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THE MANY MEANINGS OF *MONTGOMERY V. LOUISIANA*: HOW THE SUPREME COURT REDEFINED RETROACTIVITY AND *MILLER V. ALABAMA*

Brandon Buskey[*]

INTRODUCTION

Henry Montgomery has survived the remarkable arc of the Supreme Court's evolution juvenile sentencing. In 1970, Louisiana sentenced him to die in prison for the murder of a police officer, a crime he committed when he was seventeen years old.[1] The sentence was mandatory, and it was perfectly legal. At that time it was also perfectly legal to execute juveniles. A generation later, the Supreme Court barred the execution of children under age sixteen in 1988,[2] but the next year refused to extend the bar to all juveniles.[3] Not until 2005 did the Court exempt all juveniles from the death penalty.[4] In half a decade, the Court ruled that juveniles could not be imprisoned for life without any possibility of release for non-homicides.[5] A mere two years later, yet forty-six years after Mr. Montgomery's conviction, the Court declared, in *Miller v. Alabama,*[6] that mandatory life sentences like Mr. Montgomery's were unconstitutional.

Miller confirmed the lessons of these prior decisions that children's youth and immaturity make them categorically different for sentencing purposes, and that life imprisonment without parole is akin to the death

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[1] State v. Montgomery, 242 So.2d 818 (La. 1970).
[2] Thompson v. Oklahoma, 487 U.S. 815 (1988).
[3] Stanford v. Kentucky, 492 U.S. 361 (1989).
[4] Roper v. Simmons, 543 U.S. 551 (2005).
[5] Graham v. Florida, 560 U.S. 48 (2010).
[6] Miller v. Alabama, 132 S. Ct. 2455 (2012).

penalty for juveniles. Thus, automatically sentencing children to a lifetime of imprisonment "poses too great a risk of disproportionate punishment."[7] The Eighth Amendment's protection against "cruel and usual punishments" therefore prohibits such sentences.

But Mr. Montgomery's path to a hope for release was not yet complete. In fact, it was cut off by the Louisiana Supreme Court. That court ruled Mr. Montgomery could not benefit from *Miller*[8] because,[9] under the United States Supreme Court's decision in *Teague v. Lane*,[10] *Miller* did not apply retroactively to cases that were already final at the time of the decision. Mr. Montgomery's case became final in 1984, thirty years too soon.

In *Montgomery v. Louisiana*,[11] the Supreme Court reversed the Louisiana Supreme Court and held that *Miller* applies retroactively. The Court found that, by categorically prohibiting life sentences for the majority of juveniles whose crimes reflect "transient immaturity" rather than "irreparable corruption," *Miller* announced a substantive rule of criminal law that is not subject to *Teague*'s general bar against retroactivity. Now, unless Louisiana can show that the crimes of those like Montgomery demonstrate "irreparable corruption," it must grant them meaningful hope of "some years of life outside prison walls."[12]

As discussed below, *Montgomery* affirmed Court's supremacy in declaring federal law while bolstering the significant limits that *Miller* places on states' ability to condemn any juvenile to die in prison. But the Court left unresolved a critical question: how much hope for release is enough? Whatever the answer, it must account for *Miller*'s impact on the obligation of states to grant parole to juveniles facing lifelong incarceration. This article asserts that *Miller* cabins the state's power to deny parole permanently to reformed juveniles. It does so by creating a modest, but absolute, liberty interest in release before death for rehabilitated youth. The Supreme Court, rather than state parole systems, must be the ultimate protector of this right.

I. HOW THE *MONTGOMERY* COURT DECIDED IT COULD DECIDE

The central issue in *Montgomery* was whether *Miller* applied retroactively. However, the Court first had to determine whether it could even decide the case. In addition to granting *certiorari* on retroactivity, the

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[7] *Id.* at 2469.
[8] State v. Montgomery, 141 So.3d 264 (La. 2014).
[9] State v. Tate, 130 So.3d 829 (La. 2013).
[10] Teague v. Lane, 489 U.S. 288 (1989).
[11] Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
[12] *Id.* at 736-37.

Court *sua sponte* inserted the question of whether it had jurisdiction to review Louisiana's determination that *Miller* was not retroactive.[13] Both Mr. Montgomery and Louisiana agreed the Court had jurisdiction,[14] mostly likely since the Louisiana Supreme Court expressly relied on the Supreme Court's decision in *Teague v. Lane*,[15] thus creating a federal question for Supreme Court review.[16] Unsatisfied, the Court appointed a special amicus to argue against jurisdiction.

At stake was what it means for the Court to declare a rule retroactive. In *Teague* and subsequent cases, the Court identified the federal habeas statute as the source of its authority to apply rules retroactively.[17] If that is true, then *Teague* only binds federal habeas courts. That leaves Congress free to alter *Teague* under its power to define the jurisdiction of the lower federal courts. That also leaves states free to fashion their own rules for applying new rules in their own courts. In fact, the Louisiana Supreme Court expressly declared that it was not obligated to follow *Teague*.[18] However, if the Court's power to announce and apply new rules retroactively derives from the Constitution, states have no discretion on applying new federal constitutional rules in their courts.

The Court partially addressed these issues in *Danforth v. Minnesota*.[19] The Minnesota Supreme Court, under state law, gave retroactive effect to the Supreme Court's decision in *Crawford v. United States*,[20] which announced a new rule granting criminal defendants the right to cross-examine any testimonial statement at trial. Minnesota did so despite the fact that the Supreme Court had earlier held in *Whorton v. Bockting* that *Crawford* was not retroactive.[21] While the *Danforth* Court acknowledged that *Whorton* did not require states to apply *Crawford* to cases on collateral review, it nonetheless held that states could choose to apply *Crawford* retroactively under state law.[22]

Central to *Danforth* was the Court's framing of retroactivity as deciding what remedies are available for constitutional violations.[23] Under this view,

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[13] *Id.* at 727.

[14] *Id.*

[15] State v. Tate, 130 So.3d 829, 829 (La. 2013).

[16] *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (Douglas, J., dissenting).

[17] Danforth v. Minnesota, 552 U.S. 264, 277 (2008).

[18] State ex rel. Taylor v. Whitley, 606 So.2d 1292 (La. 1992).

[19] *See Danforth*, 552 U.S. at 282.

[20] Crawford v. United States, 541 U.S. 36 (2004).

[21] *See* Whorton v. Bockting, 549 U.S. 406, 409 (2007).

[22] *See Danforth*, 552 U.S. at 282.

[23] *Id*. at 275.

Teague identifies the remedies available in federal habeas.[24] But states are free to provide broader remedies under their own law.[25] Shrugging off concerns that this approach undermined the uniform enforcement of federal law—a key value in *Teague*—the Court justified the result as a necessary consequence of the states' independent sovereignty. Thus, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law."[26]

Chief Justice Roberts, in a dissent joined by Justice Kennedy, countered that retroactivity of constitutional rules is always an issue of federal law.[27] The Supremacy Clause therefore binds states to the Court's retroactivity decisions. Roberts argued that retroactivity does not involve a choice of available remedies, but a choice of law, specifically, whether the old law or the new law applies.[28] Only the Supreme Court may make this choice for constitutional rules. Roberts dismissed the majority's grounding of *Teague* in the federal habeas statute as irrelevant, since Congress' authority over the lower federal courts cannot usurp the Court's prerogative to decide federal law.[29]

Despite the majority's broad language empowering states to decide what relief they afford to constitutional rights, it limited *Danforth* to situations where states provide broader relief on collateral review than what is required under *Teague*.[30] The Court declined to resolve if states must apply retroactive rules in post-conviction, or if Congress could amend *Teague* by statute.[31]

The debate in *Danforth* over the meaning of retroactivity helps explain why the Court insisted on addressing its jurisdiction in *Montgomery*. The Court, in an opinion written by *Danforth* dissenter Justice Kennedy, held that states must give retroactive effect to new substantive rules, those which prohibit states from criminalizing certain conduct or imposing certain punishments for a class of defendants.[32] The Court explained that new substantive rules categorically barring penalties are required by the Constitution itself.[33] Any penalty that violates a substantive rule is therefore void and unenforceable, regardless of when the defendant's conviction

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[24] *Id.*
[25] *Id.* at 282.
[26] *Id.* at 288.
[27] *Id.* at 291 (Roberts, C.J., dissenting).
[28] *Id.* at 307.
[29] *Id.* at 308-09.
[30] *Id.* at 269 n.4 (majority opinion).
[31] *Id.*
[32] Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016).
[33] *Id.* at 729-30.

became final.[34]

Though the majority did not mention the "choice of remedies" versus "choice of law" conflict that animated *Danforth*, *Montgomery* unmistakably adopts the choice of law view, at least for substantive rules. The majority also did not address whether Congress could overrule *Teague*. Nonetheless, Congress clearly may not, again, at least with respect to new substantive rules.[35] *Montgomery* thus preserves the Court's supremacy *vis-a-vis* the states and Congress in declaring new substantive rules

Beyond settling these fundamental issues of federalism and the separation of powers, the practical import of *Montgomery*'s jurisdictional ruling is elusive. Had the Court held it did not have jurisdiction in *Montgomery*, it could have eventually addressed *Miller*'s retroactivity via a federal habeas case. Several such cases were pending when the Court issued *Montgomery*,[36] and all of the Court's post-*Teague* retroactivity decisions arose from federal habeas.[37] A decision out of federal habeas would have had the same effect as a decision out of state collateral review: states would have to apply *Miller* if it was retroactive, or they would be left to decide whether to apply *Miller* if it was not.

II. THE *MONTGOMERY* COURT'S SHAPING OF *MILLER* INTO A CATEGORICAL RULE

Having established its authority to decide whether *Miller* announced a retroactive substantive rule, the Court turned to this main issue. The Court first determined that substantive rules must categorically limit the states authority to either define crimes or impose a punishment on a class of persons.[38] By this rubric, *Miller*'s chances of qualifying as substantive were grim. *Miller* pointedly stated that it was *not* categorically barring a sentence for a class of offenders, and that it was only mandating that states follow a certain process—considering a juvenile's youth and attendant circumstances—before imposing punishment.[39] For this reason, many who argued that *Miller* was substantive relied on the Court's earlier suggestion that substantive rules include, but are not necessarily limited to, categorical guarantees.[40] To assert otherwise would seemingly require the Court to

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[34] *Id.* at 731-32.

[35] *See id.* at 741 (Scalia, J., dissenting).

[36] *See, e.g.*, Davis v. McCollum, 798 F.3d 1317 (10th Cir. 2015), *cert. denied*, No. 15-8005, 2016 WL 531245 (Jan. 22, 2016).

[37] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 413 (2007).

[38] *Montgomery*, 136 S. Ct. at 729.

[39] Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

[40] *See, e.g.*, Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of* Miller v. Alabama *Under* Teague v. Lane, 18 CUNY L.

contradict itself.

But that is essentially what the Court did. The Court minimized its statement in *Miller* as too general. It claimed that, while *Miller* did not bar a penalty for all juveniles, *Miller* did ban life imprisonment without release for all juveniles whose crimes do not reflect irreparable corruption.[41] Fortunately, the Court's innovation has precedent, even if *Miller* is not that precedent. As the *Montgomery* Court suggested, creating a categorical bar is an exercise in line drawing.[42] *Roper* drew a line banning the death penalty for juveniles. *Graham* drew a more specific line prohibiting life imprisonment for juveniles convicted of non-homicide offenses. In the death penalty, the Court has drawn a host of lines exempting those with a mental disability,[43] those who are insane,[44] those who have not committed a homicide,[45] and those who did not intend to commit a homicide.[46] The Court has extended this line drawing beyond extreme sentencing to prohibit any punishment for "status offenses," such as being addicted to drugs[47] or too poor to pay a fine.[48]

Most importantly, *Montgomery* applied *Miller*'s line drawing to *all* life without parole sentences imposed on juveniles, though *Miller* specifically addressed the constitutionality of *mandatory* life without parole for juveniles. This likely means that states must provide collateral review for all juveniles serving life without the possibility of parole, regardless of whether those sentences were mandatory. Think of it this way: the Court's prohibition in *Atkins v. Virginia*[49] on executing the mentally disabled is a retroactive, substantive rule.[50] It gave every death row inmate the right to establish they belonged to the new 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.[51]

REV. 21, 26 (2014) (arguing that *Miller* announced a substantive obligation which should be found retroactive under *Teague*); Beth A. Colgan, Alleyne v. United States*, Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L. R. DISC. 262, 263 (2013).

[41] *Montgomery*, 136 S. Ct. at 734.

[42] *Id.*

[43] Atkins v. Virginia, 536 U.S. 304, 305 (2002).

[44] Ford v. Wainwright, 477 U.S. 399, 400 (1986).

[45] Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

[46] Enmund v. Florida, 458 U.S. 782, 787 (1982).

[47] Robinson v. California, 370 U.S. 660, 678 (1962).

[48] Tate v. Short, 401 U.S. 395, 397 (1971).

[49] Atkins v. Virginia, 536 U.S. 304 (2002).

[50] Penry v. Lynaugh, 492 U.S. 302, 303 (1989), *overruled by Atkins*, 536 U.S. at 304.

[51] *Montgomery*, 136 S. Ct. at 735.

III. THE ADEQUACY OF PAROLE UNDER *MILLER*

The *Montgomery* majority anticipated the chaos of states holding sentencing hearings that require the state to prove that a juvenile was irreparably corrupt at the time of an offense from decades ago.[52] It therefore suggested states could avoid these difficulties by granting juveniles parole.[53] This conclusion necessarily assumes that access to parole would protect juveniles from dying in prison by allowing them to demonstrate their maturity and capacity for change.

Yet, if the central premise of *Miller* is that, regardless of their crimes, nearly every juvenile must have a meaningful opportunity for some years outside prison walls, it is not at all clear that parole always satisfies this standard, either doctrinally or practically. Doctrinally, the Supreme Court has refused to recognize a constitutional right to release before the end of a valid sentence.[54] States are not obligated to even have a parole system, and, when they do, they are free to define the factors relevant to release.[55] One's expectation of release is thus entirely up to the state.[56]

Practically speaking, individuals convicted of violent offenses stand little chance of being granted parole in many states.[57] As Professor Sarah French Russell explains, "[t]he nature of the crime of conviction is often the driving force in parole decisions."[58] This status quo is deadly for juveniles whose only chance at release may be their state's parole system. It demonstrates that merely offering parole cannot reliably guarantee that a juvenile whose crime did not reflect irreparable corruption might still die in prison.

For *Miller* truly to restore juveniles' hope for release, the ruling must regulate not only the state's sentencing authority, but also its obligation to grant juveniles parole. Though *Miller* most directly guarantees juveniles an opportunity at release, the decision contains the corollary that juveniles who demonstrate maturity and rehabilitation as adults must eventually be released. Reformed juveniles could of course be denied release for some minimum amount of time to serve the penological interests of retribution, deterrence, and rehabilitation. But at some point those interests must yield to the juvenile's right to release. Determining that point cannot be left to the

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[52] *Id.* at 736.
[53] *Id.*
[54] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).
[55] *Id.* at 7-8.
[56] *Id.* at 11.
[57] Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L. J. 373, 397 (2014).
[58] *Id.*

whim of state executive branches. It would require judicial review of whether a parole system complied with *Miller*. Without this check on a state's ability to deny parole, *Miller* would become an empty promise.[59]

At a minimum, *Miller*'s liberty interest in release before death also allows juveniles to challenge deficient parole procedures. For instance, *Miller* likely limits a state's ability to maintain release factors that facially undermine the decision's intent. These include allowing a parole board to deny release based on the charge alone and without considering a juvenile's age and immaturity at the time of the offense, or to treat a juvenile's age at the time of the offense as an aggravating, rather than a mitigating, circumstance.

A form of this challenge has succeeded in Michigan, a state with approximately 360 juveniles serving mandatory life sentences without parole, 334 of which were on collateral review.[60] In 2013, as part of a civil rights action brought under 42 U.S.C. § 1983, a federal district court invalidated Michigan's mandatory sentencing scheme as applied to juveniles.[61] Rather than ordering resentencings—a remedy unavailable in § 1983 civil rights suits[62]—the district court ordered the parties to propose a parole system that would afford juveniles a meaningful opportunity for eventual release. The case is pending at the Sixth Circuit.

However, the case's fate is uncertain. Because of *Montgomery*, all Michigan juveniles formerly serving mandatory life imprisonment are entitled to resentencing under Michigan law. These juveniles now face a sentencing range between a minimum term of twenty-five to forty years, and a maximum term of not less than sixty years. They may only receive life without parole if the prosecutor moves to seek the sentence and the court holds an individualized sentencing hearing.[63] This relief under state law may moot the §1983 action. Regardless, the case could offer a blueprint for *Miller* to reform juvenile parole procedures.

While its potential for improving the parole process for juveniles is promising, *Miller*'s regulation of parole systems extends beyond procedure. *Montgomery* reading of *Miller* leaves states no room to disagree with the Court's assessment that juvenile life without parole should be rare. Thus, even with appropriate procedures in place, a state's parole system arguably still violates *Miller* if it fails to make irrevocable life sentences sufficiently

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[59] In this way, *Miller* distinguishes juveniles from the typical adult seeking parole. Because states have no obligation to release adults before the end of their sentence, a valid conviction terminates an adult's federal liberty interest in release. Not so with juveniles under *Miller*.

[60] Buskey & Korobkin, *supra* note 40, at 25.

[61] Hill v. Snyder, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013).

[62] Heck v. Humphrey, 512 U.S. 477, 487 (1994).

[63] MICH. COMP. LAWS ANN. § 769.25(6) (West 2016).

rare. That means a juvenile could contest a parole system under the Eighth Amendment by demonstrating that too many youth still unduly risk serving death-in-prison sentences. Even if a state's parole process succeeds in making life imprisonment rare for juveniles, it would remain vulnerable to attack if impermissible factors like race result in arbitrary parole outcomes.[64]

Juveniles who wish to show they are trapped in an unconstitutional parole process face daunting challenges. The first is empirical. Establishing that a parole system does not reliably release juveniles requires building a robust record on parole release decisions. Ideally, that record would establish that deserving juveniles were routinely being denied relief. Since most states do not provide access too much or all of the information the parole board relies on to make decisions, this may prove an insurmountable barrier for most juveniles.[65] The second barrier is temporal. *Montgomery* does not force states to release juveniles immediately, and it offers no guidance on how long states may delay the decision. As a result, release data for any single year, or even several years, may not suffice to challenge a parole system. A conservative release rate one year says nothing about release rates for the next year, especially if there are changes to the parole authority's composition or political context. The third barrier is conceptual: how "rare" is "rare"? The Court provided no standards for this evaluation. It also did not require any particular fact-finding before a state denies release, leaving no objective basis for judging a parole system's faithfulness to *Miller*. The Court's vagueness in defining the contours of a new rule is not unusual, and future cases may force the Court to speak more clearly.[66]

The fourth, and perhaps most daunting, barrier is institutional. Parole typically aims to gauge an inmate's fitness to re-enter society. But prison is a terrible place to reform. This is especially true for children, most of whom enter prison with troubled backgrounds, only to be further traumatized by violence and abuse while in custody.[67] Those not broken by this experience may carry a disciplinary record that bars them from enrichment programs. The problem of access is more acute for juveniles newly granted the opportunity for parole after *Miller*, many of whom are in states that deny

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[64] *Cf*. Furman v. Georgia, 408 U.S. 238 (1972).

[65] Russell, *supra* note 57, at 397.

[66] *Compare* Gerstein v. Pugh, 420 U.S. 103 (1975) (holding that states must make probable cause determinations without undue delay for incarcerated arrestees), *with* Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991) (holding that states must make probable cause determination without undue delay, but setting presumptive limit of 48 hours).

[67] *See* Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, ATLANTIC, Jan. 8, 2016, http://www.theatlantic.com/

education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ [https://perma.cc/JC5H-FKHA].

reformative programming to those serving life sentences.[68] Consequently, juveniles seeking parole must survive prison environments designed to obscure their path to redemption. The risk that prison will irreparably rob juveniles of their capacity to reform will cloud any inquiry into whether a parole board is properly releasing juveniles.

These obstacles emphasize the need for advocates to ensure that *Montgomery*'s nod to parole does not allow states to turn their backs on *Miller*. Restoring the hopes of juveniles for release demands efforts in the courts and state legislatures to reform parole procedures, gather data on release outcomes, concretize *Miller*'s meaning and improve prison conditions.

CONCLUSION

When Henry Montgomery stepped inside Angola forty-six years ago, he literally did not have the right to hope he would take another breath in the free world. Miraculously, now he does. To resolve the often-dry subjects of jurisdiction and retroactivity, *Montgomery* canvassed the meaning of federalism, the separation of powers, and ultimately, hope itself. Nonetheless, the decision will be of little import to those like Mr. Montgomery if the Court allows states simply to thwart juveniles' opportunity for release with an unaccountable parole process. *Miller* and *Montgomery* therefore must extend to the parole process and its outcomes, an interpretation easily supported by *Montgomery* and the Court's recent juvenile sentencing decisions. Realizing substantive limitations on parole, a process traditionally left to executive discretion, likely will not come any time soon, if at all. But Mr. Montgomery's story provides some measure of the promise for hope to come.

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[68] *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 1, 29 (2010).