REIMAGINING THE THROWAWAY KID

MEGAN G. CRANE, SHOBHA L. MAHADEV & SCOTT F. MAIN∞

The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Children—even children who commit the most heinous crimes—are "constitutionally different from adults."[1] The U.S. Supreme Court has made this profound proclamation in three separate opinions addressing the extreme sentencing of kids: *Roper, Graham,* and *Miller*.[2] This trilogy of decisions is rooted in the Court's groundbreaking recognition that children are categorically different from adults in critical ways, requiring courts to fundamentally reshape the way children are treated in our criminal justice system. At its essence, this powerful line of case law required courts to bring humanity back into the law when dealing with children, to recognize that a child is more than his or her worst act, to acknowledge that many times our society—and the systems in place to purportedly protect our most vulnerable children—failed the child being sentenced before the child failed society by committing a heinous crime.

But despite the power of the Court's proclamation that "children are different," questions lingered. The language of the Court's opinion in *Miller* remained open to rampant interpretation. What exactly must the criminal justice system do to account for the differences between kids and adults? What does it mean to consider a defendant's "youth" at sentencing? What kind of evidence should the court consider? How uncommon is the "incorrigible" child who deserves a life without parole sentence? What does a kid's transient immaturity mean for a sentencer?

That all changed this past January when, in no uncertain terms, the Court ended the debate on the meaning and scope of *Miller*.[3] In *Montgomery v. Louisiana*, Justice Kennedy picked up the baton from Justice Kagan in *Miller* and ran full speed ahead, holding that life without parole is "an unconstitutional penalty for a class of defendants because of their status" as "juvenile offenders whose crimes reflect the transient immaturity of youth."[4] Justice Kennedy further

---

∞ Megan G. Crane is Co-Director of and a Clinical Fellow at the Center on Wrongful Convictions of Youth. Shobha L. Mahadev is a Clinical Assistant Professor at Children & Family Justice Center, and Scott F. Main is a Clinical Fellow at Children & Family Justice Center.

1. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S.Ct. 2455 (2012); *see also* J.D.B. v. North Carolina, 564 U.S. 261 (2011) (extending the Court's "recognition that children cannot be viewed simply as miniature adults" to the custody analysis of Miranda v. Arizona, 384 U.S. 436 (1966)).

2. *Roper*, 543 U.S. at 567; *Graham*, 560 U.S. at 68; *Miller*, 132 S.Ct. at 2463.

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

4. *Montgomery*, slip op. at 17 (internal quotations omitted).

clarified that it will no longer be sufficient for a court to simply consider a child's age as a matter of rote analysis before sentencing them to life in prison. Instead, courts must truly consider whether a juvenile's crime results from "transient immaturity" rather than the "rare" case of a juvenile offender whose crime results from "irreparable corruption."[5]

Moreover, Justice Kennedy explicitly stated that even those who commit "heinous crimes" cannot be considered irreparably corrupt as a matter of course.[6] The sentencer's analysis must go beyond the facts of the crime, however egregious.[7] The hearing must be broad enough to include specific and detailed mitigation evidence.[8] Finally, the incorrigible juvenile defendant for whom a life without parole sentence may be appropriate will be uncommon and rare, perhaps non-existent.[9]

The Court was abundantly clear that how states seek to vouchsafe the substantive constitutional right delineated in *Miller* is left to the "sovereign administration of [the states'] criminal justice systems."[10] Leaving aside the matter of retroactivity, *Miller* invalidated sentencing schemes in twenty-nine jurisdictions and required many state legislatures to take action to address their now-unconstitutional pathways to life without parole.[11] It is likely that some post-*Miller* legislation is not fully in step with the substantive holding of *Montgomery*.[12] In discussing the nature of substantive rules under the *Teague* analysis,[13] the *Montgomery* Court cautioned that even "the use of flawless sentencing procedures" cannot "legitimate a punishment where the Constitution

---

5. *See id*.; *see also Miller,* 132 S.Ct. at 2469.

6. *Montgomery,* slip op. at 21 ("*Miller*'s central intuition [is] that children who commit even heinous crimes are capable of change.").

7. *See id.* at 16.

8. *See id.* at 19 ("A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." (quoting *Miller,* 132 S.Ct. at 2460)).

9. *See id.* at 3.

10. *Id*. at 19.

11. *See Miller*, 132 S.Ct. at 2471.

12. *See e.g.*, 18 PA. CONS. STAT. § 1102.1(a), (d) (2012) (permitting the imposition of a life without parole sentence after consideration of youth-specific factors in mitigation); 2013 La. Sess. Law Serv. Act 239 (West) (preserving the sentence of life without parole for certain juveniles with the limitation that it "should normally be reserved for the worst offenders and the worst cases"); LA. CODE CRIM. PROC. ANN. art. 878.1 (2013) (same); 730 ILL. COMP. STAT. ANN. 5/5-4.5-105 (2016) (eliminating mandatory life without parole sentences, preserving discretionary life without parole sentences, codifying youth-specific factors for consideration at the time of sentencing, and granting discretion to sentencing courts to depart from some mandatory sentencing enhancements). There is nothing in these provisions that removes life without parole as a possible sentence if the offense reflects transient immaturity. Even Louisiana's effort to limit the imposition of the sentence would be susceptible to challenge absent an additional requirement of a determination that the youth is permanently incorrigible.

13. Teague v. Lane, 489 U.S. 288 (1989).

immunizes the defendant from the sentence imposed."[14] We can arm a sentencing court with every analytic, diagnostic, and assessment tool in the toolbox at the time of sentencing, and a judge may still impose a sentence that the constitution forbids.[15] Justice Scalia, in his dissent, did not overlook this problem.[16]

The *Montgomery* majority referenced Wyoming as an example of how a state may remedy a *Miller* violation by providing parole opportunities for juvenile offenders.[17] Justice Scalia describes this as, "in Godfather fashion, the majority mak[ing] state legislatures an offer they can't refuse: Avoid all the utterly impossible nonsense we have prescribed by simply permitting . . . parole."[18] He makes a fair point. But states remain free to craft their own solutions. By creating periodic judicial resentencing opportunities, states like Florida, California, and Delaware are well positioned to address "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[19] For those currently serving life without parole sentences or those now facing extreme sentences for crimes committed as children, meaningful periodic review – whether through parole or through resentencing opportunities – provides a failsafe against disproportionality.

Montgomery thus invites states to reimagine solutions for young people who commit the most serious offenses, challenging them to address the unique needs of children and the risks associated with the most difficult cases. It reminds the states that there is no "throwaway" child. In this moment, when politicians on the left and the right are finding common ground in promoting criminal justice agendas focused on "low-level, non-violent, drug offenders," the Supreme Court has asked us to consider the opposite case – the child who commits a terrible crime – and to ensure that our laws do not ignore her status as a child.[20]

---

14. *Montgomery*, slip op. at 10.

15. *See id.* at 17. This question of transient immaturity vs. irreparable corruption did not first appear in *Montgomery*; it is a theme that courses throughout *Roper* and its progeny. *See Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 66; *Miller*, 132 S.Ct. at 2469. In justifying its categorical bans and constitutional guarantees, the Court is noting the great difficulty for even expert psychologists to differentiate between the two when evaluating a juvenile whose brain is still developing.

16. Justice Scalia labels this transient immaturity vs. permanent incorrigibility inquiry as "silliness." *Montgomery*, slip op. at 14 (Scalia, J., dissenting).

17. *Montgomery,* slip op. at 21.

18. *Id*. at 14 (Scalia, J., dissenting).

19. *Id*. at 3; *see e.g.*, FLA. STAT. ANN. § 775.082 (West 2016) (permitting most individuals who were convicted and sentenced as children to petition the court for a sentencing review after serving 15, 20, or 25 years depending on the child's sentence); CAL. PENAL CODE § 1170 (West 2016) (same); DEL. CODE ANN. tit. 11, § 4204A (West 2013) (back-end review for children by providing a sentencing review hearing after 20 or 30 years and giving the sentencing judge authority to modify a person's sentence).

20. Indeed, the time for reform is particularly ripe given the recent surge in political support for criminal justice reform, focused on de-incarceration to reduce out of control costs of our prison system. Decarceration is impossible to achieve without addressing long-term and mandatory sentencing practices.

In the realm of sentencing, *Montgomery* removed the line between a "mandatory" juvenile life without parole sentence and a "discretionary" one. The *Montgomery* Court held that "a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing."[21] So-called "discretionary" life sentences, imposed without consideration of *Miller* and *Montgomery*'s articulated factors, are constitutionally disproportionate. Like *Miller*, *Montgomery*'s not-so-subtle message is that imposing age-appropriate sentences is both constitutionally necessary and the right thing to do. Thus, sentencing laws that fail to account for a child's unique characteristics and limitations—including mandatory minimum sentences and mandatory sentencing enhancements—should be revisited and revised so as to be synchronous with the Court's stated principles and reasoning.[22]

But *Montgomery*'s invitation extends beyond just reforming youth-sentencing laws. Indeed, in the wake of *Montgomery*, there is opportunity for a new broad vision—in courtrooms and statehouses—of a distinct youth-centered approach at all stages of proceedings involving children caught in the criminal justice system. The principles embodied in, and the science underlying, the Court's recent decisions apply with equal force to all aspects of criminal procedure.[23] Indeed, *Montgomery*'s reiteration of a juvenile's "special circumstances" and constitutional differences when compared to adults affirms the need for a "reasonable juvenile" standard that properly accounts for those differences.[24] Embedding youth-specific standards in areas such as self-defense, felony murder, and accomplice liability is consistent with science and the Court's stated principles.

Finally, given its emphasis on individualized, age-appropriate sentencing, *Montgomery* invites a conversation about the purpose of sentencing itself when it comes to crimes committed by young people. While acknowledging the terrible and tragic crime committed by Henry Montgomery, the Court refused to ignore the

---

21. *Montgomery*, slip op. at 13 n.1.

22. *See e.g.*, State v. Lyle, 854 N.W.2d 378 (Iowa 2014) (holding all mandatory minimum sentences of imprisonment for youthful offenders violate the Iowa Constitution's provision against cruel and unusual punishment following logic and analysis of *Miller*).

23. *See Graham*, 560 U.S. at 76 ("[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed"); *see also*, *Miller*, 132 S.Ct. at 2464-65 (noting the science and social science underpinning the Court's Eighth Amendment decisions concerning children and citing *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)) and *Graham*, 130 S.Ct. 2026, 2027) .

24. *Montgomery*, slip op. at 1, 13 n.1; *see* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda: Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 501 (2012), (analyzing the potential implications of a "reasonable juvenile" standard).

"17-year-old boy" condemned to die in prison.[25] Children are not transformed into adults by virtue of their sometimes-violent acts. Fulfilling the Court's vision requires that we also refuse to ignore the "child" when we determine, as a society, how best to treat and punish the young people for whom we are all responsible.

25. *See Montgomery*, slip op. at 2-3, 21-22.