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Departing from Teague: Miller v. Alabama's Invitation to the States to Experiment with New Retroactivity Standards

Eric Schab, Florida State University

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DEPARTING FROM *Teague: Miller v. Alabama*’s Invitation to the States to Experiment with New Retroactivity Standards

By:

Eric Schab

TABLE OF CONTENTS

I. INTRODUCTION 1

II. *Teague* Retroactivity Standard 5

III. Kids are Different: An Evolving Constitutional Rule 7

A. The “Death is Different” Principle as Primogenitor 7

B. The “Kids are Different” Principle Takes Root 11

IV. *Teague* as Applied to *Miller v. Alabama* 14

A. Miller is a Substantive Rule 16

B. Miller is a Procedural Rule Lacking Significance to Merit Retroactive Application 18

C. The Mantich Opinion: Miller is Somewhere in Between Substantive and Procedural 20

V. An Alternative Approach: *Teague* as Applied to the “Kids are Different” Line of Cases 21

A. The Effect of the “Kids are Different” Principle on the Accuracy of the Conviction 24

B. Whether the “Kids are Different” Principle Alters the Understanding of Bedrock Procedural Elements Essential to the Fairness of the Proceeding 26

VI. CONCLUSION 27

I. INTRODUCTION

Don’t miss the forest for the trees—this adage is often handed down to 1Ls approaching their first round of exams. The point is to get students to focus their sights on the broader trends in the law and not the idiosyncrasies of each individual case. In the summer of 2012, the Supreme Court overturned the life without parole sentences being served by Evan Miller and Kuntrell Jackson for homicide. The Court held that these sentences violated the Eighth Amendment because they were mandated upon conviction of homicide, which prevented the judge from taking into account any mitigating circumstances that may have lessened the

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1 Graduate Fellow, Public Interest Law Center, Florida State University College of Law
culpability of these two juvenile offenders. Standing alone, the new rule announced in *Miller v. Alabama* is a tree; it merely requires a judge to give a juvenile’s case individualized consideration before imposing a sentence of life without parole. But, viewing *Miller’s* holding so narrowly ignores the forest of Eighth Amendment jurisprudence that it inhabits.

Since June 2012, state courts have been embroiled in a debate over whether *Miller v. Alabama* applies retroactively to cases that had already reached their final disposition. Though binding only on the federal courts, the Teague standard has been the weapon of choice for all seven state Supreme Courts that have addressed the issue of whether *Miller* applies retroactively. The Teague retroactivity doctrine establishes a general rule of nonretroactivity for new rules with two limited exceptions for substantive rules and “watershed” rules of criminal procedure. The Teague standard is no stranger to criticism. *Miller v. Alabama* illuminates one

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3 Id. at 2460.
4 Id. at 2469.
5 See generally *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding that the death penalty is unconstitutional as applied to juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (holding that sentences of life without parole are unconstitutional as applied to juvenile offenders convicted of nonhomicide offenses); *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2406 (2011) (holding that the youthfulness of the offender must be considered when determining whether a juvenile is in police custody for purposes of *Miranda*).
7 See *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013) (holding that *Miller v. Alabama* is a new rule of criminal procedure that is not watershed and so it does not apply retroactively under Teague); *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013) (holding that *Miller v. Alabama* is a substantive rule meriting retroactive application under Teague); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller v. Alabama* is a substantive rule meriting retroactive application under Teague); Commonwealth v. Cunningham, 81 A.3d 1, 11 (Penn. 2013) (holding that *Miller v. Alabama* is a new rule of criminal procedure that is not watershed and so it does not apply retroactively under Teague), *State v. Tate*, 130 So.3d 829, 841 (La. 2013) (holding that *Miller v. Alabama* is a new rule of criminal procedure that is not watershed and so it does not apply retroactively under Teague); *Diatchenko v. District Attorney for Suffolk Dist.*, 466 Mass. 655, 661 (Mass. 2013) (holding that *Miller v. Alabama* is a substantive rule meriting retroactive application under Teague); *State v. Mantich*, 287 Neb. 320, 342; 2014 WL 503134 (Neb. February 7, 2014) (holding that *Miller* applies retroactively because it is more substantive than procedural).
9 See Ezra D. Landes, *A New Approach to Overcoming the Insurmountable “Watershed Rule” Exception to Teague’s Collateral Review Killer*, 70 Mo. L. Rev. 1, 11-12, n. 72 (2009). Stating that his goal is to offer an alternative to *Teague* and not to critique it, Landes offers a brief overview of the existing academic criticism of the *Teague* standard. **Supra.** Likewise, the purpose of this article is to explore an alternative to *Teague*, so I find it best to follow suit and simply direct the reader to Landes’ summary of *Teague’s* criticism.
of Teague’s fundamental flaws—its inability to account for rules that consist of both substantive and procedural components. Seven states have put Miller through the Teague analysis and a consensus has yet to develop over whether Miller is substantive or procedural.\textsuperscript{10}

The difficulty in classifying Miller as either substantive or procedural has led some courts to place it somewhere in between. Judge Wilson, concurring in the Eleventh Federal Circuit’s retroactivity decision, argued that the Court should have been more thorough in its analysis of whether Miller is substantive or procedural, stressing that the question is closer than it first appears.\textsuperscript{11} Judge Wilson even suggested that Miller is better classified as a “quasi-substantive” rule.\textsuperscript{12} Echoing Judge Wilson’s sentiment, the Nebraska Supreme Court did not classify Miller as either substantive or procedural, but rather applied Miller retroactively because it is “more substantive than procedural.”\textsuperscript{13} Finally, in holding that Miller is not retroactive as a procedural rule, the Pennsylvania Supreme Court dedicated a significant portion of its opinion in Commonwealth v. Cunningham to a discussion of Teague’s limitations.\textsuperscript{14} Justice Castille, in his concurrence to Cunningham, lamented the “seeming inequity” that arises from the majority’s well-reasoned application of Teague.\textsuperscript{15} Justice Castille further predicted that it may “require a

\textsuperscript{10} It is worth noting that, at the time of this writing, there are three State Supreme Courts that have heard oral argument on the issue of Miller’s retroactivity, but not yet issued an opinion. Those States are Illinois (People v. Davis, Case No. 115595), Michigan (People v. Carp, Case No. 146478), and Florida (Falcon v. State, Case No. SC13-865). See Supreme Court of Illinois Docket Book, at 8, available at http://www.state.il.us/court/supremecourt/Docket/2014/01-14.pdf; Case Search, MICHIGAN COURTS, available at http://courts.mi.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=146478&CourtType=CaseNumber=1; Docket Search, SUPREME COURT OF FLORIDA available at http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2013&p_casenumber=865&psCourt=FSC&psSearchType=pe=. Additionally, the Texas Court of Criminal Appeals has held that Miller applies retroactively as a substantive rule. See Ex parte Maxwell --- S.W.3d ---, 2014 WL 941675 (Tex.Crim.App. March 12, 2014). Though not the highest court in Texas, criminal cases rarely go to the Texas Supreme Court.

\textsuperscript{11} In re Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013) (Judge Wilson concurring).

\textsuperscript{12} Id. at 1369.


\textsuperscript{14} Cunningham, majority slip op. at 12-14 (Pa. 2013).

\textsuperscript{15} Id. concurrence slip op. at 2 (Pa. 2013).
constitutional decision as innovative as Miller itself to divine an existing Eighth Amendment basis for holding that Miller is to be afforded retroactive effect.”16

Only the federal courts are required to follow the Teague standard.17 Given the difficulty courts have encountered in reaching a consensus on the substantive/procedural debate, Miller’s holding can be seen as an invitation to the States to experiment with alternatives to Teague. Criminal defense attorney Ezra Landes has offered one such alternative to Teague’s exception for “watershed” procedural rules that promises to afford new rules greater potential for retroactive application.18 Under Landes’ “line of cases” approach, a new procedural rule is applied retroactively not only if it is a “watershed” rule of criminal procedure on its own, but also if it establishes a “watershed” rule when taken together with other cases.19 In short, Landes’ approach to procedural rules also focuses on the significance of the forest, rather than limiting itself to the significance of each individual tree.

This article seeks to establish that Miller v. Alabama, when taken together with the other recent Supreme Court cases Roper v. Simmons, Graham v. Florida, and J.D.B v. North Carolina, creates a watershed rule that “kids are different” and must be treated differently throughout the criminal trial process. Because Miller belongs to this watershed line of cases, it merits retroactive application. This article is aimed primarily at state courts that have yet to answer Miller’s retroactivity question and are seeking an alternative to Teague.20 Part II explains the Teague retroactivity doctrine. Part III of this article examines the evolution of the “kids are different” rule and how Miller v. Alabama fits within that rule. Part IV analyzes how Teague has
been applied to Miller by the seven state Supreme Courts. Part V discusses the “line of cases” alternative and how it would produce more accurate and consistent results than the current Teague standard as applied to Miller v. Alabama. Part VI concludes the article.

II. **The Teague Retroactivity Standard**

In Teague v. Lane, the Supreme Court adopted its current standard for determining whether new rules of criminal procedure are to be given retroactive effect, based primarily on Justice Harlan’s concurrence in Mackey v. United States.\(^{21}\) The Supreme Court felt the need to adopt a new retroactivity standard in light of the “more than mildly negative” response to the inconsistencies and inequalities created by the Linkletter standard that it had previously employed to answer questions of retroactivity.\(^{22}\) The Linkletter standard required the Court to analyze three factors in determining whether to apply a new rule retroactively: 1) the purpose served by the new rule, 2) the extent of reliance on the old rule, and 3) the effect of retroactive application on the administration of justice.\(^{23}\)

The Teague standard presumes that “new rules generally should not be applied retroactively to cases on collateral review.”\(^{24}\) The Supreme Court defines a “new rule” as one that was “not dictated by precedent existing at the time the defendant’s conviction became final.”\(^{25}\) Two minor exceptions are carved out of Teague’s general presumption of

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\(^{21}\) Teague v. Lane, 489 U.S. 288, 307 (1989). Prior to adopting Teague, the Supreme Court employed the Linkletter standard for determining whether new rules of criminal procedure would receive retroactive application. Shortly before Teague was decided, the Supreme Court had abandoned the use of the Linkletter standard for cases pending direct review, finding that such application “violates the basic norms of constitutional adjudication.” Griffith v. Kentucky, 479 U.S. 314, 322 (1987). The Supreme Court found Justice Harlan’s opinions in Mackey and Desist persuasive in deciding to distinguish between cases that had already received a final disposition from those that were pending direct review at the time a new rule was announced in a retroactivity analysis. *Id.* When the Supreme Court revamped its retroactivity analysis for final cases in Teague two years later, it again referred to Justice Harlan’s opinions in Mackey and Desist for guidance.

\(^{22}\) Teague, at 302-03 (1989).


\(^{24}\) Teague, at 305 (1989).

\(^{25}\) *Id.*
nonretroactivity for new rules that either place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”26 or require “the observance of those procedures that…are implicit in the concept of ordered liberty.”27 The Supreme Court’s interpretation of Justice Harlan’s concurrence in Mackey was that it specifically reserved the second exception for watershed rules of criminal procedure that “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.”28 The Supreme Court further narrowed the second exception by limiting its scope to “those new procedures without which the likelihood of an accurate conviction is seriously diminished,” in accordance with Justice Harlan’s dissent in Desist v. United States.29 Further, the Teague standard provides that retroactivity should be established along with a new rule, declaring that “[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant announcing the rule, evenhanded justice requires it be applied retroactively to all who are similarly situated.”30

Naturally, the Teague opinion served as a catalyst for quite a bit of litigation over exactly what rules of criminal procedure would fall within its two exceptions. In Bousley v. United States, the Supreme Court first acknowledged the significance of distinguishing between substantive and procedural rules in a Teague retroactivity analysis.31 Procedural rules are only retroactive under Teague if their absence produces a serious risk that the innocent will be convicted.32 Substantive rules necessarily carry this risk because they recognize that a criminal

26 Id. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).
27 Id. at 307 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)).
28 Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971)).
29 Id. at 312-13 (citing Desist v. United States, 394 U.S. 244, 262 (1969)).
30 Id. at 300.
32 Id.
statute does not reach certain conduct, so they are generally applied retroactively under *Teague*.  

In *Danforth v. Minnesota*, the Supreme Court held that only the federal courts are required to use *Teague*. The *Danforth* Court found that *Teague*’s general “rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings.” State courts, however, are free to give retroactive effect to cases that are deemed “nonretroactive” under the *Teague* standard. The Court acknowledged that it had adopted *Teague* in response to the inconsistent results produced by the *Linkletter* approach, but maintained that “[n]onuniformity is, in fact, an unavoidable reality in a federalist system of government.” Although the Supreme Court has renounced *Linkletter*, some state courts, such as Florida and Minnesota, still incorporate it into their own retroactivity analysis to give new rules broader retroactive effect.

III. KIDS ARE DIFFERENT: AN EVOLVING CONSTITUTIONAL RULE

A. The “Death is Different” Principle as Primogenitor

State legislatures are generally entrusted with great deference to fashion appropriate penalties for criminal behavior. Under the Supreme Court’s “gross proportionality” standard, the Eighth Amendment’s ban on cruel and unusual punishment prohibits only “extreme

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33 *Id.*
36 *Id.* at 280.
37 *Id.* at 280-81.
38 *Id.* at 280.
39 See People v. Maxson, 759 N.W.2d 817, 822 (Mich. 2008) (holding that Michigan courts can use the *Linkletter* factors to give new rules broader retroactive effect than they would receive under the federal law); Witt v. State, 387 So.2d 922, 929 (Fla. 1980) (holding that the three-pronged test of *Stovall* and *Linkletter* is to be applied in certain cases under the Florida retroactivity analysis).
sentences that are ‘grossly disproportionate’ to the crime.”⁴¹ Death is different.⁴² Because the death penalty is unique in its severity and irrevocability, the Supreme Court has placed restrictions on its imposition, including the procedures permissible to impose it,⁴³ the offenses for which it can be imposed,⁴⁴ and the offenders whom it can be imposed upon.⁴⁵

In Roper v. Simmons, the Supreme Court relied on the “death is different” principle to prohibit the imposition of the death penalty on juvenile offenders.⁴⁶ The Court found that the “objective indicia of consensus” among the States had changed regarding the imposition of the death penalty on juveniles since it issued the exact opposite holding in Stanford v. Kentucky sixteen years earlier.⁴⁷ The Court went further than merely adopting the predominant State practice and held that juveniles have a diminished culpability as compared to adults, meaning that they could not be classified among the worst of the worst offenders deserving of the death penalty.⁴⁸ In support of its holding, the Court relied on scientific data establishing that children are different from adults in three important ways: 1) “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more

⁴¹ Id.
⁴² Id. at 995-96.
⁴⁵ See Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty is unconstitutional as applied to mentally retarded defendants due to their diminished culpability); Roper v. Simmons, 543 U.S. 551, 578 (2005) (extending its holding in Atkins to juvenile offenders).
⁴⁶ Roper, at 578.
⁴⁷ Id. at 574. Sixteen years prior to Roper, the Supreme Court had held that the Eighth Amendment does not prohibit the imposition of the death penalty on juveniles. Stanford v. Kentucky, 492 U.S. 361, 380 (1989). On the same day that the Supreme Court issued Stanford, it also decided Penry v. Lynaugh, 492 U.S. 302 (1989), which held that the Eighth Amendment did not prohibit the death penalty for the mentally retarded. Roper, at 562-63. Likewise, Penry was overruled in 2002 by Atkins v. Virginia, 536 U.S. 304, 316 (1989), based on society’s evolving standards of decency. Id. at 563.
⁴⁸ Id. at 570.
common among the young”, 2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures [than adults]”, and 3) “the character of a juvenile is not as well formed as that of an adult.” As to that third point, the Supreme Court elaborated that “it is even difficult for expert psychologists to differentiate between the juvenile offender whose crime reflects an unfortunate yet transient immaturity, and that rare juvenile offender whose crime reflects irreparable corruption.”

The Roper Court found that a categorical prohibition on the death penalty for juveniles was necessary, rather than simply requiring a sentencer to take a defendant’s youthfulness into account, because “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course.” In fact, the Court was concerned that “[i]n some cases, a defendant’s youth may even be counted against him.” So, Roper v. Simmons broke from the Supreme Court’s earlier holding in Stanford v. Kentucky as more than a mere acknowledgement that the States had begun to change their practices regarding the juvenile death penalty. Roper established that “kids are different” from adults in three fundamental ways and that these differences warrant categorically different treatment by a sentencing authority.

In 2010, the Supreme Court issued Graham v. Florida, which broke open the “death is different” barrier by utilizing a categorical analysis to find that sentences of life without parole are unconstitutional as applied to juvenile offenders convicted of nonhomicide offenses. Graham relied on much of the same scientific data that the Court used in Roper, finding that advancements in neuroscience had reinforced earlier findings from psychology and social

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49 Id. at 569-70.
50 Id. at 573.
51 Id.
52 Id.
science by producing evidence that “parts of the brain involved in behavior continue to mature through late adolescence.”

Therefore, “[j]uveniles are more capable of change than adults, and their actions are less likely to be evidence of an ‘irretrievably broken moral character.”

As in *Roper*, the *Graham* Court found that a categorical prohibition on life without parole was necessary due to concerns over whether “courts taking a case-by-case approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” Additionally, the Court expressed concern that the defining characteristics of youth make juveniles more difficult to adequately represent throughout the trial process and that a case-by-case approach would inadvertently result in greater punishment for juveniles because of these difficulties. Therefore, the Supreme Court held that the State must provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” to all juveniles convicted of nonhomicide offenses that are serving life sentences.

Due to both its unprecedented imposition of a categorical ban on a noncapital sentencing scheme and its focus on the defining characteristics of juveniles, *Graham*’s holding quickly came to be understood as more than a mere extension of the “death is different” principle. *Graham*’s requirement that the State provide “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” can be seen as establishing a right to rehabilitation for juveniles. Further, the imposition of a review mechanism allows for consideration of the ways in which a juvenile’s youth may have implicated the trial process itself, yielding a less accurate

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54 Id. at 68.
55 Id.
56 Id. at 77.
57 Id. at 78-79.
58 Id. at 75.
or fair conviction. *Graham* expanded on the framework built in *Roper* by emphasizing that the fundamental differences between children and adults make children more prone to rehabilitation and have implications on the criminal trial process. While *Roper* may be seen as a mere extension of the “death is different” principle, *Graham* unequivocally stood for a new constitutional principle that “kids are different” and must be treated differently by the criminal justice system.60

**B. The “Kids are Different” Principle Takes Root**

A year after *Graham*, the Supreme Court set forth *J.D.B. v. North Carolina*, which required a judge to consider a juvenile defendant’s age when evaluating whether he or she was in custody for *Miranda* purposes.61 Again, science motivated the Court, as it expressed concern over studies illustrating the heightened risk of false confessions from youth.62 Though departing from the realm of sentencing, the Court relied on much of the same rationale that animated its earlier rulings in *Graham* and *Roper*, including the three fundamental differences between juveniles and adults.63 By the time it decided *J.D.B.*, the Court regarded the “kids are different” principle as a matter of common sense, stating that “[s]uch conclusions [about juvenile behavior and perception] apply broadly to children as a class. And, they are self-evident to anyone who was once a child himself, including any police officer or judge.”64 In fact, the Court went so far

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62 Id. at 2401.

63 Id. at 2403.

64 Id.
as to say that “in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age.”

*J.D.B.* is aimed squarely at improving the accuracy of a criminal trial by ensuring that one of the State’s key pieces of evidence—a confession—is not tainted by a juvenile suspect’s inherent inability to understand his or her surroundings and exercise mature judgment. Though youthfulness will not be a significant factor in every custody determination, to ignore it would be “to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.” The Supreme Court’s application of “kids are different” to pretrial custody determinations in *J.D.B.* establishes that this rule permeates all stages of the criminal trial process, not just sentencing.

In 2012, the Supreme Court finally pronounced that “if (as *Harmelin* recognized) ‘death is different,’ children are different too” in *Miller v. Alabama*, its landmark decision that dispelled any possibility that *Graham*’s holding was a mere deviation from the “death is different” mold. Building off of the scientific evidence that it had used in *Roper* and *Graham*, the Court made it clear that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” The Court not only prohibited the states from imposing mandatory sentences of life without parole on juveniles convicted of homicide offenses, but also cautioned that “given all we have said in *Roper*,

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65 Id. at 2405.
66 Id. at 2403.
67 Id. at 2408.
68 See Marsha L. Levick and Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 517-26 (2012) (arguing that the “reasonable juvenile” standard employed by the Supreme Court in *J.D.B.* opens the door for consideration of the unique attributes of youth in numerous other criminal law contexts, including affirmative defenses such as duress, self-defense, and provocation, and moral culpability for felony murder).
70 Id. at 2465.
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.”71 The Court stopped short of imposing a categorical ban as it had in Roper and Graham, finding instead that its holding was sufficient to resolve Miller and its companion case, Jackson v. Hobbs.72

As in Graham, the Court also took issue with the inability of the mandatory sentencing schemes at issue in Miller to account for ways in which the distinguishing characteristics of youth may influence the criminal trial process itself.73 The Court stated that a sentencing court needs to consider a juvenile’s “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.”74 So, Miller establishes not only that “kids are different” for the purpose of sentencing, but also that their differences affect the fairness of the criminal trial process itself.

Miller v. Alabama is the latest Supreme Court case in the “kids are different” line. But, some state courts have embraced this emerging constitutional principle and further expanded on it. For instance, the Massachusetts Supreme Court abolished juvenile life without parole altogether in Diatchenko v. District Attorney.75 Most prominently, however, the Iowa Supreme Court released its own trilogy of juvenile sentencing cases—Null, Ragland, and Pearson—on August 16, 2013.76 While Null and Ragland address issues related directly to the implementation

71 Id. at 2469.
72 Id. Unlike in Roper, the Miller opinion contains a thorough examination of mitigating facts present in both Miller and its companion case, Jackson v. Hobbs. Id. at 2468-69. In fact, Justice Alito’s dissent criticizes the majority for crafting a rule based around these two carefully selected cases. Id. at 2489 (Justice Alito dissenting). It’s possible that the majority found that a categorical ban on life without parole was unnecessary to resolve these two cases because it felt that the facts would warrant a lesser sentence in both cases.
73 Id. at 2468.
74 Id.
76 State v. Null, 836 N.W.2d 41, 72-75 (Iowa 2013) (holding that Miller protections are triggered when a juvenile is sentenced to a lengthy term-of-years that guarantees either life in prison or geriatric release and providing
of *Miller, Pearson* advances the “kids are different” principle well beyond what the Supreme Court has mandated thus far. Pearson had been sentenced to a term of fifty years with parole eligibility after thirty-five for a series of armed robberies she had participated in as a juvenile.77 Acknowledging that *Miller* specifically addressed only juvenile offenders who received life without parole sentences for homicide offenses, the *Pearson* court held that “its reasoning applies equally to Pearson’s sentence of thirty-five years without the possibility of parole for these [nonhomicide] offenses.”78 The court found that Pearson’s lengthy sentence violated the Eighth Amendment because “the district court emphasized the nature of the crimes to the exclusion of the mitigating features of youth.”79 Holding otherwise, the court feared, “would be ignoring the teaching of the *Roper-Graham-Miller* line of cases that juveniles have less culpability than adults, that the few juveniles who are irredeemable are difficult to identify, and that juveniles have rehabilitation potential exceeding that of adults.”80 Importantly, the Iowa Supreme Court repeatedly framed its holding as guided by the “principles of *Miller*” or “the *Roper-Graham-Miller* line of cases,” rather than by *Miller* alone.81 The *Pearson* court’s choice of words demonstrates awareness by at least one state Supreme Court that *Miller* stands for a shift in the law that is much broader than its actual holding.

IV. **Teague as Applied to Miller v. Alabama**

77 Pearson, 836 N.W.2d 88, 93.
78 Id. at 96.
79 Id. at 97.
80 Id. at 96.
81 Id. at 95-98.
Seven state supreme courts have tackled the retroactivity question presented by *Miller*, and all seven have used *Teague*. The substantive/procedural debate has thus far been dispositive of whether a state court applies *Miller* retroactively, with three states finding that *Miller* is a substantive rule that applies retroactively and three finding that it is a procedural rule that does not. Indeed, the *Miller* opinion itself left the states with mixed signals on whether it is substantive or procedural.

In *Miller*, the Supreme Court stated that “[o]ur decision does not categorically bar a penalty… [i]nstead it mandates only that a sentencer follow a certain process… before imposing a certain penalty.” On its face, this quote places *Miller* squarely within the procedural category, meaning that it only applies retroactively if it is deemed “watershed.” However, *Miller v. Alabama* differs significantly from other procedural rules, such as those announced in *Apprendi* and *Ring*, in that *Miller* does not simply tweak an existing fact-finding process, but rather requires the creation of a fact-finding process where none existed before. Further, given the Supreme Court’s admonition that life without parole should be reserved for that “rare juvenile offender whose crime reflects irreparable corruption,” it is undeniable that *Miller v. Alabama* will function as an outright prohibition on life without parole for the vast majority of juvenile offenders. Additionally, some courts have noted that it simply seems unfair to deny application of *Miller’s* holding to certain children based solely on the timing of their offense.

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82 *Supra* n. 7.
84 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact, other than the fact of a prior conviction, that increases the penalty for the crime above the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt).
85 *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that aggravating factors, necessary to impose the death penalty, must be found by a jury rather than a judge).
86 *Id.* at 2469.
Due to Miller’s refusal to fall neatly into the category of either a substantive or a procedural rule, some judges have placed Miller into its own category somewhere in between. For instance, Judge Wilson, concurring in In re Morgan, suggested that Miller may be better classified as a “quasi-substantive” rule. Likewise, the Nebraska Supreme Court framed the substantive/procedural question as a continuum, rather than as binary categories. This article proceeds to analyze each of the state Supreme Court opinions regarding the retroactive application of Miller in three parts: 1) those States that have found Miller to be a substantive rule, 2) those that have found Miller to be procedural, and 3) Nebraska, which put Miller somewhere in between.

A. Miller is a Substantive Rule

Mississippi was the first state to give Miller v. Alabama retroactive effect in Jones v. State. Using a Teague analysis, the Jones Court held that Miller is a substantive rule of criminal procedure. For Mississippi, the inquiry was simple; Miller is a substantive rule because it narrowed the scope of the existing punishment statute in Mississippi in that the existing “sentencing scheme may be applied to juveniles only after applicable Miller characteristics and circumstances have been considered by the sentencing authority. As such, Miller modified [Mississippi’s] substantive law by narrowing its application to juveniles.”

Iowa followed, also holding that Miller is a substantive rule meriting retroactive application under Teague in State v. Ragland. The Iowa Supreme Court built its holding on a
broader set of rationales than Mississippi did. Though it found that the practical effect of *Miller* was the creation of a new sentencing procedure, the *Ragland* Court found that at the root of this process was a substantive ban on a certain form of punishment for a certain class of offenders.\(^{94}\) Iowa also emphasized that the two strands of precedent that *Miller* is based on—the categorical bans on specific penalties for certain offenders and the cases requiring individualized sentencing before imposition of the death penalty—had all been applied retroactively.\(^{95}\) Lastly, the United States Supreme Court’s application of *Miller*’s holding to its companion case, *Jackson v. Hobbs*, which was before the Court on collateral review, further guided the Iowa Court’s retroactivity analysis.\(^{96}\)

Next, Massachusetts found that *Miller* applies retroactively in *Diatchenko v. District Attorney*.\(^{97}\) As with both Mississippi and Iowa, Massachusetts held that *Miller* announced a substantive rule because it “explicitly forecloses the imposition of a certain category of punishment… on a specific class of offenders.”\(^{98}\) The Court further found that “retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them.”\(^{99}\) Importantly, the Massachusetts Supreme Court also announced a remedy for juveniles affected by *Miller v. Alabama*—parole eligibility after 15 years of incarceration.\(^{100}\) So, unlike in other states, *Miller* actually did operate as a categorical ban on life without parole sentences for juvenile offenders in Massachusetts, which likely influenced the Court’s *Teague* analysis. The Massachusetts Court further noted that it did not

\(^{94}\) Id. at 115-16.
\(^{95}\) Id. at 116.
\(^{96}\) Id.
\(^{98}\) Id. at 666.
\(^{99}\) Id.
\(^{100}\) Id. at 673-74.
consider *Miller* to be a “watershed rule of criminal procedure” because it concerns sentencing and not “the fairness and accuracy of the underlying conviction.”\textsuperscript{101}

With the exception of Massachusetts,\textsuperscript{102} the States that found *Miller* to be a substantive rule regarded mandatory life without parole sentences as more severe penalties than discretionary life without parole sentences. So, by requiring the States to implement a certain procedure, the Supreme Court did invoke a substantive ban on a distinct penalty on juveniles—*mandatory* life without parole.\textsuperscript{103} Therefore, the fact that Mississippi and Iowa had to expand the range of possible penalties for juveniles convicted of homicide was sufficient to render *Miller* a substantive change in the law, even though no categorical ban on life without parole was imposed.\textsuperscript{104}

**B. Miller is a Procedural Rule Lacking Significance to Merit Retroactive Application**

In *Chambers v. State*, Minnesota became the first state to reject retroactive application of *Miller* under the *Teague* standard.\textsuperscript{105} The Minnesota Court classified *Miller* as a procedural rule because it did not announce a new element that must be proven before the State can impose a sentence of life without parole on a juvenile, but rather it simply “altered the permissible methods by which the state can exercise its continuing power to punish juvenile homicide offenders by life imprisonment without the possibility of parole.”\textsuperscript{106} Before considering whether *Miller v. Alabama* is a “watershed rule of criminal procedure,” the Court stressed just how narrow this class of rules is, emphasizing that the rule must both be necessary to prevent an impermissibly large risk of inaccurate conviction and alter the understanding of bedrock

\textsuperscript{101} *Id.* at 666 n. 11.
\textsuperscript{102} As noted, *Miller* actually did operate as a categorical ban on juvenile life without parole in Massachusetts, unlike in other States. *Id.* at 673-74.
\textsuperscript{103} *Ragland*, at 116.
\textsuperscript{104} *Jones*, at 702; *Ragland*, at 115.
\textsuperscript{105} *Chambers v. State*, 831 N.W.2d 311, 328 (Minn. 2013).
\textsuperscript{106} *Id.* at 328-30.
procedural elements essential to the fairness of the proceeding.\textsuperscript{107} Minnesota then concluded that \textit{Miller} is not a “watershed rule” because it affects only the juvenile’s sentence and not the underlying conviction, and because there are numerous other cases establishing a right to present mitigation evidence at sentencing.\textsuperscript{108}

Pennsylvania also held that \textit{Miller} is a procedural rule that does not apply retroactively under \textit{Teague} in \textit{Commonwealth v. Cunningham}.\textsuperscript{109} Interestingly, the Pennsylvania Supreme Court began its analysis by criticizing the \textit{Teague} standard, noting that it “is not necessarily a natural model for retroactivity jurisprudence at the state level.”\textsuperscript{110} However, since neither party proposed an alternative to \textit{Teague}, the \textit{Cunningham} Court felt bound to follow it.\textsuperscript{111} Using \textit{Teague}, the Court found the retroactivity analysis to be fairly straightforward.\textsuperscript{112} Pennsylvania held that \textit{Miller} is not a substantive rule because it does not prohibit the State from imposing sentences of life without parole on a juvenile altogether, and that it is not a “watershed rule” because it is an outgrowth of two strands of precedent.\textsuperscript{113} Additionally, the \textit{Cunningham} Court did not find the Supreme Court’s application of \textit{Miller}’s holding to \textit{Jackson v. Hobbs} persuasive since the Court did not specifically address the issue of retroactivity in doing so.\textsuperscript{114}

Finally, the Louisiana Supreme Court held that \textit{Miller} does not merit retroactive effect in \textit{State v. Tate}.\textsuperscript{115} Louisiana found that \textit{Miller} was a procedural rule, rather than a substantive one, placing particular emphasis on the fact that \textit{Miller} simply altered the “permissible methods” by

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{107} \textit{Id.} at 330 (citing Campos v. State, 816 N.W.2d 480, 498 (Minn. 2012)).
\textsuperscript{108} \textit{Id.} at 330.
\textsuperscript{109} \textit{Commonwealth v. Cunningham}, 81 A.3d 1, 11 (Penn. 2013).
\textsuperscript{110} \textit{Id.} at 8.
\textsuperscript{111} \textit{Id.} at 8-9.
\textsuperscript{112} \textit{Id.} at 9.
\textsuperscript{113} \textit{Id.} at 10.
\textsuperscript{114} \textit{Id.} at 9.
\textsuperscript{115} \textit{State v. Tate}, 130 So.3d 829, 841 (La. 2013).
\end{footnotesize}
\end{flushleft}
which a judge could sentence a juvenile to life without parole. Building off of Minnesota’s holding in *Chambers*, the Tate Court held that *Miller* is also not a “watershed rule” because it has no bearing on the underlying conviction itself and it follows pre-existing individualized sentencing precedent.

The States that found *Miller* to be a procedural rule did not consider a mandatory sentence of life without parole to be any more severe than a discretionary sentence of life without parole. So, in their view, *Miller* simply required States to change the means in which they imposed the exact same penalty that had already been imposing. Further, these States all agreed that *Miller* would need to clear two hurdles in order to be considered a “watershed” rule of criminal procedure. The first of these hurdles was the effect that *Miller* would have on the underlying conviction. The second was whether *Miller* alters the understanding of bedrock procedural elements essential to the fairness of the proceeding. No state found that *Miller* met these two requirements, and so it has not yet been applied retroactively as a procedural rule.

C. The Mantich Opinion: Miller is Somewhere in Between Substantive and Procedural

Most recently, in *State v. Mantich*, the Nebraska Supreme Court applied *Miller* retroactively. Nebraska surveyed the responses of other state and federal courts and found that *Miller* embodied both procedural and substantive components. As did the other “substantive” states, the Mantich Court took into account the effect that *Miller* had on Nebraska’s substantive

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116 *Id.* at 837-38.
117 *Id.* at 839-41.
118 *Chambers*, at 328-30; *Cunningham*, at 10; *Tate*, at 837-38.
119 *Chambers*, at 330; *Cunningham*, at 10; *Tate*, at 839-41.
120 *Id.*
121 *Id.*
122 But see People v. Williams, N.E.2d 181, 196-97 (Ill.App. 1 Dist. 2012) (holding that *Miller* does apply retroactively as a watershed rule of criminal procedural because it caused a substantial change in the law, which was implicated in the concept of ordered justice).
124 *Id.* at 334-39.
law and the United States Supreme Court’s application of Miller’s holding to Jackson v. Hobbs in concluding that Miller applies retroactively.\textsuperscript{125} But, ultimately, “it is the absence of choice that makes the Miller rule more substantive than procedural.”\textsuperscript{126} Although Nebraska agreed “that the Miller rule is entirely substantive when viewed as Massachusetts,\textsuperscript{127} Mississippi, and Illinois\textsuperscript{128} have,” it did not go so far as to declare that Miller is, in fact, a substantive rule, only that it is “more substantive than procedural.”\textsuperscript{129}

Nebraska’s analysis is likely the most honest of any that have been undertaken thus far. The “substantive” States have all had to reconcile their holdings with the fact that Miller plainly states that “it mandates only that a sentencer follow a certain process… before imposing a certain penalty.”\textsuperscript{130} Likewise, the “procedural” States have had to diminish the relevance of Jackson v. Hobbs and both strands of cases leading up to Miller,\textsuperscript{131} while also ignoring the fact that they do have to come up with some new penalties as an alternative for juveniles convicted of homicide, but not sentenced to life without parole. Nebraska avoided this situation by acknowledging that Miller possesses both substantive and procedural aspects and placing Miller on the substantive side of the continuum.\textsuperscript{132} Of course, this approach comes with its own set of unanswered questions. Namely, how “substantive” does a rule have to be before it applies retroactively?

V. AN ALTERNATIVE APPROACH: \textit{Teague} AS APPLIED TO THE “KIDS ARE DIFFERENT” LINE OF CASES

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 341-42.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} The Mantich opinion also contained some discussion of Nebraska’s legislative response to Miller v. Alabama. \textit{Id.} at 341. Unlike in Massachusetts, where Miller resulted in a categorical ban on juvenile life without parole, Nebraska now allows a judge to sentence a juvenile convicted of homicide to anywhere between 40 years and life without parole after considering the appropriate factors. \textit{Id.}
\item \textsuperscript{128} Illinois has had several intermediate courts apply Miller retroactively. See People v. Morfin, 981 N.E.2d 1010 (Ill.App. 1 Dist. 2012); People v. Williams, N.E.2d 181(Ill.App. 1 Dist. 2012); People v. Johnson, 998 N.E.2d 185 (Ill.App. 5 Dist. 2013). However, the Illinois Supreme Court has yet to rule on Miller’s retroactivity.
\item \textsuperscript{129} Mantich. at 342.
\item \textsuperscript{130} Ragland, at 115-16.
\item \textsuperscript{131} Cunningham, at 9.
\item \textsuperscript{132} Mantich, at 339-42.
\end{itemize}
Seven states have addressed the issue of whether *Miller v. Alabama* applies retroactively and a consensus has yet to emerge. As the Nebraska Supreme Court discussed, this is likely because *Miller* is neither purely substantive nor purely procedural.\(^{133}\) A rule that evades classification to such a degree may simply be the product of the Supreme Court’s minimalist inclinations.\(^{134}\) In *Miller*, the Supreme Court stopped short of imposing a categorical ban on life without parole for all juveniles, since the “holding [was] sufficient to decide [*Miller* and *Jackson*].”\(^{135}\) But, as Professor Berkheiser has noted, when predictability is important “the narrowness of minimalism can be a big mistake.”\(^{136}\) Professor Berkheiser expressed concern over the predictability of what length of sentences juveniles affected by *Miller* might receive,\(^{137}\) but *Miller* has yielded unpredictable results with the even more rudimentary issue of which juveniles it actually applies to. Ezra Landes also spoke of judicial minimalism as necessitating the “line of cases” modification to *Teague*, since “[t]his Court’s commitment to narrowness means that we are unlikely to ever see a revolutionary Warren Court style holding like a *Gideon* (or a *Mapp* or a *Miranda*), which in turn augurs ill for the watershed rule exception ever being satisfied under the current regime.”\(^{138}\) *Teague* reserves retroactive application for “watershed rules of criminal procedure,” but States implementing a minimalist Supreme Court’s holdings need a standard by which incremental, yet important changes in the law can receive retroactive effect. The “line of cases” approach is a simple modification to the existing *Teague* standard.

\(^{133}\) *Id.* slip op. at 12.


\(^{137}\) *Id.*

\(^{138}\) *Landes*, supra. at 18.
which promises more accurate and fair retroactive application of the incremental procedural rules that are consistent with the current Supreme Court’s judicial philosophy.

A state court applying a modified *Teague* standard to *Miller v. Alabama* would begin in the same way that courts applying *Teague* currently do. The first inquiry would be whether or not *Miller* announces a new rule.\(^{139}\) Finding that *Miller* does announce a new rule, the court would then ask whether *Miller* is a substantive or a procedural rule. Some courts, especially those in states like Massachusetts that have abolished juvenile without parole as a response to *Miller*, may conclude that *Miller* is substantive. However, others will not, and will move on to the next stage of the inquiry, which is whether *Miller* is a “watershed” rule of criminal procedure. Most state courts will likely follow the example set by Minnesota, Pennsylvania, and Louisiana and declare that *Miller* is not a “watershed rule,” which ends the inquiry under *Teague*.\(^{140}\) But, using a modified *Teague* standard, a state court would then ask whether *Miller* belongs to a “line of cases.” Given the depth at which the Supreme Court discussed *Roper* and *Graham* in the *Miller* opinion, state courts will likely conclude that *Miller* does belong to the “kids are different” line of cases.\(^{141}\) So, the question becomes whether the “kids are different” line of cases is a “watershed rule.” As the Minnesota Court discussed in *Jones*, in order for “kids are different” to reach watershed status it must 1) be necessary to prevent an impermissibly large risk of inaccurate conviction, and 2) alter the understanding of bedrock procedural elements essential to the fairness of the proceeding.\(^{142}\)

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\(^{139}\) As the Nebraska Supreme Court noted “[i]t is very clear that *Miller* announces a new rule.” *Mantich*, 287 Neb. 320, 331 (Neb. 2014). In fact, there has yet to be a Court that has found that *Miller* does not announce a new rule for retroactivity purposes. This is so because *Miller* clearly announces a rule that was not dictated by precedent at the time it was decided. *Id.* Therefore, this factor of the *Teague* test will be treated as a given for this hypothetical analysis.

\(^{140}\) *Supra* n. 119.

\(^{141}\) *Supra* n. 60.

\(^{142}\) *Supra* n. 119.
A. The Effect of the “Kids are Different” Principle on the Accuracy of a Conviction

Minnesota, Massachusetts, and Louisiana held that *Miller* does not prevent an impermissibly large risk of inaccurate conviction because it merely affects sentencing and not the underlying conviction.143 “Kids are different,” on the other hand, includes *J.D.B. v. North Carolina*, which improves the accuracy of the criminal trial process by requiring a judge to determine whether one of the State’s most powerful pieces of evidence in any case—a confession—is too unreliable to be admissible due to the defendant’s youthfulness.144 *J.D.B.* and other cases concerning the Fifth Amendment right against self-incrimination directly implicate the accuracy of the criminal trial because “the pressure of custodial interrogation is so immense that it can induce a frightening high percentage of people to confess to crimes they never committed.”145 The risk of a false confession is further heightened with juveniles because they are even more prone to succumb to these pressures.146

Additionally, although the holdings of *Graham* and *Miller* specifically alter juvenile sentencing practices, they address the ways in which juveniles are disadvantaged all throughout the criminal trial process in doing so.147 In *Graham*, the Supreme Court listed the fact “that the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings” as a justification for imposing a categorical ban on life without parole sentences for juveniles convicted of nonhomicide offenses.148 The *Graham* Court went on to say that “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and a reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all

143 Id.
145 Id. at 2401 (quoting Corley v. United States, 556 U.S. 303, 129 S.Ct. 1558, 1570 (2009)).
146 Id. at 2401.
148 Graham, at 78.
can lead to poor decisions by one charged with a juvenile offense.”149 In *Miller*, the Supreme Court similarly pointed out that a sentencing scheme that mandates life without parole for juveniles convicted of certain offenses “ignores that [the defendant] might have been charged and convicted of a lesser offense if not for the 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.”150 So, while *Graham* and *Miller* may only require a state to change its sentencing practices as applied to juveniles, they do so, in part, as a safeguard against disproportionate punishment for juveniles whose immaturity caused them to be convicted of a more serious offense than an adult would have been.

As Minnesota and Louisiana have noted, *Miller’s* holding has no direct effect on the accuracy of the underlying conviction.151 But, a state applying a modified *Teague* standard would also ask whether “kids are different” implicates the accuracy of the underlying conviction. *J.D.B.*, *Graham*, and *Miller* have all relied on the fact that juveniles are disadvantaged throughout the criminal trial process as compared to adults.152 *J.D.B.* recognized that juveniles are more likely than adults to provide false confessions to law enforcement.153 Meanwhile, *Graham* and *Miller* highlighted the difficulties juveniles face trusting and cooperating with defense counsel and negotiating with the State.154 The rules established in these three cases aim to improve the accuracy of criminal proceedings both before and after trial by requiring a judge to take into consideration the defendant’s youth. Therefore, unlike the *Miller* opinion itself, a

149 *Id.*
150 *Miller*, at 2468.
151 *Chambers*, 831 N.W.2d at 330 (Minn. 2013); *Tate*, 130 So. 3d at 840 (La. 2013).
152 *J.D.B.*, at 2401; *Graham*, at 78; *Miller*, at 2468.
153 *J.D.B.* at 2401.
154 *Graham*, at 78; *Miller*, at 2468.
state court could easily find that “kids are different” principle is necessary to prevent an impossibly large risk of inaccurate conviction.

B. Whether the “Kids are Different” Principle Alters the Understanding of Bedrock Procedural Elements Essential to the Fairness of the Proceeding.

Minnesota, Pennsylvania, and Louisiana have rejected the claim that Miller alters the understanding of bedrock procedural elements essential to the fairness of sentencing because there are numerous other cases establishing the importance of the ability to present mitigating evidence at sentencing. But, a state employing a modified Teague standard would take a step back and ask whether the “kids are different” principle as a whole marks a shift in the law that alters the understanding of procedural fairness.

Gideon v. Wainwright is the only “watershed” rule of criminal procedure currently in existence under the Teague standard. In Gideon, the Supreme Court held that a criminal defendant has a right to counsel if charged with a felony. In doing so, the Court explicitly overturned its holding in Betts v. Brady decided only twenty years earlier, which held that the right to counsel was not a “fundamental right” to be incorporated on the States. The Gideon Court stated that “Betts was an anachronism when handed down and… should now be overruled.” Similarly, when the Supreme Court issued Roper v. Simmons, it explicitly overturned its ruling in Stanford v. Kentucky from only sixteen years earlier. As Gideon broke from precedent that altered the understanding of procedural fairness, so too did Roper—the leading case in the “kids are different” line—break from the existing precedent that altered the

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155 Chambers, at 330; Cunningham, at 10; Tate, at 840-41.
158 Id. at 345.
159 Id.
understanding of fairness regarding juveniles in the criminal justice system, which \textit{Graham}, \textit{J.D.B.}, and \textit{Miller} have further developed.

Not only does the “kids are different” principle break from Supreme Court’s precedent regarding the treatment of juveniles by criminal justice system, but it also refutes the legislative dogma from the past several decades of “adult time for adult crime.”\footnote{See Guggenheim, \textit{supra.} at 473-74.} As Professor Guggenheim put it, “[l]egislatures, policy-makers, and courts ceased regarding children as mostly different from adults, and instead, for the first time since juvenile court came into being, began regarding children… as largely similar to adults.”\footnote{\textit{Id.}} While \textit{Miller} may simply extend the existing right to individualized sentencing that adults facing the death penalty already possess to juveniles confronting life without parole, it is part of a much broader shift in the law that reverses the trends that have characterized the criminal trial process as it applied to juveniles for decades. A state court looking at the “kids are different” principle through a modified \textit{Teague} standard would likely find that it alters the understanding of procedural fairness, in that it requires States to do something they have refused to do for decades—treat children, even those accused of serious crimes, like children.

\textbf{VI. CONCLUSION}

Seven states have attempted to solve the \textit{Miller} retroactivity puzzle using \textit{Teague} and a consensus has yet to emerge.\footnote{\textit{Supra} n. 7.} The split among states assessing \textit{Miller}’s retroactivity is exactly the kind of inconsistency that the Supreme Court sought to remedy by adopting \textit{Teague}.\footnote{\textit{Teague v. Lane}, 489 U.S. 288, 302-03 (1989).} Although \textit{Danforth} embraced federalism and nonuniformity among the States using their own
standards for retroactivity, the failure of the States to produce consistent results with the same standard points to a fundamental flaw with *Teague*—its inability to deal with rules that are “quasi-substantive.” States are under no obligation to use *Teague*, and, as the Pennsylvania Supreme Court noted in *Cunningham*, the *Teague* standard “is not necessarily a natural model for retroactivity jurisprudence at the state level.” So, *Miller v. Alabama* invites the States to experiment with some alternatives to *Teague*.

The modified *Teague* approach discussed in this article simply adds another two steps to the *Teague* analysis for procedural rules. After a state court has concluded that a procedural rule is not “watershed” on its own, the court would then ask whether the rule belongs to a cognizable line of cases and, if so, whether that line of cases establishes a “watershed rule of criminal procedure.” For *Miller*, the line of cases would be “kids are different.” The state courts that have classified *Miller* as a procedural rule have said that it is not watershed for two reasons. First, *Miller* does not affect the accuracy of the underlying conviction. “Kids are different,” however, contains *J.D.B.*, which is directly aimed at improving the accuracy of the trial process by excluding false confessions that are a byproduct of youth. Further, the language in *Graham* and *Miller* makes it clear that these cases provide for a consideration of youth at sentencing, in part, to account for the disadvantages that juveniles face during the criminal trial process. So, the “kids are different” rule does a lot to guarantee that the conviction of a juvenile is accurate.

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166 *Id.* at 280-81.
167 *Cunningham*, 81 A.3d 1, 8 (Penn. 2013).
168 *Supra* n. 60.
169 *Chambers*, at 330; *Cunningham*, at 10; *Tate*, at 839-41.
170 *Id.*
172 *Graham*, at 78; *Miller*, at 2468.
Second, the procedural States have found that *Miller* does not alter the understanding of bedrock elements essential to procedural fairness. But, the “kids are different” rule breaks from the pre-existing jurisprudence and legislative sentiment regarding juveniles convicted of serious crimes. *Roper* directly overrules a case permitting the death penalty for juveniles decided just 16 years prior. Also, the mandates in *Graham* and *Miller* that a judge must account for the mitigating factors of youth, whether at the initial sentencing or at some later review, directly contradict the “adult time for adult crime” attitude that pervaded the political climate. While *Miller* itself may not be a watershed rule, a court could easily find that “kids are different” is.

There are certainly flaws with a modified *Teague* approach. Some may argue that adding two steps to *Teague* will only add even more complexity to an already convoluted analysis. But, any additional exception to *Teague*’s general rule of nonretroactivity aimed at “quasi-substantive” rules will carry the same degree of complexity. Others may argue that it’s best to build on the Nebraska Supreme Court’s analysis of *Miller* in *Mantich* and view the substantive/procedural question as one of degree, rather than category. But, it can be just as subjective, if not more so, for courts to decide how “substantive” rules have to be before they apply retroactively as it is to decide whether or not rules are substantive or not. Finally, some may argue that the better approach is to follow the lead of States like *Florida* and *Michigan*, which incorporate the *Linkletter* factors into their own retroactivity analyses to give broader retroactive effect. However, it seems contradictory to revert back to a standard that the Supreme Court has already declared to be unfair and inconsistent when trying to craft a fairer

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173 *Chambers*, at 330; *Cunningham*, at 10; *Tate*, at 839-40.
175 See *Guggenheim*, *supra*. at 473-74.
176 *Mantich*, slip op. at 10.
and more consistent retroactivity standard.\textsuperscript{178} So, the “line of cases” \textit{Teague} modification is an attractive option when compared to the alternatives.

As the Iowa Supreme Court stated in \textit{Ragland}, at the root of this process mandated by \textit{Miller} is a substantive ban on a certain form of punishment for a certain class of offenders.\textsuperscript{179} Iowa’s interpretation sensed the forest behind the tree, which prompted that Court to apply \textit{Miller} retroactively.\textsuperscript{180} If other courts were to step back and look at the whole forest using a modified \textit{Teague} standard, they too would be able to see \textit{Miller v. Alabama} for what it is—a procedural rule that is part of a substantive shift in the law regarding how juveniles are treated in the criminal justice system, which deserves retroactive application.

\textsuperscript{179} \textit{Ragland}, 836 N.W.2d 107, 115-16 (Iowa 2013).
\textsuperscript{180} \textit{id.} at 117.