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Juveniles' Overdue Rights: Integrating the Rights-of-Minors Provision With the Cruel and Unusual Punishment Analysis in Montana

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JUVENILES' OVERDUE RIGHTS: INTEGRATING THE RIGHTS-OF-MINORS PROVISION WITH THE CRUEL AND UNUSUAL PUNISHMENT ANALYSIS IN MONTANA

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> "Asking a court, based on professional opinion, to determine whether a teenager is irreparably corrupt or permanently incorrigible seems more like a quest for the Holy Grail than a scientifically based inquiry."[1]

I. INTRODUCTION

Steven Wayne Keefe was abandoned by his biological father at a young age and neglected by his mother.[2] His mother's partner subjected him to abuse; during one instance Keefe thought he was "going to lose [his] ears."[3] The abuse Keefe experienced did not end at the walls of his home; a schoolteacher once hit him in the face so hard that it knocked his teeth out.[4] Keefe struggled to obtain the attention of his mother through positive behavior, which led him to plead for her attention with criminal behavior.[5] When he was just shy of his eighteenth birthday, during a robbery gone wrong, he killed three innocent members of a family.[6] He was tried by a jury and sentenced to life without parole.[7]

Keefe's situation and similar situations, where a juvenile with a difficult upbringing commits a serious crime, pose unique challenges for courts because the Cruel and Unusual Punishment Clause of the Eighth Amendment applies with special force to juvenile offenders.[8] Juvenile offenders are constitutionally different from their adult counterparts for purposes of sentencing by virtue of their psychological differences.[9] Unlike the federal

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1. State v. Keefe, 478 P.3d 830, 843 (Mont. 2021) (McGrath, C.J., concurring in part and dissenting in part).

2. Appellant's Opening Brief at *5, *State v. Keefe*, 478 P.3d 830 (Mont. 2021) (No. DA 19-0368).

3. *Id.*

4. *Id.* at *5–6.

5. *Id.* at *6.

6. *Keefe*, 478 P.3d at 849; Appellant's Opening Brief, *supra* note 2, at *4–5. R

7. *Keefe*, 478 P.3d at 833. Keefe challenged his sentence as violative of the Cruel and Unusual Punishment Clause in 2017 through a petition for postconviction relief and again in 2019 with a motion for reconsideration in front of a new judge and an appeal. *Id.* at 833–35.

8. *See*, *e.g.*, Miller v. Alabama, 567 U.S. 460, 481 (2012); Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

9. *See*, *e.g.*, *Miller*, 567 U.S. at 481; *Roper*, 543 U.S. at 569–70.

courts, Montana courts have not taken the opportunity to construe the application of Montana's analogous cruel and unusual punishment provision, Article II, Section 22, to juvenile offenders. As a result, Montana courts march lockstep with federal juvenile criminal precedent.[10] It therefore remains unresolved whether Montana law should provide greater protections to juvenile defendants than federal law concerning the constitutional parameters of what punishments a juvenile may be subject to and the corresponding process necessary for a court to implement such punishment.[11]

This comment proposes that a juvenile defendant should be entitled to heightened protections in Montana pursuant to the unique protections furnished to minors by the Montana Constitution in the rights-of-minors provision.[12] The rights-of-minors provision, Article II, Section 15, entitles minors to the same fundamental rights as adults provided in the Declaration of Rights unless such a right is infringed by "laws designed and operating to enhance the protection for [minors]."[13] This comment proposes that Article II, Section 15 could be construed with Article II, Section 22 to *enhance*, rather than place on equal footing with adults, the rights of juvenile defendants under Montana law. Montana could enhance a juvenile defendant's protections under Article II, Sections 15 and 22 because the rights granted to minors by Article II, Section 15 are not exhausted by the Declaration of Rights, the Constitutional Convention delegates preserved the ability to enhance minors' protections and indicated an objective that Montana could be a "leader among all the states in recognizing the rights of [minors]," and because Montana has extended additional protections to individuals in Montana courts beyond federal law in other key areas of criminal law.[14]

10. Steilman v. Michael, 407 P.3d 313, 318–19 (Mont. 2017) (Montana sentencing judges are only required to consider the *Miller* factors before sentencing a juvenile to life without the possibility of parole); Beach v. State, 348 P.3d 629, 636–37 (Mont. 2015) ("Beach has failed to explain why [Article II, Sections 15 and 22] of the Montana Constitution require a different retroactivity model for *Miller*.").

11. State constitutions cannot decrease the protections granted by the federal Constitution; they can, and should, grant more protections than the federal Constitution. As emphasized by Justice Brennan, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977).

12. MONT. CONST. art. II, § 15; 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1750 (1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT] (Delegate Monroe explaining that "the broad outline of the kinds of rights young people possess does not yet exist[,]" and that "the crux of the committee proposal [was] to recognize that persons under the age of majority have the same protections . . . from governmental and majoritarian abuses as do adults.").

13. MONT. CONST. art. II, § 15; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining the intent of Article II, Section 15).

14. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe supporting the adoption of Article II, Section 15). The trend of the Supreme Court of the United States has been to enhance rights of juvenile offenders compared to adults due to the psychological differences of minors; therefore, for Montana to be a "leader," it could enhance juvenile offenders' rights under Article II,

This comment focuses on the sentence to life without the possibility of parole—a punishment that has received increased publicity as applied to juvenile offenders—to explore the ways that Montana could heighten the protections afforded to juvenile defendants beyond those guaranteed by federal law.[15] Section II begins by outlining both the Cruel and Unusual Punishment Clause and Article II, Section 22 and distinguishes their applications. Section III compares the application of each provision to juvenile defendants to illustrate how Montana has mirrored federal law. Section III suggests that Montana expand a juvenile defendant's protections by integrating Article II, Section 15, to which the United States Constitution bears no counterpart, into the cruel and unusual punishment analysis under Article II, Section 22 because Montana has departed from federal law in other key areas of criminal law pursuant to public policy and the Montana Constitution. Section IV evaluates the outcome of the Montana Supreme Court's recent disposition in *State v. Keefe*,[16] which demonstrates the absence of Article II, Section 15 in the State's juvenile cruel and unusual punishment analysis under Article II, Section 22. This comment concludes by recommending two avenues that Montana could pursue to delimit boundaries for imposing life without parole on a juvenile.

II. The Historical Underpinnings of the Cruel and Unusual Punishment Clause

A. The Eighth Amendment of the United States Constitution

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[17]

The Cruel and Unusual Punishment Clause of the Eighth Amendment originated from a 1553 statute drafted by the Parliament of England emphasizing that laws with lighter penalties are "obeyed and respected [more

Sections 15 and 22 beyond those provided by the Cruel and Unusual Punishment Clause. *Miller*, 567 U.S. at 476–77 (proscribing a mandatory sentence of life without parole for juveniles); Graham v. Florida, 560 U.S. 48, 82 (2010) (proscribing life without parole for juveniles convicted of a non-homicide offense); *Roper*, 543 U.S. at 578 (proscribing the death penalty for juvenile offenders).

15. Jones v. Mississippi, 141 S. Ct. 1307, 1309 (2021) (challenge to life without parole conviction of murder for killing grandfather at age fifteen); *Miller*, 567 U.S. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *Graham*, 560 U.S. at 64 ("[O]nly 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely . . . ."); Washington v. Haag, 495 P.3d 241, 251 (Wash. 2021) ("[W]e held that under article I, section 14 of our constitution, any life-without-parole sentence for a juvenile offender is unconstitutional.").

16. 478 P.3d 830 (Mont. 2021).

17. U.S. Const. amend. VIII.

often] than their more rigorous counterparts."[18] Noted by Sir William Blackstone, the "right to be free from cruel and unusual punishment" derived from "some unprecedented proceedings in the court of King's bench, in the reign of King James the Second."[19] The concern that the "law be humane" and its punishments "not shock the conscience of society" is the cornerstone of the Cruel and Unusual Punishment Clause.[20]

Pursuant to the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Supreme Court of the United States has rendered certain punishments unconstitutional. In a 1910 decision, the Court in *Weems v. United States*[21] determined that a sentence of 15 years' incarceration while chained from the wrist to the ankle for the crime of falsifying public and official documents was cruel and unusual.[22] The Court in *Weems* noted the absence of a clear definition for "cruel and unusual" and further proclaimed that such a definition will evolve and "acquire meaning as public opinion becomes enlightened by a humane justice."[23] The Court emphasized that although the legislature retains discretion to define crimes and their respective punishments, this discretion remains subject to constitutional limitations as interpreted by the judiciary.[24]

The Court reaffirmed its proposition that the definition of "cruel and unusual" is an evolving one in the 1958 decision *Trop v. Dulles*.[25] The *Trop* decision offered a more comprehensible guiding principle to be applied prospectively, expressing that the meaning of "cruel and unusual" is derived from "the evolving standards of decency that mark the progress of a maturing society."[26] In *Trop*, loss of citizenship as a form of punishment was concluded to offend such standards and was characterized as being "more primitive than torture."[27]

18. The Treason Act, 1 MARY Sess. 1, c. 1 (1553) ("And laws also justly made for the preservation of the Commonwealth, without extreme Punishment or great Penalty, are more often for the most Part obeyed and kept, than Laws and Statutes made with great and extreme Punishments."); RICK APPLEGATE, BILL OF RIGHTS STUDY 180 (Mont. Constitutional Convention Comm'n, Montana Constitutional Convention Study No. 10, 1972) (citing The Treason Act, 1 MARY Sess. 1, c. 1 (1553)). This concept was not novel; three chapters of the Magna Carta had previously been dedicated to the regulation of "excessive amercements." Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 845–46 (1969).

19. APPLEGATE, *supra* note 18, at 180 (internal quotation marks omitted) (Rick Applegate introduced this principle from Blackstone's *Commentaries on the Laws of England*).

20. *Id.*

21. 217 U.S. 349 (1910).

22. *Id.* at 362–64, 381.

23. *Id.* at 368, 378, 382 (concluding that Weems's punishment "would have been repugnant to the Bill of Rights" even if the minimum penalty had been imposed).

24. *Id.* at 378–79.

25. 356 U.S. 86, 100–01 (1958).

26. *Id.* at 101.

27. *Id.*

To determine what punishments offend the standards of the Cruel and Unusual Punishment Clause, the Court undergoes a comparative analysis considering (1) "the gravity of the offense and the harshness of the penalty"; (2) what sentence may be imposed for the same crime in the jurisdiction where the commission occurred; and (3) what sentence may be imposed for the same crime in other jurisdictions.[28] These comparative factors do not form a "rigid three-part test[,]" and no single factor is considered dispositive; rather, they guide the disproportionality analysis, and the "combination of objective factors [makes] such analysis possible."[29] If this comparative analysis reveals that the sentence imposed is more severe than would have been imposed elsewhere in that jurisdiction or other jurisdictions, then it falls inside the ambit of the protections guaranteed by the Cruel and Unusual Punishment Clause.[30] The comparative analysis is subject to a different level of scrutiny depending on whether the sentence is capital or non-capital. The Court implemented a strict proportionality test in capital cases, which requires the sentence to be proportional to both the nature of the offense and the offender.[31] Non-capital cases are not entitled to this heightened level of strict proportionality and will only be presumed unconstitutional when the punishment is "grossly disproportionate" to the nature of the offense.[32] Today, proportionality remains at the heart of the Cruel and Unusual Punishment Clause.[33]

B. Article II, Section 22 of the Montana Constitution

> "Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."[34]

28. Solem v. Helm, 463 U.S. 277, 292 (1983).

29. *Id.* at 290 n.17.

30. *Id.* at 300, 303 ("It appears that Helm was treated more severely than he would have been in any other State.").

31. *Id.* at 288–89; *see also* Coker v. Georgia, 433 U.S. 584, 599 (1977) ("[T]he death sentence imposed on Coker is a disproportionate punishment for rape.").

32. Harmelin v. Michigan, 501 U.S. 957, 1000–01 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (stating that "the objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence," and further, "[t]he Eighth Amendment . . . forbids only extreme sentences that are 'grossly disproportionate' to the crime.").

33. *See*, *e.g.*, Miller v. Alabama, 567 U.S. 460, 469 (2012) (citing Graham v. Florida, 560 U.S. 48, 59 (2010)) ("The concept of proportionality is central to the Eighth Amendment."); *Harmelin*, 501 U.S. at 964 ("[T]he 'general principle of proportionality' [is] 'deeply rooted and frequently repeated in common-law jurisprudence,' [and was] embodied in the English Bill of Rights 'in language that was later adopted in the Eighth Amendment . . . .'") (citations omitted).

34. MONT. CONST. art. II, § 22.

1. Adopting Article II, Section 22

When initially drafted and ratified in 1889, the Montana Constitution adopted its own cruel and unusual punishment provision in its Declaration of Rights comprised of nearly identical language to the Eighth Amendment of the United States Constitution.[35] Upon amending the Montana Constitution in 1972, the delegates unanimously elected to adopt Article II, Section 22 as previously written in 1889.[36] The language of the provision, as it stood, ensured discretion in its interpretation by providing "the Judiciary and the Legislature adequate flexibility to apply the principle that there shall not be excessive bail, excessive fines, or cruel and unusual punishments."[37]

2. Interpreting Article II, Section 22

This subsection outlines where Montana law diverges from federal law in its application of Article II, Section 22 and one additional area of criminal law, Montana's search and seizure provision in Article II, Section 11. Montana law departs in these areas pursuant to public policy and the Montana Constitution. Consistent with these departures, Montana should enhance a juvenile's protections under Article II, Section 22 by integrating Article II, Section 15 into the juvenile cruel and unusual punishment analysis. Doing so would comport with the Montana Supreme Court's willingness to depart from federal law in other areas of criminal law, particularly when Montana has a unique constitutional provision warranting the departure.

First, Montana applies a presumption of proportionality in cases where the sentence is within the statutorily permitted maximum.[38] This presumption may be overcome upon a showing that the sentence is "so disproportionate" that it "shocks the conscience and outrages the moral sense of community or of justice[.]"[39] Montana's presumption is heightened beyond the federal non-capital "gross disproportionality" standard because it examines

35. U.S. CONST. amend. VIII; MONT. CONST. of 1889, art. II, § 20 (the only difference was the Montana provision's use of "or" instead of "nor").

36. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1771. R

37. *Id.* (Delegate Sullivan supporting the adoption of Article II, Section 22 of the Montana Constitution as previously written in 1889 with no revision to its language).

38. State v. Tadewaldt, 922 P.2d 463, 469 (Mont. 1996); State v. Bruns, 691 P.2d 817, 820 (Mont. 1984).

39. *Tadewaldt*, 922 P.2d at 469 (holding that Tadewaldt's "bare assertion" of disproportionality did not render his sentence cruel and unusual, as he had conceded that he received a lenient sentence under his statute of conviction for possession of Schedule IV drugs). The defendant bears the burden of proving the disproportionality. *Id.*

factors unique to the offender.[40] These factors include the nature of the crime committed, the likelihood the defendant will reoffend, and the probability the defendant will be rehabilitated.[41] Because the test considers factors specific to the offender when considering whether the sentence "shocks the conscience," it more closely reflects the federal strict proportionality test applied in capital cases, which examines the offender and the nature of the offense in comparison to the sentence.[42] To the extent this presumption of proportionality is heightened beyond the federal non-capital proportionality test, it provides additional protections to individuals in Montana courts compared to those in federal courts by requiring consideration of factors specific to the defendant.[43]

Second, the Montana Supreme Court elected not to follow federal law regarding the proportionality analysis for imposing the death penalty in felony murder and accomplice liability cases.[44] In doing so, it rejected the Supreme Court of the United States' analysis in *Tison v. Arizona*,[45] which held that capital punishment may be warranted against a defendant who lacks the requisite knowledge or purpose to cause the result of death so long as the defendant's conduct displayed "reckless indifference to human life."[46] Upon rejecting *Tison*, the Montana Supreme Court adopted the view that a finding of "mere 'reckless indifference' " is not sufficient under Montana's proportionality review, which compels adequate consideration of the defendant's "blameworthiness."[47] Instead, it held that the defendant must exhibit some intent to kill before a court may constitutionally impose the death penalty.[48] Because an intent to kill requires more culpability than mere "reckless indifference to human life," Montana affords criminal de-

40. Harmelin v. Michigan, 501 U.S. 957, 1000–01 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

41. State v. Paulsrud, 285 P.3d 505, 508–09 (Mont. 2012) (citing State v. Rickman, 183 P.3d 49, 53 (Mont. 2008); State v. Webb, 106 P.3d 521, 529 (Mont. 2005); *Bruns*, 691 P.2d at 820).

42. Solem v. Helm, 463 U.S. 277, 288–89 (1983).

43. Montana's presumption of proportionality goes a step further than the federal non-capital comparative analysis because the federal non-capital comparative analysis does not consider detailed factors unique to the offender. Solem v. Helm, 463 U.S. 277, 292 (1983). *See Paulsrud*, 285 P.3d at 508–09 (citing *Rickman*, 183 P.3d at 53; *Webb*, 106 P.3d at 529; *Bruns*, 691 P.2d at 820).

44. Kills On Top v. State, 928 P.2d 182, 206 (Mont. 1996) ("We conclude that a finding of mere 'reckless indifference' is not sufficient for imposition of the death penalty under the proportionality review required pursuant to the Montana Constitution . . . .").

45. 481 U.S. 137 (1987).

46. *Id.* at 158 ("[W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.").

47. *Kills On Top*, 928 P.2d at 206.

48. *Id.* at 206–07 (reversing Vernon Kills On Top's death sentence for felony murder charge because his sentence could not survive the "individualized scrutiny"; he was not present when the victim was killed, did not inflict the injuries responsible for the victim's death, and there was no evidence that he intended to cause the victim's death).

fendants more protection than federal law when imposing capital punishment for felony murder.

Third, Montana has abolished the affirmative defense of insanity in criminal cases, which the Montana Supreme Court upheld as not violative of either the Cruel and Unusual Punishment Clause or the Due Process Clause of the Fourteenth Amendment.[49] Arguably, this decreases the protections afforded to criminal defendants in Montana by precluding them from asserting an insanity defense at trial. Alternatively, it heightens their protections because it requires the defendant's mental state to be considered at three different stages of the criminal proceeding, as opposed to relying solely on the jury's willingness to accept the defendant's insanity defense.[50] Acknowledging these different perspectives, the Montana Supreme Court referred to a number of commentators' notions that this abolition "may have actually lowered the hurdle" by eliminating the requirement of providing affirmative proof for an insanity defense.[51] Whichever viewpoint you prefer, this prohibition nevertheless depicts Montana departing from federal precedent in a key area of criminal law.

Finally, Montana departs from federal law in the application of its search and seizure analysis under Article II, Section 11—the Montana Constitution's counterpart to the Fourth Amendment of the United States Constitution.[52] In accordance with Montana's right to privacy provision,[53] to which the federal constitution bears no analogue, the Montana Constitution affords enhanced protections regarding the constitutional parameters of a search under Article II, Section 11.[54] This example illuminates Montana's willingness to deviate from federal law where it has a compelling reason to do so, specifically, a unique constitutional provision.[55] This departure pro-

49. State v. Korell, 690 P.2d 992, 1002 (Mont. 1984). The Supreme Court of the United States also upheld an abolition of the insanity defense as constitutional in Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020). In *Kahler*, the Court noted that "the [insanity] defense is a project for state governance, not constitutional law." *Id.*

50. *Korell*, 690 P.2d at 996–97 (explaining that the defendant's mental state is considered prior to trial to determine whether the defendant is "fit" to stand trial; at trial to determine whether the defendant had the requisite mental state for commission of the crime; and finally, at the sentencing phase to consider whether the defendant "appreciate[s] the criminality of his acts," ultimately resolving whether the defendant will be sent to prison or the Warm Springs State Hospital).

51. *Id.* at 1000 ("In order to be acquitted, the defendant need only cast a reasonable doubt in the minds of the jurors that he had the requisite mental state.").

52. *See* State v. Bullock, 901 P.2d 61, 75 (Mont. 1995).

53. MONT. CONST. art. II, § 10.

54. State v. Allen, 241 P.3d 1045, 1057 (Mont. 2010) ("Read together, Sections 10 and 11 provide robust protection to people in Montana against government intrusions."); *Bullock*, 901 P.2d at 75–76 (quoting State v. Brown, 755 P.2d 1364, 1370 (Mont. 1988)).

55. State v. Goetz, 191 P.3d 489, 494 (Mont. 2008) (citation omitted) ("Furthermore, '[i]n light of the constitutional right to privacy to which Montanans are entitled, we have held that the range of warrantless searches which may be lawfully conducted under the Montana constitution is narrower than

vides the most persuasive reason that Montana should alter its juvenile cruel and unusual punishment analysis to incorporate Article II, Section 15 and enhance a juvenile defendant's protections beyond those guaranteed by federal law. The following section examines how Montana has followed federal juvenile cruel and unusual jurisprudence and outlines Article II, Section 15 to highlight why Montana should extend additional protections to juvenile defendants in light of the way it has departed from federal law in other key areas of criminal law.

III. How Montana Law Has Mirrored Federal Juvenile Criminal Jurisprudence and the Reasons it Should Deviate

A. Federal Juvenile Criminal Law

Something akin to the strict proportionality test in capital cases has been adopted to analyze the outer bounds of permissible punishments for juvenile offenders pursuant to the Cruel and Unusual Punishment Clause.[56] Comparable to the Cruel and Unusual Punishment Clause jurisprudence, the Supreme Court of the United States extended additional protections to juvenile defendants in a piecemeal fashion.[57] The crux of the decisions expanding juveniles' protections is premised on the inherent psychological differences between juvenile and adult offenders.[58] Because of these psychological differences, imposing certain punishments on a juvenile defendant offends the standards of the Cruel and Unusual Punishment Clause, even though the same punishment is constitutionally permissible if imposed on an adult.[59]

Beginning in 2005, the Court rendered it per se unconstitutional to sentence a juvenile under the age of eighteen to capital punishment.[60] The Court emphasized that the unique characteristics attributable to the juvenile's youth diminish the penological justifications for subjecting them to

the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment.'").

56. Jones v. Mississippi, 141 S. Ct. 1307, 1315–16 (2021) ("And *Miller* in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases . . . ."); Miller v. Alabama, 567 U.S. 460, 477–78 (2012) (requiring consideration of the mitigating characteristics of the juvenile's youth before imposing a sentence of life without parole, similar to consideration of mitigating and aggravating circumstances prior to imposing the death penalty).

57. *See*, *e.g.*, *Miller*, 567 U.S. at 489 (proscribing a court from imposing mandatory life without parole on a juvenile defendant); Graham v. Florida, 560 U.S. 48, 82 (2010) (life without parole for a nonhomicide offense is unconstitutional if imposed on a juvenile); Roper v. Simmons, 543 U.S. 551, 568 (2005) (capital punishment is unconstitutional if imposed on a juvenile).

58. *Miller*, 567 U.S. at 476–77.

59. *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 568.

60. *Roper*, 543 U.S. at 568.

the harshest form of punishment.[61] Five years later, the Court proscribed a life sentence without the possibility of parole for juvenile offenders convicted of a nonhomicide offense.[62] In addition to the diminished penological justifications, the Court highlighted that life without parole is an "especially harsh punishment for a juvenile" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[63]

In 2012, the Court further expanded the protections afforded to juvenile criminal defendants when it prohibited the imposition of a mandatory sentence of life without parole for a juvenile in the landmark decision *Miller v. Alabama*.[64] The Court in *Miller* reiterated the notion that juveniles are constitutionally different than adults for sentencing purposes.[65] The Court again relied on the "hallmark features" of a juvenile's youth to justify the difference in treatment from an adult defendant.[66] Pursuant to *Miller*, life without parole may only be imposed on a juvenile if they receive an adequate hearing where the mitigating attributes of their youth are considered.[67] The mitigating attributes enumerated in *Miller* include "immaturity, impetuosity, . . . failure to appreciate risks and consequences[,] . . . family and home environment," the effect of familial and peer pressure on the commission of the crime, and the fact that the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth [such as] their inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist [their] own attorneys."[68] Four years after *Miller*, the Court in *Montgomery v. Louisiana*[69] held that the rule from *Miller* applied retroactively because it established a new substantive rule of constitutional law.[70]

Subsequently, the Court in *Jones v. Mississippi*[71] considered the unresolved implications suggested by dicta in *Miller* and *Montgomery*[72] re-

61. *Id.* at 571.

62. *Graham*, 560 U.S. at 82.

63. *Id.* at 70.

64. 567 U.S. 460, 489 (2012) (voiding Alabama's mandatory life without parole for juvenile offenders' statute).

65. *Id.* at 480 ("[W]e require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to life in prison.").

66. *Id.* at 477.

67. *Id.* at 489 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

68. *Id.* at 477–78.

69. 577 U.S. 190 (2016).

70. *Id.* at 212.

71. 141 S. Ct. 1307 (2021).

72. The Court in *Miller* mentioned the discussion from *Roper* and *Graham* regarding the "great difficulty . . . of distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" Miller

garding the proper procedure for a court to constitutionally sentence a juvenile to life without the possibility of parole.[73] Some lower courts had interpreted the holdings of *Miller* and *Montgomery* to require a finding that the juvenile was permanently incorrigible or irreparably corrupt before the court could sentence the juvenile to life without parole.[74] Clarifying this interpretation, the Court in *Jones* held that a sentencing court does not need to make any specific finding, either on the record or implicitly, that the juvenile defendant is permanently incorrigible or irreparably corrupt prior to exercising its discretion to impose a sentence of life without parole on a juvenile.[75] It reiterated that the effect of the prohibition articulated by *Miller* and *Montgomery* only requires a sentencing court to hold a hearing, often called a *Miller* hearing, where the mitigating factors of the offender's youth must be considered prior to implementing a sentence of life without parole.[76] Finally, and of particular relevance to the thesis of this comment, the Court left it to the discretion of the states to impose additional procedural requirements, such as an on the record requirement, necessary for a court to sentence a juvenile to life without parole.[77]

B. Montana Has Mirrored Federal Criminal Juvenile Precedent

Montana has not been provided an ample opportunity to adjudicate juvenile criminal law. However, the few times it has, the Montana Supreme

v. Alabama, 567 U.S. 460, 479–80 (2012). In *Montgomery* it observed that "*Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption[.]" 577 U.S. at 208 (internal quotation marks and citation omitted).

73. *See Jones*, 141 S. Ct. at 1315.

74. *See, e.g.*, Malvo v. Mathena, 893 F.3d 265, 275 (4th Cir. 2018) ("[T]he Chesapeake City jury was never charged with finding whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender."); Pennsylvania v. Batts, 163 A.3d 410, 415–16 (Pa. 2017) ("[W]e further conclude that to effectuate the mandate of *Miller* and *Montgomery*, procedural safeguards are required to ensure that life-without-parole sentences are meted out only to 'the rarest of juvenile offenders' whose crimes reflect 'permanent incorrigibility,' 'irreparable corruption' and 'irretrievable depravity,' as required by *Miller* and *Montgomery*."); Veal v. Georgia, 784 S.E.2d 403, 411–12 (Ga. 2016) ("Thus, *Montgomery* emphasizes that a [life-without-parole] sentence is permitted only in '*exceptional* circumstances,' . . . for 'those *rare* children whose crime reflect *irreparable corruption*[.]'") (emphasis in original) (citation omitted).

75. *Jones*, 141 S. Ct. at 1316.

76. *Id.* at 1317–18 ("On the question of what *Miller* required, *Montgomery* was clear: '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.'"). To support this holding, the Court equated the mitigating attributes of the juvenile's youth to the mitigating circumstances that must be considered prior to imposition of the death penalty. *Id.* at 1320–21. The Court noted that it would be inconsistent to require the mitigating characteristics attributable to a juvenile's youth to be on the record before imposing life without parole because there is no similar requirement for mitigating factors prior to imposing the death penalty. *Id.*

77. *Id.* at 1323.

Court has predominantly relied on federal precedent, suggesting its inclination to mirror federal criminal juvenile jurisprudence.[78] Consequently, the Montana Supreme Court has not directly explored whether Article II, Sections 15 and 22 could afford heightened protections to juvenile defendants in Montana.[79]

In *Beach v. State*,[80] the Montana Supreme Court asserted that juveniles have diminished criminal culpability, which it derived from the Supreme Court of the United States' opinions in *Roper v. Simmons*,[81] *Graham v. Florida*,[82] and *Miller*.[83] Notwithstanding the majority's reliance on federal precedent, Justice McKinnon noted in her concurrence that "[t]here is nothing new about the rationale that juvenile offenders are less culpable than adult offenders, nor does the application of this rationale constitute a new rule in Montana."[84] In Justice McKinnon's view, the process prescribed by *Miller* had already been implemented in Montana due to Montana's individualized and discretionary sentencing scheme.[85] Justice McKinnon relied on Montana sentencing policy to reach this conclusion, but she did not consider what the Montana Constitution's specific provisions might add to the juvenile cruel and unusual punishment analysis.[86]

The Montana Supreme Court in *Beach* was tasked with resolving whether the rule established by *Miller* was entitled to retroactive application.[87] Because it answered this question in the negative, the Montana Supreme Court did not actually reach the merits of Beach's challenge to his deliberate homicide conviction for a crime he committed when he was seventeen.[88] Thus, the Montana Supreme Court nullified its opportunity to consider what a juvenile defendant's rights might mean pursuant to Montana law, rather than just federal law.[89]

78. *See* State v. Keefe, 478 P.3d 830 (Mont. 2021) (relying on federal precedent to determine whether Keefe was afforded an adequate *Miller* hearing); Steilman v. Michael, 407 P.3d 313, 319–20 (Mont. 2017) (citing primarily to federal precedent); Beach v. State, 348 P.3d 629, 642 (Mont. 2015) (declining to reach the merits of Beach's case, thus implicitly accepting the federal standard).

79. *See Keefe*, 478 P.3d at 840 n.7 ("While the Chief Justice's Concurrence and Dissent raises additional important constitutional issues involving the interplay of Article II, Section 15, and Article II, Section 22, of the Montana Constitution, such are not squarely before us.").

80. 348 P.3d 629 (Mont. 2015) (implicit overruling recognized by *Steilman*, 407 P.3d at 317).

81. 543 U.S. 551 (2005).

82. 560 U.S. 48 (2010).

83. *Beach*, 348 P.3d at 633–42 (the Montana Supreme Court did not reach the merits of Beach's challenge to his life without parole sentence for a conviction for a crime he committed at age seventeen as being violative of either the Cruel and Unusual Punishment Clause or Article II, Section 22).

84. *Id.* at 642 (McKinnon, J., specially concurring).

85. *Id.* at 642–43 (citing MONT. CODE ANN. § 46-18-101 (1978)).

86. *Id.*

87. *Id.* at 631 (majority opinion).

88. *Id.* at 642 (the Montana Supreme Court did not consider Beach's arguments that his sentence was unconstitutional pursuant to *Miller*).

89. Beach had raised Article II, Sections 15 and 22 in his appellate brief. *Id.* at 636.

Two years after *Beach*, the Montana Supreme Court in *Steilman v. Michael*[90] held that the procedural protections from *Miller* must be applied to the discretionary sentencing regime in Montana.[91] This decision occurred following the Supreme Court of the United States' opinion in *Montgomery* (establishing that *Miller* must be applied retroactively), implicitly overturning the prior contradictory holding expressed in *Beach*.[92] In *Steilman*, the Montana Supreme Court considered Steilman's challenge to a deliberate homicide conviction for a crime he committed while he was seventeen years old.[93] In doing so, it stated that for the past dozen years the Supreme Court of the United States has repeatedly emphasized the constitutional differences of juveniles from adults in the criminal justice system.[94] Despite this recognition, the Montana Supreme Court found Steilman's 110-year sentence not to be a "de facto" life sentence, thereby failing to trigger the protections of the Cruel and Unusual Punishment Clause and considerations of his youthful characteristics.[95] The Montana Supreme Court did not dive into what Montana law could add to the recognized constitutional protections for juveniles, similar to *Beach*.[96]

Collectively, *Beach* and *Steilman* illustrate the way Montana has echoed federal juvenile criminal jurisprudence in two regards. First, each opinion relied principally on federal precedent to emphasize the differences between juveniles and adults in criminal law, rather than considering the potential application of Montana constitutional law.[97] Second, the Montana Supreme Court in *Beach* nullified its opportunity to extend juvenile defendants' protections; ultimately, it was compelled to adhere to federal law in *Steilman* following the Supreme Court of the United States' opinion in *Montgomery*.[98] However, this determined only that the federal *Miller* opinion applied retroactively, contradictory to the conclusion from *Beach*, and that Montana courts must conduct a *Miller* hearing prior to sentencing a juvenile to life without parole.[99] Neither opinion explored how the juvenile cruel and unusual punishment analysis might be different under Montana constitutional law.

90. 407 P.3d 313 (Mont. 2017).

91. *Id.* at 315.

92. Montgomery v. Louisiana, 577 U.S. 190, 205 (2016); *Steilman*, 407 P.3d at 317.

93. *Steilman*, 407 P.3d at 315.

94. *Id.* at 317.

95. *Id.* at 320.

96. *Id.* (citing *Montgomery*, 577 U.S. at 205–08; Miller v. Alabama, 567 U.S. 460, 470–72 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 575 (2002)).

97. *Id.* at 317; Beach v. State, 348 P.3d 629, 633–42 (Mont. 2015).

98. *Steilman*, 407 P.3d at 317 ("*Montgomery* announced that *Miller* applies retroactively and effectively overruled our holding in *Beach*."); *Beach*, 348 P.3d at 642 (declining to reach the merits of Beach's case).

99. *Steilman*, 407 P.3d at 317; *Beach*, 348 P.3d at 642.

Montana has strayed from federal criminal law in its presumption of proportionality, requisite "intent to kill" *mens rea* for the imposition of the death penalty for felony murder, abolishment of the affirmative defense of insanity, and the bounds of a search under Article II, Section 11. Montana's departures from federal criminal law are grounded in public policy and the unique considerations of Montana constitutional law. Departing from federal law in the juvenile cruel and unusual punishment context would therefore be compatible with these other departures pursuant to Article II, Section 15. Although the federal rule that juveniles are constitutionally different from their adult counterparts is relevant to the cruel and unusual punishment analysis in Montana and elsewhere, Montana can go a step further given the distinct protections provided to juveniles that are not paralleled in the federal system.[100] These protections are explored in-depth in the following subsection.

C. Article II, Section 15: The Primary Reason Montana Should Not Mirror Federal Juvenile Criminal Law

> "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons."[101]

1. Adopting the Rights-of-Minors Provision

Montana's 1889 Constitution did not have a specific provision addressing the rights of minors; Article II, Section 15 was added at the 1972 Constitutional Convention, and it passed by a vote of seventy-six to eleven.[102] When Article II, Section 15 was introduced at the Convention, Delegate Monroe emphasized that it was included "in recognition of the fact that young people have not been held to possess basic civil rights."[103] Delegate Monroe further explained that by adopting Article II, Section 15, "Montana [could] be the leader among all states recognizing the rights of people under the age of majority."[104] In essence, Article II, Section 15 applies the Declaration of Rights to minors, ensuring that they are entitled to the same fundamental rights as their adult counterparts.[105]

100. MONT. CONST. art. II, § 15; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining that "the broad outline of the kinds of rights young people possess does not yet exist"). R

101. MONT. CONST. art. II, § 15.

102. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1753. R

103. *Id.* at 1750.

104. *Id.*

105. Rebecca Stursberg, *Still-In-Flux: Reinterpreting Montana's Rights-of-Minors Provision*, 79 MONT. L. REV. 259, 266 (2018). To educate the Montana electorate when Article II, Section 15 was

Notwithstanding the extension of the Declaration of Rights to minors pursuant to Article II, Section 15, the provision's plain language provides that a law may infringe upon a minor's fundamental rights so long as the law is designed to "enhance the protection" of minors.[106] This carve-out was included to balance the two "often-competing premises" on which Article II, Section 15 is grounded: (1) "youth should have the same fundamental rights as adults"; and (2) "youth are fundamentally different from adults."[107]

At the Convention, there was some debate between the delegates regarding the purpose and intended effect of Article II, Section 15.[108] Specifically, Delegates Rygg and Brown were perplexed by the need for Article II, Section 15; in Delegate Brown's view, "[t]he Bill of Rights covers all people[.]"[109] Delegate Dahood, as one of the proponents for Article II, Section 15, responded:

> All we're going to do is make sure that the young boys and the young girls, the young men, the young women, prior to reaching the age of majority, are going to know that during that particular period of maturity they shall have all the basic rights that are accorded to all citizens of the State of Montana, and they are going to be better trained to be more responsible citizens.[110]

Although minors had not consistently possessed the same civil rights as adults at that time, Delegate Dahood added that Article II, Section 15 was "not revolutionary by any means."[111] Despite the debate and attempt for clarification at the Convention, the delegates did not offer significant guidance to interpret the provision.[112] This has led to the lack of understanding surrounding the provision and its resultant under-utilization.

2. Interpreting the Rights-of-Minors Provision

To give meaning to Article II, Section 15, the Montana Supreme Court has construed it in conjunction with other provisions of the Declaration of

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adopted, several informational pamphlets were disseminated to describe the purpose and intended effect of the provision. *Id.* One pamphlet indicated that Article II, Section 15 affords "children all of the rights that adults have unless a law meant to protect children prohibits their enjoyment of the right." *Id.* (internal quotation marks omitted). Another pamphlet explained that the effect of Article II, Section 15 "w[ould] eventually be felt . . . in criminal law and school supervision." *Id.*

106. MONT. CONST. art. II, § 15 ("[U]nless specifically precluded by laws which enhance the protection of such persons."); Stursberg, *supra* note 105, at 273–74 (citing State v. Strong, 203 P.3d 848, 851 (Mont. 2009); In re S.L.M., 951 P.2d 1365, 1373 (Mont. 1997)). **R**

107. Stursberg, *supra* note 105, at 264. **R**

108. *Id.* at 264–65.

109. *Id.* at 265 (citing CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1751) (Delegate Brown expressing his confusion with the purpose of Article II, Section 15).

110. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1752. **R**

111. *Id.*

112. Stursberg, *supra* note 105, at 265. **R**

Rights, rather than in isolation.[113] This is likely derived from the precept of Article II, Section 15 that minors are entitled to the same fundamental rights as all persons, in other words, those rights encompassed by the Declaration of Rights.[114] Specifically, the Montana Supreme Court has interpreted Article II, Section 15 in conjunction with Sections 10, 24, 25, and 26 of the Declaration of Rights, and the Equal Protection Clause.[115] Minors are therefore entitled to the following same rights as adults: the right to privacy, the right to a trial by jury, the right to counsel and the right against self-incrimination in delinquency proceedings, and the right to equal protection under the law.[116]

Pursuant to the carve-out in Article II, Section 15, there are limitations for extending certain fundamental rights to minors.[117] The constitutionality of these limitations depends on a three-step inquiry: (1) whether the law infringes on a fundamental right; (2) whether there exists a compelling state interest for infringing on that fundamental right; and (3) whether the law provides enhanced protection to juveniles.[118] One limitation entitles the legislature to establish the legal age for purchasing, consuming, or possessing alcoholic beverages.[119] Other limitations exist where Article II, Section 15 appears to be "incompatible" with other sections of the Constitution, such as control of the military or veterans.[120] Despite these limitations, the core function of Article II, Section 15 is to afford juveniles essentially the same fundamental rights as adults to the extent practicable.[121]

Construing Article II, Section 15 in conjunction with provisions of the Declaration of Rights, subject to the limitations permitted by the carve-out, illustrates that juveniles have been afforded the *same*, not *enhanced*, protections with respect to their adult counterparts. This is noteworthy because the effect of Article II, Section 15 is somewhat circular. It is intended to *enhance* the protections that were previously extended to minors, which basically means affording minors the *same* rights as adults.[122] Consequently, at

113. *Id.* at 267–68 (citing State v. E.M.R., 292 P.3d 451, 456 (Mont. 2013); In re C.T.P., 87 P.3d 399, 406 (Mont. 2004); Pengra v. State, 14 P.3d 499, 501 (Mont. 2000)).

114. *See* MONT. CONST. art. II, § 15.

115. Stursberg, *supra* note 105, at 268–71. R

116. *Id.* When construing Article II, Section 15 with the Equal Protection Clause, Montana follows federal precedent and does not recognize age as a suspect class for purposes of an Equal Protection Analysis. *Id.* at 269 (citing In re S.M.K.-S.H., 290 P.3d 718, 722 (Mont. 2012)).

117. MONT. CONST. art. II, § 15 (permits a law to infringe on a minor's fundamental right if it enhances their protection).

118. Stursberg, *supra* note 105, at 274. R

119. *Id.* at 267 (citing MONT. CONST. art. II, § 14).

120. *Id.* (citing MONT. CONST. art. II, §§ 32, 35).

121. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining the effect of Article II, Section 15). R

122. *Id.*

first glance, asserting that minors could be afforded *enhanced* protections within the criminal justice system pursuant to Article II, Section 15 seems irreconcilable with this circular result. However, doing so is consistent with the objective that Montana could be a "leader" among states affording rights to minors and the observation that the effect of Article II, Section 15 would be "felt" in the criminal law.[123] Alternatively, such a result might derive from the untouched "but not be limited to" language of Article II, Section 15.[124]

Although Article II, Section 15 was adopted in 1972, it has not been fully utilized as intended by the delegates; student-author Rebecca Stursberg noted in her comment analyzing Article II, Section 15 that the "but not be limited to" language of the provision has not been clarified by the Montana Supreme Court.[125] On its face, the "but not be limited to" language suggests that the rights which minors are entitled to are not restricted to those embodied in the Declaration of Rights.[126] This language may have been anticipating future protections that should be afforded to juveniles, as evidenced by Delegate Monroe's comment that "whatever rights and privileges might be given to [minors] in the future, we also want to protect them."[127] The inclusion of the "but not be limited to" language, coupled with Delegate Monroe's acknowledgement that other rights will arise in the future which minors should be entitled to, suggests that Article II, Section 15 is not exclusively limited to the rights provided by the Declaration of Rights.[128]

Because Article II, Section 15 is not necessarily confined to those rights provided by the Declaration of Rights, there may exist rights that juveniles are entitled to beyond those granted to adults. Moreover, the carve-out to Article II, Section 15 preserves the ability to *enhance* protections of minors where their unique status demands such protection.[129] Additionally, Delegate Monroe did not limit enhancing minors' protections to cases only where a law infringes upon their fundamental rights; instead, he broadly pointed out that "[i]n such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that

123. *See id.* (Delegate Monroe supporting adoption of Article II, Section 15); Stursberg, *supra* note 105, at 266. R

124. MONT. CONST. art. II, § 15; *see also* Stursberg, *supra* note 105, at 276. R

125. Stursberg, *supra* note 105, at 276. R

126. MONT. CONST. art. II, § 15.

127. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining the effect of Article II, Section 15); Stursberg, *supra* note 105, at 265–66 (citing CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750) (internal quotation marks omitted). R

128. MONT. CONST. art. II, § 15; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750.

129. MONT. CONST. art. II, § 15; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining that there are exceptions where a minor's protections may be enhanced under Article II, Section 15).

such protection is being enhanced."[130] Rather than restricting the circumstances in which a minor's protection may be enhanced, Delegate Monroe broadly mentioned the existence of exceptions where a minor's special status supports enhanced protection.[131]

Taken together, the notions that there are future rights protected by Article II, Section 15 which a minor is entitled to, non-exclusive to the Declaration of Rights, and situations where a minor's protection may be enhanced under Article II, Section 15, suggest that Article II, Section 15 may be utilized to enhance juveniles' rights under Article II, Section 22.[132] Federal criminal law has already observed that there are certain contexts, such as the terms under which a juvenile offender may be sentenced to life without parole, where juveniles are entitled to heightened rights.[133] Thus, it would be consistent with this trend to utilize Article II, Section 15 to enhance juvenile offenders' rights under Article II, Section 22. The following subsection explains in greater detail why Article II, Section 15 should be integrated with Article II, Section 22 to afford juvenile criminal defendants heightened protections pursuant to the fact that Article II, Section 15 has been construed in conjunction with other provisions of the Declaration of Rights, the method employed to interpret constitutional provisions, and Montana's other departures from federal law in key areas of criminal law.

3. The Rights-of-Minors Provision Should be Integrated into the Juvenile Cruel and Unusual Punishment Analysis

Article II, Sections 15 and 22 could be construed together to heighten juvenile defendants' rights in Montana because (1) Article II, Section 22 is encompassed by the Declaration of Rights and Article II, Section 15 has been construed in conjunction with other privileges contained in the Declaration of Rights; (2) the method applied to interpret a constitutional provision indicates that Article II, Section 15 may be utilized to enhance juvenile rights in the context of Article II, Section 22 considering the delegates' discussion; and (3) Montana departs from federal law in other pertinent areas of criminal law.

130. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining Article II, Section 15).

131. *Id.*

132. MONT. CONST. art. II, § 15; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining that Article II, Section 15 will entitle minors to the "same protections . . . from governmental and majoritarian abuses as . . . adults," and further, that "[w]here juveniles have rights at this time, we certainly want to make sure that those rights and privileges are retained; and whatever rights and privileges might be given to them in the future, we also want to protect them.").

133. Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

As a preliminary matter, Article II, Section 15 should be construed in conjunction with Article II, Section 22 because Article II, Section 22 is a fundamental right embodied in the Declaration of Rights.[134] As Article II, Section 15 has already been interpreted with other fundamental rights in the Declaration of Rights, it should be interpreted in conjunction with the remaining provisions of the Declaration of Rights to maintain consistency—which includes Article II, Section 22.[135]

Additionally, an analysis of the plain language of Article II, Section 15, its ambiguities, and the discussion of the delegates at the Constitutional Convention supports the idea that it may be interpreted alongside Article II, Section 22 to enhance a juvenile defendant's rights in Montana. When analyzing a constitutional provision, the Montana Supreme Court begins by looking to the intent of the framers as evidenced by the provision's "plain language."[136] Subsequently, the Montana Supreme Court resolves any ambiguities by relying on the legislative history and proceedings from the Constitutional Convention.[137]

The plain language of Article II, Section 15 entitles juveniles to the same fundamental rights as their adult counterparts, or enhanced protections in the event that a law infringes on one of those fundamental rights.[138] Article II, Section 15 presents the following ambiguities: (1) what exactly it means to enhance a minor's protection when a law infringes upon their fundamental rights, and (2) what the "but not be limited to" language is intended to add. There are obvious examples where an infringing law enhances a minor's protection, such as the drinking and driving ages.[139] There remain unanswered questions, though, such as the implications of utilizing Article II, Section 15 to enhance a minor's protections even where the law does not infringe upon a fundamental right.[140] Additionally, the "but not be limited to" language suggests that the rights to which a minor is entitled are

134. MONT. CONST. art. II, § 22; Stursberg, *supra* note 105, at 284. R

135. MONT. CONST. art. II, §§ 15, 22; Stursberg, *supra* note 105, at 269 (citing In re S.M.K.-S.H., 290 P.3d 718, 722 (Mont. 2012)). R

136. Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 134–35 (2016) (citing Sch. Dist. No. 12 v. Hughes, 552 P.2d 328, 331 (Mont. 1976); Bd. of Pub. Ed. v. Judges, 528 P.2d 11, 14–15 (Mont. 1975)).

137. *Id.* at 135.

138. MONT. CONST. art. II, § 15.

139. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1751 (Delegate Monroe discussing laws which provide the required age to obtain a driver's license or legally drink and that such laws are present to protect minors).

140. This remains unanswered because the delegates preserved the ability to enhance a minor's protections, but that analysis is triggered where the law infringes upon one of their fundamental rights. Stursberg, *supra* note 105, at 274; CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe noting that "[i]n such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced."). R

not necessarily exhausted by the Declaration of Rights.[141] However, the plain language of Article II, Section 15 does not clarify the effect of the "but not be limited to" language, and what additional rights it is intended to incorporate into the purview of Article II, Section 15.

In resolving these ambiguities, the proceedings from the Constitutional Convention are informative. A focal point of the delegates' discussion was due process.[142] Delegate Monroe highlighted that "persons under the age of majority have been accorded certain specific rights which are felt to be part of the due process. However, the broad outline of the kinds of rights young people possess does not yet exist."[143] By doing so, Delegate Monroe focused the delegates' conversation on due process and observed that minors' specific rights have not been fleshed out—potentially revealing an intent that Article II, Section 15 could develop a more thorough outline of those rights.[144] Delegate Monroe further elaborated that "[w]here juveniles have rights at this time, we certainly want to make sure that those rights and privileges are retained; and whatever rights and privileges might be given to them in the future, we also want to protect them."[145] Therefore, Delegate Monroe suggested that Article II, Section 15 may also be utilized in the future to grant additional rights and privileges to minors. Additionally, Delegate Monroe did not confine enhancing a minor's protections to laws that infringe upon a minor's rights but more broadly referred to enhancing protections where their "unique status" supports doing so.[146] Adding to Delegate Monroe's explanation, Delegate Dahood noted with respect to the exception that a minor's protection may be enhanced under Article II, Section 15, "as a consequence, what we are doing by this article is focusing on the basic guarantees that citizens have with respect to their person, their property and their liberty."[147] Delegate Dahood thus broadly implicated due process rights in directly addressing the carve-out that laws may enhance the protection of minors.[148]

Delegates Monroe and Dahood therefore suggested that part of the focus of Article II, Section 15 was due process.[149] Accordingly, the delegates' comments foreshadow the emergence of future rights that should be protected for minors, and further, imply broader connotations regarding a mi-

141. MONT. CONST. art. II, § 15.

142. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1751 (Delegates Monroe and Dahood explaining that young people will be entitled to constitutional standards of due process if Article II, Section 15 is passed).

143. *Id.* at 1750.

144. *Id.* (Delegate Monroe explaining the intent behind Article II, Section 15).

145. *Id.*

146. *Id.*

147. *Id.* at 1751 (Delegate Dahood supporting the adoption of Article II, Section 15).

148. *Id.*

149. *Id.* at 1750–51 (Delegates Dahood and Monroe explaining Article II, Section 15).

nor's due process rights.[150] These ideas work together to support the conclusion that Article II, Section 15 may be interpreted to entitle juvenile defendants to heightened protections under Article II, Section 22.[151] First, integrating these provisions would enhance a minor's rights and privileges, consistent with the focus of the due process discussion at the Constitutional Convention.[152] Second, enhancing a juvenile's rights under Article II, Section 22 could be understood as some of the future rights that Delegate Monroe foreshadowed protecting under Article II, Section 15.[153] Specifically, the cruel and unusual punishment analysis under Article II, Section 22 might include cases where minors' "unique status," such as their distinct psychological differences,[154] supports enhancing their protection.[155] Moreover, the policy behind Article II, Section 15 that Montana could be a "leader" regarding the rights of minors suggests that it could be integrated into the juvenile cruel and unusual punishment analysis to afford juvenile defendants heightened protections, making Montana a "leader" with respect to juvenile defendants' rights.[156]

Finally, Montana's departure from other notable areas of federal criminal law supports integrating Article II, Section 15 into the juvenile cruel and unusual punishment analysis where, as here, the right lacks a federal counterpart and the right is supported by compelling public policy justifications.[157] Despite the evidence supporting the intent that Article II, Section 15 may be utilized to enhance minors' protections, it has yet to be applied to the juvenile cruel and unusual punishment analysis; some opinions omit any mention of the provision altogether.[158] Consistent with the pronouncement that Montana does not want to "march lock step" with federal law,[159] it could provide juvenile defendants the heightened protections that may

150. *Id.*

151. The cruel and unusual punishment analysis under Article II, Section 22, and the interplay of Article II, Section 15 with that analysis, implicates such due process concerns because it involves an analysis of what punishments a juvenile may be subject to and the process by which such punishments may be imposed on a juvenile. *See, e.g.*, State v. Keefe, 478 P.3d 830 (Mont. 2021) (discussing whether Keefe was properly sentenced to life without parole for a crime that he committed while he was a juvenile).

152. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750–51 (Delegates Dahood and Monroe discussing Article II, Section 15 and its due process concerns and implications).

153. *Id.* at 1750.

154. Miller v. Alabama, 567 U.S. 460, 476–77 (2012).

155. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe explaining the effect of Article II, Section 15).

156. *Id.*

157. *See supra* Section II(B)(2).

158. *See, e.g.*, State v. Keefe, 478 P.3d 830 (Mont. 2021) (majority opinion); Steilman v. Michael, 407 P.3d 313 (Mont. 2017); Beach v. State, 348 P.3d 629 (Mont. 2015).

159. State v. Bullock, 901 P.2d 61, 75 (Mont. 1995) (stating "We have chosen not to 'march lockstep' with the United States Supreme Court, even when applying nearly identical language").

have been contemplated by the delegates when adopting Article II, Section 15. It is overdue that Article II, Section 15 be included in this analysis; *State v. Keefe* acknowledges this for the first time, as discussed in the following section.

IV. *STATE V. KEEFE*: AN ILLUSTRATIVE EXAMPLE OF THE FAILURE TO IMPLEMENT ARTICLE II, SECTION 15

The Montana Supreme Court's recent disposition in *State v. Keefe* encapsulates Montana's inclination to follow federal juvenile cruel and unusual punishment jurisprudence. *Keefe* represents two seemingly contradictory propositions: (1) Montana continues to mirror federal juvenile criminal law, as exhibited by the majority opinion; and (2) Article II, Section 15 has something to add to the juvenile cruel and unusual punishment analysis in Montana, as advanced by Chief Justice McGrath's concurrence in part and Justice Sandefur's concurrence in part.[160]

A. The Majority Opinion

In 1985, when Keefe was seventeen years old, he attempted to commit a burglary in Great Falls, Montana, in the course of which he killed three individuals home at the time.[161] Keefe was convicted by a jury on three counts of deliberate homicide and one count of burglary.[162] Following his conviction, Keefe was sentenced to three consecutive terms of life without the possibility of parole, plus an additional fifty years for the use of a weapon in connection with the deliberate homicide counts and the burglary.[163] In 2017, thirty-two years after the commission of his crime, Keefe petitioned the district court for postconviction relief.[164] He argued that his sentence was unconstitutional in accordance with *Miller* and *Montgomery*.[165] Keefe's postconviction proceeding was stayed while the Montana Supreme Court resolved *Steilman*.[166] Following *Steilman*, the stay was lifted after which the district court granted Keefe's petition and explained

160. *Keefe*, 478 P.3d at 841–44 (McGrath, C.J., concurring in part and dissenting in part); *id.* at 844–47 (Sandefur, J., specially concurring in part and dissenting in part).

161. *Id.* at 832–33 (majority opinion). Keefe committed this crime twenty-seven years prior to the protections provided by the *Miller* decision.

162. *Id.* at 833.

163. *Id.*

164. *Id.*

165. *Id. Miller* and *Montgomery*, discussed above in Section III(A), collectively hold that a mandatory sentence of life without the possibility of parole may not be imposed on a juvenile defendant, and that such a rule is a new substantive rule of constitutional law that is entitled to retroactive application.

166. *Keefe*, 478 P.3d at 833. *Steilman*, also discussed above in Section III(A), applied the principles of *Miller* and *Montgomery* to Montana's discretionary sentencing regime.

that Keefe was entitled to a new sentencing hearing pursuant to the principles articulated in *Miller*, *Montgomery*, and *Steilman* because the mitigating attributes of Keefe's youth were never considered at his previous sentencing hearing.[167]

At Keefe's new sentencing hearing, the district court re-imposed Keefe's life sentence without parole plus fifty years, despite expert testimony regarding the effect of Keefe's mental health and development on his commission of the crime.[168] Shortly thereafter, he filed a motion for reconsideration in front of a new judge, which the district court denied, and Keefe's appeal followed.[169]

On January 8, 2021, the Montana Supreme Court reversed the district court's resentencing and remanded for yet another hearing, this time compelling consideration of Keefe's rehabilitation evidence.[170] The majority primarily relied on federal precedent in granting Keefe a new sentencing hearing.[171] It explained that the district court erred by disregarding expert testimony of Keefe's rehabilitation during his thirty years of incarceration for two primary reasons: (1) the district court considered other post-offense evidence, but selectively excluded evidence of Keefe's post-offense rehabilitation; and (2) disregarding such evidence precluded the district court from adequately considering the fifth *Miller* factor—possibility of rehabilitation.[172] The expert testified "extensively" as to Keefe's psychological differences at the age of seventeen versus the age of fifty-one, indicating that Keefe had matured and responded well to rehabilitation efforts during his incarceration.[173] The Montana Supreme Court found it erroneous to deem Keefe "irreparably corrupt" and "permanently incorrigible" without affording any consideration to Keefe's "unrebutted" post-offense evidence of actual rehabilitation, which would refute such a finding.[174]

As a final point, the majority emphasized that consideration of Keefe's post-offense evidence of rehabilitation is in line with Montana sentencing policy.[175] Specifically, such evidence is encompassed by Montana sentencing policy to "encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back

167. *Keefe*, 478 P.3d at 833.

168. *Id.* at 834.

169. *Id.*

170. *Id.* at 840–41.

171. *Id.* at 836–40 (relying heavily on Miller v. Alabama, 567 U.S. 460 (2012) and Montgomery v. Louisiana, 577 U.S. 190 (2016) to explain juveniles' constitutional differences and diminished criminal culpability).

172. *Id.* at 838–39.

173. *Id.* at 838.

174. *Id.* at 838–39.

175. *Id.* at 839 (citing MONT. CODE ANN. § 46-18-101(2) (2019)).

into the community," and not merely to serve as a mode of punishment.[176] Therefore, as a result of the insufficient consideration of the *Miller* factors, Keefe's sentence violated both his constitutional rights and Montana sentencing policy considerations.[177]

B. Chief Justice McGrath's and Justice Sandefur's Concurrences

Departing from federal precedent, Chief Justice McGrath in his concurrence in part insisted that "in [his] view, *the Montana Constitution* and the rationales underlying the *Miller* and *Montgomery* decisions warrant stronger protection for youthful defendants facing a lifetime in prison."[178] Pursuant to "the Montana Constitution's explicit protections for juveniles," Chief Justice McGrath would go a step further than federal law and render it per se unconstitutional to sentence a juvenile offender to a life sentence without parole.[179] He pointed directly to Article II, Sections 15 and 22 of the Montana Constitution and the 1972 Constitutional Convention debate to support his proposition that "[i]mposition of a punishment that denies an individual any hope of life outside prison walls is a case where the special status of minors demands the enhancement of their protection."[180]

Chief Justice McGrath noted that although the principles underpinning both *Miller* and *Montgomery* support the need to take the analysis a step further and "recognize the special constitutional status of adolescents[,]" it is also "time to recognize that *our Constitution* has granted even greater protections in this regard."[181] Additionally, he criticized how difficult it is for a judge to "determine whether a teenager is irreparably corrupt or permanently incorrigible" under the *Miller* standard, and equated doing so to a "quest for the Holy Grail" or "medieval methods for determining whether a defendant is a witch."[182]

Expressing his agreement with Chief Justice McGrath, Justice Sandefur asserted that, aside from the protections furnished by the Cruel and Unusual Punishment Clause, there exist "independent Montana constitutional presumptions that life in prison without possibility of parole is cruel

176. *Id.* (citing § 46-18-101(2)(d)).

177. *Id.* at 840. Importantly, Keefe's efforts of self-rehabilitation came prior to the *Miller* decision and were thus for his own "improvement's sake." *See id.* at 837–38.

178. *Id.* at 841 (McGrath, C.J., concurring in part and dissenting in part) (emphasis added). Chief Justice McGrath read the federal juvenile cruel and unusual jurisprudence to establish a presumption against life without parole and added that Article II, Section 15 of the Montana Constitution independently creates this presumption under Montana law.

179. *Id.* at 842.

180. *Id.* at 842–43.

181. *Id.* at 844 (emphasis added).

182. *Id.* at 843. Chief Justice McGrath indicated that, to him, the inquiry does not seem to be "scientifically-based."

and unusual punishment of a juvenile offender."[183] Justice Sandefur would hold that Article II, Sections 15 and 22 of the Montana Constitution provide a presumption against life without parole for a juvenile offender, absent the requisite findings of irreparable corruption and permanent incorrigibility.[184] The majority did not discuss the positions articulated by Chief Justice McGrath and Justice Sandefur to enhance a juvenile's protections in accordance with the Montana Constitution.[185]

C. Implications of State v. Keefe *and Proposed Standard Implementing Article II, Section 15*

Despite the dissatisfaction expressed by Chief Justice McGrath and Justice Sandefur with the omission of Article II, Section 15 from the juvenile cruel and unusual punishment analysis in Montana, *Keefe* does not provide similarly situated juvenile defendants in the future any different protections from those that were extended to Keefe.[186] The constitutional protections afforded to juveniles that might be subject to serving life behind bars, with no prospect of parole, are still rooted in federal precedent.[187] Montana merely requires consideration of the mitigating factors of youth delineated by *Miller*, placing juvenile offenders' rights in Montana on equal footing with those in federal court.[188] Correspondingly, Article II, Section 15 does not entitle juvenile criminal defendants to heightened protections under Montana law, specifically with respect to a life sentence without the possibility of parole.[189] However, the concurring opinions of Chief Justice McGrath and Justice Sandefur could provide a starting point for advocacy to enhance juveniles' protections in the State.

Still, the question remains unresolved: how should Article II, Section 15 be applied to juvenile cruel and unusual punishment jurisprudence to afford juveniles heightened protections when facing a life sentence with no prospect of parole? The core concern when departing from federal prece-

183. *Id.* at 844 (Sandefur, J., concurring in part and dissenting in part).

184. *Id.* at 844–45. Notably, this presumption would enhance the protections of juvenile offenders in Montana in light of Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021) (noting that there is no requirement that the juvenile be deemed "irreparably corrupt" or "permanently incorrigible" before a court may sentence a juvenile to life without parole, and that such discussion in *Miller* and *Montgomery* is nonbinding dicta).

185. *See generally Keefe*, 478 P.3d 830 (majority opinion) (the majority opinion did not consider Article II, Section 15 of the Montana Constitution).

186. *Id.* at 840 (stating "[N]either 'irreparable corruption' nor 'permanent incorrigibility' are facts which would increase a possible sentence. Rather, youth is a mitigating factor which can reduce the possible sentence for deliberate homicide in Montana.").

187. *See id.* at 836–40 (relying primarily on *Miller* and *Montgomery*).

188. *Id.* at 840.

189. *Id.* at 836–40 (Article II, Section 15 was not mentioned in the majority opinion, even to address the concurring opinions of Chief Justice McGrath and Justice Sandefur).

dent is establishing a workable guideline that can withstand the test of time. This comment proposes two options: (1) categorically bar life without parole for juvenile offenders, as advocated for by Chief Justice McGrath;[190] or (2) impose an on the record fact-finding requirement that the juvenile is deemed irreparably corrupt and permanently incorrigible, which was rejected by *Jones* and left to the discretion of the states.[191]

Option one, adopting Chief Justice McGrath's approach, would fulfill the intentions underpinning Article II, Section 15 because a sentence of life without the possibility of parole "is a case where the special status of minors demands the enhancement of their protection."[192] This option poses an interesting question: how is this result compatible with the fact that Article II, Section 15 simply applies the Declaration of Rights to minors, and the Declaration of Rights does not include any right to be free from a sentence of life without the possibility of parole? Assuming the protections encompassed by Article II, Section 15 ended there, then Chief Justice McGrath's resolution would not be in harmony with such protections. However, the protections furnished to minors by Article II, Section 15 are not necessarily exhausted by the Declaration of Rights; there are future rights the delegates intended to protect by including the "but not be limited to" language.[193] Moreover, Delegate Monroe broadly indicated that certain cases will arise where the "special status" of minors "demands" an exception whereby their protections are enhanced.[194] Thus, such a result may have been contemplated by the delegates because a minor's special status, by virtue of their distinct psychological characteristics, might demand enhanced protection with regard to being subjected to serving a sentence of life without parole.[195] Further, as explained below, this result would eliminate the difficult subjective inquiries that a judge or jury would be faced with if option two were implemented.[196]

Additionally, with respect to this option of categorically barring life without parole for juvenile offenders, Montana would not be the first state to impose this bar.[197] There are already twenty-five states which have

190. *Id.* at 842 (McGrath, C.J., concurring in part and dissenting in part).

191. Jones v. Mississippi, 141 S. Ct. 1307, 1320–21, 1323 (2021).

192. *Keefe*, 478 P.3d at 843.

193. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1751–52.

194. *Id.* at 1750 (Delegate Monroe explaining the implications of Article II, Section 15).

195. *See* Miller v. Alabama, 567 U.S. 460, 476–77 (2012); *Keefe*, 478 P.3d at 842 (McGrath, C.J., concurring in part and dissenting in part); CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750.

196. An inquiry regarding whether a juvenile defendant is irreparably corrupt and permanently incorrigible is difficult and subjective. *Keefe*, 478 P.3d at 843 (McGrath, C.J., concurring in part and dissenting in part).

197. The Campaign for the Fair Sentencing of Youth, *Which States Ban Life Without Parole for Children?*, https://perma.cc/2MM3-4N58 (last visited Dec. 29, 2021).

banned life without parole for juveniles.[198] Aside from the twenty-five states that have imposed this ban, there are six additional states which have no juvenile offenders serving life without parole sentences.[199] This brings the total to thirty-one states that do not have any juvenile offenders serving life without parole sentences.[200] As a result, Montana is not necessarily a "leader" with respect to juvenile defendants' rights, which is not compatible with Delegate Monroe's objective that Montana could be a "leader" among the states with respect to the rights of minors.[201] Adopting option one could therefore place Montana back among the leaders regarding the rights of minors and the possibility that a juvenile may be subject to a sentence of life without parole.

Option two, imposing an on the record fact-finding requirement that the juvenile offender is irreparably corrupt and permanently incorrigible, likewise captures the objectives of Article II, Section 15. This conclusion is contingent on the presumption that the juvenile offender's protections are enhanced solely because federal law explicitly denied the fact-finding requirement.[202] The juvenile's rights would be "enhanced" in that regard. Such an on the record fact-finding requirement avoids the potential that the sentencing court will fail to engage in a fully developed and meaningful analysis of the mitigating characteristics of the juvenile's youth delineated by *Miller*.[203] It further enhances the juvenile's protections by requiring the juvenile to be deemed irreparably corrupt and permanently incorrigible, such that life behind bars is arguably warranted.[204]

However, the effect of option two might not actually provide additional protections to a juvenile offender because, as Chief Justice McGrath highlighted, a finding that a juvenile is irreparably corrupt and permanently incorrigible is a subjective and difficult analysis for a judge to engage in.[205] Option two is further complicated because the *Apprendi v. New Jersey*[206] rule is potentially implicated. *Apprendi* requires any fact that enhances the

198. *Id.*

199. *Id.*

200. *Id.*

201. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 12, at 1750 (Delegate Monroe supporting the adoption of Article II, Section 15). **R**

202. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

203. Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at *10, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (No. 18-1259).

204. Montgomery v. Louisiana, 577 U.S. 190, 195 (2016) (stating "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption'").

205. State v. Keefe, 478 P.3d 830, 843 (Mont. 2021) (McGrath, J., concurring in part and dissenting in part).

206. 530 U.S. 466 (2000).

defendant's sentence beyond the statutorily permitted maximum to be resolved by the jury.[207] It is unclear whether *Apprendi* is implicated in this scenario because determining that the juvenile is irreparably corrupt and permanently incorrigible might not necessarily enhance their sentence beyond the statutorily permitted maximum.[208] Assuming, *arguendo*, a juvenile's sentence is enhanced beyond the statutorily permitted maximum because they are irreparably corrupt and permanently incorrigible pursuant to the *Miller* factors, thereby implicating *Apprendi*, then to permit a judge to make this determination invades the province of the jury and deprives the juvenile of their right to a jury trial.[209] Thus, adopting Chief Justice McGrath's categorical bar would ensure that a juvenile is entitled to stronger protections than federal law and further eliminate the concerns associated with option two.[210]

V. Conclusion

Montana has merely echoed federal juvenile criminal jurisprudence, contrary to the unique protections explicitly afforded to this class by the Montana Constitution. As recognized by the concurring opinions in *Keefe*, it is overdue that the protections afforded to minors by Article II, Section 15 be felt in juvenile cruel and unusual jurisprudence. Montana diverges from federal law in other aspects of criminal law based on different policy positions, thus, juvenile criminal law is entitled to the same divergence for an even stronger reason: the Montana Constitution itself. The concurring opinions in *Keefe* are the first step in this direction, as Chief Justice McGrath and Justice Sandefur expressed their standpoints that Article II, Section 15 is entitled to be a part of the juvenile cruel and unusual punishment analysis. Hopefully, the shortcomings of *Keefe* will prompt overdue advocacy regarding the extended rights of juveniles in Montana.

207. *Id.* at 466. The defendant's prior convictions are the carve-out to the *Apprendi* rule.

208. *See* Mont. Code Ann. §§ 46-18-219(1)(a), 46-18-222(1) (2019). The Montana Supreme Court in *Keefe* suggested that "irreparable corruption" and "permanent incorrigibility" do not need to be found by the jury under *Apprendi* but did not fully develop this analysis and relied on *Miller* and *Montgomery*. 478 P.3d at 840.

209. *See Apprendi*, 530 U.S. at 497.

210. *Keefe*, 478 P.3d at 843.