REACTION TO *MONTGOMERY V. LOUISIANA*: THE SUPREME COURT OFFERS HOPE TO JUVENILES SENTENCED TO DIE IN PRISON, AND A LITTLE TO ADULTS AS WELL

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Beneath its technical veneer, the Supreme Court's recent decision in *Montgomery v. Louisiana* holds the promise of a sentencing revolution.[1] The Court gave retroactive effect to its decision in *Miller v. Alabama*, which barred sentences of mandatory life imprisonment without parole for juveniles. To do so, the Court ruled that *Miller* prohibits any life without parole sentence on a juvenile who was not "permanent[ly] incorrigibl[e]" at the time of the offense.[2]

States must now afford almost every juvenile facing an irrevocable life sentence a genuine chance at release. This requirement alone is radical. But by barring life imprisonment for most juveniles convicted of homicide, the decision also offers hope to adult offenders sentenced to die in prison for minor offenses.

Montgomery's central holding is straightforward. States must apply *Miller* retroactively to juveniles whose sentences were already final at the time of the decision[3] because *Miller* announced a "substantive" rule of constitutional law.[4] *Miller* is substantive because it categorically bars a sentence for a class of offenders.[5]

Montgomery's exegesis of *Miller*'s categorical bar is less straightforward. Read on its own, *Miller* suggests that, if there is a category of sentence at issue, that sentence is *mandatory* life imprisonment without parole.[6] *Miller* discusses at length how automatically condemning juveniles to die in prison, even for homicides, is uniquely harsh. The Court did not address life without parole for juveniles more generally, except to suggest

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1. Montgomery v. Louisiana, No. 14-280 (Jan. 25, 2016).

2. *Montgomery*, slip op. at 17; *see also Miller*, 132 S.Ct. at 2465.

3. *See id.* at 6, 11, 20.

4. *Id.* at 20.

5. *Id.* at 17-18.

6. *See Miller*, 132 S.Ct. at 2464, 2466-68.

that, given the unique mitigating characteristics of youth, life without parole should be "uncommon" for juveniles.[7]

But *Montgomery* made clear that *Miller* cannot be limited to mandatory life without parole. The Court held that *Miller* categorically barred life imprisonment for any juvenile whose crime does not reflect "irreparable corruption."[8] The mandatory nature of the sentence is irrelevant. This conclusion is surprising, given that the *Miller* court denied that the decision categorically barred a sentence for a class of offenders.[9] Rather, the majority emphasized that it simply required courts to consider youth and its attendant circumstances before sentencing.[10]

Montgomery's approach to remodeling *Miller* as a categorical rule is critical to *Montgomery*'s potential reach. Perhaps most important is that *Montgomery* did not rule that sentencing juveniles to a lifetime of imprisonment violates our nation's "evolving standards of decency," the Court's traditional metric for categorically barring sentences under the Eighth Amendment.[11] It couldn't. The Court applies the evolving standards test to invalidate sentences that have fallen out of favor with modern society.[12] At the time of *Miller*, however, life without parole was very much in favor. Nearly 2,500 juveniles were serving the sentence in a majority of states.[13] Instead, the Court invoked the Eighth Amendment's proportionality guarantee to hold that life without parole is improper for all but the most irredeemable juveniles.[14] The Court's proportionality analysis may have dramatic implications for juvenile sentencing. Even though *Montgomery* ruled that juveniles who received *mandatory* life imprisonment could retroactively challenge their sentences, there is every reason to believe that juveniles who received *discretionary* life imprisonment may also be entitled to such collateral attacks.

Think of it this way: the Court's prohibition in *Atkins v. Virginia*[15] on executing the mentally disabled is a retroactive, substantive rule.[16] It

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7. *Id.* at 2469; *see also id.* at 2481 (Roberts, C.J., dissenting) ("[T]he Court has already announced that discretionary life without parole for juveniles should be "uncommon"—or, to use a common synonym, "unusual.").

8. *Montgomery*, slip op. at 3, 7.

9. *Miller*, 132 S.Ct. at 2471.

10. *Id.*

11. *See* Kennedy v. Louisiana, 554 U.S. 407, 419-421 (2008) (explaining Court's evolving standards analysis).

12. *See e.g.*, *id.* at 2463.

13. *Id.* at 2477-78 (Roberts, C.J., dissenting).

14. *See id.* at 2475; *Montgomery*, slip op. at 17-18.

15. 536 U.S. 304 (2002).

gave every death row inmate the right to establish they belonged to the category of individuals exempt from execution. By this same reasoning, *Montgomery* grants every juvenile serving life imprisonment without parole the right to establish that their crimes reflected "transient immaturity," the category of individuals now exempt from a death-in-prison sentence.[17] As with *Atkins*, that right exists regardless of when or how the state imposed the sentence.

Montgomery's proportionality analysis, in combination with the Court's earlier comparison of life imprisonment without parole for juveniles to the death penalty,[18] facilitates at least two additional categorical protections for juveniles. First, it appears inevitable that juveniles serving life imprisonment for felony murder must have their sentences vacated if they did not kill, or intend to kill, the victim. The Court has already exempted such "non-triggerperson" adults from the death penalty,[19] and the Court strongly hinted in *Graham v. Florida* that the same rule should apply to juveniles.[20] After *Montgomery*, it is inconceivable that such crimes could establish irreparable corruption. In addition, juveniles with mental disabilities cannot logically or morally be allowed to die in prison after *Montgomery*, since *Atkins* grants adults this protection against the death penalty.

Montgomery may also extend beyond the trial level, allowing juveniles who receive life without parole to assert more robust protections on appeal. *Miller* and *Montgomery* essentially create a presumption against life imprisonment for juveniles by barring such a sentence under most circumstances. Faithfully enforcing *Miller* likely means appellate courts cannot simply defer to trial level findings of irreparable corruption. Rather, the reviewing court would have to assess not only whether the sentencer duly considered the juvenile's youth and attendant circumstances, but also whether the sentencer accurately concluded that the juvenile was beyond reform.

Moreover, *Montgomery* leaves states no room to disagree with the Court's assessment that juvenile life without parole should be rare. Thus, if a state fails to make life imprisonment for juveniles uncommon, this could allow a broader Eighth Amendment attack on its sentencing system. Borrowing from the Court's death penalty jurisprudence, a juvenile

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16. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

17. *Montgomery*, slip op. at 17-18.

18. *Miller*, 132 S.Ct. at 2466 ("In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.").

19. *Enmund v. Florida*, 458 U.S. 782, (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

20. 560 U.S. 48, 68-71 (2010).

sentencing scheme would be "cruel and unusual" if it does not genuinely narrow life imprisonment to the class of incorrigible defendants.[21] Even if a state makes life imprisonment rare for juveniles, its sentencing scheme remains vulnerable if impermissible factors like race or geography result in arbitrary sentencing outcomes. This conclusion flows from the fact that the Eighth Amendment already forbids the arbitrary administration of the death penalty.[22]

Adult offenders sentenced to life imprisonment without parole for minor or otherwise nonviolent offenses may benefit tangentially from *Montgomery*. Along with establishing that juveniles are different for sentencing purposes, *Miller* and its predecessor *Graham* separately describe the unique severity of sentencing an individual to die in prison.[23] The Court's acknowledgement creates a dilemma for punishing adult offenders: if sentencing a 17-year-old to lifetime incarceration for murder almost always violates the Constitution, how can a civilized society tolerate sentencing an 18-year-old to the same lifetime of imprisonment for selling marijuana or stealing a jacket? Yet over 3,000 people are currently doomed to die in prison for these sorts of nonviolent offenses, many of whom were first time offenders.[24]

The stiffest barrier to ending life imprisonment for nonviolent offenses is the Supreme Court's 1991 decision in *Harmelin v. Michigan*.[25] There, the Court upheld a sentence of mandatory life without parole for a defendant who possessed nearly two pounds (672 grams) of cocaine. Decided near the apex of America's carceral epidemic, *Harmelin* rejected the idea that a mandatory life sentence was disproportionate for this offense.[26] Writing the main concurrence, Justice Kennedy – incidentally, the author of *Graham* and *Montgomery* – called Harmelin's characterization

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21. *Cf.* Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("[A] capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

22. Furman v. Georgia, 408 U.S. 238 (1972) (finding the death penalty cruel and unusual punishment in the cases at bar).

23. *Miller*, 132 S.Ct. at 2466 (citing *Graham*, 560 U.S. at 70-78); *see also Graham*, 560 U.S. 48 (ruling juvenile offenders may not receive life without parole for non-homicide crimes) .

24. AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 2, 39 (2013), https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses; *see also* Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40.1 N.Y.U. REV. L. & SOC. CHANGE 139 (2016); Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels' A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds From the Death Penalty*, 40.1 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 147 (2016).

25. 501 U.S. 957 (1991).

26. *See id*. at 996.

of the offense as nonviolent "false to the point of absurdity," and emphasized the "pernicious effects of the drug epidemic in this country."[27]

But times have changed. For one, *Miller* distinguished *Harmelin* for juveniles.[28] Second, a chorus of voices from across the political spectrum is demanding an end to America's era of "mass incarceration" and the closely related "War on Drugs," at least with respect to nonviolent offenders. Drug enforcement in particular has been exposed as racially biased and wasteful, raising troubling questions about whether so many black and brown bodies are dying in our prisons for defensible reasons, or as an outgrowth of our nation's original sin of slavery.[29] Plus, many of the offenses for which people are dying in prison are nonviolent by any measure, such as attempting to cash a stolen check, shoplifting, or siphoning gasoline.[30]

As Justice Kennedy recognized in *Lawrence v. Texas*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress."[31] Proving his point, twelve years after his *Harmelin* concurrence Justice Kennedy openly criticized harsh mandatory minimums, including for drug offenders.[32] Just as advocates struggled in state legislatures and courthouses for decades to overcome the societal and doctrinal barriers that allowed states to execute juveniles until 2005, and then continued those efforts to all but ban life without parole for juveniles by 2016, a similar effort may eventually open the country's eyes to the need to end extreme sentences for nonviolent offenses.

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27. *Id*. at 1002-03 (Kennedy, J., concurring).

28. *Miller*, 132 S.Ct. at 2470.

29. *See generally* AMERICAN CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE (2013), https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS (2010).

30. *See* A LIVING DEATH, at 5 (listing nonviolent offenses that have resulted in life without parole sentences).

31. 539 U.S. 558, 579 (2003).

32. AM. BAR ASSOC., JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 4 (2004).