



**THE RETROACTIVITY ROADMAP:
HOW *MONTGOMERY* EXPOSES CHALLENGES
TO LWOP MANDATORY SENTENCES**

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I. INTRODUCTION

Beware lest you lose the substance by grasping at the shadow.
-- Aesop

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Retroactivity matters.¹ It provides a tool for righting wrongs, making amends, and correcting errors.² Yet in most cases, retroactivity remains the exception to the rule.³ This is because retroactivity requires undoing many prior cases and finding that a new substantive rule of law applies that justifies undoing a final judgment.⁴

At the heart of this question lies the tension between finality⁵—the idea that criminal judgments must remain settled—and individual justice—the idea that fundamental fairness demands criminal sentences accord with constitutional requirements.⁶ Traditionally, in non-capital cases, the Supreme Court and Congress have overwhelmingly favored finality over justice.⁷ Both the federal statute—

¹ Indeed, it is at the heart of *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015), the pending Supreme Court case that is the subject of this essay. For Henry Montgomery and dozens of others, the way in which the Court applies this principle can mean the difference between a continued sentence to die in prison, and a new sentencing hearing with the possibility of release from prison before death. See, e.g., Brief of the Equal Justice Initiative on Behalf of Dozens Sentenced to Die in Prison When They Were Children as Amici Curiae in Support of Petitioner, *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (No. 14-280).

² See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) (arguing for a theory of constitutional remedies to address the failure of non-retroactivity rules to vindicate constitutional rights).

³ See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989); Jonathan M. Zarrow & William H. Milliken, *Retroactivity, the Due Process Clause, and the Federal Question in Montgomery v. Louisiana*, 68 STAN. L. REV. ONLINE 42 (2015).

⁴ See, e.g., Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79 (2012).

⁵ Finality also incorporates the idea of efficiency—that the state should not expend judicial resources to retry or resentence cases already adjudicated.

⁶ See, e.g., Timothy Finley, *Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY (1994) (analyzing *Gilmore v. Taylor* as an example of the failure to strike this balance properly).

⁷ New rules in capital cases still face the same presumption against retroactivity, but the Court is more willing to find exceptions under its long-held principle that “death is different”—the finality and irrevocability of the death penalty warrant greater scrutiny.

the Antiterrorism and Effective Death Penalty Act (AEDPA)⁸—and the applicable Supreme Court precedent—*Teague v. Lane*⁹—severely limit the application of new rules of criminal law to cases on collateral appeal.¹⁰

In *Miller v. Alabama*, the Supreme Court held that imposing a mandatory life-without-parole (“LWOP”) sentence on a juvenile offender constituted a cruel and unusual punishment in violation of the Eighth Amendment.¹¹ Three years later, the question remains whether the holding in *Miller* applies retroactively.¹² As explained below, the applicable exception to the *Teague* presumption of prospective application of new criminal rules concerns whether the new rule is substantive or procedural.¹³ Generally, if the rule is substantive, its application is retroactive; if the rule is procedural, its application is prospective. This term, the Court will take up that question in *Montgomery v. Louisiana*.¹⁴

This short essay argues that the new rule articulated in *Miller* possesses *both* substantive and procedural characteristics. This essay then explains why, for purposes of retroactivity, the substantive content of *Miller* matters more than the procedural content. As a result, *Miller* should apply retroactively. Finally, the essay suggests that the

⁸ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁹ 489 U.S. 288 (1989).

¹⁰ See, e.g., James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062 (1985).

¹¹ As the United States is the only country in the world that imposes juvenile LWOP, the Court could have gone even further in that case, but declined to bar such sentences. See *Juvenile Life Without Parole*, SENTENCING PROJECT, http://www.sentencingproject.org/doc/publications/jj_jlwopfactshet.pdf; *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (suggesting that the Court may revisit the broader question of the constitutionality of juvenile LWOP).

¹² *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015).

¹³ See Brief of Petitioner; Brief of Respondent.

¹⁴ Henry Montgomery is serving a LWOP sentence for killing a Louisiana Police Officer when he was 17 years old. See Brief of Petitioner.

argument in *Montgomery* provides a roadmap for future Eighth Amendment challenges. Specifically, each characterization of *Miller*—substantive and procedural—has novel implications for the scope of the Eighth Amendment, and offers intriguing opportunities for future petitioners to challenge the constitutionality of mandatory sentences and LWOP sentences.

II. THE RETROACTIVITY QUESTION

In *Montgomery v. Louisiana*, two questions will be before the Supreme Court. First, the Court will address whether it has jurisdiction to hear the appeal from the Louisiana Supreme Court.¹⁵ Second, the Court must decide whether its decision in *Miller*—that proscribes mandatory juvenile LWOP sentences—applies retroactively to cases on collateral review.

As to the retroactivity question, the analysis in *Montgomery* centers on the Court's decision in *Teague v. Lane*, where the Court articulated the controlling rule for determining whether a decision applies retroactively.¹⁶ *Teague's* basic principle is that new rules of criminal law generally do not apply retroactively to cases on collateral review.¹⁷ The basis for this presumption is society's compelling interest in the finality of convictions. Further, allowing new rules to have retroactive application has the potential to undermine the criminal process itself by forcing re-litigation of cases, often concerning events long passed.

¹⁵ Analysis of this question is beyond the scope of this short essay. Both parties, and the United States, agree that the Court has jurisdiction because the decision below rested on *Teague* and was interwoven with federal law. See *Long v. Michigan*, 436 U.S. 1032 (1983) (holding that the Court has jurisdiction in such cases, particularly where the decision does not rest on independent grounds of state law). My suspicion is that some of the justices on the Court do not like the holding in *Miller* and are exploring ways—including the jurisdiction question—to diminish its impact.

¹⁶ Brief of Petitioner; Brief of Respondent.

¹⁷ 489 U.S. 288 (1989); Brief of Respondent.

On the other hand, where the Supreme Court articulates new rules of criminal law or procedure, failing to apply the rule to offenders sentenced prior to the adoption of the rule can create fundamental unfairness. When the new rule identifies a constitutional right, the failure to apply the new rule retroactively results in injustice.

As a result, *Teague* recognizes that new rules of criminal law should apply retroactively in some situations.¹⁸ Specifically, *Teague* articulates two narrow exceptions to its presumption against retroactivity.¹⁹ The first exception applies to new rules that place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”²⁰ This rule, as applied by the Court, distinguishes “substantive” rules that apply retroactively from “procedural” rules that do not.²¹

The second *Teague* exception applies to new rules that require “observance of those procedures that . . . are implicit in the concept of ordered liberty.”²² In other words, this exception allows for retroactive application of new rules only where the new rule is a “watershed” rule of criminal procedure that implicates the “fundamental fairness and accuracy of the criminal proceeding.”²³ To be a watershed rule, a rule must be necessary to prevent an impermissibly large risk of inaccuracy in a criminal proceeding and alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding.²⁴

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Given the narrow application of the second exception, Montgomery's best claim arises under the first exception — that *Miller* creates a *substantive*, not *procedural* new rule of criminal law.²⁵ If substantive, the rule applies retroactively to his case.²⁶

III. WHY MILLER IS BOTH SUBSTANTIVE AND PROCEDURAL, BUT THE SUBSTANTIVE CHARACTERISTICS MATTER MORE

Miller holds that juvenile offenders cannot receive mandatory LWOP sentences.²⁷ This means that juvenile offenders have a constitutional right to a sentencing hearing in which they can present mitigating evidence to argue that they do not deserve to die in prison.²⁸ In *Miller*, the Court articulated a series of items that courts must consider as part of this individualized sentencing requirement mandated by the Eighth Amendment, including: (1) the juvenile's chronological age and related immaturity, impetuosity, and failure to appreciate risks and consequences, (2) the juvenile's family and the home environment that surrounds him, (3) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected him, (4) the incompetencies associated with youth in dealing with law enforcement and a criminal justice system designed for adults, and (5) the possibility of rehabilitation.²⁹

²⁵ The amicus brief of the United States agrees with this view. See Brief of the United States as Amicus Curiae in Support of Petitioner, *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015)(No. 14-280).

²⁶ Given the short length of this essay, it does not explore in detail Montgomery's claim under the second *Teague* exception. In my view, this is a more difficult claim, but the equities of the case should allow it to succeed if the Court decides that the *Miller* rule is procedural.

²⁷ 132 S. Ct. 2455 (2012).

²⁸ *Id.*

²⁹ *Id.* at 2468–69; Petitioner's Brief at 22–23.

As such, *Miller* demands consideration of substantive aspects of the defendant's acts, past, and personal character. These determinations are substantive in nature in that they define the *content* of the sentencing proceeding.

Alternatively, *Miller* speaks to the constitutional limits on the *process* by which a juvenile offender can receive a LWOP sentence. Specifically, *Miller* prohibits mandatory LWOP sentences for juvenile offenders, meaning that courts must engage in a sentencing process by which a judge or jury determines that LWOP is the appropriate sentence. A legislature cannot mandate LWOP as a sentence for a crime by a juvenile offender. In this sense, *Miller* adds a procedural requirement.

Another way of thinking about the difference between mandatory LWOP sentences and judicially-imposed LWOP sentences concerns the impact of the different sentences on the offender. On the one hand, the sentence is the same – life-without-parole – making the difference appear procedural. On the other hand, the difference between a mandatory sentence and having the ability to plead for one's life seems quite significant, particularly when the offender is a juvenile. While the Eighth Amendment's concept of human dignity admittedly is a broad concept,³⁰ there exists a core aspect of one's human dignity or human rights in having the opportunity to plead for one's life, to have one's day in court, and to have a court consider relevant mitigating evidence concerning one's character.³¹ Consid-

³⁰ See *Trop v. Dulles*, 356 U.S. 86 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

³¹ *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Vinter v. U.K.*, [2013] Eur. Ct. H.R. 66069/10, 130/10, & 3896/10, [123-32] (appeal taken from U.K.), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664> (holding that LWOP sentences violate human rights).

ered in this light, the consequence of *Miller* appears to be quite substantive—the difference between automatic condemnation and a chance, however small, at leaving prison before one’s death.

In other words, while *Miller* mandates a particular procedure—an individualized sentencing hearing—the constitutional significance of the decision lies in the *substantive consequences* of the procedure. Specifically, *Miller* requires that the state recognize certain substantive rights, namely the right to present evidence that one does not deserve to die in prison and that one has redeemable characteristics. To dismiss *Miller* as a case that simply imposes a new procedural requirement at sentencing misses the core point of the decision itself—that the dignity and human rights of offenders require consideration of their personal mitigating characteristics.

As a policy matter, the finality of LWOP sentences likewise outweighs the finality concern of the state in decided cases. The decision to impose a LWOP sentence is, for the offender, a final one. Courts will not reconsider such sentences, and the likelihood of reversal or clemency is exceedingly low.

Further, the need for efficiency pales in comparison to the need to recognize the human rights of the offenders, even those that committed unspeakable acts. On the contrary, the barbaric and brutal behavior of criminal offenders does not justify the state depriving them of their constitutional rights.

The burden of resentencing offenders under a retroactive application of *Miller* likewise does not seem overwhelming. At the time of *Miller*, a total of 2,500 offenders were serving juvenile LWOP sentences, with only a portion of those sentences resulting from a mandatory imposition. For the dozens of offenders who fall into this category, though, the opportunity to explain why they do not deserve to die in prison and why their lives still have value is priceless.

For all of these reasons, the substantive characteristics of *Miller* seem to matter more than the procedural characteristics for purposes of retroactivity. The Court’s most similar applicable precedents, *Woodson v. North Carolina* and *Lockett v. Ohio*, were analogous death penalty cases that provided the basis for much of the reasoning in

Miller v. Alabama. Both cases applied retroactively. *Miller* should be no different.

IV. CONSEQUENCES OF A BROADER READING OF *MILLER*

Lost in the discussion about the question of the application of *Miller* to cases on collateral appeal are the broader consequences of the decision in both its substantive and procedural components. Indeed, the retroactivity discussion sheds light on these potential collateral consequences.

As a substantive decision, *Miller* extends the core principle of *Woodson* and *Lockett* that criminal offenders deserve individualized sentencing consideration. As such, mandatory death penalty sentences and mandatory juvenile LWOP sentences violate the Eighth Amendment.³²

There is no obvious reason that this principle should apply only to capital cases and juvenile LWOP cases. The Court has explained that “death is different” and now, “kids are different,” but there is no reason that LWOP is not “different” in a similar way.³³ Three strikes sentences resulting in life-with-parole sentences might also be different in the same way – the consequence of the sentence is significant enough to mandate judicial consideration of mitigating evidence. The idea here is that the seriousness of the sentence invokes the Eighth Amendment requirement of individualized sentencing and consideration of mitigating evidence, such that cabinining the application of this constitutional principle to the death penalty and juvenile LWOP seems arbitrary.

³² *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978).

³³ See, e.g., William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2011).

Another way to think about this principle of individualized sentencing is that it is not about the severity of the sentence, but the possibility of the imposition of a disproportionately severe sentence. The concern in the death penalty context certainly relates to the excessive imposition of a death sentence as an improper result of a mandatory capital statute. Similarly, the need to hear mitigating evidence in juvenile LWOP cases, as articulated by *Miller*, relates in part to the idea that juveniles are less intellectually and emotionally developed, and as a result deserve individual consideration to avoid an excessive sentence.

Under this reading of *Miller*, shorter mandatory sentences that are likely to be excessive in some cases would likewise warrant Eighth Amendment scrutiny. Harsh mandatory sentences for non-violent drug offenses, for example, may violate the Eighth Amendment because they impose sentences that could be disproportionate and foreclose consideration of the individual characteristics of offenders.

The consequence, then, of a broader reading of *Miller's* substantive requirement of individualized consideration could be a widespread challenge to the imposition of mandatory sentences, both in the LWOP context and in situations where the sentence could potentially be excessive.

A broad reading of *Miller* as a procedural decision similarly opens the door to a panoply of arguments, but related to LWOP sentences, not mandatory ones. If *Miller's* core principle is requiring consideration of mitigating characteristics at sentencing in light of the rehabilitation potential of juveniles, it follows that subsequent hearings further into an offender's time in prison might also be helpful to determine the length of his sentence.

Imposing a LWOP sentence threatens human rights in similar ways to a mandatory sentence. The mandatory sentence denies consideration of one's potential for rehabilitation; the LWOP sentence denies any future consideration of one's actual rehabilitation.

Refusing an offender a second look, and deciding that as a one-time, final matter, forecloses any opportunity to present evidence

supporting release from prison just as a mandatory sentence forecloses any opportunity to present evidence supporting the opportunity for release from prison.

The human right here lies in the procedure—the opportunity for a court or parole board to consider the merits of an offender’s case for mitigation and release. It is important to note that offering the opportunity does not constitute opening the doors of the prisons and releasing the most dangerous offenders. Indeed, in most cases, courts and parole boards likely would not grant release to offenders. Rather, affording such a procedure to offenders would allow the opportunity to have one’s situation carefully considered, and mitigate against excessive punishment.³⁴

The procedural consequence of *Miller*, then, suggests that LWOP sentences may also violate the Eighth Amendment in that they deny consideration of mitigating evidence at a point after the initial sentencing hearing. To be sure, the precedents of the Supreme Court have refused, thus far, to declare juvenile LWOP unconstitutional, much less LWOP. The same is true for the imposition of mandatory sentences. The reasoning of *Miller*, however, suggests that these earlier decisions are worth revisiting, particularly in light of the substantive and procedural components of the case.

³⁴ This is certainly a problem in the United States, which has “5 percent of the world’s population and 25 percent of the world’s known prison population.” *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearing Before the J. Economic Comm.*, 110th Cong. 1 (2008) (statement of Sen. Jim Webb, Member, Econ. Comm.) (providing a transcript of the committee hearing in which Senator Webb made his remarks about prison populations). Senator Webb added, “Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system, and I choose to believe the latter.” *Id.* at 1–2. See also Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations’*, N.Y. TIMES (Apr. 23, 2008) (reporting data about prison and population).

V. CONCLUSION

Montgomery is a significant case both in terms of defining the concepts of substantive and procedural rules for retroactivity under *Teague* and of determining whether offenders like Henry Montgomery will receive new sentencing hearings. As explained, while the *Miller* rule contains both substantive and procedural aspects, the better reading of the case for purposes of retroactivity is as a substantive decision. Finally, under each conception of *Miller*, there exists significant potential to challenge the constitutionality of mandatory and LWOP sentences.