New York Law Journal

Outside Counsel

Children Sentenced to Life: A Struggle for the N.Y. Board of Parole

Issa Kohler-Hausmann, Avery P. Gilbert and Christopher Seeds, New York Law Journal
January 12, 2017

Recent U.S. Supreme Court Eighth Amendment jurisprudence, including this year's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), holds that except in rare cases a life sentence without parole for a crime committed by a juvenile is disproportionate punishment in violation of the cruel and unusual punishment clause. In accordance with these cases, persons sentenced to life as juveniles now must be provided a "meaningful opportunity" for release based on demonstrated maturity and rehabilitation.

These recent cases require New York state to re-evaluate its parole law, regulations, and practices for four reasons: (1) New York is one of only two states that automatically prosecutes teenagers 16 and up as adults; (2) children as young as 13 convicted of murder are automatically sentenced to life in prison with opportunity for parole; (3) the New York Board of Parole does not currently focus its parole release decision-making on whether or not offenders have been reformed and are safe to release, i.e., their "maturity and rehabilitation"; and (4) the New York parole scheme does not currently afford procedural protections to ensure that the Board of Parole provides persons serving life sentences for crimes committed as juveniles a meaningful opportunity for release.

The New York State Board of Parole is now in the process of developing new regulations to comply with constitutional principles. Unfortunately, the Board's proposed new regulations are unlikely to pass constitutional muster.

U.S. Supreme Court Case Law

The backdrop for New York's proposed parole release regulations starts with *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth Amendment bars death sentences for offenders under the age of 18. Then, in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the court held that a sentence of life imprisonment without the possibility of parole imposed upon a juvenile is cruel and unusual punishment in violation of the U.S. Constitution.

In these cases, the court recognized a substantial volume of neuroscience evidence demonstrating the undeveloped nature of the adolescent brain. The court also recognized psychological science showing that teenagers are more impulsive, more susceptible to peer pressure, less able to extricate themselves from crime-inducing environments, and more lacking in foresight than adults. This scientific evidence led the court to conclude that, "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. "Because juveniles have diminished culpability and greater prospects for reform [] 'they are less deserving of the most severe punishments.'" Id. (internal citations omitted). While a state "is not required to guarantee eventual freedom to a juvenile offender," it must offer a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *Miller*, 132 S. Ct. at 2469.

In *Montgomery*, decided in 2016, the U.S. Supreme Court confirmed that *Miller* announced a new substantive rule of constitutional law that applied retroactively. Moreover, the Supreme Court held that proceedings bearing life sentences for offenders sentenced as juveniles must, in order to avoid being categorically unconstitutional, "afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 724.

Here in New York, the Third Department decided a case in April 2016 that addressed whether the New York Board

of Parole was in compliance with this line of cases. The Third Department relied on the "foundational principle" of the Eighth Amendment jurisprudence regarding punishment for juveniles, citing *Miller* for the proposition "that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children." It held that, "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, No. 521536, 2016 WL 1689740 (3d Dep't 2016). Citing *Graham*, the Appellate Division described a "meaningful opportunity" for release as one in which the inmate's youth at the time of the crime and its attendant characteristics structure the inquiry both in relationship to (1) the commission of the crime for which the individual is serving an indeterminate life sentence and (2) the individual's capacity for reform and rehabilitation.

'Meaningful Opportunity'

For decades, commissioners on the New York State Board of Parole have denied parole release to reformed and rehabilitated individuals who have served their minimum sentence. New York's parole scheme does not differentiate, in substance or procedure, its parole release evaluation between persons serving indeterminate life sentences for crimes committed when they were juveniles and persons serving indeterminate life sentences for crimes committed as adults. Commissioners serving on the Board frequently give the seriousness of the crime of conviction a determinative role in their decision-making—no matter how unequivocally an inmate's educational achievements and disciplinary record evidence rehabilitation and reform. Reliance on the crime of conviction to consistently deny parole release to persons serving indeterminate life sentences for crimes committed as juveniles runs afoul of the proportionality principles announced in the above cases.

Following *Hawkins*, the New York Board of Parole this summer proposed revisions to its parole release regulations to bring its practices in line with recent case law. The proposed regulations, however, do not appear poised to meet the standards of the Eighth Amendment to the U.S. Constitution.

First, the proposed regulation amending NYCRR §8002.1(c)(1) simply lists youth as one of many "factors" that the Board has unstructured discretion to consider and weigh in any fashion it chooses. However, the Supreme Court has long made clear that "youth is more than a chronological fact" for Eighth Amendment purposes. Rather, it is a constitutionally relevant status that demands a particular type of inquiry: "[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). The *Miller* line of cases points to some of the specific considerations that follow from this, such as assessing the crime in light of the perpetrator's youth and concomitant lack of impulse control, a limited ability to plan alternate courses of action, the difficulty young people have extricating themselves from crime-inducing circumstances, and greater susceptibility to peer pressure. Therefore, any adequate regulation would direct the Parole Board to specifically consider the youthful perpetrator's crime in light of such hallmark features of youth. Second, the *Miller* line of cases requires parole boards to focus the release decision on demonstrated rehabilitation and reform—not the seriousness of the crime. Meeting this standard will require the parole regulation to clarify that if a prisoner sentenced to life as a juvenile has served his or her minimum sentence and demonstrated maturity and rehabilitation—for example by maintaining a disciplinary record that shows the development of impulse control, educational achievements that demonstrate an ability to plan for the future, and ability to resist peer pressure—then that person must be released to parole supervision. Current parole release decision-making is incapable of providing the thoughtful evaluation of maturity and reform that is required by the Constitution. As a recent New York Times series exposed, commissioners conducting parole hearings typically receive prisoners' parole files, at best, the day before the hearing and give them cursory review. They often conduct 15-30 hearings in one day devoting roughly less than 20 minutes to each interview. The type of inquiry the Board must make to meet constitutional principles will require a wholesale change in its method of evaluating inmates for release, in addition to re-training commissioners on how to comply with the law and how to evaluate relevant psychological and developmental evidence.

Finally, the section of the proposed regulations intended to address prisoners sentenced as juveniles under §8002.2(c) fails to afford the procedural protections that are constitutionally required in order to give those serving life sentences a meaningful opportunity for release. For example, it is likely that assistance of counsel is necessary to ensure that prisoners life-sentenced as juveniles are able to mount evidence at their parole interviews showing that their crime was a crime borne of youth, not a sign of "irretrievable depravity," and that they have matured and

grown into law-abiding contributors to society.

Stakes Are High in New York

New York is particularly challenged in its efforts to come into compliance with this new constitutional law. New York is one of only two states in the nation to automatically prosecute all young people as adults upon their 16th birthday. Furthermore, children at the ages of 13, 14, and 15 accused of murder and certain other violent crimes automatically are sent to criminal court where they are prosecuted as adults and sentenced as "juvenile offenders." NY Criminal Procedure Law §1.20(42). The New York legislature has imposed a mandatory maximum life sentence for all children convicted of murder, even those as young as 13 years old.

The American Civil Liberties Union recently released a detailed national report, entitled "False Hope", on parole for persons serving life sentences for crimes. The report documented 632 people serving life sentences for offenses they committed between the ages of 13 and 17 in New York state. The report also found pronounced racial disparities: Of the 78 individuals serving a life sentence in New York who were 13 to 15 at the time of their offense, 69.2 percent are Black, 17.9 percent are Latino, and 11.5 percent are white (the final person is listed as other). Of the 1,012 individuals serving life with parole who were 16 to 18 at the time of their offense, 634 are Black (62.6 percent), 250 are Latino (24.7 percent), 110 are white (10.9 percent), and 18 individuals are listed as other (1.8 percent). Although these individuals are constitutionally entitled to a parole review process that provides a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation," New York's Parole Board practices are not set up to provide that opportunity. According to the ACLU report, the Board conducted over 10,000 parole hearings in 10 months in 2014. These hearings may be conducted in a matter of five to 10 minutes. The commissioners usually get the file and submissions—hundreds of pages documenting decades of program participation, institutional records, reentry plans and letters of support—the day of the hearing and look at the information only when the person eligible for parole release comes into the room. With between 15 and 30 hearings to prepare for each day, on average, commissioners do not read these extensive submissions. They also lack training in juvenile psychology and development, leaving them ill equipped to evaluate the types of evidence relevant to youth mitigation and reform.

Without the time or resources for thoughtful consideration, many Boards base their decisions solely on the seriousness of the crime—no matter how long ago it was committed or how young the person was at the time of their offense—and deny parole to the overwhelming majority of applicants, sometimes even when there is strong evidence of their rehabilitation. Decades of habituated practice of commissioners focusing on the nature of the crime itself, something taken into account already by a court and a static factor the prisoner cannot change, has not well prepared the New York Board of Parole for its new constitutional obligation to provide "even those convicted of the most heinous crimes" a "meaningful opportunity to obtain release."

Conclusion

The question ofwhat exactly constitutes a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" is the next frontier in the development of the *Graham-Miller-Montgomery* line of cases. Legislatures and courts across the country are struggling with this question, and most that have addressed the question have gone beyond what New York is currently proposing in terms of the procedural protections to ensure that a parole hearing is substantively a meaningful opportunity for release. For example, the Massachusetts Supreme Judicial Court held that juveniles convicted of both first- and second-degree murder are entitled to representation by counsel, who can make opening and closing statements, and the payment of expert fees in connection with their initial application for parole. Lifers sentenced when they were children are also entitled to appointment of counsel in California, where the Legislature recently extended the enhanced consideration provided for youth offender parole hearings from eighteen to age 23. New York could be a national leader if it chooses to resolve the conflict between its institutional practice and its constitutional obligations.

Issa Kohler-Hausmann is an associate professor of law and sociology at Yale. Avery P. Gilbert is an attorney and and partner at Engage Strategies. Christopher Seeds is an attorney in private practice.
