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Criminal Law: No Looking Back: Narrowing the Scope of the Retroactivity Doctrine for Juveniles Sentenced to Life Without Release—Roman Nose v. State

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CRIMINAL LAW: NO LOOKING BACK: NARROWING THE SCOPE OF THE RETROACTIVITY DOCTRINE FOR JUVENILES SENTENCED TO LIFE WITHOUT RELEASE—*ROMAN NOSE V. STATE*

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I. INTRODUCTION

Courts have struggled for nearly fifty years to maintain a retroactivity doctrine, which allows meaningful relief for those who deserve it without flooding the court system with petitions from cases long since closed.[1] In *Roman Nose v. State*, the Minnesota Supreme Court recently reaffirmed that it will not retroactively apply the rule prohibiting mandatory life without possibility of release for juveniles (LWOR).[2] The majority held that the rule does not fall into either of the two exceptions allowing retroactive application of rules of criminal procedure.[3]

This case note first reviews the history of the retroactivity doctrine and the United States Supreme Court's decision prohibiting mandatory LWOR for juveniles.[4] It then discusses the facts and the Minnesota Supreme Court's analysis of the *Roman Nose* decision.[5] Next, it argues that the majority was wrong to reaffirm the analysis used in deciding whether a rule applies retroactively because the analysis creates disparate results.[6] Finally, it concludes that the Minnesota Supreme Court should have adopted a clear retroactivity doctrine and applied it to the prohibition against mandatory LWOR retroactively.[7]

1. *See* Danforth v. Minnesota, 552 U.S. 264, 271–75 (2008).
2. Roman Nose v. State (*Roman Nose II*), 845 N.W.2d 193, 198–201 (Minn. 2014).
3. *Id.* at 199–200.
4. *See infra* Part II.
5. *See infra* Part III.A–B.
6. *See infra* Part IV.
7. *See infra* Part IV–V .

II. HISTORY OF THE RETROACTIVITY DOCTRINE

A. Origins of the Retroactivity Doctrine

Limiting the retroactive application of new court rules is a relatively recent phenomenon.[8] In his commentaries, William Blackstone explained that it is not the responsibility of the court "'to pronounce a new law, but to maintain and expound the old one.'"[9] In this vein of reasoning, a judge does not create law, but rather he or she is its "discoverer."[10] As far back as 1801 the Supreme Court has adhered to this doctrine, evidenced by an opinion written by Chief Justice Marshall concerning the retroactivity of a treaty between the United States and France.[11] In that opinion Marshall ruled, "unconstitutional action 'confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed.'"[12] Over 164 years of jurisprudence reaffirmed this broad view of retroactivity.[13]

In the 1965 case of *Linkletter v. Walker*, the Supreme Court of the United States, for the first time, imposed a limit on the retroactivity of new rules.[14] The Court progressively applied the Bill of Rights to the states,[15] and as more of these rights applied to the

8. *See* Linkletter v. Walker, 381 U.S. 618, 622 n.6 (1965) ("'I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.'" (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))).

9. *Id.* at 622–23 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

10. *Id.* at 623 (citing JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW 222 (1st ed. 1909)).

11. United States v. Schooner Peggy, 5 U.S. 103, 110 (1801) (involving captured naval ships). *But see* Brief for Respondents at 4, *Linkletter*, 381 U.S. 618 (No. 95) (arguing that *Schooner Peggy* embodies the view that a new rule applies to cases pending on direct review, but not necessarily on collateral review, because the treaty did not apply to ships on which seizure was final).

12. *Linkletter*, 381 U.S. at 623 (quoting Norton v. Shelby Cnty., 118 U.S. 425, 442 (1886)).

13. *See, e.g.*, *Kuhn*, 215 U.S. at 369–70; *Norton*, 118 U.S. at 442.

14. Danforth v. Minnesota, 552 U.S. 264, 273 (2008); *Linkletter*, 381 U.S. at 629; *see also* Ann N. Bosse, *Retroactivity and the Supreme Court*, 41 MD. B.J. 30, 30 (2008) (providing a brief overview of Supreme Court cases addressing the retroactivity doctrine).

15. *See Danforth*, 552 U.S. at 272. *See generally, e.g.*, Jackson v. Denno, 378 U.S.

states, federal courts became increasingly overwhelmed with petitions for writs of habeas corpus.[16] *Linkletter* determined that not all rules apply retroactively[17] and denied the retroactive use of the Fourth Amendment's exclusionary rule.[18]

According to *Linkletter*, cases pending on direct review receive the benefit of a change in law, but no such bright line exists for prior judgments based on subsequently invalidated rules.[19] After deciding it was neither required to nor prohibited from making rules retroactive, the Court devised certain considerations to determine whether a rule applies retroactively, including the purpose of the rule.[20] However, the years subsequent to *Linkletter*'s new restriction resulted in unpredictable decisions.[21] To curb the erratic results, the Court felt the need to further expand the retroactivity analysis to include not just "convictions now final . . .

368, 408 (1964) (applying a defendant's Fifth Amendment right to not be compelled as a witness against him or herself to the states); Gideon v. Wainwright, 372 U.S. 335, 352 (1963) (applying the Sixth Amendment right to counsel to the states).

16. *Danforth*, 552 U.S. at 272 ("The serial incorporation of the Amendments in the Bill of Rights during the 1950's and 1960's imposed more constitutional obligations on the States and created more opportunity for claims that individuals were being convicted without due process and held in violation of the Constitution.").

17. *Id.* at 273 ("[T]he retroactive effect of each new rule should be determined on a case-by-case basis . . . ." (citing *Linkletter*, 381 U.S. at 629)); *see also* Bosse, *supra* note 14, at 30–31.

18. *See Linkletter*, 381 U.S. at 639–40. *See generally* Mapp v. Ohio, 367 U.S. 643 (1963) (applying the Fourth Amendment's exclusionary rule to the states); Weeks v. United States, 232 U.S. 383 (1914) (determining that the exclusionary rule emanates from the Fourth Amendment).

19. *Linkletter*, 381 U.S. at 627, 629 ("[W]e believe that the Constitution neither prohibits nor requires retrospective effect. . . . We think the Federal Constitution has no voice upon the subject." (citation omitted) (internal quotation marks omitted)).

20. *See id.* at 636 (relying on three considerations: (1) the purpose of the new rule, (2) the reliance placed on the invalidated rule, and (3) the effect on the administration of justice if the new rule applied retroactively).

21. *Danforth*, 552 U.S. at 273–74. For example, the Fifth Amendment's protection against self-incrimination was applied to a defendant on direct review in *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966), but was held not to apply to another defendant on direct review using the *Linkletter* standard. Johnson v. New Jersey, 384 U.S. 719, 733–35 (1966).

[but] convictions at various stages of trial and direct review" as well.[22] This was adopted as the "*Linkletter-Stovall*" approach.[23]

B. The Teague *Analysis*

In 1989 the United States Supreme Court in *Teague v. Lane* took it upon itself to again redefine retroactivity and narrow its scope.[24] The Court was no longer concerned with the considerations used in *Linkletter*.[25] Instead, the analysis shifted to whether the rule announced was substantive or procedural.[26] The Court held that new rules generally do not apply retroactively after direct review concludes.[27] However, two exceptions to this rule exist.[28] First, a new rule applies retroactively if it is substantive law.[29] Second, a new rule applies retroactively, despite being procedural, if it is a "watershed rule[] of criminal procedure" implicating the fundamental fairness and accuracy of criminal proceedings.[30]

Rules of substance apply retroactively because "they 'necessarily carry a significant risk that a defendant stands

22. Stovall v. Denno, 388 U.S. 293, 300 (1967).

23. *See generally* Danforth v. State, 761 N.W.2d 493, 495 (Minn. 2009) ("Under the so-called *Linkletter-Stovall* test, we decided whether to give retroactive effect to a particular decision based on (1) the purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice of granting retroactive effect.").

24. 489 U.S. 288, 300 (1989)

25. *See id.* at 301 ("[The] retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification.").

26. *Id.* at 307 (adopting previous dissents and concurrences of Justice Harlan).

27. New rules of criminal procedural generally apply to cases on "direct review or not yet final." *See Teague*, 489 U.S. at 300–10; Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

28. *Teague*, 489 U.S. at 300–10. It should be noted the preliminary burden in the analysis is to determine whether the rule being discussed is a new rule. *See id.* at 301.

29. *Id.* at 307 ("'[A] new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))). It wasn't until 2004 that the Court explicitly explained that this exception applied to "substantive rules"; the explanation seems only to be a semantic shift. Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

30. *Teague*, 489 U.S. at 311–13; *see also* Chambers v. State, 831 N.W.2d 311, 323 (Minn. 2013).

convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."[31] On the other hand, procedural rules do not apply retroactively because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[32] To Justice Scalia, this is a "more speculative connection to innocence" warranting retroactivity in "a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.'"[33]

C. *Minnesota's Application of* Teague

Minnesota applied the *Linkletter-Stovall* test to determine retroactivity until 2004,[34] when it finally adopted the *Teague* analysis.[35] In adopting *Teague* fifteen years after the Supreme Court decided it, the Minnesota Supreme Court believed that it was bound to its application.[36] The Minnesota Supreme Court trusted that while it was able to determine the retroactivity of state law,[37] it was mandated to "follow the lead of the Supreme Court" when called upon to decide the retroactivity of a federal rule of constitutional criminal procedure.[38]

However, the Supreme Court of the United States reviewed Minnesota's decision and declared that *Teague* is not binding on

31. *Schriro*, 542 U.S. at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

32. *Id.*

33. *Id.* (quoting Saffle v. Parks, 484 U.S. 484, 495 (1990)).

34. *See* State v. Hamm, 423 N.W.2d 379, 386 (Minn. 1988) (basing retroactivity on (1) the purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice of granting retroactive effect).

35. O'Meara v. State, 679 N.W.2d 334, 339 (Minn. 2004) (holding that in the context of a new rule of constitutional criminal procedure, the court is "compelled to follow the lead of the Supreme Court in determining when a decision is to be afforded retroactive treatment").

36. The Minnesota Supreme Court concluded that it was "not free to fashion [its] own standard of retroactivity." Danforth v. State, 718 N.W.2d 451, 457 (Minn. 2006).

37. *See O'Meara*, 679 N.W.2d at 338 (citing Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 177 (1990)).

38. *Id.* at 339.

the states.[39] Nevertheless, Minnesota continues to apply it voluntarily.[40] Minnesota has reaffirmed its voluntary choice to apply *Teague* three times, and each time it has declined to decide in favor of retroactivity.[41]

D. Mandatory Life Without Release for Juveniles

1. The Founding Principle of the Juvenile Court: Rehabilitation

The central focus of this article is the retroactivity doctrine and whether it should be applied to juveniles who were sentenced to mandatory LWOR.[42] In order to adequately discuss this issue, however, this case note must briefly touch on the founding principle of rehabilitation in the juvenile justice system.[43] The juvenile system is first focused on rehabilitating juveniles, whereas the adult system is focused primarily on punishment and deterrence.[44] The call for a distinct system to address the unique needs of juveniles who commit crimes originally fueled the creation of the first juvenile court.[45]

39. Danforth v. Minnesota, 552 U.S. 264, 275 (2008) (pointing out that *Teague* and its progeny spoke in terms of federal habeas corpus remedies, so the states are not bound by *Teague*).

40. *See* Danforth v. State, 761 N.W.2d 493, 498 (Minn. 2009) ("We elect to retain *Teague*.").

41. *See Roman Nose II*, 845 N.W.2d 193, 200 (Minn. 2014); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013); Campos v. State, 816 N.W.2d 480, 499 (Minn. 2012) (reviewing the retroactivity of a new rule holding that the Sixth Amendment is violated where a defendant is not informed about the deportation consequences of a guilty plea).

42. *See infra* Part IV.

43. This is despite the availability of previous, well-formed articles published by the *William Mitchell Law Review* involving juveniles and the criminal justice system. *See, e.g.*, Wright S. Walling & Stacia Walling Driver, *100 Years of Juvenile Court in Minnesota—A Historical Overview and Perspective*, 32 WM. MITCHELL L. REV. 883, 889–93 (2006) (describing the origin and founding principles of the juvenile court in the United States and Minnesota); *see also* Nic Puechner, Note, *No Clean Slates: Unpacking the Complications of Juvenile Expungements in the Wake of* In re Welfare of J.J.P., 40 WM. MITCHELL L. REV. 1158, 1162–66 (2014) (advocating for reform to Minnesota's juvenile expungement statute).

44. *See* Walling & Driver, *supra* note 43, at 890–92.

45. *See id.* at 889. The first juvenile court was created in 1899 in Chicago. *Id.* at 889. Prior to then, children fourteen and older were treated as adults. Sean Craig, Note, *Juvenile Life Without Parole Post-*Miller*: The Long, Treacherous Road*

Courts maintain a *parens patriae*[46] role in guiding a juvenile back to law-abiding behavior.[47] Historically, the juvenile court was meant to remove the harsh consequences attributed to the adult criminal system.[48] The belief was that capital punishment and lengthy prison sentences have no deterrent effect on children, so they are repugnant.[49] Since the juvenile system was not focused on punishing children, but rather on rehabilitation, it was believed that juveniles did not need the same constitutional protections as adult defendants.[50] Although created with the best intentions, this paternalistic approach to delinquent children led to a deprivation of fundamental rights.[51]

The application of *parens patriae* slowly gave way to stricter consequences mirroring adult sentences.[52] These stricter consequences led the United States Supreme Court, in the 1960s, to hold for the first time that juvenile delinquency does, in fact, involve a substantial loss of freedoms that must be constitutionally

Towards a Categorical Rule, 91 WASH. U. L. REV. 379, 382 (2013). Before turning fourteen, juveniles maintained a rebuttable presumption that they were not criminally liable for their actions. *Id.* at 382.

46. *Parens Patriae* is a doctrine in which the state provides protection for those unable to care for themselves and literally means "parent of his or her country." BLACK'S LAW DICTIONARY 1287 (10th ed. 2014).

47. *See* Walling & Driver, *supra* note 43, at 914.

48. *See id.* at 890. Juvenile matters are civil, not criminal. *Id.* at 894. Further, the terminology is different in juvenile court, creating a façade that juvenile proceedings are different from criminal proceedings. MINN. R. JUV. DEL. P. 6.08 (juveniles are respondents); MINN. R. JUV. DEL. P. 15.04 (juveniles receive a disposition hearing); MINN. R. JUV. DEL. P. 15.05 (juveniles are adjudicated delinquent); MINN. R. CRIM. P. 2.1 (not defendants); MINN. R. CRIM. P. 27.01 (not convicted of crimes); MINN. R. CRIM. P. 27.03 (not a sentencing hearing).

49. Walling & Driver, *supra* note 43, at 891 (citing MONRAD G. PAULSEN & CHARLES H. WHITEBREAD, JUVENILE LAW AND PROCEDURE 1 (N. Corinne Smith ed., 1974)).

50. *Id.* at 902.

51. *Id.* at 903–04.

52. *Id.* at 893–94 ("Many people characterized [the court's treatment of juveniles] as punitive and indistinguishable from criminal dispositions."); *see, e.g.*, *In re* Welfare of D.D.N., 582 N.W.2d 278, 281 (Minn. 1998) ("The juvenile court's dispositions must be rehabilitative and tied to the needs of and opportunities for the child, . . . but these laws do not prohibit 'a rational, punitive disposition, one where the record shows that correction or rehabilitation of the child reasonably cannot be achieved without a penalty.'" (quoting *In re* Welfare of C.A.W., 579 N.W.2d 494, 497 n.5 (Minn. Ct. App. 1998))).

protected.[53] Specifically, one year later the Supreme Court held in *In re Gault* that the right to the notice of charges, the right to counsel, the right against self-incrimination, the right to confrontation, and the right to appellate review all apply to juvenile delinquency proceedings.[54] The Court was hesitant to do away with any distinction between the adult and juvenile system—maintaining the semblance of *parens patriae*, so not all of the rights afforded to adult defendants are yet available to juveniles.[55] However, the line between the adult and juvenile system is blurred, and in Minnesota, the harshest adult consequences are available to use against juveniles.[56]

2. *The Heinous Crimes Statute and Juveniles Tried as Adults*

Juveniles sentenced to life imprisonment in Minnesota were not always sentenced to die in prison.[57] But two separate systems collided, resulting in harsher mandatory sentences for juveniles in adult court without the consideration of the juvenile's age: (1) the creation and expansion of the heinous crimes statute, and (2) the expansion of the court's ability to try juveniles as adults.[58]

In the 1980s and early 1990s Minnesota, and much of the country, was transformed by a tough-on-crime approach to criminal justice.[59] Minnesota created mandatory life imprisonment sentences

53. *See* Kent v. United States, 383 U.S. 541, 557 (1966) (holding that the Due Process Clause of the Fourteenth Amendment applies to delinquency proceedings in a case involving a juvenile being removed to adult court by waiver).

54. 387 U.S. 1, 33, 41, 47, 57–58 (1967).

55. *See id.* at 30.

> We do not mean [by this] to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Id. (quoting *Kent*, 383 U.S. at 562) (internal quotation marks omitted).

56. *See infra* note 67.

57. Prior to the adoption of stricter sentences, an adult life sentence had the possibility of parole after a minimum of thirty years. *See* State v. Mitchell, 577 N.W.2d 481, 483 (Minn. 1998).

58. *Id.* at 488–90 (giving a brief overview of the heinous crime statute's adoption in Minnesota and the broadening of the extended juvenile jurisdiction (EJJ) and certification processes).

59. *See id.*; Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW &

for "heinous" crimes.[60] The heinous crimes statute signed into law in 1998 does not make a distinction between adult and juvenile offenders.[61] Further, since the statute's inception, the legislature has twice sharpened its teeth. First, the legislature expanded the list of heinous crimes requiring a mandatory life sentence.[62] Second, it took away the possibility of parole for certain life sentences.[63]

The juvenile system was not shielded from the national shift to more severe punitive policies.[64] The drive to make juvenile court increasingly punitive was fueled by an increase in youth violence and a rhetorical fear of a "young generation of super-predators."[65] As a result, an estimated 200,000 juveniles are tried as adults each year in the United States.[66] Following this nationwide trend, Minnesota advanced its own policies to allow courts to prosecute more juveniles as adults.[67]

INEQ. 263, 266–67 (2013).

60. Act effective Aug. 1, 1998, ch. 367, art. 6, § 3, 1998 Minn. Laws 667, 727 (codified at MINN. STAT. § 609.106 (2012)) (defining heinous crimes as first through third degree murder, first degree assault, and first through third degree criminal sexual conduct committed with "force or violence").

61. *See* MINN. STAT. § 609.106. *But see* State v. Ali, Nos. A12-0173, A13-0996, 2014 WL 5012773, at *13 (Minn. Oct. 8, 2014) (holding that the heinous crimes statute can no longer be mandatorily applied to juveniles after the decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)).

62. *See* Act of May 22, 2002, ch. 401, art. 1, § 13, 2002 Minn. Laws 1673, 1681 (codified as amended at MINN. STAT. § 609.106) (including felony murder in furtherance of an act of terrorism to include a mandatory life sentence); Act of June 2, 2005, ch. 136, art. 2, § 5, 2005 Minn. Laws 901, 1127 (codified as amended at MINN. STAT. § 609.106) (including premeditated murder to require a mandatory life sentence).

63. *Compare* MINN. STAT. § 244.05, subdiv. 4 (mandating that parole is not available for heinous crimes), *with* Act of Apr. 4, 1978, ch. 723, art. 1, § 5, 1978 Minn. Laws 761, 764 (codified as MINN. STAT. § 244.05, subdiv. 4 (1978)) (creating the possibility of parole after seventeen years for a mandatory life sentence).

64. Feld, *supra* note 59, at 265–67 (advocating for a "youth discount" to formally mitigate all sentences imposed on juveniles).

65. *Id.* at 266–67 (internal quotation marks omitted).

66. *Id.* at 265.

67. *See* State v. Mitchell, 577 N.W.2d 481, 488–90 (Minn. 1998). First, in 1994 the Minnesota legislature implemented extended juvenile jurisdiction (EJJ). *Id.* at 489; *see* MINN. STAT. § 260.126 (1994), *repealed by* Act of May 11, 1999, ch. 139, art. 4, § 3, 1999 Minn. Laws 567, 692 (codified as amended at MINN. STAT. § 260B.130 (1999)). EJJ is a designation allowing juvenile courts to retain jurisdiction over a juvenile until he or she reaches twenty-one years old by imposing both an adult and juvenile sentence, while staying the adult portion of the sentence. MINN. STAT.

3. Prohibiting Mandatory LWOR for Juveniles

As it did in *In re Gault*, the United States Supreme Court took steps to combat the harsher punishments used on juveniles.[68] It did this through the lens of the Eighth Amendment's protection against "cruel and unusual punishment."[69]

First, in *Roper v. Simmons*, the Court reopened a discussion foreclosed sixteen years earlier,[70] holding that the Eighth Amendment and the Fourteenth Amendment forbid the imposition of the death penalty on any juvenile.[71] In 2005, Justice Kennedy recognized in his majority opinion that the Court's current understanding of what is "cruel and unusual" is based on "'the evolving standards of decency that mark the progress of a maturing society.'"[72] Second, in 2010 the Court expanded its Eighth Amendment protection for juveniles in *Graham v. Florida*.[73] In *Graham* the Court prohibited states from imposing LWOR on juveniles for non-homicide crimes.[74] A common theme between

§ 260B.130, subdiv. 4 (2012). The legislature implemented EJJ "in part because of the perception that juvenile court dispositions were often *too lenient* while the adult court sentences were often *too harsh* when applied to children." *Mitchell*, 577 N.W.2d at 489 (emphasis added). Second, the legislature also expanded juvenile certification in 1994, allowing fifteen-year-olds—now fourteen-year-olds—to be certified to adult court after showing that retaining the child in juvenile court would not serve public safety. *Id.* (citing MINN. STAT. § 260.125, subdiv. 2(6)(ii) (1994)). Minnesota's adult certification statute is now codified at MINN. STAT. § 260B.125 (2012).

68. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005).

69. *See id.*

70. *See* Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (rejecting the claim that it was a violation of the Eighth Amendment to use capital punishment on children over fifteen, but under eighteen, because there was not a national consensus to label it cruel and unusual), *abrogated by Roper*, 543 U.S. 551.

71. *See Roper*, 543 U.S. at 573–74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."). The Court had also held prior to *Roper* that it was cruel and unusual to apply the death sentence to criminals with intellectual disabilities and juveniles fifteen and younger. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (intellectual disabilities); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (juveniles under sixteen).

72. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

73. 560 U.S. 48 (2010).

74. *Id.* at 82. The court further explained that a state is not required to give

these cases is that the harshest juvenile consequences do not have the same deterrent effect as when applied to adult defendants.[75]

Expounding on the new line of precedent creating special considerations for juveniles, the Court again reexamined a juvenile sentencing scheme in 2012.[76] In an opinion authored by Justice Kagan, the Supreme Court, in its combined decision of *Miller v. Alabama* and *Jackson v. Hobbs*,[77] held that sentencing a juvenile to mandatory LWOR violates the Eighth Amendment.[78] Although the Court did not categorically prohibit LWOR for juveniles, it did comment, "[T]his harshest possible penalty will be uncommon."[79] The Court focused on the fact that *Roper* and *Graham* made it clear that "children are constitutionally different from adults for sentencing" based on "their lack of maturity and . . . undeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking."[80] Justice Kagan explained that before a juvenile can be sentenced to LWOR, the court must consider the juvenile's individual characteristics, including maturity and family environment.[81]

freedom to a juvenile offender, but rather to "give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

75. *See id.* ("Deterrence does not suffice to justify the sentence . . . ."); *Roper*, 543 U.S. at 572 ("[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders . . . .").

76. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).

77. *Id.* at 2461–62 (decided on collateral review); *see also* Jackson v. State, 194 S.W.3d 757 (Ark. 2004), *cert. granted sub nom.* Jackson v. Hobbs 132 S. Ct. 548 (2011), *rev'd*, *Miller*, 132 S. Ct. 2455.

78. *Miller*, 132 S. Ct. at 2469 (holding that the sentencing court must consider the individual characteristics of the juvenile before imposing LWOR).

79. *Id.*

80. *Id.* at 2464 (citations omitted) (internal quotation marks omitted).

81. *Id.* at 2468. However, the Court failed to explain all of the factors to be considered and how each affects the sentence. *See id.*; *see also* State v. Ali, Nos. A12-0173, A13-0996, 2014 WL 5012773, at *17 (Minn. Oct. 8, 2014) (remanding the case back to the district court to follow the basic factors outlined in *Miller* to determine whether the defendant may be sentenced to LWOR for an offense committed as a juvenile).

E. Retroactive Application of Miller

The Court did not address whether the rule applies retroactively,[82] so states have taken it upon themselves to decide.[83] In November 2012 Michigan was the first state court to address the retroactivity of *Miller*.[84] This court held that it does not apply retroactively.[85] Less than fifteen days later Illinois responded with its own decision holding that *Miller* does apply retroactively—foreshadowing the divide between jurisdictions.[86]

In 2013 the Minnesota Supreme Court in *Chambers v. State* also held that *Miller* does not apply retroactively.[87] It decided that while *Miller* is a new rule, it is "neither substantive nor a watershed [procedural] rule."[88] Justice Dietzen emphasized the need for "finality and providing a bright-line rule," and that "[w]ithout finality, the criminal law is deprived much of its deterrent effect."[89]

III. THE *ROMAN NOSE* DECISION

A. Facts and Procedural Posture

On June 16, 2001, Tony Allen Roman Nose was found guilty on two counts: (1) first-degree murder while committing or attempting to commit criminal sexual conduct, and (2) first-degree premeditated murder.[90] On July 11, 2000, Jolene Stuedemann was found dead in her home; she was beaten, sexually assaulted, and

82. *Miller*, 132 S. Ct. at 2469.

83. *See, e.g.*, State v. Ragland, 836 N.W.2d 107, 114–17 (Iowa 2013) (holding that *Miller* is retroactive after using the *Teague* analysis).

84. People v. Carp, 828 N.W.2d 685, 708–09 (Mich. Ct. App. 2012), *aff'd*, 496 Mich. 440 (2014).

85. *Id.*

86. People v. Morfin, 981 N.E.2d 1010, 1021–22 (Ill. Ct. App. 2012).

87. Chambers v. State, 831 N.W.2d 311, 330–31 (Minn. 2013).

88. *Id.* at 331 (relying on the following facts: (1) *Miller* does not eliminate the power of the state to impose LWOR, (2) certain federal decisions held that *Miller* is procedural, and (3) *Miller* does not announce a new element of the offense).

89. *Id.* at 323–24.

90. *Roman Nose II*, 845 N.W.2d 193, 195 (Minn. 2014).

stabbed repeatedly with a screwdriver.[91] She was seventeen years old.[92]

Roman Nose was living in a group home during that time, and on the night of the murder he left without permission to visit his friend, Andy Reiman, who was dating the victim.[93] The three drank beer and watched television at Reiman's home.[94] Although there was conflicting testimony about the events that took place that night,[95] it appears that Roman Nose left Reiman's home around 4:00 a.m.[96] The victim left Reiman's home and returned to her own before Roman Nose left that evening.[97]

The next morning Roman Nose returned to the group home, and staff contacted the police to alert them about his return.[98] An officer questioned Roman Nose about his absence from the home and then subsequently responded to a call resulting in the discovery of the victim's body.[99] The investigators discovered a crumpled newspaper in the victim's mouth, a bloodstained screwdriver near the victim's body, a bathroom towel with blood on it, and part of a set of headphones under the victim's body.[100] Investigators found the other half of the headphones and various bloodstained clothing belonging to Roman Nose concealed in a trash bag in a garbage can at the group home.[101] The police also found Roman Nose's underwear in his bedroom at the group home containing a mixture of semen and a bloodstain.[102]

A forensic scientist performed DNA testing on the newspaper, screwdriver, and bathroom towel, and fingerprint analysis was

91. State v. Roman Nose (*Roman Nose I*), 667 N.W.2d 386, 389–90 (Minn. 2003).

92. *Id.* at 389.

93. *Id.*

94. *Id.*

95. Roman Nose testified that he was sitting on the couch, he saw Reiman and Stuedemann having sex, and then he had consensual sex with Stuedemann while Reiman slept. *Id.* Reiman testified that after Reiman and Stuedemann had sex, he did not fall asleep right away, and Stuedemann did not have sex with Roman Nose while he was there. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

performed on the newspaper.[103] Vaginal swabs revealed a positive match for Roman Nose's DNA.[104] The blood on Roman Nose's jeans and jersey matched the victim's DNA, and a fingerprint found on the newspaper stuffed in the victim's mouth matched Roman Nose's left middle finger.[105]

Roman Nose was seventeen years and ten months old at the time of the murder, and he was mandatorily sentenced to LWOR.[106] On appeal the Minnesota Supreme Court affirmed his conviction but did not address his sentence because he did not challenge it.[107] Instead, Roman Nose challenged various aspects of the DNA evidence used in his conviction,[108] and he claimed the prosecutor engaged in misconduct during closing arguments.[109]

Three months after the *Miller* decision, but prior to the *Chambers* decision, Roman Nose petitioned the district court on collateral review,[110] arguing that his sentence violated the Eighth Amendment.[111] Roman Nose sought to be resentenced to life with the possibility of release.[112] Roman Nose sought collateral review almost nine years after his original sentence.[113] Generally, postconviction petitions must be filed within two years of an appellate court's disposition on direct appeal,[114] but exceptions exist.[115] Relevant to this case, a postconviction petition is not time

103. *Id.*

104. *Id.* at 391.

105. *Id.* at 390.

106. *Roman Nose II*, 845 N.W.2d 193, 195–96 (Minn. 2014). *See generally* MINN. STAT. § 609.106, subdiv. 2(1) (2012).

107. *Roman Nose II*, 845 N.W.2d at 196; *accord Roman Nose I*, 667 N.W.2d 386.

108. *Roman Nose I*, 667 N.W.2d at 391–92 (objecting to the admissibility of the DNA because it was new type of DNA testing).

109. *Id.* at 400–04 (claiming that the prosecutor misrepresented the DNA evidence, the fingerprint analysis, and the blood on the shirt, and made improper arguments based on character evidence).

110. *See generally* Wall v. Kholi, 131 S. Ct. 1278, 1285 (2011) (defining for the first time collateral review of a judgment to "mean[] a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process").

111. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

112. *Roman Nose II*, 845 N.W.2d at 196. *See generally* U.S. CONST. amend. VIII; Miller v. Alabama, 132 S. Ct. 2455 (2012).

113. *Roman Nose II*, 845 N.W.2d at 196.

114. *Id.*; *see* MINN. STAT. § 590.01, subdiv. 4(a) (2012).

115. *Roman Nose II*, 845 N.W.2d at 196; *see* MINN. STAT. § 590.01, subdiv.

barred if "the petitioner asserts a new interpretation of federal . . . law by . . . the United States Supreme Court . . . and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case."[116]

The district court granted Roman Nose's petition and resentenced him without a *Miller* hearing[117] to life "with the possibility of release after thirty years."[118] The district court first held that Roman Nose's appeal was not time barred because Roman Nose asserted a new interpretation of federal constitutional law by the United States Supreme Court.[119] The court then elaborated by adding that *Miller* "made a substantial change in federal law that does, indeed, break new ground, and was not dictated by precedent at the time Petitioner's conviction occurred,"[120] so it applied retroactively.[121]

The district court struggled in deciding how to resentence Roman Nose, noting that he was almost thirty and it would be difficult "[to] envision[] Petitioner as a juvenile, and [to] apply[] appropriate consideration to his age, life history, home environment, and other circumstances."[122] The court ultimately concluded that it was "left with no alternative but to resentence Petitioner to life with the possibility of release after thirty (30) years."[123]

The state appealed the decision on March 18, 2013.[124] The Minnesota Supreme Court stayed the appeal until it announced the *Chambers* decision, where it held that *Miller* does not apply

4(b)(3).

116. MINN. STAT. § 590.01, subdiv. 4(b)(3).

117. *See Miller*, 132 S. Ct. at 2475 (allowing for courts to hold a hearing to make specific findings about the individual characteristics of the juveniles before sentencing them to LWOR).

118. *Roman Nose II*, 845 N.W.2d at 197.

119. Respondent's Brief & Addendum, add. at 4, *Roman Nose II*, 845 N.W.2d 193 (No. A13-0483).

120. *Roman Nose II*, 845 N.W.2d at 202.

121. Respondent's Brief & Addendum, *supra* note 119, add. at 9 (finding that *Miller* "made a substantial change in federal law that does, indeed, break new ground, and was not dictated by precedent at the time [Roman Nose's] conviction occurred" and that "*Miller* also created a watershed rule of criminal procedure" (internal quotation marks omitted)).

122. *Id.* at 12.

123. *Id.*

124. *Roman Nose II*, 845 N.W.2d at 197.

retroactively.[125] On June 28, 2013, the Supreme Court lifted the stay in Roman Nose's case.[126]

B. The Supreme Court's Decision

Roman Nose challenged his sentence for three reasons.[127] This case note, however, is focused on Roman Nose's argument that the court wrongly decided *Chambers* and that *Miller* applies retroactively.[128] Roman Nose also argued that the retroactivity issue was moot because *Chambers* decided the issue already, so there was nothing to resolve.[129] He thirdly argued that the court should use its supervisory power[130] to grant him extraordinary relief in this unique circumstance.[131] The court held in favor of the State on all issues.[132] Ultimately, the court reversed his sentence and reinstated his original sentence of LWOR.[133]

The majority initially noted the importance of stare decisis in that the court only overrules precedent for a "compelling reason."[134] The court then disposed of Roman Nose's retroactivity argument in three ways.[135] First, the court was unmoved by the fact that the U.S. Attorney's Office for the District of Minnesota conceded that *Miller* applies retroactively.[136] Second, the court was not persuaded by the fact that *Miller* applied retroactively to its companion case, *Jackson v. Hobbs*,[137] which was pending on

125. *Id. See generally* Chambers v. State, 831 N.W.2d 311 (Minn. 2013). Decided on May 31, 2013, *Chambers* addressed the retroactivity of *Miller* for the first time in Minnesota. *Id.*

126. *Roman Nose II*, 845 N.W.2d at 197.

127. *Id.*

128. *See* Respondent's Brief & Addendum, *supra* note 119, at 16–23.

129. *Roman Nose II*, 845 N.W.2d at 197–98.

130. *Id.* at 201. Supervisory powers allow the court to grant relief to ensure the fair administration of justice. *Id.*

131. *Id.* at 201–02.

132. *Id.* at 198–201.

133. *Id.* at 202.

134. *Id.* at 198 (citing State v. Martin, 773 N.W.2d 89, 98 (Minn. 2009) and State v. Lee, 706 N.W.2d 491, 494 (Minn. 2005)).

135. *Id.* at 198–200.

136. *Id.* at 198–99 (explaining that it was aware of the U.S. attorney's position prior to deciding *Chambers*).

137. 132 S. Ct. 548 (2011), *rev'd*, Miller v. Alabama, 132 S. Ct. 2455 (2012).

collateral review in state court.[138] Finally, the court rejected Roman Nose's argument that *Chambers* is flawed because *Miller* is both a substantive and a watershed procedural rule.[139] Roman Nose contended that *Miller* is substantive because it "prohibit[s] the *mandatory* imposition" of LWOR, and that it is procedural because it requires the sentencing court to contemplate specific factors before sentencing a juvenile to a *non-mandatory* LWOR sentence.[140] The majority reiterated its holdings in *Chambers*, under a *Teague* analysis, and concluded that *Miller* is a procedural rule.[141] After reaffirming *Chambers*, the court held that the district court erred when it concluded that Roman Nose's petition was not time barred.[142]

IV. ANALYSIS

The Minnesota Supreme Court was wrong to reaffirm its choice to follow *Teague* and to determine that *Miller* is not retroactive.[143] *Teague* is not binding on the states, and states may choose to abandon it.[144] The United States Supreme Court created the *Teague* analysis to answer questions of retroactivity involving federal petitions for habeas corpus.[145] Some states abandoned

138. *Roman Nose II*, 845 N.W.2d at 199 (citing Campos v. State, 816 N.W.2d 480, 494–95 (Minn. 2012) (refusing to apply a rule retroactively based solely on the procedural posture of a case at the Supreme Court)). *See generally Miller*, 132 S. Ct. at 2468–69 (granting relief in both *Miller* and *Jackson v. Hobbs*).

139. *Roman Nose II*, 845 N.W.2d at 199–200.

140. Respondent's Brief & Addendum, *supra* note 119, at 20 (emphasis added) (citation omitted).

141. *Roman Nose II*, 845 N.W.2d at 199–200.

142. *Id.* at 200–01. Because *Miller* did not apply retroactively, the time barring exceptions of MINN. STAT. § 590.01, subdiv. 4(a)(b)(3) (2012) also did not apply. *Id.*

143. *Roman Nose II*, 845 N.W.2d at 204–05 (Page, J., dissenting) (citing Chambers v. State, 831 N.W.2d 311, 342–44 (Minn. 2013) (Page, J., dissenting)).

144. Danforth v. Minnesota, 552 U.S. 264, 278–79 (2008) ("Since *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts.").

145. Teague v. Lane, 489 U.S. 288, 293, 316 (1989) (reviewing the retroactive application of a new criminal procedure rule on "a petition for a writ of habeas petition corpus" in federal court).

Teague in favor of a modified analysis[146] or the *Linkletter-Stovall* approach.[147] But, most states still choose to apply *Teague*.[148]

The Minnesota Supreme Court noted various critiques about *Teague* when it originally adopted it.[149] However, it overlooked these shortcomings in favor of the policy interest of "finality" in sentencing.[150] That being said, this concern is basically irrelevant here because there are only eight juveniles sentenced to LWOR in Minnesota.[151] Further, the Minnesota court believed that *Teague* drew a bright line and avoided the pitfall of the modified *Linkletter* approach—that it did not create uniform results.[152] Similarly, Minnesota rejected Nevada's modified version of *Teague* because it feared it also lacked uniform results.[153]

A. Teague *Produces Disparate Results*

The Minnesota Supreme Court failed to recognize that *Teague* does not create uniform results either.[154] *Teague* works under the assumption that all rules fall into a dichotomy of being either substantive or procedural.[155] When a rule is strictly substantive or procedural, *Teague* produces adequate results.[156] However, the line

146. *E.g.*, Colwell v. State, 59 P.3d 463, 471 (Nev. 2002).

147. *See, e.g.*, State v. Whitefield, 107 S.W.3d 253, 266–68 (Mo. 2003); Cowell v. Leapley, 458 N.W.2d 514, 517–518 (S.D. 1990).

148. *See, e.g.*, State v. Towery, 64 P.3d 828, 833 (Ariz. 2003); Windom v. State, 886 So. 2d 915, 939 (Fla. 2004) (Cantero, J., concurring); Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003); Rhoades v. State, 233 P.3d 61, 67 (Idaho 2010); Danforth v. State, 761 N.W.2d 493, 498 (Minn. 2009).

149. *Danforth*, 761 N.W.2d at 497 (acknowledging the criticism that *Teague* is "too narrow or strict, or out of place where a state court is reviewing its own convictions").

150. *See id.* (noting that states adopted *Teague* "on the important policy interest in finality").

151. Abby Simons, *Eight Young Killers at Core of Life-Sentence Debate*, STAR TRIB. (Minneapolis), Mar. 28, 2014, at 1B, *available at* LEXIS.

152. *Danforth*, 761 N.W.2d at 499.

153. *Id.*

154. *See id.*; *see also infra* notes 163–64 and accompanying text (listing the cases finding *Miller* substantive and the cases finding it procedural).

155. Roman Nose II, 845 N.W.2d 193, 202 (Minn. 2014) (Anderson, J., concurring) ("But *Teague* does not address what should be done with rules that do not fit neatly into either of these boxes.").

156. *See, e.g.*, Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (concluding that a new rule about jury instructions was procedural).

between a substantive rule and a procedural rule is not always clear.[157] The *Teague* analysis does not have a solution for newly announced rules exhibiting both substantive and procedural characteristics.[158] This problem exists with *Miller* since it exhibits characteristics of both a substantive rule[159] and a procedural rule.[160]

Minnesota definitively declared that *Miller* is not substantive and does not apply retroactively,[161] but fifteen other states have had different interpretations of the *Miller* decision.[162] Some held that *Miller* is substantive and applies retroactively,[163] while other states held that it does not.[164] The first courts to address *Miller*'s retroactivity, like Minnesota, failed to recognize that the rule has both substantive and procedural elements.[165] The most recent *Miller*

157. *See* United States v. Tayman, 885 F. Supp. 832, 841 (E.D. Va. 1995) ("[T]he line separating procedure and substance is not always a bright one . . . ." (citing Robinson v. Neil, 409 U.S. 505, 509 (1973) ("We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other."))).

158. *See generally* Schriro v. Summerlin, 542 U.S. 348 (2004) (failing to address instances where a rule is both substantive and procedureal); Teague v. Lane, 489 U.S. 288 (1989) (failing to address instances where a rule is both substantive and procedureal).

159. *Roman Nose II*, 845 N.W.2d at 202–03 (explaining that *Miller* is substantive because it (1) prohibits mandatory LWOR for juveniles, which basically prohibits a class of punishment available to the state; and (2) potentially introduces a new element into sentencing structure, which modifies the elements of an offense).

160. *Id.* at 203 (arguing that *Miller* is procedural because it (1) only adds one step to the consideration of LWOR; and (2) does not entirely prohibit LWOR for juveniles).

161. *Id.* (majority opinion).

162. Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 192 (2014).

163. *E.g.*, People v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013); Jones v. State, 122 So. 3d 698, 703 (Miss. 2013).

164. *E.g.*, Williams v. State, No. CR-12-1862, 2014 WL 1392828, at *12 (Ala. Crim. App. Apr. 4, 2014); Geter v. State, 115 So. 3d 375, 385 (Fla. Dist. Ct. App. 2013); State v. Tate, 130 So. 3d 829, 844 (La. 2013); People v. Carp, 828 N.W.2d 685, 711 (Mich. Ct. App. 2012), *aff'd*, No. 146478, 2014 WL 3174626 (Mich. July 8, 2014); Chambers v. State, 831 N.W.2d 311, 327–30 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1, 9 (Pa. 2013).

165. *See Morfin*, 981 N.E.2d at 1022 ("[W]e find that *Miller* constitutes a new substantive rule."); *Carp*, 828 N.W.2d at 711 ("It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.").

retroactivity decisions, however, discern the duality of the rule.[166] If a court chooses to paint *Miller* as substantive, it refers to the rule as "categorically bann[ing] a punishment that the law cannot impose upon juveniles, a mandatory life without parole sentence."[167] While a court interpreting *Miller* to be procedural concludes that *Miller* did not "eliminate the power of the State to impose" LWOR, it only requires the "sentencer [to] follow a *certain process*."[168]

Minnesota adopted *Teague* to draw a bright line and create uniform results,[169] but it instead creates arbitrary results in this case.[170] The divide in the retroactive application of *Miller* creates disparate results for juveniles sentenced to LWOR.[171] A juvenile will be entitled to a *Miller* hearing based solely on where the offense was committed—not on the individual determination of the juvenile.[172] Further, the Minnesota branch of the Department of Justice conceded that *Miller* applies retroactively.[173] Juveniles within the state of Minnesota will have disparate treatment depending on whether the state or federal government prosecutes them.[174]

166. Songster v. Beard, No. 04-5916, 2014 WL 3731459, at *3 (D. Pa. July 29, 2014).

> The *Miller* rule has both substantive and procedural elements. Substantively, it bans mandatory life without parole sentences for juvenile homicide defendants. Procedurally, it mandates a minimal process for sentencing those in that class of defendants. The former is a new substantive rule of criminal law. The latter is an implementation of the substantive rule.

Id.

167. *Id.* at *4.

168. Chambers v. State, 831 N.W.2d 311, 328 (Minn. 2013) (internal quotation marks omitted).

169. *See* Danforth v. State, 761 N.W.2d 493, 499 (Minn. 2009).

170. *Compare* Williams v. State, No. Cr-12-1862, 2014 WL 1392828, at *12 (Ala. Crim. App. Apr. 4, 2014) (holding that *Miller* does not apply retroactively), *with Morfin*, 981 N.E.2d at 1021–22 (holding that *Miller* applies retroactively).

171. *Roman Nose II*, 845 N.W.2d 193, 204 (Minn. 2014) (Anderson, J., concurring) (explaining that juveniles will receive "significant disparity in outcome" influenced "only by the date of the offense or by the state of residence").

172. *Id.*

173. *See* Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013) ("The government here has conceded that *Miller* is retroactive . . . ."); *see also* Flowers v. Roy, No. 13-1508, 2014 WL 1757898, at *6 (D. Minn. May 1, 2014).

174. *See Flowers*, 2014 WL 1757898, at *9 (granting a writ of habeas corpus).

Uniform results are important so that similarly situated defendants do not receive disparate treatment. Essential to fundamental fairness in our judiciary is the equal treatment for those accused of crimes; it is why the Equal Protection Clause is imbedded into both the Minnesota and U.S. Constitution.[175]

> One of the inherent rights secured to a free people by [the Minnesota Constitution] is the inherent right to "equal and impartial laws, which govern the whole community and each member thereof." Put another way, persons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing among them.[176]

Equal treatment of similarly situated defendants is an important value to the people of Minnesota.[177] In fact, in the past, Minnesota courts chose to apply a state rule retroactively solely based on the equal treatment of similar defendants.[178] This principle should carry into the decision of whether to apply *Miller* hearings retroactively to the eight Minnesotans serving life for childhood crimes.[179] The uncertainty of the substantive/procedural analysis does not provide a "sufficient basis" to distinguish those who were previously sentenced to LWOR.[180]

175. U.S. CONST. amend. XIV, § 1; Hawes v. 1997 Jeep Wrangler, 602 N.W.2d 874, 880 (Minn. Ct. App. 1999) ("'Equal protection is an inherent but unenumerated right found and confirmed in Minnesota's state constitution.'" (quoting Lundberg by Lundberg v. Jeep Corp., 582 N.W.2d 268, 271 (Minn. Ct. App. 1998))).

176. State v. Russell, 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring) (quoting Thiede v. Town of Scandia Valley, 217 Minn. 218, 225, 14 N.W.2d 400, 405 (1944)).

177. *See id.*

178. State v. Baird, 654 N.W.2d 105, 112 (Minn. 2002) (rejecting the application of a civil retroactivity rule and basing retroactivity solely on the reasoning that "hold[ing] otherwise would be to treat similarly situated criminal defendants differently"). Minnesota never addressed this case and its weight on the *Chambers* or *Roman Nose* decisions. *Roman Nose II*, 845 N.W.2d 193 (Minn. 2014); Chambers v. State, 831 N.W.2d 311 (Minn. 2013); *Roman Nose I*, 667 N.W. 2d 386 (Minn. 2003).

179. Simons, *supra* note 151.

180. *See Russell*, 477 N.W.2d at 893 (citing Bernthal v. City of St. Paul, 376 N.W.2d 422, 424 (Minn. 1985)).

B. Narrowing the Retroactivity Doctrine

Minnesota's application of *Teague* also has a limiting effect on the future of the retroactivity doctrine.[181] The majority labeled the *Miller* rule as procedural without discussing *Teague*'s inadequate application to rules exhibiting both substantive and procedural characteristics.[182] It is unclear where the line between substantive and procedural rules now lies.[183] Nevertheless, *Chambers* and *Roman Nose* create precedent allowing rules exhibiting both substantive and procedural characteristics to be defaulted as procedural.[184]

Once a rule is labeled procedural, it only applies retroactively if it is considered a watershed procedural rule.[185] A watershed procedural rule "alters our understanding of the bedrock procedural elements essential to the fairness of the proceeding."[186] Since the inception of *Teague*, a rule has yet to be considered a watershed rule.[187] This suggests that even fewer rules will be applied retroactively in Minnesota.[188]

It is not the intention of this note to argue for the broadest application of retroactivity; there must be limits. However, the doctrine should not be so limited to exclude the benefit of a *Miller* hearing to all juveniles currently serving LWOR. In the case of sentencing, particularly as applied to juveniles, a narrowed retroactivity doctrine has a negative effect.[189] Even commenters in

181. *Compare Roman Nose II*, 845 N.W.2d at 203 (Anderson, J., concurring), *with* Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (Anderson, J., dissenting).

182. *See Roman Nose II*, 845 N.W.2d at 202–03; *Chambers*, 831 N.W.2d at 327.

183. *See Roman Nose II*, 845 N.W.2d at 203.

184. *See id.* (agreeing that "[b]ased on the current state of the law . . . the *Miller* rule is procedural" after explaining how *Miller* has both substantive and procedural characteristics); *Chambers*, 831 N.W.2d at 328.

185. *See generally* Teague v. Lane, 489 U.S. 288, 311–12 (1989) (explaining how retroactivity is reserved only for watershed rules of criminal procedure).

186. *Roman Nose II*, 845 N.W.2d at 200 (citing *Chambers*, 831 N.W.2d at 331).

187. 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.6(e) (3d ed. 2013) (citing Beard v. Banks, 542 U.S. 406, 417 (2004)).

188. *See* Danforth v. State, 761 N.W.2d 493, 502 (Minn. 2009) (Anderson, J., dissenting) (foreseeing the narrowing scope of *Teague*).

189. *See* Douglas A. Berman, *Re-balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 153 (2014); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 126–27 (2012) ("Retroactivity doctrines should not be a bar to relief when a prisoner seeks to rely on a case . . . that has narrowed the scope of a sentencing

favor of a narrow retroactivity doctrine recognize that relief should be given to juveniles in some cases.[190] *Miller* is a special circumstance in which the traditional *Teague* retroactivity doctrine produces the wrong result.[191]

C. *Dollars and Cents*

Another critique of *Miller* hearings is that they are too costly[192] and inaccurate,[193] but this view is shortsighted. First, resentencing hearings will save money systemically by reducing the cost of imprisoning juveniles given reduced sentences.[194] Juveniles sentenced to LWOR are likely serving the longest prison sentences because they enter prison at an earlier age than any other defendant, and they do not have the opportunity for release.[195] Juveniles sentenced to LWOR will grow old and die in prison.[196] They "add to the rising geriatric prison population and place heavy financial burdens on states."[197] In the United States the average cost of incarceration is $22,000 annually—$36,836 in Minnesota[198]—and the sentence can be expected to last at least fifty-five years if the

enhancement provision.").

190. *E.g.*, Scott, *supra* note 162, at 226–27.

> I earnestly hope that *Miller* . . . affects all of the more than two thousand sentences imposed in violation of the rule but which became final before the decision. As a matter of justice, every juvenile offender serving a mandatory sentence of life without parole deserves an opportunity to request resentencing or parole.

Id.

191. *See generally Roman Nose II*, 845 N.W.2d at 200 (refusing to apply *Miller* retroactively).

192. *E.g.*, Scott, *supra* note 162, at 197–202 (arguing that resentencing hearings are costly "both in time and resources").

193. *E.g.*, *id.* at 203–08 (arguing that the rules of evidence do not apply in resentencing hearings and that too much time has passed since the original sentencing hearing).

194. Russell, *supra* note 189, at 150.

195. *See* ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 33 (2012), *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

196. *Id.* at 1.

197. *Id.* at 33.

198. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: STATE PRISON EXPENDITURES, 2001, 3 (2004), *available at* http://www.bjs.gov/content/pub/pdf/spe01.pdf.

juvenile is sentenced in his or her late teens.[199] However, the cost of care for inmates rises with age, and at age fifty-five the annual average cost of incarceration is closer to $65,000.[200] This yields a lifetime average cost of $2 million per prisoner.[201] Adding the possibility of parole could substantially reduce the lifetime incarceration cost of a juvenile inmate.[202]

Second, resentencing hearings on direct appeal often take place years after the original sentence,[203] and courts are allowed to consider additional information at resentencing.[204] So, the simple fact that a juvenile receives a *Miller* hearing years later does not necessarily mean the hearing is more expensive or difficult than a direct appeal hearing.[205] Further, resentencing juveniles will not represent "sunk costs"[206] by the court since the juveniles received mandatory sentences.[207] Necessarily, they could not have cost the court because the court was restricted from making any considerations.[208]

Third, juveniles allowed a *Miller* hearing are not entitled to a new trial.[209] Courts have noted that resentencing hearings are much less burdensome than new trials.[210] Juveniles sentenced to life are

199. NELLIS, *supra* note 195, at 33.

200. *Id.* (citing B. JAYE ANNO ET AL., NAT'L INST. OF CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 9 (2004)).

201. *Id.*

202. Russell, *supra* note 189, at 150.

203. *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1236 (2011) (resentencing taking place five years after direct appeal).

204. *Id.* at 1236 (holding that district courts may consider post-sentencing rehabilitation when resentencing defendants).

205. *See* Russell, *supra* note 189, at 146–52.

206. A "sunk cost" is "[a] cost that has already been incurred and cannot be recovered." BLACK'S LAW DICTIONARY 423 (10th ed. 2014). In this context, a "sunk cost" refers to the cost a court spends on making specific findings before sentencing a juvenile to LWOR.

207. Scott, *supra* note 162, at 213 ("Those cases also involve few 'sunk costs' because by definition the life without parole sentence was mandatory.").

208. *See id.*

209. *See generally* Scott, *supra* note 162, at 181 (discussing factors that favor resentencing over retrial).

210. *See* United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005) (reasoning that sentencing hearings take much less time and are much less costly than new trials). *But see* Scott, *supra* note 162, at 181 ("[R]oughly ninety-five percent of criminal convictions result from guilty pleas rather than trials.").

only entitled to a hearing that takes individualized characteristics into consideration.[211] Retroactive *Miller* hearings will only need to be conducted for a finite number of juveniles and will not allow every sentenced juvenile to receive a reduced sentence.[212]

D. Juveniles Sentenced to LWOR: Deterrence v. Rehabilitation

This abstract discussion of retroactivity affects juveniles spending the rest of their lives in prison.[213] An estimated 2574 juveniles are currently sentenced to LWOR throughout the country.[214] When the district court resentenced Roman Nose to life with the possibility of parole after thirty years, it did not consider his individual characteristics.[215] The court should have granted him a *Miller* hearing in order to adhere to the United States Supreme Court's goal of rehabilitation in connection with juvenile offenders.[216]

Rehabilitation is a closely linked goal to the juvenile system since children are categorically different from adults.[217] The Court in *Roper*, which prohibited the death penalty, relied on the fact that "any parent" or expert would confirm that juveniles are different from adults in three ways.[218] First, they lack maturity, which lends itself readily to making poor decisions.[219] Second, children are "more vulnerable or susceptible to negative influences and outside

211. Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012).

212. *See generally State-by-State Map*, Graphic on *Juveniles Serving Life Sentences Without Parole in the U.S.*, PBS FRONTLINE (May 8, 2007), http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html#more [hereinafter *State-by-State Map*] (estimating that 2574 juveniles are sentenced to LWOR based on data from Human Rights Watch as of 2009).

213. *See* Scott, *supra* note 162, at 179. *See generally* Beth Schwartzapfel, *Sentenced Young: The Story of Life Without Parole for Juveniles Offenders*, AL JEZEERA AM. (Feb. 1, 2014), http://america.aljazeera.com/features/2014/1/sentenced-young-thestoryoflifewithoutparoleforjuvenileoffenders.html (profiling stories of juveniles serving LWOR).

214. *State-by-State Map*, *supra* note 212.

215. Brief & Appendix of Appellant at 9, *Roman Nose II*, 845 N.W.2d 193 (Minn. 2014) (No. A13-0483) (stating that Roman Nose was resentenced without holding a sentencing hearing).

216. *See Miller*, 132 S. Ct. at 2475 (remanding for a resentencing hearing).

217. *See* Walling & Driver, *supra* note 43, at 889–93.

218. Roper v. Simmons, 543 U.S. 551, 569 (2005).

219. *Id.*

pressures."[220] Third, and most important to the discussion of rehabilitation, a juvenile's character is not as well formed as an adult's.[221] The Court also stressed rehabilitation when banning juvenile LWOR for non-homicide crimes:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.[222]

On the other hand, Justice Dietzen in *Chambers* emphasized deterrence as a primary reason not to apply *Miller* retroactively,[223] despite the United States Supreme Court admitting that deterrence does not justify an imposition of LWOR in non-homicide cases.[224] Juveniles lack the maturity and have an undeveloped sense of responsibility, often resulting in "'impetuous and ill-considered actions and decisions.'"[225] "The same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."[226] In fact, "swiftness and certainty of conviction, rather than sentence severity, is most relevant to effective deterrence."[227] It is even suggested that people are more

220. *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104 (1984) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.")).

221. *Id.* at 570 ("The personality traits of juveniles are more transitory, less fixed.").

222. Graham v. Florida, 560 U.S. 48, 79 (2010).

223. Chambers v. State, 831 N.W.2d 311, 320, 323 (Minn. 2013) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality . . . . Without finality, the criminal law is deprived of much of its deterrent effect." (quoting Teague v. Lane, 489 U.S. 288, 309 (1989))).

224. *Graham*, 560 U.S. at 72 ("Deterrence does not suffice to justify the sentence either.").

225. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

226. *Id.* (quoting *Roper*, 543 U.S. at 571 (2005)).

227. Russell, *supra* note 189, at 154 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 n.21 (1963)).

deterred by a system that is viewed as just and legitimate than one with harsher penalties.[228]

Beyond the debate of whether the goal in sentencing juveniles should be rehabilitation or deterrence, it is interesting to note that state statutes have never explicitly endorsed the policy of sentencing juveniles to LWOR.[229] Rather, it came about as a "statutory accident."[230] In *Graham*, Justice Kennedy noted, "the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration."[231] Since LWOR for juveniles was imposed without any express consideration, courts should take the time to reflect and come to the conclusion that rehabilitation outweighs deterrence as a policy goal for juveniles sentenced to LWOR. The *Roman Nose* and *Chambers* decisions are contrary to that policy, and for the eight that serve life for crimes committed as juveniles in Minnesota, the retroactivity analysis should have allowed them the opportunity to receive a *Miller* hearing.[232]

E. Forging a New Retroactivity Doctrine in Minnesota

The Minnesota Supreme Court should have applied a modified *Teague* analysis to determine that *Miller* applies retroactively.[233] The court should follow Nevada's lead in adopting a broader retroactivity doctrine, which accounts for new rules that do not fit into the substantive/procedural dichotomy.[234] This flexibility would not force the court to make such rigid

228. *Id.* (citing Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176–77 (2008)) (suggesting that a high incarceration rate can undermine the legitimacy of the criminal justice system).

229. NELLIS, *supra* note 195, at 28 (citing Commonwealth v. Knox, 50 A.3d 749, 766 (2012)).

230. *Id.*

231. *Graham*, 560 U.S. at 67.

232. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

233. *See* Danforth v. State, 761 N.W.2d 493, 500 (Minn. 2009) (Anderson, J., dissenting) ("I would not adopt *Teague* in total, rather I would, as the Nevada Supreme Court has done, adopt the basic approach set forth in *Teague* but with some significant qualifications.").

234. *See id.*; Colwell v. State, 59 P.3d 463, 471 (Nev. 2002).

determinations in ambiguous circumstances, like in this case.[235] Nevada allowed itself the flexibility to retain the basic outline of the *Teague* rule, while being able to make exceptions when it felt necessary.[236] Although this case note does not advocate adopting the same rule, it is prudent to use the same principle in crafting a retroactivity rule that works for Minnesota.[237] The analysis the court should use must take into account the purpose and effect of the rule that is being addressed.[238]

1. *The Guiding Principle of the Retroactivity Doctrine and* Miller *Hearings*

The United States Supreme Court limited retroactivity as an administrative need because it is not possible to apply every new decision retroactively to cases already finished.[239] It needed to find a cutoff line to determine which cases are worthy of receiving the

235. *Danforth*, 761 N.W.2d at 500 (Anderson, J., dissenting) ("The policy interests of finality and uniformity addressed by *Teague* are important, but I conclude that the Supreme Court has applied the *Teague* rule so narrowly and strictly that many cases involving constitutional safeguards that warrant collateral review have not or will not receive such review."); *see also* Chambers v. State, 831 N.W.2d 311, 341 (Minn. 2013) (Anderson, J., dissenting).

236. *Colwell*, 59 P.3d 463 at 471 ("[W]e are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires." (quoting State v. Fair, 502 P.2d 1150, 1152 (Or. 1972))).

237. Other jurisdictions have considered the defendant's equal treatment as an additional factor in the retroactivity analysis. *See, e.g.*, Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 282 (Mass. 2013); State v. Mantich, 842 N.W.2d 716, 728–29 (Neb. 2014) (citing State v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013)). A prior *William Mitchell Law Review* case note argued for the adoption of the modified Nevada approach when the Supreme Court held that *Teague* is not binding on the states. Zorislav R. Leyderman, Note, *Criminal Law: Minnesota Formally Adopts the* Teague *Retroactivity Standard for State Post-Conviction Proceedings*—Danforth v. State, 36 WM. MITCHELL L. REV. 297, 321 (2009). Although this is a well-reasoned alternative, it did not contemplate cases where a new rule of criminal procedure is not clearly substantive or procedural. *See id.* The analysis suggested in this case note addresses this issue. *See supra* Part IV.A.

238. South Dakota's rule also takes into account the purpose of the rule in adopting a modified *Linkletter* approach. Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990).

239. Danforth v. Minnesota, 552 U.S. 264, 273 (2008) (citing Linkletter v. Walker, 381 U.S. 618 (1965)).

benefit of a retroactive rule.[240] The guiding principle that the Court used in *Teague* is to determine if a new rule of criminal procedure changes our view on whether a person is considered guilty.[241]

If a new rule is substantive, it typically does one of three things. First, a substantive rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense."[242] Second, a substantive rule "alters the range of conduct or the class of persons that the law punishes."[243] Third, a substantive rule "narrow[s] the scope of a criminal statute by interpreting its terms."[244] Each of these changes the view of whether a convicted person is still considered guilty.[245] A substantive rule "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal."[246] Alternatively, a procedural criminal rule only addresses the process of how someone's guilt is determined, not whether the person in question is still considered culpable.[247] As Justice Scalia pointed out, it is more speculative whether a person is still considered culpable when the new rule is procedural.[248]

The purpose of the retroactivity doctrine turns on whether a rule will continue to define someone as criminally culpable.[249] In the administration of the court, a rule should apply to defendants whose cases are long since closed only when it changes whether they are considered criminally culpable.[250] However, when the

240. *See Linkletter*, 381 U.S. at 627–30.

241. Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

242. Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated by* Teague v. Lane, 489 U.S. 288 (1989).

243. *Schriro*, 542 U.S. at 353.

244. *Id.* at 351.

245. *Id.* at 352.

246. Bousley v. United States, 523 U.S. 614, 620 (1998) (internal quotation marks omitted).

247. *Schriro*, 542 U.S. at 352.

248. *Id.*

249. *Id.* at 352. This is a slight oversimplification of the rule, ignoring the bedrock procedural rule exception. *Id.* (giving retroactive effect in "only a small set of 'watershed rules . . .'" (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990))). The underlying principle in the second exception is the implication of "'fundamental fairness and accuracy,'" which is tangential to this discussion. *Id.* (quoting *Saffle*, 494 U.S. at 495).

250. Teague v. Lane, 489 U.S. 288, 305–10 (1989) (agreeing with Justice Harlan's previous concurrences and dissents that retroactivity should be reserved

United States Supreme Court devised the substantive/procedural analysis to accomplish this goal, it divorced itself from the underlying principle guiding the distinction created in the retroactivity rule.[251] Instead, courts focus on this extremely abstract, often arbitrary, analysis contemplating if a rule is substantive or procedural.[252]

Miller is guided by the same basic principle—to protect a group of people categorically distinguished as less criminally culpable.[253] In the very special circumstance of sentencing juveniles to our nation's second, and Minnesota's first, harshest punishment, *Miller* commands a sentencing court to determine culpability.[254] It guides the determination of whether a juvenile is in fact culpable for the crime that they committed, or whether they lack the maturity, understanding, and foresight to be criminally liable.[255] If they are not as criminally liable for their actions, *Miller* implies they should not be sentenced to LWOR.[256]

2. *Minnesota Fails to Recognize the Underlying Principle of Specialized Considerations for the Less Culpable in Not Applying* Miller *Retroactively*

The guiding principle of both prohibiting mandatory LWOR and determining retroactivity is actually the same: people deemed

for limited, worthy cases).

251. *Schriro*, 542 U.S. at 351–52 (defining the distinction the Court uses in its retroactivity analysis in terms of substance versus procedure and shifting the analysis away from the language in *Teague*).

252. *Id.*

253. Miller v. Alabama, 132 S. Ct. 2455, 2457, 2464 (2012) (citing Roper v. Simmons, 543 U.S 551, 571 (2005)) (recognizing that juveniles have diminished culpability).

254. *Id.* at 2469; *see also* MINN. STAT. § 609.106, subdiv. 2 (2012) (LWOR is Minnesota's harshest penalty); John D. Bessler, *The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849–1911*, 22 WM. MITCHELL L. REV. 577, 690 (1996) (reviewing the history of Minnesota's 1911 abolition of the death penalty).

255. *Miller*, 132 S. Ct. at 2469.

256. *Id.* ("'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (quoting Graham v. Florida, 560 U.S. 48, 50 (2010))).

less criminally culpable should receive extra consideration.[257] In the case of retroactivity, the court applies a rule retroactively if the convicted is no longer considered as criminally liable, despite the case being concluded.[258] In the case of juveniles sentenced to LWOR, the court must decide whether they are too immature to be criminally liable.[259] But, Minnesota's driving goal in adopting *Teague* was finality and evenhandedness.[260]

The United States Supreme Court abandoned *Linkletter* and devised a new rule so that retroactivity is uniformly applied.[261] But, uniformity was not the reason why the Court chose to create the substantive/procedural dichotomy specifically for rules of constitutional criminal procedure.[262] As stated above, the substantive/procedural analysis is used to determine whether the change in the rule negates the culpability of the convicted.[263] In adopting *Teague* and ignoring the underlying goal of determining retroactivity, the Minnesota Supreme Court and other courts are blinded by the strict application of the retroactivity rule.[264] Courts get bogged down in the abstract idea of substance versus procedure.[265] The guiding principle is lost in its application.[266]

257. *Compare Miller*, 132 S. Ct. 2455, 2467 (2012) (providing an additional hearing at sentencing to determine a juvenile's culpability before handing down a LWOR sentence), *with* Teague v. Lane, 489 U.S. 288, 309 (1989) (providing retroactivity to defendants when federal law substantively changes).

258. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

259. *Miller*, 132 S. Ct. at 2469.

260. Danforth v. State, 761 N.W.2d 493, 497–99 (Minn. 2009).

261. *Teague*, 489 U.S. at 302.

262. The court adopted the new dividing line based on the concurrences and dissents of Justice Harlan. *See id.* (citing Desist v. United States, 394 U.S. 244, 256–57 (1969) (Harlan, J., dissenting)).

263. *Schriro*, 542 U.S. at 352.

264. *See* Berman, *supra* note 189, at 166 ("Consequently, it is now critically important for policy-makers, courts, and scholars to consider more thoughtfully and thoroughly the values and interests served—and not served—by doctrines, policies, and practices that may allow or preclude the review of sentences after they have been deemed final.").

265. *See, e.g.*, Chambers v. State, 831 N.W.2d 311, 326–30 (Minn. 2013). *But see Roman Nose II*, 845 N.W.2d 193, 203 (Minn. 2014) (Anderson, J., concurring) (acknowledging both the substantive and procedural characteristics of *Miller*).

266. *See* Colwell v. State, 59 P.3d 463, 471 (Nev. 2002) ("Though we consider the approach to retroactivity set forth in *Teague* to be sound principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review."); Cowell v.

Minnesota fails to recognize that the retroactivity doctrine is used to determine whether a rule has the power to change someone's culpability.[267] Similarly, Minnesota's analysis fails to recognize that the rule announced in *Miller* is used to determine whether a juvenile is considered sufficiently criminally liable to impose LWOR.[268] Minnesota should employ a retroactivity rule that allows it to recognize both of these underlying considerations without getting stuck in the strict substantive/procedural dichotomy.[269]

3. New Rule: Consider the Underlying Principle in Ambiguous Cases

This case note is not advocating for a rule that markedly broadens the retroactivity doctrine, but for one that clarifies the analysis. In order to accomplish this, the court should adopt a modified *Teague* analysis, like Nevada did, which takes into account an additional consideration when a new rule is not clearly substantive or procedural.[270] Minnesota should explicitly consider whether the rule, as applied, would change the culpability of those seeking retroactive application.[271]

The proposed rule is administrable, encourages uniform results, and provides meaningful relief for those who deserve it.[272] The traditional *Teague* analysis should still apply in cases when the rule being reviewed is clearly substantive or procedural. It is not necessary to delve into a second layer of analysis if a new rule is clearly substantive or procedural. But, in ambiguous cases, a second analysis should be triggered. A simple question can be employed: would applying this rule to the defendant have the likelihood to

Leapley, 458 N.W.2d 514, 518 (S.D. 1990) ("We find the *Teague* rule to be unduly narrow as to what issues it will consider on collateral review.").

267. *See Schriro*, 542 U.S at 352.

268. *See Roman Nose II*, 845 N.W.2d at 201; *Chambers*, 831 N.W.2d at 325–27.

269. *See* Berman, *supra* note 189, at 151.

270. *See Colwell*, 59 P.3d at 471.

271. *See id.* Nevada's modified *Teague* analysis is not described in these exact terms, but it is based in the principle that it may give broader relief when it sees fit. *Id.*

272. Since *Miller* does not fit into the substantive/procedural dichotomy, courts decide whether to deem it substantive or procedural. *See* Songster v. Beard, No. 04-5916, 2014 WL 3731459, at *3 (D. Pa., July 29, 2014). The extra consideration creates a marker for courts to use to disentangle the ambiguity of the rule while making a fair determination on the individual case. *Id.*

reasonably negate whether the defendant is considered guilty?[273] If the answer is yes, the rule should apply retroactively; if the answer is no, the rule is not worth applying retroactively. In the case of *Miller*, the answer is yes.[274] If a juvenile is found to lack the maturity, forethought, and ability to understand the gravity of a decision after a *Miller* hearing, he or she will not be considered criminally culpable enough to be sentenced to LWOR.[275]

4. Roman Nose

In this case, Roman Nose committed a horrendous crime, and nothing can make up for that fact.[276] This case note does not advocate for Roman Nose's release from prison, or even that he should receive a reduced sentence. As a juvenile sentenced to LWOR, however, the Eighth Amendment entitles him to one hearing to consider his culpability as a juvenile convicted of murder.[277] Constitutional rights should not be withheld arbitrarily because the analysis is ambiguous.

It is likely that the day may never come when Roman Nose receives a reduced sentence, but the guiding principle of the retroactivity doctrine dictates that he at least be given the

273. It is not the same determination as to whether the process used to find guilt was accurate. It is not an evidentiary determination, but a determination of what is understood as guilt. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (explaining that procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise"). *See generally* Gray v. Netherland, 518 U.S. 152, 168 (1996) (holding that a new rule requiring adequate notice of evidence to be used at the penalty hearing of a capital murder trial was procedural).

274. *See, e.g.*, State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013).

> There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.

Id. (citing Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. DAILY NEWS (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/news/article/Chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/).

275. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

276. *See Roman Nose I*, 667 N.W.2d 386, 389–90 (Minn. 2003).

277. *Miller*, 132 S. Ct. at 2474.

opportunity. Again, this would not allow every child sentenced to LWOR to receive a reduced sentence.[278] For some children—as sad as it is to admit—there is no saving, and there is nowhere else to place them. They will need to live and die behind bars because of the threat they pose to society. The Supreme Court has likened LWOR to a death sentence for juveniles.[279] Applying *Miller* retroactively would not create black letter law mandating all juveniles sentenced to LWOR receive new sentences.[280] It would only give relief to those who deserve it.[281]

V. CONCLUSION

The Minnesota Supreme Court's second application of *Miller* in *Roman Nose* gave the court the opportunity to reflect on its *Chambers* decision. The court again affirmed a rule meant to create a bright line on retroactivity, but—as shown all around the country—it has created disparate results for juveniles sentenced to LWOR.[282] The underlying goals of both the retroactivity doctrine and the rule pronounced in *Miller* are similar, and Minnesota's retroactivity doctrine should be flexible enough to take this into consideration. However, the differing interpretations among the states and the way they have addressed the issue[283] suggest that the

278. *Id.* at 2474–75.

279. Chambers v. State, 831 N.W.2d 311, 332 (Minn. 2013) (citing Miller v. Alabama, 132 S. Ct. 2455, 2466–67 (2012)) ("The Supreme Court has held that [LWOR] is tantamount to a death sentence for an offender who . . . is sentenced for a crime committed when he was a juvenile.").

280. *Id.* at 333 (Anderson, J., dissenting) (explaining that a remand for a *Miller* sentencing hearing "does not in and of itself change the life-in-prison-without-release aspect of [a petitioner's] sentence," but allows him or her the opportunity to have a hearing).

281. *See id.*

282. For further discussion of the cultural aspects of juveniles sentenced to LWOR, see NELLIS *supra* note 195.

283. Some states have chosen to address the issue legislatively. *Compare* CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii) (West, Westlaw through ch. 931 of 2014 Leg. Sess.) (allowing petition after fifteen years), *and* DEL. CODE ANN. tit. 11, § 4204A(d)(1)(2) (West, Westlaw through 2014 Leg. Sess.) (allowing petition after thirty years), *and* LA. REV. STAT. ANN. § 15:574.4(E)(1) (West, Westlaw through 2014 Leg. Sess.) (allowing petition after thirty-five years), *and* WYO. STAT. ANN. § 6-10-301(c) (West, Westlaw through 2014 Leg. Sess.) (allowing petition after twenty-five years), *with* H.F. 3358, 88th Leg. Sess. (Minn.) (as introduced to House on Apr. 28, 2014) (prohibiting LWOR petitions).

United States Supreme Court should ultimately decide whether *Miller* applies retroactively.[284] Until that happens, Minnesota should adopt a modified *Teague* analysis, allowing it to take into consideration the underlying principle of the newly announced rule in ambiguous cases.

284. *Roman Nose II*, 845 N.W.2d 193, 204 (Minn. 2014) (Lillehaug, J., concurring) ("One can only hope that the United States Supreme Court will take its earliest opportunity to clarify whether [*Miller*] applies retroactively.").