition. 28 U.S.C. § 2244(d)(1)(A), (C) (2012). This time period is tolled while the petitioner is properly in state post-

With relief on the horizon, state and lower federal courts started ruling on these petitions erratically and inconsistently.[10] Some prisoners were immediately granted relief in state proceedings and awarded resentencing hearings under the guidelines set out in *Miller*.[11] Others were initially provided new hearings, which were later denied as the states and prosecutors began to fight the application of *Miller* to sentences that were final on direct appeal.[12] What has emerged is a seemingly arbitrary tableau: State and federal courts, evaluating the retroactive effect of the same decision on petitioners in the same procedural posture, have come to vastly different conclusions. At stake for each defendant is the opportunity to someday qualify for release, or else a guaranteed death in prison. In December 2014, the Supreme Court granted certiorari on an appeal to the Louisiana Supreme Court's decision that *Miller* was not retroactive, and practitioners expected to have a final answer on the question by June 2015.[13] However, after certiorari was granted, oral arguments scheduled, and the petitioner's brief filed, the district attorney offered a plea bargain to the defendant, which he accepted, and he was released from prison.[14] The case was dismissed as moot in February 2015 pursuant to Rule 46.1[15] and the retroactivity question remains unresolved.[16]

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conviction proceedings, *id.* § 2244(d)(2), but the petitioner must also meet applicable state statutes of limitations, which vary from state to state. *See, e.g.*, GA. CODE ANN. § 9-14-42(c) (2014) (statute of limitations is four years for felony convictions except in death penalty cases, and one year for misdemeanors except as provided in § 40-13-33); OR. REV. STAT. § 138.510(3) (2015) (statute of limitations is two years for all crimes unless the court finds grounds for relief which could not reasonably have been raised in the original or amended petition).

[10] *See infra* Part II.C.1 (describing a variety of judicial opinions on retroactive application of *Miller*).

[11] *See infra* notes 137–40 and accompanying text (describing decisions of Mississippi and Massachusetts courts to apply *Miller* retroactively).

[12] *See infra* notes 129–31 and accompanying text (discussing the application of *Miller* in Louisiana).

[13] State v. Toca, 2013-1110 (La. 6/20/14); 141 So. 3d 265, *cert. granted in part*, 135 S. Ct. 781 (2014) *and cert. dismissed*, 135 S. Ct. 1197 (2015).

[14] Lyle Denniston, *Juvenile Sentencing Case to End*, SCOTUSBLOG (Feb. 3, 2015, 10:59 AM), http://www.scotusblog.com/2015/02/juvenile-sentencing-case-to-end/.

[15] SUP. CT. R. 46.1 ("At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed . . . and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.").

[16] In March 2015, the Supreme Court granted certiorari in a new case scheduled to be heard during the October term. Montgomery v. Louisiana, 135 S. Ct. 1546, 1546 (2015). The Court also asked the parties to brief the question of whether the Supreme Court has federal question jurisdiction over Louisiana's decision to not grant retroactive relief through state post-conviction proceedings. *Id*.

The post-*Miller* mess is a concrete example of what happens at the intersection of two confusing—sometimes incomprehensible—doctrines of criminal law: retroactivity and the Eighth Amendment. *Miller* raises a question that has rarely been asked in our country's judicial history: Once a punishment is found unconstitutionally cruel and unusual, may the State continue to inflict it on those whose sentences were final at the time of the Court's decision? While the *Miller* retroactivity question provides a hook and a legal space to discuss this issue, an appropriate answer should address the broader topic of the retroactive application of *all* criminal Eighth Amendment decisions.[17] Thus, this Note posits that our current retroactivity framework does not always lead courts to the correct answer in determining this question and, even when courts correctly grant retroactivity, they often do so for the wrong reasons. As the Supreme Court continues to develop and expand Eighth Amendment doctrine outside the context of capital punishment, an articulated presumption of the retroactivity of these decisions—justified because they are outside the current legal framework for determining retroactivity—is necessary to ensure the Amendment's protections in the context of both capital and noncapital sentences.

This Note aims to provide a nuanced understanding of the theoretical and historical background of both retroactivity and Eighth Amendment law, including the precedent drawn on in *Miller*, in order

[17] Since *Miller* came down, numerous scholars and practitioners have argued that retroactive application of the decision is appropriate under the current framework used by federal courts because the case fits within one of the two exceptions to non-retroactivity outlined by *Teague* (detailed further below). *See, e.g.*, Brandon Buskey & Daniel Korobkin, *Elevating Substance over Procedure: The Retroactivity of* Miller v. Alabama *Under* Teague v. Lane, 18 CUNY L. Rev. 21, 26 (2015) (arguing that *Miller* announced a substantive obligation which should be found retroactive under *Teague*); Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 Conn. Pub. Int. L.J. 143, 145 (2013) (offering four actions states should take in response to *Miller*, including retroactive application, but failing to provide a normative basis for this argument); Eric Schab, *Departing from* Teague*:* Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 Ohio St. J. Crim. L. 213, 215 (2014) (suggesting that *Miller*, when taken together with other recent Supreme Court cases, provides a "watershed" decision within this line of cases, and thus should be retroactively applied under the *Teague* exceptions); Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 Ind. L. Rev. 931, 935, 970 (2015) (concluding that *Miller* is not substantive in toto but that the decision contains a substantive component, thus allowing habeas petitioners to rely on it under AEDPA, which is discussed *infra* notes 39–46, 180–84 and accompanying text).

However, these scholars have declined to broaden the argument to one encompassing the criminal Eighth Amendment as a whole, not anticipating further developments in the wake of *Miller*, and have failed to suggest that the retroactivity of these decisions lies outside of the current framework altogether.

to fully analyze the problems inherent to their juxtaposition, as well as to contextualize this thesis. Part I provides an overview of retroactivity doctrine and then discusses the opinions in *Miller*. Part II explores the evolution of Eighth Amendment jurisprudence through the lens of the retroactivity question being answered affirmatively throughout history, and also describes the current divide in state and federal courts regarding the retroactive applicability of *Miller*. Part III explains that there has been an unstated presumption of retroactivity in the Eighth Amendment capital punishment context because the state interests driving the retroactivity doctrine are diminished and ultimately irreconcilable with the guarantee against cruel and unusual punishment. This Note then argues that an articulated presumption of retroactivity should apply to the Eighth Amendment as a whole, because states' interests against retroactivity are equally irrelevant in both the noncapital punishment and capital punishment contexts.

I
The *Miller* Retroactivity Problem

A. *What Is Retroactivity?*

A brief history of American retroactivity jurisprudence and an explanation of the current doctrine are required to understand the extent of the confusion caused by *Miller* and the inherent theoretical conflict between the retroactivity doctrine and Eighth Amendment jurisprudence. Current retroactivity doctrine allows for four different options along a prospective/retrospective spectrum that a court may consider when determining how a new rule is to be applied: pure retroactivity, full retroactivity, selective prospectivity, and pure prospectivity.[18] Federal retroactivity doctrine, which, for the most part, dictates state retroactivity doctrine,[19] has moved around the spectrum throughout history, with separate, complex rules emerging to govern

[18] Pure retroactivity means that the new legal rule is applied to all cases, whether on collateral or direct review. Full retroactivity means that the rule is applied to all cases not final on direct review. Selective prospectivity means the rule is applied to the case announcing the new rule as well as all cases from that time forward (and sometimes selected cases filed before that date). Pure prospectivity restricts the application of the rule to the cases filed only after the date the new legal rule was announced. Courts may also choose a hybrid of these four methods. *See* Paul E. McGreal, *A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity*, 9 Alaska L. Rev. 305, 307 (1992) (describing these options).

[19] *But see* Danforth v. Minnesota, 552 U.S. 264, 281–82 (2008) (stating that federal law does not limit the state courts' authority to provide retroactive remedies even if a rule is deemed non-retroactive under *Teague* because the states are free to give broader retroactive effect to new rules in state conviction proceedings).

retroactivity in civil and criminal law.[20] The complexities and inconsistencies once drove Justice Harlan to comment that the Supreme Court's retroactivity doctrine was "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."[21] Given the wide reach of the doctrine, this Note discusses only retroactivity as applied to criminal law.

Although *Teague v. Lane*[22] provides the modern blueprint for the federal courts' retroactivity analysis, earlier cases help illuminate the incentive to limit the retroactive application of criminal case law, which is especially salient for Eighth Amendment decisions. The history of retroactivity doctrine is also crucial to understanding the approach courts took towards Eighth Amendment cases decided pre-*Teague*, as discussed in Part II.

1. The Historical Background of Retroactivity

The historical background and factors that comprised previous retroactivity frameworks help illuminate how inapplicable the modern doctrine is in the context of the Eighth Amendment, even from an originalist perspective. For almost two hundred years, United States courts applied the pure retroactivity approach as dictated by the Blackstonian view that judges were not really making law but merely "finding" it.[23] In 1965, the Supreme Court finally confronted the retroactivity question in *Linkletter v. Walker*[24] and determined that a

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[20] Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907 (1962) (explaining the principle that "judicial decisions are of their nature retrospective").

[21] Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part & dissenting in part).

[22] *See infra* Part I.A.2 (describing the *Teague* analysis, which holds that new rules of criminal procedure do not apply retroactively, and the two exceptions).

[23] Under this theory of the judiciary's role, the old rule represented incorrectly "found" law and thus was never actually valid. *See, e.g.*, Legg's Estate v. Comm'r, 114 F.2d 760, 764 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation."); 1 WILLIAM BLACKSTONE, COMMENTARIES *69–70; JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 93 (2d ed. 1921) ("The Law . . . is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the law, they are not the Law because they are laid down by the judges; . . . judges are the discoverers, not the creators, of the Law."); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1082 (1999) (noting that the very "concept of retroactivity is a relative newcomer to our jurisprudence" since retroactive application was historically the norm).

[24] *See* 381 U.S. 618, 622 (1965) (considering whether the Fourth Amendment exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), applied to state convictions that at the time had been final on direct review).

change in law would be applicable to all cases on direct appeal.[25] The Court also found that there was no concrete principle guiding the collateral effect of a subsequent new rule.[26] The Court balanced the conflicting reliance and equity principles at play and created a three-pronged test for determining retroactivity: the purpose of the new rule, the reliance placed on the old rule, and the effect of retroactive application on the administration of justice.[27] The justifications behind this approach were fundamentally abandoned with the emergence of the *Teague v. Lane* framework, which governs modern retroactivity analysis.

2. *The* Teague v. Lane *Model and Evolution of the Two Exceptions*

In 1989, a plurality of the Supreme Court in *Teague v. Lane* departed from the *Linkletter* test and held that new rules of criminal procedure do not apply retroactively to cases that had become final on direct review at the time the new rule was decided.[28] Particularly relevant to the thesis of this Note is the justification provided by the Court for this new bright-line retroactivity test: The Court cited equitable treatment of similarly situated defendants,[29] comity and federalism in determining the proper scope of habeas review,[30] and the "principle of

[25] Cases are considered final on direct appeal after all trial proceedings and direct appeal proceedings, and the Supreme Court either denies a petition for certiorari or issues a decision. *Compare* Johnson v. New Jersey, 384 U.S. 719, 726–27 (1966) (departing from the statement in *Linkletter* and holding that the three-part test applied equally to criminal cases on direct review), *with* Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (determining that failing to apply a constitutional rule to criminal cases on direct review was a constitutional violation, given the Article III "cases and controversies" requirement that federal courts must apply their understanding of the law as the case comes before them).

[26] *Linkletter*, 381 U.S. at 627.

[27] *Id.* at 629; *see also* Stovall v. Denno, 388 U.S. 293, 297 (1967) (describing the three-part balancing test to be employed in each case: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards"). Commentators have argued that the *Linkletter* test favored reliance interests over equity principles as government reliance is examined by both the second and third factors and equity is not taken into consideration at all. McGreal, *supra* note 18, at 310–11.

[28] *See* Teague v. Lane, 489 U.S. 288, 296 (1989) (determining the retroactivity of the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986)). The *Teague* plurality's retroactivity analysis was endorsed by a majority of the Court and applied to capital cases later that same year. Penry v. Lynaugh, 492 U.S. 302, 314 (1989). The *Teague* plurality left unchanged the *Griffith v. Kentucky* determination that new rules applied retroactively to all cases not yet final on direct review. 479 U.S. 314, 328 (1987).

[29] *See Teague*, 489 U.S. at 305 (explaining that announcing new rules in collateral cases and later limiting their retroactive effect has led to disparate treatment). The plurality felt it could fix this inequity by treating retroactivity as a threshold question. *Id.*

[30] *Id.* at 308.

finality which is essential to the operation of our criminal justice system."[31] The Court then discussed the considerations of cost, reliance, judicial intrusion, and the frustrations of state courts when prisoners were given the ability to upset finalized convictions.[32] According to several Justices, the change in retroactivity was needed to both simplify the retroactivity test and protect the states' interest in finality.[33] The Court decided that a case announces a new rule when it breaks new ground or imposes a new obligation on the states, or, in other words, if the result was not dictated by precedent when the defendant's conviction became final.[34] The Court also described two exceptions to the general rule against collateral retroactivity. First, new legal rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and, second, rules that are "implicit in the concept of ordered liberty."[35] Later cases elaborated and clarified these exceptions to distinguish between substantive and procedural rules: Substantive rules generally apply retroactively, but procedural rules must be "watershed rules of criminal procedure."[36] The plurality in *Teague*

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[31] *Id.* at 309.

[32] *Id.* at 310.

[33] *See* L. Anita Richardson & Leonard B. Mandell, *Fairness over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11, 23 (1989) (explaining how and why it took the Court more than twenty years to articulate that the *Linkletter* rule is "as fundamentally arbitrary and indefensible today as it was in 1965"); Benjamin P. Cooper, Comment, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. CHI. L. REV. 1573, 1590 (1996) (detailing the multiple motivations driving *Teague*: the states' interests in finality, economic benefits, and incentivizing trial and appellate courts to apply the correct constitutional standards). Justifications for the *Teague* framework are further discussed in Part III.A, *infra*.

[34] *See* John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 340 (1991) (discussing the contradiction in the two definitions of "new rule" in *Teague*).

[35] *Teague*, 489 U.S. at 307 (citing Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., dissenting)).

[36] Schriro v. Summerlin, 542 U.S. 348, 352 (2004). The *Summerlin* Court also emphasized that the set of rules that would meet the second exception was "extremely narrow." *Id.* at 352. The Supreme Court has never found a claim that fits within the second exception. *See, e.g.*, Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (finding the second exception inapplicable to the rule prohibiting double jeopardy in noncapital sentencing procedures); Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (finding the second exception inapplicable to the rule that homicide instructions denied due process in permitting a jury to convict for murder instead of voluntary manslaughter without considering whether the killing was in the heat of passion); Sawyer v. Smith, 497 U.S. 227, 244 (1990) (finding the second exception inapplicable to the rule that the Eighth Amendment bars imposition of a death sentence by a jury that has been led to falsely believe that responsibility lies somewhere else); Saffle v. Parks, 494 U.S. 484, 495 (1990) (finding the second exception inapplicable to the rule that in a capital sentence hearing, it violates the Eighth Amendment to provide jury instructions that tell the jury to avoid any influence of sympathy).

also stated that the retroactivity of any decision should be treated as a threshold issue—thus, the Court should only announce a new rule when the rule would be applied retroactively to the defendant (whether on direct or collateral review) and all those similarly situated.[37] As explained further in Part III, the articulated concerns for finality and simplicity driving the formulation of the modern framework are fundamentally incompatible with the promise of the Eighth Amendment.[38]

3. *Requirements for Federal Habeas Corpus Relief and Successive Petitions*

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),[39] which severely limited the availability of relief through federal habeas corpus petitions.[40] Under AEDPA, a federal court ruling on an original petition for federal habeas relief by a state prisoner may not grant it unless the defendant has exhausted state post-conviction remedies and the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[41] On its face, this provision would require that the Supreme Court explicitly determine the retroactivity of all their decisions before state prisoners are entitled to

[37] *See Teague*, 489 U.S. at 300 ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."). While the plurality characterized the threshold test as part of the holding, four justices continued to support the historic approach of announcing a new rule before deciding its retroactive effect. *Id.* at 319 & n.2 (Stevens, J., concurring in the judgment); *id.* at 339 & n.7 (Brennan, J., dissenting). Justice White did not address the timing issue in his concurrence. *Id.* at 316–17.

[38] *See infra* notes 162–72 and accompanying text (critiquing the *Teague* court's limiting of retroactive application of legal rules based on their newness and the placement of finality at conviction).

[39] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[40] *See* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 735–36 (2002) (discussing the collateral effects AEDPA has had on the opportunity for state and federal prisoners to raise claims in habeas actions as to the conditions of their confinement or method of execution).

[41] 28 U.S.C. § 2254(d)(1) (2012). A similar provision for federal prisoners is found in 28 U.S.C. § 2255 (2012) (allowing that a prisoner, under custody, claiming the right to be released upon qualifying grounds, "may move the court which imposed the sentence to vacate, set aside or correct the sentence"). Under § 2255, the qualifying grounds require "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." *Id.*

relief through federal habeas proceedings. Furthermore, if the prisoner has already filed a petition for federal habeas review, the circuit court may only grant him leave to file a successive petition if it is a claim not yet raised and "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[42] Again, the requirement for successive petitions seems to indicate that the Supreme Court must rule on a decision's retroactive effect before federal habeas relief may be granted. In *Tyler v. Cain*, a Supreme Court plurality seemingly endorsed this reading of AEDPA;[43] however, the case law suggests that lower courts have afforded collateral relief in many cases where the Supreme Court has not ruled on the retroactive applicability of its decisions, especially when retroactivity under the *Teague* framework is uncontested.[44] For both original and successive petitions, the petitioner must file within a year of the decision under which he seeks relief.[45] While AEDPA seems to be a significant obstacle to implementing a presumption of retroactivity, in this context it presents only a minor inconvenience.[46]

B. Providing a Legal Space: Miller v. Alabama

On June 25, 2012, the Supreme Court decided *Miller v. Alabama*[47] and its companion case, *Jackson v. Hobbs*.[48] The majority

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[42] 28 U.S.C. § 2244(b)(2)(A) (2012).

[43] *See* 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.").

[44] *See infra* note 104 and accompanying text (providing examples). A more common approach of the lower courts is to determine whether the Supreme Court *would* find a decision retroactive if the case were in front of them, rather than ask if the Supreme Court *already has* declared it retroactive. *See infra* note 46 (same).

[45] 28 U.S.C. § 2244(d)(1)(A), (C) (2012).

[46] *See infra* notes 180–84 and accompanying text (discussing lower courts finding retroactivity absent a Supreme Court ruling on retroactive applicability).

[47] 132 S. Ct. 2455 (2012). On an evening in 2003, fourteen-year-old Evan Miller and a friend smoked marijuana and played drinking games with an adult neighbor. *Id.* at 2462. When the neighbor fell asleep, they stole his wallet. *Id.* The neighbor woke up and tried to stop them, but they hit him repeatedly with a baseball bat. *Id.* Later, they set two fires in order to cover up the evidence of their crime. *Id.* The neighbor died from smoke inhalation and his injuries from the baseball bat. *Id.* The jury found Miller guilty of murder in the course of arson, which statutorily carries a mandatory minimum of life without parole. *Id.* at 2462–63. The Alabama Court of Criminal Appeals affirmed his conviction and his sentence in 2010 and the Alabama Supreme Court denied review. *Id.* at 2463. The Supreme Court granted certiorari on his appeal from the state court determinations, and thus his case was heard on direct review. *Id.*

[48] In 2003, a state jury convicted Kuntrell Jackson of capital felony murder and aggravated robbery for a crime committed in 1999. *Id.* at 2461. The sentencing judge, noting that there was only one option, sentenced Jackson to life without parole. *Id.* Jackson

of the Supreme Court, in an opinion written by Justice Kagan, held that mandatory life imprisonment without parole for those who were under eighteen at the time of their crimes violated the Eighth Amendment's ban on cruel and unusual punishments.

The majority's rationale and use of precedent provides much-needed insight into the retroactivity question. Justice Kagan began by stating that the Court's Eighth Amendment analysis is driven by a concept of proportionality viewed less through a "historical prism" and more through the evolving standards of decency.[49] She then examined two lines of Eighth Amendment precedent—categorical exemptions and individualized sentencing requirements—lingering on the "distinctive attributes of youth" discussed in *Roper v. Simmons*[50] and *Graham v. Florida*.[51] She also drew on *Roper* and *Graham* to conclude that the determination that juveniles are categorically less culpable than adults is at odds with a mandatory sentencing scheme that prevents the judge or jury from taking this into consideration.[52] Additionally, Justice Kagan discussed *Graham*'s creation of a categorical exception outside the capital context as likening life-without-parole sentences to the death penalty when imposed on juveniles.[53] It is at this point that the majority could have chosen to extend the categorical rule established in *Graham* to juvenile homicide offenders (eliminating much need for an extensive retroactivity analysis). Instead, the majority turned to individualized sentencing and the second line of precedent for a solution.[54] Thus, *Miller* does not forbid

did not challenge his sentence or conviction on appeal and the Arkansas Supreme Court affirmed both in October 2004. *Id.* After *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding the death penalty unconstitutional as applied to juveniles), came down in 2005, Jackson filed a petition for state habeas corpus, which was denied by the circuit court. While his appeal from this decision was pending, the Supreme Court decided *Graham v. Florida*, 560 U.S. 48, 74 (2010) (finding life-without-parole sentences unconstitutional for juvenile nonhomicide offenders), and both parties filed briefs addressing the applicability of *Graham* to Jackson's case. The Arkansas Supreme Court ultimately found that *Roper* and *Graham* were narrowly tailored to address the juvenile death penalty and juvenile life-without-parole sentences for nonhomicide offenders, and thus neither provided relief for Jackson. Jackson v. Norris, 378 S.W.3d 103, 106 (Ark. 2011). The Supreme Court granted certiorari on his appeal from the state post-conviction determinations, and his case was heard on collateral review.

[49] *Miller*, 132 S. Ct. at 2463.

[50] 543 U.S. 551 (2005).

[51] 560 U.S. 48 (2010). *See Miller*, 132 S. Ct. at 2464–65 (explaining that juveniles' lack of maturity, recklessness, vulnerability to negative pressures, inability to extricate themselves from crime-producing settings, and transient character traits weaken the penological justifications for imposing upon them life-without-parole sentences).

[52] *Miller*, 132 S. Ct. at 2466.

[53] *Id.*

[54] *Id.* at 2467. Every case Justice Kagan draws on in describing both lines of precedent had been retroactively applied.

all juvenile life-without-parole sentences, only those that are imposed mandatorily without individualized consideration akin to that found in the case of capital sentencing.[55]

Especially relevant to the question of retroactive relief is a statement by Justice Kagan apparently classified as dicta[56]: "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[57] Justice Kagan also made clear that both Miller and Jackson are to be resentenced under mechanisms that provide for individualized consideration.[58] However, the majority failed to answer the question of whether the rule applies to the thousands of prisoners serving mandatory juvenile life-without-parole sentences.

Justice Breyer's concurrence, joined by Justice Sotomayor, adds a corollary to the majority's opinion: For Kuntrell Jackson to be resentenced to life without parole, there would have to be a finding that he killed or intended to kill the robbery victim, or else his sentence would not comport with *Graham*.[59]

Perhaps ironically, it is the dissenters in *Miller* who assumed the decision's retroactive effects in voicing their opposition to the majority's holding.[60] Chief Justice Roberts critiqued the majority's

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[55] *See id.* at 2468 ("Mandatory life without parole for a juvenile precludes consideration" of an array of factors, including the defendant's age and level of emotional development, his or her family and home environment, the circumstances of the homicide, and "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.").

[56] *See* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 Geo. Mason L. Rev. 25, 29 (2012) (referring to the statement as casual speculation); *but see* Richard A. Posner, The Federal Courts: Challenge and Reform 377 (1996) ("[R]emarkably—considering how fundamental the distinction is to a system of decision by precedent—the distinction [between holding and dictum] is fuzzy not only at the level of application but also at the conceptual level.").

[57] *Miller*, 132 S. Ct. at 2469.

[58] *Id.* at 2475.

[59] *Id.* at 2475 (Breyer, J., concurring). Breyer's concurrence suggests that he believes juvenile felony-murderers should not be eligible for life-without-parole sentences both because they are within the reach of *Graham* and because they are not among the worst types of offenders for whom this sentence should be reserved. *Id.* at 2475–76. Specifically, Justice Breyer thinks that applying the doctrine of transferred intent necessary to make a juvenile felony-murderer eligible for a life-without-parole sentence would involve "fallacious reasoning," and he opposes the Court's practice of not recognizing artificially constructed intent in the Eighth Amendment context. *Id.* at 2476–77 (quoting May v. Anderson, 345 U.S. 528, 536 (1953) (concurring opinion)).

[60] *See id.* at 2481 (Roberts, C.J., dissenting) ("Indeed, the Court's gratuitous prediction [that these sentences will be 'uncommon'] appears to be nothing other than an invitation to overturn life-without-parole sentences imposed by juries and trial judges."); *see also*

finding that Miller's sentence was "unusual" under the Eighth Amendment given that more than two thousand juveniles had been given mandatory life-without-parole sentences.[61] He also noted that the *Miller* decision seemed to evoke a principle that could ultimately bar any mandatory juvenile sentences or prevent the state from trying any juveniles as adults.[62] Justice Thomas based his dissent on his originalist understanding of the Eighth Amendment; he reiterated his belief that it prohibited only torturous methods of punishment and not punishments disproportionate to the crime or as applied to a class of offenders.[63] Additionally, he expressed his fear that the majority had gone from "'merely' divining the societal consensus of today to shaping the societal consensus of tomorrow."[64] Similarly, Justice Alito found that since twenty-eight states and Congress had allowed for juveniles to be sentenced to mandatory life-without-parole sentences, the majority engaged in an "arrogation of legislative authority" by finding them unconstitutional.[65] He also spoke to the future of the Eighth Amendment and his belief that the cases were no longer tied to objective indicia but instead whatever the majority believed were the correct and evolved standards of decency.[66]

The holding in *Miller* and the accompanying opinions left open many questions regarding its retroactive and prospective application, as well as its effect on other types of juvenile and life-without-parole sentencing schemes.[67] As stated above, the Court did not directly

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Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 382 (2013) (discussing *Miller*'s retroactivity and its impact on juvenile offenders).

[61] *Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

[62] *Id.* at 2482.

[63] *Id.* at 2483–84 (Thomas, J., dissenting). Note that under the originalist understanding, all Eighth Amendment decisions would be considered categorically retroactive because they would place a certain type of punishment beyond the state's power to inflict. *See infra* note 72 (explaining how a ban against torturous punishments and retroactive application go hand-in-hand).

[64] *Miller*, 132 S. Ct. at 2486.

[65] *Id.* at 2487–88 (Alito, J., dissenting).

[66] *See id.* at 2490 ("Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.").

[67] For a more extensive discussion, see Lerner, *supra* note 56, at 27 (discussing the uncertainty of what is meant by "individualized sentencing," the possible expansion of *Miller* to non-juveniles, and questions regarding long prison sentences that are the practical equivalent to life without parole); Alexander L. Nostro, Comment, *The Importance of an Expansive Deference to* Miller v. Alabama, 22 AM. U. J. GENDER SOC. POL'Y & L. 167 (2013) (arguing that *Miller* applies to juvenile sentencing of mandatory functional life sentences). Among these open questions are what factors must be considered at a juvenile sentencing hearing for life without parole, the extension of the majority's reasoning to virtual life sentences and felony-murder convictions, and the impact on state parole

address the retroactivity question in either the majority or concurring opinions—aside from applying the new rule to Kuntrell Jackson, whose case was on collateral review—but the decision's retroactive impact was assumed by the dissenters. Until this question is settled, thousands of prisoners continue to serve what are now considered unconstitutional sentences with the question of their relief under *Miller* left primarily to the states' discretion.

II
Retroactivity in Eighth Amendment Case Law

The federal and state responses to *Miller* reveal a fundamental conflict between the historical Eighth Amendment presumption of retroactivity and the retroactivity analysis under current doctrine.[68] This Note aims to resolve that conflict by arguing that the Supreme Court should institute a presumption of retroactivity for Eighth Amendment decisions. This conflict has remained hidden, in part, because the Supreme Court in the past has very rarely intervened in punishment outside the context of death.[69]

This Part provides a summary of Eighth Amendment jurisprudence through the lens of retroactivity and illustrates how the question of retroactive application of these cases has always been answered affirmatively. This jurisprudence has created a long-held, but unarticulated, presumption of retroactive application.[70] A discussion of the Eighth Amendment's historical evolution also reveals the original purposes and understandings of the ban on cruel and unusual punishment that guides courts in practical implementation of the Supreme Court's recent decisions. I will also describe some of the conflicted state and federal answers to the question of whether *Miller* applies retroactively to illustrate how courts applying the *Teague* framework misunderstand the implications of the retroactivity question in the Eighth Amendment context.

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schemes. *See* Levick & Schwartz, *supra* note 60, at 389–93 (discussing complications states may have in implementing *Miller*).

[68] *See infra* Parts II.C.1–2.

[69] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long, [as d]eath in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). *But see* Graham v. Florida, 560 U.S. 48, 82 (2010) (finding juvenile life-without-parole sentences for nonhomicide offenders unconstitutional). Because the Court framed the rule in *Graham* as a categorical decision, it did not present the same conflict as *Miller*.

[70] Both retroactivity and the Eighth Amendment are highly complex areas of law, and the overview given here and in Part II.B, *infra*, is meant merely to provide context for evaluating their intersection: namely, the retroactivity of Eighth Amendment decisions.

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[71] The American drafters were primarily concerned with proscribing "tortures" and other "barbarous methods of punishment."[72] Because the types of barbarous punishments used in Stuart, England, were not often seen in the United States, the clause was rarely invoked in the courts before the twentieth century.

A. *Evolving Standards of Decency and Proportionality Review*

In 1910, the Supreme Court in *Weems v. United States* rejected for the first time the proposition that the Eighth Amendment reached

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[71] U.S. CONST. amend. VIII. The phrase "cruel and unusual punishments" first appeared in the English Bill of Rights in 1689 in response to the sentencing practices of royal judges during the reign of King James II. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969); *see also* Solem v. Helm, 463 U.S. 277, 285 n.10 (1983) ("There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen."); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1759 (2008) ("[The English] Bill of Rights . . . was designed to limit the arbitrary exercise of the monarch's prerogative power."). The first application of the provision was retroactive. An Anglican clerk named Titus Oates had been convicted of perjury in 1685 and sentenced to a fine of two thousand marks, pillorying four times a year, life imprisonment, and to be whipped "from Newgate to Tyburn." Trial of Titus Oates (K.B. 1685), 10 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1079, 1315–17 (T. Howell ed., 1811). The court may have believed it was sentencing Oates to be "scourged to death" with this sentence. 2 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND, 62 (Longmans, Green, & Co. 1897). After the Bill of Rights was enacted in 1689, Oates petitioned Parliament for a release from his judgment and the House of Commons passed a bill to release him, finding that the cruel punishments imposed on Oates were beyond the bounds of both the common law and the Bill of Rights. 10 HC Jour. 247 (1689).

Almost a century later, James Madison placed a proscription against "cruel and unusual punishments" in the Bill of Rights he drafted and the language ultimately became part of the Eighth Amendment. *See* Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 420–21 (1995) (discussing the historical progression of the inclusion of the phrase "cruel and unusual punishment" in the American Bill of Rights).

[72] Bukowski, *supra* note 71, at 420–21. This original understanding of the Eighth Amendment mandates that retroactive application was central to the Framers' formulation of the prohibition against cruel and unusual punishments—it would be impossible to actively impose a torturous method of punishment after it was declared cruel and unusual. *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision . . . but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . . ."); *see also* Granucci, *supra* note 71, at 860 (describing the English Bill of Rights of 1689 as "an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court").

only punishments that were inhumane, barbarous, or torturous.[73] Through this case, the Court both broadened the scope of the Eighth Amendment to include considerations of proportionality, and explicitly rejected the eighteenth-century conception of cruelty as a basis for cruel and unusual punishments.[74] This broadened scope of protection was embraced and applied by the Court in later cases to both categories of criminal offenders[75] and types of sentencing power.[76]

The majority of the Court has declined to adopt a robust proportionality review doctrine for all criminal sentencing, and instead has carved out categorical exceptions for death sentences and juvenile life-without-parole sentences.[77] The formulation of the Court's "evolving standards of decency" test has fluctuated in its individual application, but is generally measured by an assessment of contemporary values both through objective indicia[78] and the independent judg-

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[73] 217 U.S. 349, 381 (1910) (finding a sentence of fifteen years of hard labor while chained at the ankles and wrists for the crime of falsifying a public document unconstitutional). The Court noted the English origins of the text but concluded that the Framers "intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts" and insisted that the Amendment was "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 372–73. In contrasting Weems' sentence to the lighter sentences available for more serious offenses, the Court concluded that it was cruel and unusual. *See id.* at 381 (finding the sentence "exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice").

[74] *See* Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 Ohio St. J. Crim. L. 403, 407 (2011) ("After canvassing various interpretations of the Clause, the Court insisted that the Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'") (internal citations omitted).

[75] *See* Robinson v. California, 370 U.S. 661, 667 (1962) (declaring the state criminalization of narcotic drug addiction "cruel and unusual" and thereby unconstitutional). *Robinson* also incorporated the Eighth Amendment's ban on cruel and unusual punishments into the Fourteenth Amendment's Due Process Clause, rendering it applicable to the states as well as the federal government. *Id.* at 666.

[76] *See* Trop v. Dulles, 356 U.S. 86, 102–04 (1958) (plurality opinion) (invalidating a sentence of expatriation for the crime of wartime desertion). The Court found that while expatriation did not constitute torture in the traditional sense of physical brutality, it amounted to "a form of punishment more primitive than torture . . . destroy[ing] for the individual the political existence that was centuries in the development." *Id.* at 101. As a result, expatriation was inconsistent with the "dignity of man" and consensus of civilized nations underlying the Eighth Amendment. *Id.* at 100.

[77] *See* Harmelin v. Michigan, 501 U.S. 957, 997–1002 (1991) (Kennedy, J., concurring in part and concurring in judgment) (concluding that the Eighth Amendment contains only a "narrow proportionality principle," that "does not require strict proportionality between the crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime"). *Id.* at 1001.

[78] These indicia are primarily patterns of jury decisionmaking and trends in legislation. Occasionally, the Court also engages in an international comparison. *See* Graham v. Florida, 560 U.S. 48, 80 (2010) ("There is support for our conclusion in the fact that, in

ment of the judiciary.[79] Several of the Eighth Amendment cases discussed in the next section are examples of the Court's application of the test to specific types of offenders and sentences and are targeted to answering the retroactivity question.

B. *Retroactivity of Eighth Amendment Decisions*

The Supreme Court in *Miller* draws on two lines of Eighth Amendment precedent in its analysis of the constitutionality of mandatory juvenile life-without-parole sentences.[80] Each of the cases in both lines of case law has been retroactively applied by the lower courts, implying that until *Miller* there was an assumed presumption of retroactivity. This Note's proposition that an articulated presumption is the appropriate solution in the Eighth Amendment context is bolstered by an understanding of the reasons for the "silent" presumption of retroactivity. Since some of these cases were decided under pre-*Teague* case law, it is important to understand the evolving justifications for restricting retroactivity under the doctrine.[81]

1. *Pre-*Teague *Cases: Constitutional Requirements for Capital Sentencing*

The cases mandating individualized sentencing in the death penalty context were all decided before *Teague v. Lane* replaced the increasingly convoluted *Linkletter* triad. After the Supreme Court in *Furman v. Georgia* found that the imposition of the death penalty in the cases before them was a violation of the Eighth and Fourteenth Amendments, the states and Congress were required to rewrite their capital sentencing schemes in order to comport with the requirement that the death penalty not be administered in an arbitrary or capricious manner.[82] In the four years that passed between *Furman* and the Court's subsequent ruling on the constitutionality of capital sentencing mechanisms, there was effectively a moratorium on the death

continuing to impose life-without-parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.").

[79] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting *Trop*, 356 U.S. at 100) (noting that the judicial responsibility to exercise independent judgment is to ensure that the punishment is consistent with "the dignity of man").

[80] *See* Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012) (detailing the line of categorical exemptions and individualized sentencing requirements that informed the Court's decision).

[81] *See supra* Parts I.A.1–2 (detailing the evolution of the retroactivity doctrine and the impetus behind *Teague*).

[82] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (finding two death sentences for homicide and one for rape unconstitutional although the Justices in the majority did not produce a controlling opinion as to what the violation was).

penalty and those individuals already on death row were not executed. Hence, it was widely understood, although not litigated, that *Furman* applied retroactively and those with finalized convictions would benefit from any changes in state or federal sentencing practices.[83] On July 2, 1976, the Supreme Court explained in five separate decisions the requirements for states to constitutionally sentence offenders to death.[84] Anyone put to death after this date would have to be sentenced under a constitutional scheme, regardless of when his or her conviction was final.

In *Lockett v. Ohio*[85] and *Eddings v. Oklahoma*,[86] the Court emphasized that, constitutionally, a sentencer in capital cases could not be precluded from considering as a mitigating factor any information about the defendant or the circumstances of the crime.[87] In doing so, it differentiated the requirements of capital sentencing from noncapital sentencing due to the irreversible nature of the punishment of death.[88] Both *Lockett* and *Eddings* were retroactively applied by the

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[83] Note that *Teague* was decided in 1989 and thus was not the framework used to determine the retroactivity of *Furman* or any of the individualized sentencing cases discussed below with the exception of *Sumner*.

[84] *See* Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion) (invalidating a statute mandating death sentence for first-degree murder); *Gregg*, 428 U.S. at 196–98 (finding a death penalty scheme requiring additional evidence of an aggravating factor valid); Proffitt v. Florida, 428 U.S. 242, 247–53 (1976) (validating a statute requiring the jury to weigh mitigating factors against statutory aggravating factors); Jurek v. Texas, 428 U.S. 262, 276–77 (1976) (ruling a narrow definition of capital murder and scheme which required jury to consider "special issues" valid); Roberts v. Louisiana, 428 U.S. 325, 332–37 (1976) (invalidating a mandatory death penalty scheme for five categories of first-degree murder). In upholding the Georgia, Florida, and Texas statutes and striking down the North Carolina and Louisiana statutes as unconstitutional, the Court effectively banned any sentencing scheme that made the death penalty mandatory for certain crimes. *See, e.g.*, *Woodson*, 428 U.S. at 301 (finding that the first-degree murder death penalty statute in North Carolina "departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards'" (quoting *Trop*, 356 U.S. at 100). The Court further held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304.

[85] 438 U.S. 586 (1978).

[86] 455 U.S. 104 (1982).

[87] *See Lockett*, 438 U.S. at 604 (concluding that the Eighth and Fourteenth Amendments require sentencers to "in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

[88] *See id.* at 604–05 (delineating differences between capital and noncapital sentencing requirements). In noncapital cases, the opportunity to present evidence of mitigation has been widely embraced as a concomitant to judges' sentencing discretion, though the

lower courts.[89] In *Sumner v. Shuman*, the Court effectively slammed a door already closed in *Woodson v. North Carolina*[90] and found unconstitutional a statute mandating the death penalty for an inmate convicted of murder while serving a life sentence.[91] *Sumner* was a case decided on collateral review two years before *Teague*, but later courts using the *Teague* framework applied it retroactively.[92] In drawing on the individualized sentencing line of precedent in *Miller*, the Court has crossed the divide it previously created between capital and non-capital cases and, for the first time, found the Constitution requires individualized sentencing for a sentence less than death. Because all individual sentencing cases were decided before *Teague*, courts have never had to determine how modern retroactivity doctrine conflicts with the presumption of retroactive application these new rules carry.

2. *Retroactivity and Collateral Review:* Roper v. Simmons

Under *Teague*'s rationale, if the Supreme Court decides a case on collateral review, there is an indication that the decision meets either the substantive rule exception or the watershed procedural rule exception, and therefore applies to all those similarly situated.[93] One line of cases the Court draws on in *Miller* discusses the categorical exemptions of certain groups of people from specific types of punishment—namely, capital punishment or life-without-parole sentences.[94]

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opportunity is not constitutionally mandated. *See* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 56, 58 (2013) (citing *Lockett*, 438 U.S. at 602–03).

[89] *See, e.g.*, Dutton v. Brown, 812 F.2d 593, 599 n.7 (10th Cir. 1987) (noting that "retroactive application" of *Lockett* is mandatory); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (applying *Lockett* retroactively); Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986) (same); Shuman v. Wolff, 571 F. Supp. 213, 216 (D. Nev. 1983) (applying the rule from *Eddings* retroactively), *aff'd*, 791 F.2d 788 (9th Cir. 1986), *aff'd sub nom.* Sumner v. Shuman, 483 U.S. 66 (1987).

[90] 428 U.S. 280 (1976).

[91] 483 U.S. 66 (1987).

[92] *See* Campbell v. Blodgett, 978 F.2d 1502, 1512–13 (9th Cir. 1992) (determining merits of Sumner claim in case that became final two years before *Sumner* was decided); Thigpen v. Thigpen, 926 F.2d 1003, 1005 (11th Cir. 1991) (noting death sentence set aside on *Sumner* grounds in federal habeas corpus case); McDougall v. Dixon, 921 F.2d 518, 530–31 (4th Cir. 1990) (determining merits of *Sumner* claim in a case that became final four years before *Sumner* was decided). On a meta-theoretical level, the courts applying *Teague* to *Sumner*—a case that was decided two years before the new retroactivity framework was instituted—were retroactively applying retroactivity. Of course, this could also be explained by courts applying the retroactivity framework applicable at the time of the claim brought under *Sumner* instead of the one applicable at the time of *Sumner* itself.

[93] *See* Teague v. Lane, 489 U.S. 288, 307–10 (1989) (adopting Justice Harlan's two exceptions to the general rule of non-retroactivity in cases on collateral review).

[94] Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012). In these cases, the Court has found a mismatch between the culpability of a class and the harshness of the penalty inflicted based on either the nature of the offense or the characteristics of the offender. *See*

In 2005, the Supreme Court held that the Eighth Amendment did not permit death sentences for any juvenile defendant, even those guilty of first-degree murder.[95] *Roper v. Simmons* was decided on collateral review, on appeal from state post-conviction proceedings, and was retroactive when announced.[96] Since the procedural posture of the case determined the retroactivity question, the courts were generous in providing relief in post-conviction review and many state prisoners did not have to resort to federal habeas review.[97]

3. *Retroactivity Under the First* Teague *Exception*

For cases decided on direct review, the lower federal and state courts have had to decide the retroactivity question for themselves. *Atkins v. Virginia*, the case on which Sullivan[98] based his state post-conviction petition, addressed the constitutionality of executing a defendant who was mentally retarded.[99] *Atkins* was decided on direct appeal,[100] yet due to the categorical nature of the rule announced and the Supreme Court cases previously addressing the retroactivity

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Graham v. Florida, 560 U.S. 48, 60–61 (2010) (holding that juveniles could not be sentenced to life without parole for nonhomicide offenses).

[95] Roper v. Simmons, 543 U.S. 551 (2005). The Court found that offenders under eighteen were across-the-board less culpable than adults and thus could not under any circumstances be punished by a death sentence. *Id.* at 569–71. This applied an extension of the Court's plurality opinion in *Thompson v. Oklahoma* which set the minimum age for the death penalty at sixteen and stressed that the "reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." 487 U.S. 815, 835 (1988). Note that in *Thompson* the Court set aside the death sentence for a fifteen-year-old offender but Justice O'Connor concurred on narrower grounds.

[96] *Roper*, 543 U.S. at 559–60. This reasoning could also be extended to the companion case in *Miller*, *Jackson v. Hobbs*, which was also decided on collateral review of state post-conviction proceedings. 132 S. Ct. at 2461.

[97] *See* Lee v. Smeal, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (vacating retroactively a death sentence for a seventeen-year-old offender and replacing with two consecutive life sentences); Loggins v. Thomas, 654 F.3d 1204, 1209–10 (11th Cir. 2011) (explaining the Alabama Court of Criminal Appeals determination that *Roper* applied retroactively to cases finalized on direct review); Horn v. Quarterman, 508 F.3d 306, 307–08 (5th Cir. 2007) (discussing the Texas Court of Criminal Appeals decision to grant relief to the seventeen-year-old defendant and commute his death sentence to life); LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1239–40 (11th Cir. 2005) (stating that the Florida Supreme Court vacated the seventeen-year-old defendant's death sentence based on an application of *Roper* in state post-conviction review).

[98] Sullivan v. Florida, 560 U.S. 181 (2010). Originally the companion case to *Graham v. Florida*. *See infra* note 113.

[99] 536 U.S. 304 (2002). In *Atkins*, the Court held that those who are mentally retarded are "categorically less culpable than the average criminal" and thus the execution of such an individual violates the Eighth Amendment. *Id.* at 304.

[100] *See id.* at 310 (providing the procedural history of *Atkins v. Virginia*).

issue,[101] lower courts have consistently applied the rule retroactively to cases on collateral review.[102]

Three years after *Roper*, the Supreme Court held in *Kennedy v. Louisiana* that the Eighth Amendment did not permit a sentence of death for a rapist, even when the victim is a child, who did not also commit homicide.[103] In doing so, the Court turned from *Roper*- and *Atkins*-type analyses categorically exempting the offender to a study of the crime committed, and determined that offenses not resulting in death, while they may be horrific, are categorically less deserving of capital punishment.[104] Retroactivity was not litigated after this case as only Kennedy and one other offender (out of more than three thousand total) were on death row for a nonhomicide.[105] It is clear, however, that had a court needed to determine *Kennedy*'s retroactivity, it would have fallen into the first *Teague* exception as a categorical decision that placed beyond the power of the state punishment by execution for offenders convicted of rape but not homicide.[106]

Atkins, *Roper*, and *Kennedy* all introduced categorical exemptions to imposition of the death penalty, but in 2010 the Supreme Court extended the categorical proportionality review to life-without-parole sentences imposed on juvenile offenders for nonhomicide crimes.[107] In *Graham*, the majority, over the objections of Chief Justice Roberts in his concurrence,[108] established a rule that a punishment of life without parole for the class of juvenile offenders con-

101 *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 339–40 (1989) (holding that the execution of a prisoner with the mental capacity of a seven-year-old did not violate the Eighth Amendment). The Court ruled unanimously that the first *Teague* exception "prohibited a certain category of punishment for a class of defendants because of their status or offense" but rejected the claim on the merits. *Id.* at 330.

102 *See* Ochoa v. Sirmons, 485 F.3d 538, 540 n.2 (10th Cir. 2007) (accepting the State's concession that the Supreme Court had anticipatorily made the case expressly retroactive in *Penry v. Lynaugh*); *In re* Holladay, 331 F.3d 1169, 1172–73 (11th Cir. 2003) (collecting cases in which *Atkins* has been found retroactive); *In re* Morris, 328 F.3d 739, 740 (5th Cir. 2003) (same).

103 554 U.S. 407 (2008).

104 *Id.* at 421; *see also* Coker v. Georgia, 433 U.S. 584, 600 (1977) (barring the use of death as a penalty for the rape of an adult woman).

105 *See* Kennedy v. Louisiana, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/kennedy-v-louisiana-no-07-343 (last visited June 12, 2015) (listing total number of death sentences for sexual assault of a child by states). Although six states allowed the death penalty for child rape, only Louisiana actually imposed it on offenders. *Id.*

106 *See Kennedy*, 554 U.S. at 421 (holding death sentences unconstitutional for those who rape but do not kill a child); *see also Teague*, 489 U.S. at 307 (citing Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., dissenting) (providing the definition of a categorical decision).

107 Graham v. Florida, 560 U.S. 48, 100–03 (2010) (Thomas, J., dissenting).

108 *See id.* at 86–91 (Roberts, C.J., concurring) (urging the Court to adopt a case-by-case proportionality analysis instead of a categorical ban).

victed of nonhomicide offenses was cruel and unusual under the Eighth Amendment.[109] The Court both relied and expanded on the scientific and developmental research used in *Roper* to find that juveniles were categorically less culpable than adult offenders.[110] In likening life-without-parole sentences to death for juvenile offenders, the Court seemed to extend the "death is different" Eighth Amendment framework[111] to include the notion that "kids really are different."[112] *Graham* was a case on direct review,[113] but the majority's decision to frame the question as a substantive categorical exemption rather than an additional procedural burden has led lower courts to apply the decision retroactively.[114]

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[109] *Id.* at 58–62 (acknowledging the instant case presented a novel issue, "a categorical challenge to a term-of-years sentence," questioning the applicability of other approaches when the object in question is a sentencing practice itself—such as "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis"—and deciding that "in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach"); *see also* Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, CRIM. JUST., Winter 2013, at 19–20 (explaining how the majority chose to establish a new categorical substantive Eighth Amendment rule rather than requiring proportionality analysis).

[110] *Graham*, 560 U.S. at 68–73 (noting that, in relation to adults, "juveniles have a '"lack of maturity and an underdeveloped sense of responsibility"'" and "are more vulnerable or susceptible to negative influences and outside pressures," and that "their characters are 'not as well formed,'" so that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption" (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

[111] *See Roper*, 543 U.S. at 568 (explaining how historically the Eighth Amendment has applied to death sentences with "special force" because death is the "most severe punishment").

[112] Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, 87 CRIM. L. REP., 664, 664–65 (2010) (describing the extension of the Eighth Amendment framework beyond *Graham*).

[113] *Graham*'s companion case, *Sullivan v. Florida*, was on collateral review but the Supreme Court dismissed the writ as "improvidently granted" due to a state procedural bar. 560 U.S. 181, 182 (2010). The defendant in *Sullivan* could later use the holding in *Graham* to obtain retroactive relief. *See EJI Client Joe Sullivan's Death-in-Prison Sentence Overturned by United States Supreme Court's Ruling*, EQUAL JUSTICE INITIATIVE (May 17, 2010), http://www.eji.org/node/394 ("Joe Sullivan . . . will now use the new rule established in *Graham* to obtain a new sentence that . . . provides a 'realistic opportunity to obtain release.'")

[114] *See, e.g.*, *In re* Evans, 449 F. App'x 284, 284 (4th Cir. 2011) (per curiam) (noting the government "properly acknowledged" *Graham* applies retroactively on collateral review); Kleppinger v. State, 81 So. 3d 547, 550 (Fla. Dist. Ct. App. 2012) (applying *Graham* on collateral review); Manuel v. State, 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010) (same); State v. Dyer, 2011-1758, p. 3 (La. 11/23/11); 77 So. 3d 928, 930 (same); Rogers v. State, 267 P.3d 802, 804 (Nev. 2011) (noting that the district court properly applied *Graham* retroactively). It is interesting to note that had the majority adopted Chief Justice Roberts's mechanism

Miller represents the expansion of the Supreme Court's Eighth Amendment jurisprudence even more so than *Graham* because it requires individualized sentencing for juveniles in noncapital cases, but it does not explicitly create a categorical exemption.[115] Unlike in the Eighth Amendment cases discussed above, all of which were applied or would have been applied retroactively, *Teague* allows the courts and legislatures implementing *Miller* to directly oppose the presumption of retroactivity. This collection and analysis of the judicial response to the Eighth Amendment decisions since *Furman* with regards to retroactive application sheds an important light on how the question should be resolved.

C. *Conflicted Response to* Miller *in the State and Federal Systems*

Supreme Court precedent,[116] the text of the *Miller* Court's opinions,[117] and the nature of Eighth Amendment decisionmaking as discussed above[118] dictate that the new rule should be retroactively applied. However, this outcome has not been consistent across the country. In this section, I will address the divergent outcomes that various states and federal systems have come to in addressing *Miller*'s retroactive effect on those seeking collateral review of their juvenile life-without-parole sentences. A discussion of the aftermath of *Miller* serves two purposes: first, it shows that the retroactivity question must be addressed by the Supreme Court given the divide in both the states and the circuits; second, it portrays the lack of clarity that the current *Teague v. Lane*[119] analysis provides decisionmakers in determining retroactivity in this context, and allows them to come to a conclusion different from that historically provided to Eighth Amendment decisions. As stated in the Introduction, the Supreme Court granted certiorari on the retroactivity question in December 2014, but dismissed

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for a case-by-case proportionality review, the same contested retroactivity question raised by *Miller* would have arisen in the aftermath of *Graham*.

[115] The counterargument is that it does create a categorical exception as to *mandatory* life-without-parole sentences for juveniles as a class.

[116] *See supra* Part II.B (examining the retroactive application of the Eighth Amendment cases the Court draws on in *Miller*).

[117] Each of the cases drawn on by the *Miller* Court was retroactively applied. *See supra* Part I.B (examining the implications respecting retroactivity of the *Miller* Court's majority and concurring opinions and the apparent assumption of retroactivity embodied in the dissent).

[118] *See supra* Parts II.A–B & *infra* Parts III.A–B (explaining the factors motivating the Eighth Amendment that are incompatible with the current retroactivity framework).

[119] *See supra* Part I.A.2 (elaborating upon the many crucial and relevant facets of its ruling).

the case when the Louisiana District Attorney offered the petitioner a plea bargain and released him from prison.[120]

1. *Judicial Response*

Several federal circuit courts have addressed the retroactivity question, either in the context of prisoners under federal jurisdiction or in ruling on the availability of successive habeas corpus petitions to state prisoners.[121] The Eleventh Circuit, in deciding *In re Morgan*, denied a motion for leave to file a second or successive petition and found that *Miller* had not been made retroactively applicable to decisions on collateral review by the Supreme Court or applicable retroactivity doctrine.[122] The Fifth Circuit similarly addressed the retroactivity issue in *Craig v. Cain*, seemingly sua sponte, as neither party had raised the issue nor was it germane to the resolution of the habeas claims before the court.[123] The decision has since been challenged on those grounds as well as on the fact that the defendant's *Miller* claim had not been exhausted in state court and thus was not properly before the Fifth Circuit for review.[124]

In contrast to the Eleventh and Fifth Circuit decisions, the Fourth and Third Circuits granted authorization for successive federal habeas petitions based on *Miller*.[125] The Eighth and Second Circuits made similar determinations in considering requests to file successive peti-

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[120] *See* State v. Toca, 2013-1880 (La. 6/20/14); 141 So. 3d 265, *cert. granted in part*, 135 S. Ct. 781 (2014), *and cert. dismissed*, 135 S. Ct. 1197 (2015). In March 2015, the Supreme Court granted certiorari in a new case scheduled to be heard during the October term. *See* Montgomery v. Louisiana, 135 S. Ct. 1546 (2015) (addressing, among other things, the question of whether retroactivity in state post-conviction proceedings raises a federal question).

[121] *See* 28 U.S.C. § 2244(b)(2)(A) (2012) (stating that one of the exceptions to the rule against successive habeas petitions is when an applicant can show that the "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

[122] 713 F.3d 1365, 1367–68 (11th Cir. 2013), *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013).

[123] No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013).

[124] Dale Dwayne Craig's Opposition to the State's Motion to Publish and Motion to Withdraw January 4, 2013 Order at 1, Craig v. Cain, No. 12-30035, 2013 WL 96128, at *1–2 (5th Cir. Jan. 14, 2013).

[125] *See In re* Pendleton, 732 F.3d 280 (3d Cir. 2013) (directing the district court to determine whether the petitioner was entitled to retroactive relief); *In re* James, No. 12-287, 2013 U.S. App. LEXIS 20382, at *1 (4th Cir. May 10, 2013) (same). No opinion was attached in the Fourth Circuit's decision, but the Third Circuit tentatively determined there was a prima facie case that *Miller* was retroactive, which compelled a full exploration of the matter. *Id.* at 282–83.

tions under 28 U.S.C. § 2255, which regulates habeas requirements for federal rather than state prisoners.[126]

Numerous state high courts have come down on the retroactivity question in the wake of *Miller*.[127] Under the federal habeas statute of limitations, the one-year window after *Miller* for those seeking collateral relief under the opinion is tolled while a petitioner is properly involved in state post-conviction proceedings. However, the clock ceases to be tolled once the final state appellate court hears the case or denies certiorari. In considering the conflicting state judicial responses to *Miller*, it is also important to note that state courts are not limited by either AEDPA provisions or the *Teague v. Lane* analysis in their retroactivity decisions.[128]

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126 28 U.S.C. § 2255 (2012); *see* Wang v. United States, No. 13-2426, 2013 U.S. App. LEXIS 20386, at *1 (2d Cir. July 16, 2013) (ordering the district court to address whether the decision in *Miller* announced a new rule of law made retroactive to cases on collateral review); Johnson v. United States, 720 F.3d 720, 720 (8th Cir. 2013) (holding that Johnson made sufficient showing of possible merit, meeting the prima facie requirement for successive motions under 28 U.S.C. § 2255).

127 *See, e.g.*, *Ex parte* Williams, No. 1131160, 2015 WL 1388138, at *14 (Ala. March 27, 2015) (determining that defendant's life sentence without possibility of parole was permissible because *Miller* does not apply retroactively); Casiano v. Comm'r of Corr., 115 A.3d 1031 (Conn. 2015) (concluding that the rule announced in *Miller* applies retroactively); Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015) (holding the rule in *Miller* constitutes a "development of fundamental significance" and therefore applies retroactively); People v. Davis, 6 N.E.3d 709 (Ill. 2014) (finding the defendant's sentence to be invalid under *Miller*, but observing that *Miller* does not invalidate all life without parole sentences for juveniles, only the mandatory imposition of such sentences); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller* "recognize[s] a new substantive rule of law under the Eighth Amendment" and as such, applies retroactively); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 281 (Mass. 2013) (determining that the rule announced in *Miller* is substantive and, "therefore, has retroactive application to cases on collateral review, including Diatchenko's case"); Chambers v. State, 831 N.W.2d 311, 330–31 (Minn. 2013) (deciding *Miller* is a procedural rule and is not entitled to retroactive application); Jones v. State, 122 So. 3d 698, 703 (Miss. 2013) (concluding that *Miller* "created a new, substantive rule which should be applied to cases on collateral review"); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2015) (holding that the rule announced in *Miller* is more substantive than procedural, and as such, applies retroactively to Mantich's sentence); Petition of State, 103 A.3d 227, 236 (N.H. 2014) ("We conclude that, pursuant to the *Teague* framework, the rule announced in *Miller* constitutes a new substantive rule of law that applies retroactively to cases on collateral review."); Aiken v. Byars, 765 S.E.2d 572, 575–76 (N.C. 2014) (holding *Miller* creates a new substantive rule and failure to apply this rule "risks subjecting defendants to a legally invalid punishment"); State v. Mares, 2014 WY 126, 335 P.3d 487, 491 (Wyo. 2014) (deciding that the *Miller* rule applies retroactively to cases on collateral review).

128 In *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), the Supreme Court made clear that federal law does not limit state courts' authority to provide retroactive remedies even if a rule is deemed non-retroactive under *Teague*. If a new rule is found not to apply retroactively under *Teague*, that "does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts." *Id*. at 291. The states remain free to "give broader retroactive effect to [the Supreme] Court's new rules . . . in state post-conviction proceedings" though very few have

Louisiana, which had approximately 355 individuals serving juvenile life-without-parole sentences at the time of *Miller*, has arguably had the most difficulty in determining the question of whether the decision applies retroactively. In October 2012, only several months after *Miller*, the Louisiana Supreme Court remanded a 1995 conviction for resentencing "in accord with the principles enunciated in *Miller*" without addressing retroactivity.[129] However, in November 2013 the Louisiana Supreme Court engaged in an extensive *Teague v. Lane* retroactivity analysis and found that *Miller* does not apply retroactively to cases on collateral review as it is a new rule of criminal constitutional procedure that meets neither of the *Teague* exceptions.[130] Furthermore, the court held that the new state statute regulating juvenile homicide offenders (discussed further below), which did not expressly address the retroactivity or resentencing issue, applied to those sentenced only after the legislation's enactment.[131]

Similarly, Pennsylvania, which had approximately 480 individuals serving juvenile life-without-parole sentences at the time of *Miller*,[132] has found the decision does not apply retroactively. The Pennsylvania Supreme Court held that while *Teague* does not necessarily limit the authority of state courts to provide collateral relief, *Miller* does not fall within either of the *Teague* exceptions, and the parties failed to properly develop and present an alternative retroactivity framework.[133] The court also noted in dicta that while the appellant had not

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chosen to do so in post-*Miller* litigation. *Id*. at 289. It appears to be an open question whether states may also give *narrower* retroactive effect to the Supreme Court's new rules, or why they would choose to do so since relief would be provided through federal habeas proceedings. However, if the Supreme Court determines in *Montgomery v. Louisiana* that state determination of retroactive application does not raise a federal question, all retroactivity decisions will have to be litigated in the context of federal habeas review rather than on appeal from state post-conviction proceedings, and thus would be subject to AEDPA's stringent requirements. 135 S. Ct. 1546 (2015).

129 *See* State v. Simmons, 2011-1810, p. 2 (La. 10/12/12); 99 So. 3d 28, 28 (remanding for resentencing after finding that the district court erred in denying relief to a defendant serving a sentence of life imprisonment at hard labor without possibility of parole for a second-degree murder committed when the defendant was seventeen).

130 *See* State v. Tate, 2013-2763, p. 1 (La. 11/5/13); 130 So. 3d 829, 831 (upholding denial of motion for resentencing where defendant received a life-without-parole sentence for a murder he committed as a juvenile).

131 *Id.* at 829.

132 *Public Hearing to Receive Testimony Regarding United States Supreme Court Decision,* Miller v. Alabama*, Relating to Juvenile Lifers: Hearing Before the Pa. S. Judiciary Comm.* 8 (2012) (statement of Lourdes Rosado, Assoc. Dir. of the Juvenile Law Ctr.), *available at* http://judiciary.pasenategop.com/2012/07/12/receive-testimony-regarding-united-states-supreme-court-decision-miller-v-alabama-relating-to-juvenile-lifers/.

133 Commonwealth v. Cunningham, 81 A.3d 1, 9 (Pa. 2013). The court pointed out that "litigants who may advocate broader retrospective extension of a new federal constitutional rule would do best to try to persuade this Court both that the new rule is

developed his argument in terms that would allow him to meet the watershed exception to *Teague*, the court believed that given the "high importance" the *Miller* majority attached to the rule, at least some of the Supreme Court Justices "may find the rule to be of the watershed variety."[134] However, the court also expressed doubt that a majority would agree to broaden the exceedingly narrow exception.[135]

The decisions of the Louisiana and Pennsylvania Supreme Courts to deny retroactive application severely limit the effect of *Miller* given the high number of individuals serving life-without-parole sentences concentrated in those two states and the influence these early decisions will have on cases in other states pending in the lower courts.[136]

In contrast, the high court in Mississippi held in July 2013 that *Miller* applied retroactively to cases on collateral review.[137] The court noted that despite *Miller* not categorically banning juvenile life-without-parole sentences, it nonetheless established a new rule that modified the state's substantive criminal law and, therefore, should be applied retroactively under *Teague*.[138] With this decision, the court mandated resentencing hearings for the approximately twenty-four individuals affected. The Massachusetts Supreme Judicial Court in December 2013 also held that *Miller* announced a new substantive constitutional rule that applied retroactively to the petitioner and sixty-three other juvenile offenders serving life-without-parole sentences.[139] The court also found that mandatory or discretionary

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resonate with Pennsylvanian norms *and* that there are good grounds to consider the adoption of broader retroactivity doctrine . . ." at which point the rule could be applied at the collateral review stage. *Id.* Speaking on such application at that stage, the court also noted it "would benefit from recognition and treatment of the strong interest in finality inherent in an orderly criminal justice system, as well as the social policy and concomitant limitations on the courts' jurisdiction and authority reflected in the Post Conviction Relief Act." Finally, regarding the instant question, the court decided that "[b]ecause the appellant in this matter has not set an appropriate stage for either pillar of such review, the *Teague* line of analysis remains the appropriate default litmus governing the present appeal."

[134] *Id.* at 10.

[135] *Id.*

[136] *See, e.g.*, Chambers v. State, 831 N.W.2d 311, 346 (Minn. 2013) (finding that *Miller* was neither a substantive rule nor a watershed procedural rule under *Teague v. Lane* and thus did not apply retroactively); Geter v. State, 115 So. 3d 375, 385 (Fla. Dist. Ct. App. 2012) (holding that *Miller* could not be applied retroactively to Florida post-conviction proceedings when the life sentence was already final at the time of the decision); People v. Carp, 828 N.W.2d 685, 723 (Mich. Ct. App. 2012) (stating that *Miller* does not apply retroactively).

[137] Jones v. State, 122 So. 3d 698, 703 (Miss. 2013) ("We are of the opinion that *Miller* created a new, substantive rule which should be applied retroactively to cases on collateral review.").

[138] *Id.* at 701–02.

[139] Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 275, 281 (2013).

imposition of life-without-parole sentences on juveniles was disproportionate and a violation of the state constitution.[140]

2. *Legislative Response*

At the time of *Miller*, twenty-three states had sentencing schemes necessitating the mandatory imposition of life without parole for certain juveniles convicted of homicide.[141] Additionally, sixteen states and the federal government accorded decisionmakers the discretion to impose a life-without-parole sentence on juveniles.[142] In the aftermath of *Miller*, some of these states addressed the retroactivity question through legislation. For example, California, which had around 250 prisoners serving juvenile life-without-parole sentences, eliminated life without parole for any new youth offenders and established parole review for existing offenders after fifteen, twenty, and twenty-five years.[143] Louisiana set a mandatory minimum of thirty-five years for juvenile defendants sentenced to first- and second-degree murder and requires that offenders complete educational and job training programs before being eligible for parole. The legislature left life-without-parole sentences as an option.[144] As discussed above, the legislature specifically declined to address whether this provision applied retroactively, but the Louisiana Supreme Court held that it does not.[145]

Other states that have enacted legislation amending their sentencing schemes for juveniles have either limited it to prospective

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[140] *See id.* at 668–71 (describing a life-without-parole sentence as disproportionate based on the age of the defendant).

[141] *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, JUVENILE LIFE WITHOUT PAROLE (JLWOP), (Feb. 2010), http://www.ncsl.org/documents/cj/jlwopchart.pdf (listing the legal requirements of life-without-parole sentencing for juveniles in each state). The NCSL chart also provides a more thorough description of pre-*Miller* criminal law and sentencing statutes. *Id.*

[142] *Id.*

[143] 2013 Cal. Stat. 2520, 2524–25. The legislation also requires the parole board to consider criteria specifically tailored to youth. *Id.*

[144] 2013 La. Sess. Law Serv. 404–05 (West) (La. 2013). A telephone conversation with activists in Louisiana revealed that the thirty-five year mandatory minimum was not challenged because the legislative response to *Graham* was a mandatory minimum of thirty years for juvenile defendants convicted of certain nonhomicides.

[145] State v. Tate, 2013-2763, p. 21 (La. 11/5/13); 130 So. 3d 829, 844. Additionally, North Carolina passed new legislation requiring a mandatory minimum of twenty-five years before being considered for parole eligibility for juveniles who commit first-degree murder and leaves life without parole as a sentencing option. The law also allows for retroactive resentencing under the new guidelines. Act of July 12, 2012, Ch. 15a, art. 93, 2012 N.C. Sess. Laws 713, 713–14. Wyoming removed life without parole as a punishment for any new youth offenders and provided parole eligibility to those serving juvenile life-without-parole sentences after twenty-five years or after commutation from the governor to a term of years. Act of Feb. 14, 2013, Ch. 18, sec. 1, 2013 Wyo. Sess. Laws 73, 76.

application or declined to address the retroactivity issue.[146] The legislative responses to *Miller* emphasize the confusion and inconsistency that has emerged as states attempt to bring their sentencing laws into accordance with the Supreme Court's holding while leaving untouched convictions that were final at the time.[147]

III
The Solution: Enforce the Presumptive Retroactivity of Criminal Eighth Amendment Decisions

The divide in the federal and state decisions regarding the retroactive application of *Miller* reveals the need for a clearly articulated framework for Eighth Amendment decisions, both within and outside of the death context. Applying the test in *Teague v. Lane* and its progeny allows decisionmakers to come to conclusions contrary to the one dictated by precedent[148] and the Supreme Court's rationale in *Miller*,[149] as well as the fundamental respect for human dignity underlying the Eighth Amendment.[150] The current analysis allows courts to arrive at entirely different outcomes depending on how they frame the new rule: as a substantive change placing mandatory life-without-parole sentences outside the power of the states to impose on juveniles, or as a procedural change requiring an individualized sentencing hearing when a juvenile is eligible for a life-without-parole sentence. The justifications for the historical presumption of retroac-

146 *See* H.R. 1993, 89th Gen. Assemb. Reg. Sess. (Ark. 2013) (explicitly stating that the General assembly does not intend to authorize revised punishments for those sentenced before the effective date of the legislation); L.B. 44, 103rd Leg., 1st Sess. (Neb. 2013) (failing to address retroactive application); S. 850, 2012 Leg., (Pa. 2012) (stating the Act does not apply retroactively); Tex. S.B. No. 2 (2013) S. 2, 2013 Leg., Reg. Sess. (Tex. 2013) (specifically declining to apply the new statutory maximums for juvenile defendants to convictions that were final on or before the date the legislation was enacted).

147 For a discussion of the problems juvenile defendants will face in parole hearings, see Levick & Schwartz, *supra* note 60. Additionally, the responses of state executives to *Miller* show that executive clemency will likely not be a successful route for achieving retroactive application. In July 2012, Governor Terry Branstad of Iowa commuted the life sentences of thirty-eight juveniles and ordered that they instead serve a mandatory sixty years in prison before being considered for parole. Steve Eder, *Iowa Governor Commutes Sentences of Teen Killers*, Wall St. J.: L. Blog (July 16, 2012, 3:53 PM), http://blogs.wsj.com/law/2012/07/16/iowa-governor-commutes-sentences-of-teen-killers/. The Iowa Supreme Court unanimously affirmed a new sentence of life with the possibility of parole after twenty-five years and found that the governor could not use his commutation power to increase a defendant's punishment. State v. Ragland, 812 N.W.2d 654, 658 (Iowa 2012).

148 Each case in the two strands of precedent the *Miller* majority draws on has been applied retroactively, under *Teague* or earlier frameworks. *See supra* Part II.B (introducing these strands of precendent).

149 *See supra* Part I.B (examining the Supreme Court's decision and rationale in *Miller*).

150 *See* Trop v. Dulles, 356 U.S. 86, 100 (1957) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

tivity apply here just as strongly as they traditionally have in the capital context. The inconsistent and inequitable outcomes of this litigation cannot be justified under the traditional rationales for limiting retroactive application of new rules, primarily the state interest in the finality of criminal convictions.[151]

A. Diminished State Interest in Finality

In *Teague*, a plurality of the Supreme Court moved away from the case-by-case approach of the *Linkletter* balancing test and established a bright-line rule for collateral non-retroactivity of new rules of criminal law, subject to two exceptions.[152] As justification for the new retroactivity analysis, the Court cited equitable treatment of similarly situated defendants,[153] the "interests of comity . . . in determining the proper scope of habeas review,"[154] and the "principle of finality which is essential to the operation of our criminal justice system."[155] In constructing the new analysis, retroactive availability of new rules was curtailed to address these concerns.

This Note is not meant to be a general criticism of the *Teague* standard or its ability to meet the stated concerns,[156] but a critique based on the diminished value of these interests in the Eighth Amendment context—specifically, the principle of finality and the costs imposed on the State.[157] In no sense does retroactively applying a decision based on the Cruel and Unusual Punishment Clause upset the finality of criminal *convictions*. Instead, these decisions necessarily affect criminal punishments, i.e., *sentencing*. In the categorical

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[151] *See infra* Part III.A (explaining how the State has a diminished interest in finality in the Eighth Amendment context, specifically for life-without-parole sentences).

[152] *See supra* Part I.A.2 and accompanying footnotes (detailing *Teague*'s rule and its derivative effects on criminal law jurisprudence).

[153] Teague v. Lane, 489 U.S. 288, 305 (1989) (explaining that announcing new rules in collateral cases and later limiting their retroactive effect has led to disparate treatment). The plurality felt it could fix this inequity by treating retroactivity as a threshold question. However it is clear from the cases discussed in Part II.B *supra* and *Miller* itself that the Court has not consistently done so.

[154] *Id.* at 308.

[155] *Id.* at 309. The Court also discussed the considerations of cost, reliance, judicial intrusion, and the frustrations of state courts when prisoners were given the ability to upset convictions final on direct review. *Id.* at 310.

[156] For a detailed critique of the *Teague* decision and its progeny, see generally Blume & Pratt, *supra* note 34, at 326 (claiming that the rule announced in *Teague* did not contribute to the goals of simplifying retroactivity analysis or protecting the State's interest in finality).

[157] A fear that prisoners were inundating courts with multiple appeals similarly influenced AEDPA's federal habeas reforms. *See* Stevenson, *supra* note 40, at 711–22, 728 (explaining the "hidden" narrative driving AEDPA); *supra* Part I.A.3 (describing AEDPA changes).

cases,[158] new rules required that states commute capital sentences to life-without-parole sentences—as in *Roper* and *Atkins*—and life-without-parole sentences to life or "term-of-years" sentences—as in *Kennedy* and *Graham*. No retrial or prosecution by the State was necessary, simply judicial resentencing. For individualized sentencing cases[159] and *Miller*, the procedural framing of the rule does slightly increase the State's burden as the resentencing hearings must incorporate all mitigating evidence on behalf of the defendant. Still, the upset to the interest in finality goes to the sentence and not the conviction, and no retrial is required. The cost and inconvenience to the State, while present, is minimal compared to the concern underlying *Teague*'s limitation—the reopening of the conviction itself. Applying *Teague* allows states to differentiate between the categorical and the individualized sentencing rules, finding the former retroactive and the latter non-retroactive, though both require merely resentencing processes.

Applying the presumption of retroactivity to all Eighth Amendment decisions will actually increase judicial efficiency and lower costs since the issue will no longer have to be litigated extensively in state and federal courts.[160] The presumption would additionally serve the equity purpose that the *Teague* plurality tried to address by making retroactivity a threshold question. Having a stated presumption of retroactivity for any new rules under the Eighth Amendment would end the state-by-state disparities (apparent in the aftermath of *Miller*) that concerned the Justices in *Teague*.[161]

B. *Defendants' Heightened Interest in Retroactive Application*

1. *Decisionmaking Under the Eighth Amendment*

While the states' interest here in non-retroactivity is diminished, the defendants' interest in retroactivity is greatly heightened. Fundamental to the Eighth Amendment is the protection of human dignity[162] and the premise that "even the vilest criminal remains a human being possessed of common human dignity."[163] The underpinnings of

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158 *See supra* Part II.B.3 (detailing the application of retroactivity analysis to cases that fall within the first *Teague* exception).

159 *See supra* Part II.B.1 (explaining the retroactivity of the capital sentencing, pre-*Teague* cases).

160 *See supra* Part II.C.1 (providing disparate examples of judicial handwringing that would be superfluous with the establishment of this approach).

161 *Id.*

162 *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (upholding the revised Georgia criminal sentencing procedures).

163 Furman v. Georgia, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

the Constitution's Cruel and Unusual Punishment Clause are distinctively moral—both in what is moral for a prisoner to endure, and what is moral for a state to inflict.[164] Therefore, while other new rules may enact procedures to ensure fairness and accuracy in criminal proceedings, rules based on the Eighth Amendment enhance our commitment to decency and resistance to inhumanity.[165] Until *Miller*, Eighth Amendment decisions either specifically addressed the death penalty and were deemed retroactive, or were captured by *Teague*'s substantive rule exception. With *Miller*, the Court has shown its willingness to extend the sentencing requirements of the Eighth Amendment beyond the death context. For now, this principle has only applied to juvenile offenders. The presumption of retroactivity should not be thwarted just because the *Miller* rule requires individualized sentencing for lifetime incarceration instead of the death penalty. *Teague* artificially separates the cohesive Eighth Amendment promise by distinguishing between substantive and procedural manifestations of the same moral assurance. As shown in the Eighth Amendment case law, deeming a new rule "procedural" ensures it will not be retroactively applied under *Teague* given that no procedural change has ever been found to meet the "watershed" standard.[166] *Teague* also does not consider the underlying purpose of creating a new rule, and in this context incorrectly allows for the state interest in finality and cost to outweigh basic human dignity.

The *Teague* analysis does not account for the realities of Eighth Amendment decisionmaking since the "new rule" distinction is incompatible with the "evolving standards of decency" test.[167] Under the Supreme Court's framework, a punishment or sentencing scheme is found to be cruel and unusual if it is against contemporary societal values—measured by patterns of jury verdicts and legislative enactments as well as the Justices' own independent judgment.[168] The test is

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164 *See* Sigler, *supra* note 74, at 406 (suggesting that moral considerations lie at the heart of Eighth Amendment analysis).

165 *See id.* at 405 (arguing that the evolving standards of decency test highlights important liberal-democratic values).

166 *See supra* Part II.B.2 (examining the *Teague* rule and *Teague* exceptions).

167 *See supra* Part II.A (portraying how Eighth Amendment analysis is informed by a judicial assessment of contemporary values, such that changes in its jurisprudence follow public morality and sentiment).

168 *See* Roper v. Simmons, 543 U.S. 551, 561–63 (2005) (describing cases where the Court decided that capital punishment is cruel and unusual where the defendant is under the age of sixteen at the time of the crime or "mentally retarded" because of evolving standards of decency); Graham v. Florida, 560 U.S. 48, 61 (2010) (explaining the Court's two-part approach, which is grounded in "objective indicia of society's standards, as expressed in legislative enactments and state practice" and the Court's Eighth Amendment precedents).

grounded in both objective indicia of what the national consensus actually is, and the Justices' independent belief in what it should be.[169] The Court is creating or announcing a new *legal* rule to match the *moral* rule they believe is already in play. However, the plurality in *Teague* characterized new rules in a purely legal sense.[170] Thus, although Eighth Amendment decisionmaking is based precisely on discovering and concretizing existing moral rules into legal ones, the *Teague* analysis labels them as "new" and limits their retroactive application on this basis. However, given the justification for distinguishing between old and new rules—protecting states' reliance interest—enforcing a standard which gives defendants the benefit of rules supported by legal precedent, but not by widespread national moral consensus, makes no sense. Defendants have just as much, if not more, at stake when the basis of the unconstitutionality of their punishment is from the national collective conscience as when it is from existing legal precedent.

2. *Irreconcilable Definitions of Finality and State Action Compared to Inaction*

Also irreconcilable with the Eighth Amendment's protection against cruel and unusual punishment is *Teague*'s placement of finality at conviction.[171] When the new rule concerns trial proceedings, it may make sense to have a case become "final" on conviction so that the states will not be obligated to reopen and retry cases indefinitely. But in the Eighth Amendment context, the finality of a conviction and sentencing does not coincide with the actual infliction of the punishment. Put another way, placing the barrier at conviction allows the state to implement or continue to implement a cruel and unusual punishment after it is declared unconstitutional. Through this lens, when a new rule concerns the constitutionality of a punishment, the application is always prospective until the time the punishment is completed.[172] The fact that the completion of punishment is exceedingly

[169] For a critique of this approach, see, for example, *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (calling the Court's reliance on "evolving standards" and evidence of a "national consensus" wrong); Stinneford, *supra* note 71, at 1746 (2008) (advocating the view that Eighth Amendment interpretation should focus on "longstanding traditions").

[170] A rule is new if it "breaks new ground or imposes a new obligation on the States or Federal government" or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Existing moral rules could arguably be left out of the first description of a "new rule" but are captured by the second, since they are in no way dictated by existing legal precedent. *Id.*

[171] *Id.* at 310 (stating that convictions are final once a defendant's direct appeals are complete).

[172] Which in the capital or life-without-parole case would be the defendant's death through either state-inflicted or natural causes.

clear-cut in the death penalty context—at the time of execution—may explain why individualized sentencing cases in the pre-*Teague* era were simply assumed to be retroactive.

Two illustrations are useful in illuminating this point. If the Supreme Court on December 31, 2025 declares that certain types of torturous punishments, such as stun belts[173] or waterboarding,[174] are against the country's evolved sense of decency and thus cruel and unusual, this decision would constitute a new rule of criminal law. It would be unthinkable for the federal or state governments to continue to use stun belts or waterboarding after the decision was issued, whether or not a particular defendant's conviction had been final on that date.[175] For the state to do so would be an active, visible infliction of an unconstitutional punishment. Similarly, a moratorium on the death penalty put in place by the Supreme Court in *Furman* was lifted, with certain procedural restrictions, by *Gregg v. Georgia*[176] and its companion cases in 1976. For the states to execute those on death row whose convictions and death sentences were final pre-*Furman* in the intervening years would be inconceivable given that the Supreme Court had said the process by which those defendants were sentenced to death was unconstitutional. When the moratorium was lifted in *Gregg*, the state would not execute these same prisoners before providing the constitutionally-mandated procedural protections for capital sentencing. To do otherwise would be implausible and bring a barrage of media and public outrage.

The only differences between the examples above and *Miller* is the type of state action that is required to impose the punishment. In the case of the death penalty and torture, the State would have to actively and visibly inflict an unconstitutional form of punishment in order to deny retroactive relief, which they are understandably unwilling to do. The point of finality here is located not at conviction, but at the time of the execution or torture. In the case of life-without-parole sentences, the State is not required to act to impose the punish-

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[173] *See* Julian Borger, *US Prisons 'Use Electric Shock Belts for Torture*,' THE GUARDIAN (June 8, 1999, 20:41 EDT), http://www.theguardian.com/world/1999/jun/09/julianborger (discussing stun belts as a form of torture).

[174] President Obama banned the use of waterboarding in January 2009. Exec. Order No. 13,491, 3 C.F.R. § 3(b) (2009); Ewen MacAskill, *Obama: 'I Believe Waterboarding Was Torture, and It Was a Mistake*,' THE GUARDIAN (Apr. 29, 2009; 22:23 EDT), http://www.theguardian.com/world/2009/apr/30/obama-waterboarding-mistake.

[175] For the purposes of this illustration, I lay aside the fact that a total ban against a form of punishment would be encompassed under *Teague*'s categorical exception. The result would be the same if the Supreme Court instead required individualized sentencing and limited the use of stun belts and waterboarding to the rarest of cases.

[176] Gregg v. Georgia, 428 U.S. 153, 188 (1976).

ment, but instead can opt to do nothing and let the prisoner continue to serve his sentence until death. This is both less visible and easier to justify on moral grounds, which is why non-retroactivity becomes an option. However, the effect is the same—after the date at which a punishment has been declared cruel and unusual, the State continues to impose it based on the arbitrary line of finality placed at conviction. In the punishment context, finality should be found at the culmination of the punishment being served—death instead of conviction for capital and life-without-parole sentences—which can be implemented through a presumption of retroactivity for both capital and noncapital sentences.

C. The New Framework and Its Practical Implementation

Given the history of Eighth Amendment jurisprudence[177] and the relative dearth of Supreme Court rulings on retroactivity in this area, it seems there is already an existing, unspoken presumption of retroactivity. The decisions post-1989 concerning cruel and unusual punishments have all been retroactively applied without question, or made to fit into one of the *Teague* exceptions by the lower courts.[178] *Miller*, on the other hand, points to a new doctrinal development expanding individualized sentencing requirements outside the death penalty context. Therefore, an articulation of the presumption of retroactivity could be highly beneficial in the future.[179] Even within the strict requirements of AEDPA,[180] there are several ways the presumption can be put into practice, even if the Supreme Court does not resolve the question of *Miller* retroactivity. First, states and Congress usually have to write new legislation after Eighth Amendment decisions, altering their sentencing schemes to bring them up to constitutional muster.[181] The legislative bodies can easily insert retroactivity clauses into these new bills and avoid costly litigation and adjudication. Second, since retroactivity is not constitutionally dictated, the state courts have the option to go beyond what *Teague* allows.[182] State

[177] *See supra* Parts II.A–B (providing details and examples of this jurisprudence).

[178] *Id.*

[179] Additionally, it is unclear whether the individualized sentencing cases pre-1989 would have been applied retroactively if they were subject to *Teague*.

[180] *See supra* Part I.A.3 (discussing AEDPA's limitations on available relief for plaintiffs).

[181] *See, e.g.*, H.B. 152, 2013 Leg., Reg. Sess. (La. 2013) (setting a mandatory minimum of thirty-five years for juvenile defendants sentenced to first- and second-degree murder and requires that they complete educational and job training programs before being eligible for parole). The Act leaves life-without-parole sentences as an option. *Id.*

[182] Danforth v. Minnesota, 552 U.S. 264, 282 (2008) (stating that federal law does not limit the state courts' authority to provide retroactive remedies even if a rule is deemed

courts, as seen in the post-*Miller* muddle, can, and sometimes do, provide relief through state post-conviction proceedings.[183] If they recognize an articulated presumption of retroactivity for Eighth Amendment rules, state courts would have guidance in making these determinations and little reason for denying petitions. AEDPA requirements would not even be brought into question if prisoners did not have to rely on federal habeas as a final resort. Finally, although AEDPA seems to explicitly require that the Supreme Court make a rule retroactive before a circuit court can grant leave for a prisoner to file a successive petition,[184] this requirement has not been consistently applied by the lower courts. The more common practice is for lower courts to discern whether the Supreme Court would have found a decision to be retroactive and deny or grant a petition on that basis. Applying a presumption of retroactivity will allow these decisions to be made in a more consistent, equitable, and methodological manner. The Supreme Court would only have to address the retroactivity question in the rare, perhaps nonexistent, instance the Court makes a new rule regarding cruel and unusual punishments that it did *not* want retroactively applied. If the Supreme Court substantively resolves the question of *Miller* retroactivity by articulating a presumption of retroactivity for Eighth Amendment decisions, it will provide a framework for state courts and legislatures and lower federal courts moving forward.

Conclusion

In a maximum-security prison in the heart of the Deep South, Barbara Smith[185] is currently serving her thirty-seventh year in prison. She was sentenced to death in 1978 at the age of seventeen, and several years later her sentence was changed to life without parole. Barbara's story began as of one typical of teenage rebellion—she fell in with the wrong type of guy and they ran away from home. Somewhere in the course of her cliché adolescent adventure gone awry, her boyfriend allegedly committed first-degree murder in the course of a robbery, and a couple months later he told the police that Barbara was present at the scene of the crime. The jury heard these facts when

non-retroactive under *Teague* because the states are free to give broader retroactive effect to new rules in state conviction proceedings).

[183] *See supra* Part II.C.1 (analyzing judicial responses to *Miller*).

[184] 28 U.S.C. § 2244(b)(2)(A) (2012); *see also* Tyler v. Cain, 533 U.S. 656, 663 (2001) (plurality opinion) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.").

[185] For privacy purposes, the name of this individual has been changed, and citations to her case have been omitted.

they sentenced her to death, and then, on retrial, to life without parole.

What they did not hear was the fact that she had a long, disturbing history involving sexual abuse, extreme poverty, and borderline mental retardation. They were unaware that she was manipulated into running away from home by a mentally ill convicted felon ten years older than her, and who first became obsessed with her when she was thirteen and he was twenty-three years old. Or that before and after running away she was subjected to extreme physical, sexual, and emotional abuse by her father, and witnessed him beating her mother with his fist or belt on a daily basis. They never learned how her mother was forced to prostitute herself to keep food on the family's table. Without these discoveries, they were never able to conclude that Barbara Smith had never had a normal childhood or been taught proper judgment, and her real crime was being in the wrong place, at the wrong time, with the wrong person.

Barbara has grown up in prison. Now in her mid-fifties, she is a model inmate and a religious counselor. She has not had a major disciplinary infraction since the 1980s. Yet under her current sentence, one that the Supreme Court has now said is cruel and unusual, she will die in prison. *Miller* gave Barbara, her family, and her lawyers hope that after more than three decades, she may have a chance at parole eligibility. Every day she waits for news is another day the State imposes on her an unconstitutional punishment. Justice Kagan's opinion stated that juvenile life without parole should be "uncommon" and reserved for those "whose crime reflects irreparable corruption."[186] Under no formulation is Barbara one of those "uncommon" offenders, yet at the time of her sentencing the jury was not permitted to learn the whole story. Even if they had, the law in effect at the time made life without parole the minimum sentence they could recommend.

The Eighth Amendment protects not only the right to be free from unconstitutional punishment, but enforces a standard of decency and human dignity that evolves as our society evolves. *Miller* recognized this by requiring that before juveniles like Barbara could be sentenced to die in prison, the decisionmaker must hear all the mitigating evidence in her favor. For this protection and other Eighth Amendment protections to be fully realized, a different type of retroactivity analysis must be employed, one that presumes the decision applies retroactively until the Supreme Court speaks to the contrary. Only then can the states continue to punish within the boundaries of the Constitution.

[186] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).