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NOTE

Instilling Hope: Suggested Legislative Reform for Missouri Regarding Juvenile Sentencing Pursuant to Supreme Court Decisions in *Miller* and *Montgomery*

Brooke Wheelwright*

I. INTRODUCTION

Hope is the significant factor distinguishing a life without parole sentence (“LWOP”) from other sentences. In deciding *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, the Supreme Court of the United States has introduced the concept of hope into Eighth Amendment jurisprudence, as “[i]t is now impermissible to abandon all hope for a young offender and judge him irredeemable at the outset of his sentence.”¹ Offenders now view “the Eighth Amendment[’s] prohibition on cruel[and unusual punishments as] . . . ground[s] for hope of eventual release.”² In 2010, the Supreme Court held in *Graham* that it was unconstitutional to sentence non-homicide juvenile offenders to LWOP.³ This decision marked the first appearance of hope in Eighth Amendment jurisprudence for juvenile offenders serving life sentences. Then, the Supreme Court held in *Miller* that it was a violation of the Constitution to impose mandatory LWOP sentences, and that a sentencer must take into account an offender’s youth and attendant characteristics before imposing a penalty of LWOP.⁴ The Court in *Miller* stated that the “appropriate occasion[] for sentencing juveniles to this harshest possible penalty will be uncommon.”⁵ While this decision did not guarantee the hope of release for juveniles with LWOP sentences, it made the possibility of release much more real. And finally, in January 2016, the Court decided in *Montgomery* that the *Miller* rule is to apply retroactively to all offenders currently serving mandatory

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1. Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1059–60 (2014).

2. *Id.* at 1060 (quoting Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT. REP. 27, 76 (2010)).

3. *See generally* *Graham v. Florida*, 560 U.S. 48, 62–66 (2010).

4. *Miller v. Alabama*, 132 S. Ct. 2455, 2457–58, 2471 (2012).

5. *Id.* at 2469.

LWOP sentences, giving offenders sentenced before the *Miller* decision hope as well.⁶

In fewer than ten years, the Supreme Court has given hope to juveniles with LWOP sentences across the country. However, the introduction of hope into Eighth Amendment jurisprudence has created complications for many states. When it was decided in 2012, the holding in *Miller* invalidated sentences for juvenile first degree murder offenders in over twenty states; and when *Montgomery* was decided in 2016, it created the need for even more juvenile sentencing reform across the country.

Missouri recently passed Senate Bill 590 (“SB 590”) in response to these decisions.⁷ However, inadequate time, research, and consideration were given to the passage of SB 590, in part because it was rushed through the legislature near the end of the legislative session. As a result, the bill has many shortcomings that must be fixed; this is the primary focus of this Note. Part II of this Note examines the necessary context and background of a handful of Supreme Court decisions pertaining to this issue. Part III discusses the language and likely impact of SB 590. Part III analyzes the issue presented by the *Miller* decision, highlights how Missouri has failed to adequately address this issue, assesses what other states have done, and suggests what Missouri should do to remedy the shortcomings of SB 590. Part IV discusses the issue of retroactivity presented by the *Montgomery* decision and offers a suggestion as to what legislative reform Missouri should undertake to accommodate the *Montgomery* decision. Part V concludes this Note.

II. LEGAL BACKGROUND: LEGAL PRINCIPLES DERIVED FROM SUPREME COURT JURISPRUDENCE

The Supreme Court based *Miller* on two principles reflected in prior cases interpreting constitutional issues surrounding juvenile sentencing. The first principle is that children are different from adults because they do not have the equal ability to think, weigh consequences, or resist peer pressure, and, therefore, they are less deserving of harsh punishment.⁸ The second principle is that mandatory death sentences are unconstitutional.⁹ Understanding the cases that develop these principles will provide clarity to the Court’s decision in *Miller*, a case that has created an issue Missouri must face – the “*Miller* Issue,” as referred to in this Note. Missouri is also faced with the “*Montgomery* Issue,” a product of the Court’s holding in *Montgomery* that *Miller* applies retroactively. To understand the “*Montgomery* issue,” one must start with the *Miller* issue.

6. See generally *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

7. S. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

8. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988); *Graham*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)); *Roper*, 543 U.S. at 571.

9. *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976); *Sumner v. Shuman*, 483 U.S. 66, 77–78 (1987).

A. Principle #1: Juveniles Are Different from Adults and, Therefore, Less Deserving of Harsh Punishment

Since the late twentieth century, the Supreme Court of the United States has consistently supported the notion that juveniles are developmentally different from adults and, therefore, should be treated differently by the justice system.

In 1988, the Supreme Court held in *Thompson* that the Eighth Amendment prohibits the execution of a person under sixteen years of age at the time he or she committed the underlying offense.¹⁰ In 2005, the Supreme Court in *Roper v. Simmons* banned the death penalty for all juveniles when it raised the bar against the death penalty from sixteen to eighteen.¹¹ In 2009, the Court used this same reasoning in *Graham v. Florida* to prohibit the imposition of LWOP for juveniles convicted of non-homicide offenses.¹² The Court found that LWOP for non-homicide juvenile offenders was always disproportionate in light of their capacity for change and limited moral culpability.¹³

B. Principle #2: Mandatory Death Sentences Are Unconstitutional

Since 1976, the Court has consistently held that it is a violation of the Eighth and Fourteenth Amendments to sentence an individual to death without giving the individual the right to present mitigating evidence, such as the individual's age, character, background, and upbringing, to prove that a lesser sentence is warranted.¹⁴ The Court first faced this issue in *Woodson v. North Carolina*.¹⁵ In *Woodson*, the Court held that North Carolina's mandatory death sentence for first degree murder violated the Eighth and Fourteenth Amendments because a mandatory death sentence failed to mitigate against "arbitrary and wanton jury discretion."¹⁶ The Court further explained that not considering an offender's character and the circumstances of the particular offender's crime was inconsistent with "the fundamental respect for humanity underlying the Eighth Amendment."¹⁷

In 1987, the Court decided *Sumner v. Shuman*.¹⁸ In *Sumner*, the defendant, who was already serving a life sentence without the possibility of parole, was convicted of murdering a fellow prisoner.¹⁹ The defendant was sentenced to death pursuant to a Nevada statute that imposed a mandatory death sentence

10. *Thompson*, 487 U.S. at 838.

11. *Roper*, 543 U.S. at 569–70.

12. *Graham*, 560 U.S. at 68.

13. *Id.* at 74.

14. *See Woodson*, 428 U.S. at 303–05.

15. *Id.*

16. *Id.* at 303.

17. *Id.* at 304.

18. *Sumner v. Shuman*, 483 U.S. 66 (1987).

19. *Id.* at 67.

on defendants convicted of murder while already serving an LWOP sentence.²⁰ The Court concluded that the individualized capital-sentencing doctrine requires the sentencing authority to consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the particular offense.²¹

Combined, these cases established the principle that mandatory death penalty sentences are unconstitutional.

C. Application of Legal Principles: Subsequent Supreme Court Jurisprudence

The previous two sections discussed two important principles set out by the Supreme Court: under *Thompson*, *Roper*, and *Graham*, the Court has repeatedly upheld the notion that juveniles are different and, therefore, less deserving of harsh punishment; under *Woodson* and *Sumner*, the Court consistently held that mandatory sentences for the death penalty are unconstitutional. In 2012, the Court used these two principles to reach its decision in *Miller v. Alabama*.²² Relatedly, the Court's decision in *Montgomery v. Louisiana* held that the rule in *Miller* is to apply retroactively.²³

1. *Miller v. Alabama*

Evan Miller was fourteen years old when he murdered his neighbor.²⁴ The trial court held that, due to Miller's "mental maturity" and his prior offenses, he should be tried as an adult.²⁵ Miller was found guilty of felony murder for committing murder in the course of arson.²⁶ Felony murder carries a mandatory minimum punishment of life without parole, and Miller was sentenced accordingly.²⁷ The Alabama Court of Criminal Appeals affirmed, stating that mandatory LWOP was "not overly harsh when compared to the crime."²⁸ The Supreme Court of Alabama denied review, but the Supreme Court of the United States granted review in 2012.²⁹

In its decision, the Supreme Court held that the Eighth Amendment forbids a mandatory sentencing scheme that requires LWOP for juveniles convicted of murder.³⁰ Many states – such as Missouri – only have two possible

20. *Id.*

21. *Id.* at 75–76.

22. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

23. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

24. *Miller*, 132 S. Ct. at 2462.

25. *Id.* at 2462–63.

26. *Id.*

27. *Id.* at 2463.

28. *Id.* at 2457.

29. *Id.* at 2463.

30. *Id.* at 2457–58.

punishments for first degree murder, the death penalty or LWOP. Since juveniles cannot receive the death penalty (per *Roper*), they are automatically sentenced to LWOP if convicted of first degree murder. In coming to this conclusion, the Court explained that there are two lines of precedent leading to the present conclusion that mandatory LWOP sentences for juveniles violate the Eighth Amendment's Cruel and Unusual Punishment Clause.³¹

The first line of cases³² supports the proposition that juveniles must be treated differently under the Constitution.³³ Collectively, these cases banned categorical sentencing practices that mismatch the culpability of the offenders and the severity of the penalty those offenders receive. The second line of cases represents the proposition that no one may be sentenced to death without the right to present mitigating evidence, such as information about the defendant's age, character, background, and upbringing, to prove that a lesser sentence is warranted.³⁴ Although *Woodson* and its progeny refer to the death penalty, the Court relied on the conclusion reached in *Graham* to apply the same arguments to the sentence of LWOP to juveniles.³⁵ In *Graham*, the Court "likened life without parole for juveniles to the death penalty itself," and the Court in *Miller* concluded a sentencing court must consider the juvenile defendant's individual characteristics before issuing "a state's harshest penalt[y]." ³⁶

Based on these two strands of cases, the *Miller* Court concluded that a sentencer must take into account an offender's youth and attendant characteristics before imposing a penalty of LWOP.³⁷ The *Miller* Court explained that the characteristics of youth can weaken rationales for punishment, and the consideration of these youth-specific characteristics can render an LWOP sentence disproportionate.³⁸ Because of this, *Miller* permits a juvenile to receive an LWOP sentence only after having the right to present mitigating evidence.³⁹

31. *Id.* at 2463.

32. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010).

33. *Thompson*, 487 U.S. at 838 (holding Eighth Amendment prohibits the execution of a person under sixteen years of age at the time he or she committed the underlying offense); *Roper*, 543 U.S. at 569 (holding it is unconstitutional for juveniles to receive the death penalty); *Graham*, 560 U.S. at 62–67 (holding it is unconstitutional for juveniles to receive LWOP for non-homicide crimes).

34. *Woodson v. North Carolina*, 428 U.S. 280, 301, 303–04 (1976) (holding that mandatory death sentence for first degree murder violated Eighth and Fourteenth Amendments and that imposition of mandatory death sentence without consideration of the character and record of individual offender was unconstitutional under Eighth Amendment); *Sumner v. Shuman*, 483 U.S. 66, 77–78 (1987) (imposing mandatory death penalty for prison inmate who was convicted of murder while serving LWOP violates Eighth and Fourteenth Amendments).

35. *Miller*, 132 S. Ct. at 2458.

36. *Id.* at 2463.

37. *Id.* at 2467.

38. *Id.* at 2465–66.

39. *Id.* at 2475.

2. *Montgomery v. Louisiana*

The Court's holding in *Miller* left one very important question unanswered: what about the juveniles who received mandatory LWOP sentences prior to the *Miller* decision? Until *Montgomery* was decided in 2016, the answer to this question was left up to the states. The states dealt with the issue of the retroactive application of *Miller* in a variety of ways. For instance, sixteen states had the issue decided by their state supreme courts. Ten of those states held that *Miller* should apply retroactively,⁴⁰ and six held that it should

40. *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) (“[*Miller*’s] procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people.”); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013) (stating that *Miller* is substantive because it “explicitly foreclosed imposition of a mandatory sentence of life without parole on juvenile offenders”); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013) (finding *Miller* retroactive because it “forecloses the imposition of a certain category of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants” and because the Supreme Court retroactively applied *Miller* in *Jackson*); *State v. Mantich*, 842 N.W.2d 716, 730 (Neb. 2014) (“In essence, *Miller* ‘amounts to something close to a de facto substantive holding,’ because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.” (footnote omitted) (quoting *The Supreme Court, 2011 Term – Leading Cases*, 126 HARV. L. REV. 276, 286 (2012))); *Petition of State*, 166 N.H. 659, 667–68 (N.H. 2014) (“By prohibiting the imposition of mandatory sentences and requiring that the sentencing authority ‘have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,’ . . . *Miller* changed the permissible punishment for juveniles convicted of homicide.” (citation omitted) (quoting *Miller*, 132 S. Ct. at 2475)); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (“We conclude that [the *Miller* rule] is a ‘new substantive rule’ that puts a juvenile’s mandatory ‘life without parole’ sentence outside the ambit of the State’s power.”); *State v. Mares*, 335 P.3d 487, 507 (Wyo. 2014) (holding that while *Miller* “certainly has a procedural component,” it is a substantive rule because it “has effected a substantive change in the sentencing statutes applicable to juvenile offenders”); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (stating that *Miller* is substantive because it “places a particular class of persons covered by the statute – juveniles – constitutionally beyond the State’s power to punish with a particular category of punishment – mandatory sentences of natural life without parole”); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014) (holding that “[t]he [*Miller*] rule plainly excludes a certain class of defendants – juveniles – from specific punishment – life without parole absent individualized considerations of youth”); *Kelley v. Gordon*, 465 S.W.3d 842, 846 (Ark. 2015) (holding that *Miller* applies retroactively as a matter of “fundamental fairness and evenhanded justice,” and the defendant is entitled to a “sentencing proceeding at which he will have the opportunity to present *Miller* evidence”); *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (holding that the rule in *Miller* is substantive and to be applied retroactively because it is a “development of fundamental significance” (quoting *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980))).

not.⁴¹ Five states⁴² determined the issue by legislation, four of which chose to apply *Miller* retroactively.⁴³

Consider Henry Montgomery. In 1963, when Montgomery was seventeen years old, he was charged with and subsequently convicted of murdering a police officer in East Baton Rouge, Louisiana.⁴⁴ Montgomery was originally sentenced to death, but the Louisiana Supreme Court reversed his conviction after finding that public prejudice had prevented Montgomery from receiving a fair trial.⁴⁵ Montgomery was retried and was found “guilty without capital

41. *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013) (*Miller* is procedural because it “does not categorically bar” the sentence of life without parole for juveniles); *State v. Tate*, 130 So. 3d 829, 837 (La. 2013) (“[*Miller*] simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life imprisonment without parole for such a conviction, ‘mandat[ing] only that a sentence follow a certain process – considering an offender’s youth and attendant circumstances – before imposing a particular penalty.’” (alteration in original) (quoting *Miller*, 132 S. Ct. at 2471)), *abrogated sub nom.* *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *People v. Carp*, 828 N.W.2d 685, 711 (Mich. Ct. App. 2012) (“It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.”), *reversed in part*, 877 N.W.2d 716 (Mich. 2016) (mem.); *Ex parte Williams*, 183 So. 3d 220, 230–31 (Ala. 2015) (“*Miller* did not create a substantive rule requiring retroactive application to cases on collateral review; rather, *Miller* set forth a procedural rule by proscribing the permissible methods by which states may exercise their continuing power to punish juvenile defendants”), *vacated sub nom.* *Williams v. Alabama*, 136 S. Ct. 1365 (2016); *People v. Tate*, 352 P.3d 959, 963 (Colo. 2015) (holding that the rule announced in *Miller* is procedural and does not apply retroactively because the *Miller* decision did “not categorically bar a penalty for a class of offenders or type of crime. . . . Instead [*Miller*] mandates only that a sentencer follow a certain process” (first alteration in original) (quoting *Miller*, 132 S. Ct. at 2471)); *Chambers v. State*, 831 N.W.2d 311, 328 (Minn. 2013) (reasoning that *Miller* is procedural because it did not “eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release,” but merely mandated that “a sentencer follow a *certain* process – considering an offender’s youth and attendant characteristics – before imposing a sentence of life imprisonment without the possibility of parole” (quoting *Miller*, 132 S. Ct. at 2469)), *overruled sub nom.* *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016). See also Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 967–68 (2015); Josha Rovner, *Slow to Act: States Responses to 2012 Supreme Court Mandate on Life Without Parole*, SENT’G PROJECT 2 (June 2014), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf [hereinafter Rovner, *Slow to Act*]; Michelle Kirby, *Juvenile Sentencing Laws and Court Decisions After Miller v. Alabama*, CONN. GEN. ASSEMBLY OFF. LEGIS. RES., <https://www.cga.ct.gov/2014/rpt/2014-R-0108.htm> (last visited Feb. 5, 2017).

42. Those states include California, Delaware, Hawaii, North Carolina, and Washington.

43. Those states include California, Delaware, North Carolina, and Washington. Rovner, *Slow to Act*, *supra* note 41, at 2; Kirby, *supra* note 41.

44. *Montgomery*, 136 S. Ct. at 725.

45. *Id.*

punishment,” a conviction that required the trial court to impose a sentence of LWOP.⁴⁶ Since this sentence was automatic, Montgomery had no opportunity to present mitigating evidence, such as his age, limited capacity for foresight, self-discipline and judgment, and higher potential for rehabilitation.⁴⁷

Fifty years after Montgomery was first taken into custody, the Court decided *Miller*.⁴⁸ After the Court issued its decision in *Miller*, Montgomery sought collateral review at age sixty-seven.⁴⁹ The trial court denied Montgomery’s motion, holding that the rule in *Miller* does not apply retroactively to cases on collateral review.⁵⁰ The Louisiana Supreme Court denied review and relied on its earlier decision in *State v. Tate* when deciding that *Miller* does not apply retroactively to cases on state collateral review.⁵¹ The Supreme Court of the United States granted certiorari to decide the issue of “whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison.”⁵²

In January 2016, the Court decided *Miller*’s prohibition on mandatory LWOP for juvenile offenders was a new substantive law.⁵³ Generally speaking, substantive law is law that governs the relationship between people or between people and the state,⁵⁴ whereas procedural law sets out the rules followed by the court when it hears a case.⁵⁵ The Court articulated that the rule created in *Miller* was substantive because it rendered mandatory LWOP an unconstitutional penalty for a class of defendants.⁵⁶ In other words, the Court found the

46. *Id.* at 725–26.

47. *Id.* at 726.

48. *Id.*

49. Collateral review is a non-appeal proceeding attacking a judgment. It is referred to as a collateral case because it is an entirely new case. *See, e.g.,* Wall v. Kholi, 562 U.S. 545, 547 (2011) (“We hold that the phrase ‘collateral review’ in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review.”).

50. *Montgomery*, 136 S. Ct. at 727.

51. *Id.*

52. *Id.*

53. *Id.*

54. This general definition of “substantive law” is fairly broad and not extremely helpful in application. However, practicing attorneys Jason Zarrow and William Milliken provide concrete examples of when a rule is substantive: (1) it places primary private conduct beyond the power of the state to proscribe, (2) it prohibits a certain category of punishment for certain classes of defendants because of their status or offense, (3) it narrows the scope of the criminal statute by interpreting its terms, or (4) it modifies the elements of the offense for which the individual was convicted or punished. Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on Miller v. Alabama*, 48 IND. L. REV. 931, 984 (2015). If a new court-created rule fits into one of these categories, it will be applied retroactively under the *Teague* analysis.

55. *Difference Between Substantive and Procedural Law*, DIFFERENCEBETWEEN.NET, <http://www.differencebetween.net/miscellaneous/difference-between-substantive-and-procedural-law/> (last updated July 28, 2011).

56. *Montgomery*, 136 S. Ct. at 732.

rule in *Miller* to be substantive because states do not have the power to impose categorical sentences that have been deemed unconstitutional.⁵⁷ The Court determined that “category” or “class of defendants” to be “juvenile offenders whose crimes reflect the transient immaturity of youth.”⁵⁸ After determining that the rule set out in *Miller* was substantive, the Court then applied *Teague*.⁵⁹ *Teague* requires all substantive rules, state or federal, to apply retroactively.⁶⁰

In all, *Montgomery* held that the rule set out in *Miller* – that it is unconstitutional for juveniles to receive mandatory LWOP sentences – is to apply retroactively to all cases on collateral review.⁶¹ In reality, this means that all juvenile offenders currently serving LWOP sentences prior to *Miller* need to be resentenced. The Court provided a non-binding suggestion for the states:

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.⁶²

The decisions of *Miller* and *Montgomery* have had a significant impact on juvenile sentencing law across the country. The next section explores what action the State of Missouri has taken as a result of these decisions.

III. ACTION TAKEN IN MISSOURI REGARDING *MILLER* AND *MONTGOMERY*

Prior to May 2016, when a juvenile offender was convicted of first degree murder in Missouri, there was only one sentencing option: life without parole.⁶³ Missouri’s previous first degree murder statute authorized only a sentence of death or LWOP.⁶⁴ And since juveniles are constitutionally protected from the death penalty by *Roper*, the only possible punishment under the first degree murder statute for juvenile offenders was LWOP.⁶⁵ However, in 2012, the Supreme Court held in *Miller* that a mandatory LWOP sentence was unconstitutional as well.⁶⁶ Therefore, from 2012 to May of 2016, Missouri’s first degree murder statute did not provide a constitutionally valid punishment for juveniles.

57. *Id.*

58. *Id.* at 734.

59. *Id.* at 736.

60. *Id.* at 728.

61. *Id.* at 727.

62. *Id.* at 736.

63. MO. REV. STAT. § 565.020 (2000) (current version at MO. ANN. STAT. 565.033 (West 2017)).

64. *Id.*

65. *Id.*; *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

66. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

Miller and *Montgomery* required Missouri to address two issues: (1) what sentence should apply to juveniles convicted of first degree murder post-*Miller*, and (2) how should juveniles sentenced to mandatory LWOP sentences pre-*Miller* be resentenced? In May of 2016, SB 590 addressed these issues.⁶⁷

RSMO § 565.033 responds to the first issue by repealing the mandatory LWOP sentence and providing that a person who was under eighteen years of age at the time of the crime may be sentenced to either (1) LWOP, (2) life with the eligibility for parole, or (3) a term of imprisonment between thirty and forty years.⁶⁸ RSMO § 565.033 also provides factors for the sentencer to consider when reviewing an offender's suitability for LWOP.⁶⁹ These factors include: the nature of the circumstances of the offense, the likelihood for rehabilitation, the degree of the defendant's culpability in light of his or her age and role in the offense (including intellectual capacity as well as mental and emotional health), the offender's background (including family, home, and community environment), plus a handful of others.⁷⁰

Relatedly, RSMO § 565.034 establishes specific requirements for when a prosecutor intends to seek an LWOP sentence.⁷¹ It requires that a juvenile found guilty of first degree murder be eligible for a sentence of LWOP "only if a unanimous jury, or a judge in a jury-waived sentencing, finds beyond a reasonable doubt that . . . [t]he victim received physical injuries personally inflicted by the defendant and the physical injuries inflicted by the defendant caused the death of the victim," and if at least one of an enumerated list of aggravating factors exists.⁷²

Lastly, RSMO § 558.047 addresses how to resentence juveniles given mandatory LWOP sentences pre-*Miller*.⁷³ RSMO § 558.047 states that any person sentenced to LWOP for the crime of first degree murder committed as a juvenile prior to August 28, 2016, be eligible for a parole hearing after serving twenty-five years.⁷⁴ Relatedly, RSMO § 558.047 also states that a juvenile convicted of first degree murder on or after August 28, 2016, and sentenced to any term of imprisonment except LWOP, be eligible for a parole hearing after serving twenty-five years and eligible for another parole hearing after serving thirty-five years.⁷⁵

67. S. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

68. MO. ANN. STAT. § 565.033 (West 2017).

69. *Id.*

70. *Id.*

71. *Id.* § 565.034.

72. *Id.* § 565.034.6.

73. *Id.* § 558.047.

74. *Id.*

75. *Id.*

IV. MISSOURI LEGISLATURE GOT IT WRONG: WHAT MISSOURI SHOULD HAVE DONE IN RESPONSE TO *MILLER* AND *MONTGOMERY*

SB 590 was pre-filed December 1, 2015.⁷⁶ However, from January 25, 2016 (the day *Montgomery* was decided), until April 5, 2016 (the day the bill was amended), the bill, as written, was unconstitutional.⁷⁷ It required action deemed by *Montgomery* to be unconstitutional.⁷⁸ The amendment to the bill filed on April 5, 2016, attempted to bring the bill in alignment with the holding of *Montgomery*. Five weeks after the introduction of the amendment, the bill became law. However, during those short five weeks, the bill was changed very minimally in regards to its status under *Miller* and *Montgomery*.⁷⁹

It was undoubtedly a pressing time for the legislature. A bill needed to be passed on this issue because Missouri's previous first degree murder statute did not provide a valid sentencing option for juveniles, and there were eighty-four juveniles convicted of first degree murder who needed to be resentenced pursuant to *Montgomery*.⁸⁰ Due to its race against the legislative clock, the legislature did not have adequate time to research and engage in a thorough consideration to ensure this statute was responsive to the concerns raised by *Miller* and *Montgomery*.

The following two sections of this Note are the result of taking the time, doing the research, and engaging in the consideration these two issues deserve. To follow is a proposed legislative reform of RSMO §§ 558.047, 565.033, and 565.034.

A. The "Miller Problem": What Should Be the Sentencing Options for Juveniles Convicted of First Degree Murder Post-Miller in Missouri?

Prior to May 2016, the only sentencing option for a juvenile convicted of first degree murder was LWOP.⁸¹ However, pursuant to *Miller*, it was unconstitutional to mandatorily sentence juveniles to LWOP, which left Missouri without a constitutional sentencing option for a juvenile convicted of first degree murder.⁸² In response to this problem, RSMO § 565.033 was enacted. RSMO § 565.033 requires that juveniles convicted of first degree murder be sentenced to one of the following: (1) LWOP, (2) life with the possibility of parole, or (3) a term of imprisonment between thirty and forty years.⁸³ RSMO § 565.033 brought Missouri's juvenile sentencing structure for first degree

76. S. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

77. *Id.*

78. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

79. *Id.*

80. *See* MO. REV. STAT. § 565.020 (2000) (amended 2016).

81. *Id.*

82. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

83. MO. ANN. STAT. § 565.033 (West 2017).

murder into compliance with the Constitution.⁸⁴ However, as discussed above, the sentencing structure it implemented was created too quickly, and adequate consideration was not given to the complex factors surrounding the decision. As a result, the following section discusses the legislative reform Missouri should undergo in regards to its juvenile sentencing structure.

1. Other States' Responses to *Miller*

In determining how Missouri should respond to this issue, it is helpful to consider how other states have responded to *Miller*. Some have eliminated LWOP as a punishment for juveniles, others have made it nearly impossible to apply LWOP to juveniles, and in some states, LWOP is still a sentencing option for juveniles.

The Supreme Court in *Miller* clearly articulated that juvenile offenders could not be sentenced to LWOP without considering mitigating factors.⁸⁵ This presents two options for states: they can either choose to eliminate LWOP as a punishment for juvenile offenders, or they can determine on a case-by-case basis the culpability of each juvenile offender and determine if he or she is, in fact, deserving of the harshest punishment available for juveniles. Since the *Miller* decision in 2012, twenty-six states have changed their laws for juvenile offenders convicted of first degree murder.⁸⁶ Prior to *Miller*, all but four of these states required LWOP for juveniles convicted of murder.⁸⁷ Currently, eighteen states⁸⁸ have banned juvenile LWOP.⁸⁹ Of the thirty-two states that allow LWOP sentences for juveniles, four – Pennsylvania, Michigan, Louisiana, and California – account for approximately half of the 2500 juveniles serving LWOP sentences.⁹⁰ This section explores the actions of three states that have dealt with this issue differently in order to pool a range of information that can inform Missouri's approach.

In response to *Miller*, Delaware eliminated LWOP for juvenile offenders.⁹¹ Its law replaced the automatic LWOP sentence for first degree murder with a sentencing range of twenty-five years to life.⁹² After serving twenty-

84. *Id.*

85. *Miller*, 132 S. Ct. at 2467–69.

86. Rovner, *Slow to Act*, *supra* note 41, at 1.

87. Joshua Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT 2 (July 2016), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> [hereinafter Rovner, *Juvenile Life*].

88. These states include Oregon, Nevada, Montana, Utah Wyoming, Iowa, Colorado, Kansas, New Mexico, Texas, Kentucky, West Virginia, Connecticut, Vermont, Delaware, Massachusetts, Alaska, and Hawaii.

89. Rovner, *Juvenile Life*, *supra* note 87, at 2.

90. *Id.* at 3.

91. S. 9, 147th Gen. Assemb. (Del. 2013).

92. *Id.*

five years, the juvenile offender can petition the trial court for a sentence review.⁹³ In the sentence review, the court is to determine if the person has been rehabilitated and should be eligible for release.⁹⁴ Additionally, the law states that juveniles sentenced to LWOP for first degree murder may petition for a reduction in their sentence after serving thirty years.⁹⁵

The *Miller* decision did not invalidate California's first degree murder statute because it provided an option for punishment of LWOP *or* twenty-five years to life, at the discretion of the court.⁹⁶ However, prior to the 2012 passage of SB 9, a legislative response to *Miller*, California had 309 inmates serving LWOP sentences for murders committed when they were minors.⁹⁷ The 2012 law will reduce that number significantly. The law allows inmates convicted of murder as juveniles to ask judges to reconsider their sentences after they serve at least fifteen years in prison.⁹⁸ If the judge does not grant leniency, another petition may be made after the offender serves twenty years, and then another petition may be filed after serving twenty-four years.⁹⁹ However, offenders whose crimes involved torture or the killing of public officials are foreclosed from using the reconsideration provisions.¹⁰⁰ The bill gives the judge the opportunity to reduce the sentence from LWOP to twenty-five years to life if the judge determines the inmate has taken steps toward rehabilitation.¹⁰¹

In 2012, in response to *Miller*, SB 850 was enacted in Pennsylvania.¹⁰² For first degree murder, judges in Pennsylvania have the option to sentence juveniles from fifteen to seventeen years of age to a minimum sentence of thirty-five years to life, with LWOP as a discretionary option, and a minimum of twenty-five years to life for juvenile offenders under fifteen years of age.¹⁰³ The bill also set out additional procedural measures¹⁰⁴ the court must follow prior to imposing an LWOP sentence.¹⁰⁵ This reform leaves Pennsylvania's

93. *Id.*

94. *Id.*

95. *Id.*

96. CAL. PENAL CODE § 190.5(a) (West 2017) (imposition of death penalty prohibited for persons under eighteen).

97. Michael Harris, *California Law Gives Youth Sentenced to Life Without Parole Another Chance*, NAT'L CTR. FOR YOUTH L., <http://youthlaw.org/publication/california-law-gives-youth-sentenced-to-life-without-parole-another-chance/> (last visited Feb. 5, 2017).

98. S. 9, 2013–2014 Leg. Reg. Sess. (Cal. 2013).

99. *Id.*

100. *Id.*

101. *Id.*

102. S. 850, 2011–2012 Reg. Sess. (Pa. 2011).

103. *Id.*

104. Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CONN. PUB. INT. L.J. 143, 149 (2013).

105. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

sentencing scheme as one of the harshest in the country.¹⁰⁶ Senate Bill 850 “relaxes automatic LWOP sentence[s] for juveniles somewhat, [but it] is still so extreme as to be a virtual guarantee of life sentences for youth offenders.”¹⁰⁷

2. Suggestions for Missouri

Based on the discussion of the above-mentioned states, there are numerous ways to handle the requirements of *Miller*. The following sections advocate for a reform of the statutes enacted pursuant to SB 590. This section first explains why Missouri should ban LWOP for juvenile offenders, the second section suggests the sentencing scheme that Missouri should adopt for these offenders, and the third discusses the policy justifications that support these proposals.

i. Missouri Should Ban LWOP for Juvenile Offenders

In *Miller*, the Supreme Court continued to allow LWOP to be a sentencing option for some juvenile offenders, but that does not necessarily mean Missouri must have this option.¹⁰⁸ This Note argues LWOP should be eliminated altogether for juvenile offenders in Missouri. Categorical bans are not always favorable. However, in this instance, a categorical ban on LWOP for juvenile offenders is preferable for numerous reasons.

Generally speaking, an LWOP sentence for a child is inhumane and barbaric – a person’s life should not be defined by a tragic mistake he or she made as a child. Taking a closer look at this punishment for this class of offenders, none of the justifications for punishment are accomplished when a juvenile is sentenced to LWOP, even when other mitigating factors are absent.

In the United States, criminal punishment serves any combination of the following four goals: retribution, deterrence, incapacitation, and rehabilitation.¹⁰⁹ Further, “[t]he effectiveness of any punishment . . . should be measured against the yardstick of these four goals and should accord with the widely accepted corollary that no punishment should be more severe than necessary to

106. Matt Fleischer, *Governor, Have Mercy: Give Juvenile Justice a Chance in Pennsylvania*, TAKEPART (Oct. 22, 2012), <http://www.takepart.com/article/2012/10/22/no-mercy-kid-offenders>.

107. *Id.*

108. *See generally* *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

109. Lisa M. Storm, *1.5 The Purposes of Punishment*, FLAT WORLD EDUC., http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05 (last visited Feb. 5, 2017).

achieve these stated goals.”¹¹⁰ LWOP sentences for juvenile offenders “fail[] to measure up on all counts” and thus are not justified.¹¹¹

Retribution goals are met when the criminal sentence is directly related to the personal culpability of the offender.¹¹² However, in order to determine if the offender “deserves” the punishment he or she is given, the nature of the offense, as well as the culpability of the offender, must be considered.¹¹³ After taking each of these considerations into account, it is clear that children do not deserve one of the harshest punishments in our criminal system.¹¹⁴ As discussed in further detail below, children are not as blameworthy or as culpable as adults because children do not have the same ability to think, weigh consequences, or resist peer pressure.¹¹⁵ The Court in *Roper* stated that “these differences [between juveniles and adults] render suspect any conclusion that a juvenile falls among the worst offenders.”¹¹⁶

Deterrence is accomplished when the threat of a punishment dissuades someone from committing a certain crime. Proponents of LWOP sentences for juveniles argue that children will be best deterred from committing homicides if they face harsh sentences as a consequence of their actions.¹¹⁷ However, “research has failed to show that the threat of adult punishment deters adolescents from crime[,] . . . given the well-documented limited abilities of children, including teenagers, to anticipate the consequences of their actions and rationally assess their options.”¹¹⁸ Even after decades of research, there has been minimal evidence to support the notion that the threat of incarceration does much of anything to deter criminals.¹¹⁹ Furthermore, adolescents are less able to grasp the significance of an LWOP sentence. Thus, LWOP sentences for juveniles do not accomplish the deterrence goal, either.¹²⁰

Incapacitation contributes to public safety because an incarcerated person cannot commit additional crimes when he or she is incapacitated.¹²¹ However, once an offender has been rehabilitated, the justification for incapacitation

110. *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUM. RTS. WATCH (Oct. 11, 2005), <https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states#page>.

111. *Id.*

112. Storm, *supra* note 109.

113. *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

114. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

115. *Position Statement 58: Life Without Parole for Juvenile Offenders*, MENTAL HEALTH AM., <http://www.mentalhealthamerica.net/positions/life-without-parole-juveniles> (last visited Feb. 5, 2017).

116. *Roper*, 543 U.S. at 570.

117. *The Rest of Their Lives*, *supra* note 110.

118. *Id.*

119. Maggie Koerth-Baker, *Crime Despite Punishment*, UNDARK (May 16, 2016), <http://undark.org/article/deterrence-punishments-dont-reduce-crime/>.

120. *Position Statement 58*, *supra* note 115.

121. Storm, *supra* note 109.

ends, because, at that point, the individual in custody is no longer a threat to public safety.¹²² Oftentimes, juvenile offenders who receive LWOP sentences are first-time offenders with “little in their histories to warrant the assumption that they would not grow up and be rehabilitated if they were spared a lifetime in prison.”¹²³ Additionally, a study conducted by the Office of Juvenile Justice and Delinquency Prevention found that about 91.5% of the juvenile offenders in their study “reported decreased or limited illegal activity during the first 3 years following their court involvement.”¹²⁴ Since juvenile offenders have high potential to be rehabilitated and become productive members of society, LWOP sentences for juvenile offenders are not warranted on incapacitation grounds either.¹²⁵

The last justification for punishment is rehabilitation. LWOP sentences for juvenile offenders do not serve rehabilitation goals.¹²⁶ In fact, they do just the opposite – LWOP sentences “discourage[] youth offenders from attempting to reform themselves in prison.”¹²⁷ Because correctional facilities typically reserve educational, vocational, and other reform programs that develop the minds and skills of prisoners for those individuals who will someday be released, juvenile offenders sentenced to LWOP will rarely receive the benefit of rehabilitation programs while in prison.¹²⁸

In addition to the lack of justification for juvenile LWOP sentences, it is important to note that the United States is one of the only nations permitting LWOP for juvenile offenders.¹²⁹ The Convention on the Rights of the Child, a treaty that forbids LWOP for juvenile offenders, has been ratified by every country except the United States and Somalia.¹³⁰ Excluding the United States, there are fewer than fifteen juvenile offenders currently serving LWOP sentences in the world.¹³¹

122. *Position Statement 58*, *supra* note 115.

123. *The Rest of Their Lives*, *supra* note 110.

124. Edward P. Mulvey, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, DOJ, at 1 (Mar. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf>.

125. *The Rest of Their Lives*, *supra* note 110.

126. *Juvenile Life Without Parole Fact Sheet*, CITIZENS FOR JUV. JUST. (Mar. 2011), <http://www.cfjj.org/pdf/LWOP%20March%202011.pdf>.

127. *The Rest of Their Lives*, *supra* note 110.

128. *Juvenile Life Without Parole Fact Sheet*, *supra* note 126.

129. James Felman & Cynthia Orr, ABA, CRIMINAL JUSTICE SECTION, 107C, REPORT TO THE HOUSE OF DELEGATES (2015).

130. *United States: Thousands of Children Sentenced to Life Without Parole*, HUM. RTS. WATCH (Oct. 11, 2005, 8:00 PM), <https://www.hrw.org/news/2005/10/11/united-states-thousands-children-sentenced-life-without-parole>.

131. *Id.*

Furthermore, it is nearly impossible for judges to “define or identify what constitutes [] adult level culpability among offending youths.”¹³² Even “[c]linicians lack tools with which to assess impulsivity, foresight, and preference for risk, and any metric with which to equate those qualities with criminal responsibility.”¹³³ Therefore, it follows that judges are even less equipped to do so.¹³⁴ Due to the inability to define or measure immaturity or equate it to culpability, the juvenile offenders of our society end up being over punished.¹³⁵ A categorical rule takes into consideration the inability of judges or juries to balance the “abstract idea of youthfulness against the aggravating reality of a horrific crime.”¹³⁶

When the Supreme Court was faced with a similar issue in *Roper*, it was fearful that judges and juries “could not distinguish between a youth’s diminished responsibility for causing the harm and the harm itself.” For this reason and others, the Court categorically banned the imposition of the death penalty.¹³⁷ There is nothing to suggest that judges and juries have a better ability to make this determination when the punishment in question is LWOP instead of the death penalty.¹³⁸ Additionally, society has accepted the use of age-based categories to approximate the age of maturity when it is either impossible or inefficient to try to calculate maturity on a case-by-case basis. Consider activities such as voting, driving, and consuming alcohol.¹³⁹

Likewise, the American Bar Association (“ABA”) supports the abolishment of LWOP for juvenile offenders.¹⁴⁰ The ABA has adopted Resolution 107C, which suggests that courts should eliminate LWOP for juveniles both prospectively and retroactively.¹⁴¹ The ABA states that:

The legal developments in *Graham* and *Miller*, along with the advances in brain and behavioral development science showing how children are fundamentally different from adults, as explained in *Roper* and in the report accompanying ABA Approved Resolution 105C, support a conclusion that it is inappropriate to decide at the time of sentencing that life without parole is an appropriate sentence for a juvenile offender. This resolution [(107C)] encourages jurisdictions to go one step further than *Miller* and to join the policy position of the rest of the world by

132. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 138 (2013).

133. *Id.* at 139.

134. *Id.* at 140.

135. *Id.* at 142–43.

136. *Id.* at 140–41.

137. *Id.*

138. *Id.* at 131 n.114.

139. *Id.* at 140.

140. Felman & Orr, *supra* note 129.

141. *Id.*

eliminating mandatory life without parole sentences for youthful offenders.¹⁴²

While the *Miller* Court did not specifically prohibit the imposition of LWOP after considering a child's age, the Court did suggest that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."¹⁴³ After considering the underlying psychological premise of *Roper*, *Graham*, and *Miller*, this "suggestion sounds less like dicta" and a lot more like a preview of a future decision.¹⁴⁴ Based on the above-mentioned reasons, a categorical ban on juvenile LWOP is "the approach most likely to be taken by the Supreme Court if this question is ever placed before them in the future."¹⁴⁵

Therefore, pursuant to the arguments set out above, and in accordance with principles set out by the Supreme Court, Missouri should abolish LWOP for juvenile offenders.

ii. Suggested Sentencing Options for Juveniles Convicted of First Degree Murder in Missouri

The suggestion in the previous section that Missouri should abolish LWOP as a sentencing option for juveniles provides only a partial solution. Missouri must also determine what the sentencing option for juvenile first degree murder offenders should be at the present moment. The suggestion provided in this section is similar to the sentencing scheme adopted for offenders under the age of eighteen in the Model Penal Code.¹⁴⁶ Since Missouri has already adopted much of the Model Penal Code, to enact legislation in accordance with it in regard to juvenile sentencing would not be a far stretch.¹⁴⁷

First, the guidelines when sentencing a juvenile offender need to be established. When sentencing a juvenile first degree murder offender, blameworthiness, gravity of the offense, harm to the victim, offender rehabilitation and regeneration, deterrence, and incapacitation should all be considered.¹⁴⁸ However, each of these considerations should not be given equal weight. First, in regard to blameworthiness, the offender's age must be a mitigating factor, and greater weight should be given to offenders of younger ages. However, this consideration does not rule out that a court could find a juvenile offender

142. *Id.*

143. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

144. Kinell, *supra note* 104, at 168.

145. *Id.*

146. *See generally* MODEL PENAL CODE: SENTENCING § 6.11A cmt. c (AM. LAW INST., Tentative Draft No. 2, 2011), <http://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2>.

147. Anders Walker, *Criminal Confusion: Addressing the Tension Between Bar Preparation & Practical Skills*, 10 OHIO ST. J. CRIM. L. 669, 669 (2013).

148. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c.

committed a crime with a high degree of personal blameworthiness.¹⁴⁹ A court should find a juvenile offender highly culpable and deserving of a harsher punishment if the crime was “committed only for a thrill, or for sadistic purposes, or out of racial animus.”¹⁵⁰

Second, priority should be given to the punishment justification of rehabilitation over justifications such as general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities.¹⁵¹ While a court may consider deterrence, incapacitation of dangerous offenders, gravity of the offense, and harm to the victim, these factors are ancillary to the consideration that should be given to the reduced blameworthiness of juveniles and the goal of rehabilitation.¹⁵² However, if “an offender has been convicted of a serious violent offense, and there is a reliable basis for belie[ving] that the offender presents a higher risk of serious violent offending in the future, priority may be given to the goal of incapacitation.”¹⁵³ This will not be a common occurrence, as “[m]ost juvenile criminal careers last a very short time.”¹⁵⁴ It is also important to note that deterrence cannot be the primary sentencing goal of a juvenile offender because juvenile offenders are less deterrable due to their reduced ability to reason and weigh consequences.¹⁵⁵

Another feature of the proposed new sentencing structure is that there must be an increased emphasis on the individual considerations of each case and offender.¹⁵⁶ Therefore, under the new system, there will be no mandatory minimum penalty for juvenile offenders.¹⁵⁷ The American Law Institute has long disapproved of mandatory minimum penalties for numerous reasons.¹⁵⁸ First, statutorily mandated punishments shift the discretion of sentencing from courts, on an individualized basis, to the legislature, on a general basis.¹⁵⁹ This is problematic because legislatures do not have the ability to know ahead of time the specific facts of both the crime and the offender in all the cases a court

149. *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK, http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Feb. 5, 2017).

150. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c.

151. Courtney Amelung, Endnote, *Responding to the Ambiguity of Miller v. Alabama: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 40 (2013).

152. MODEL PENAL CODE: SENTENCING § 6.11A(b).

153. *Id.* § 6.11A(c).

154. *Id.* § 6.11A cmt. c.

155. *Cruel and Unusual Punishment: The Juvenile Death Penalty*, ABA JUV. JUST. CTR. 2 (Jan. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

156. MODEL PENAL CODE: SENTENCING § 6.06 cmt. a(3).

157. *Id.* § 6.06 cmt. d.

158. *Id.*

159. *Mandatory Sentencing Was Once America’s Law-and-Order Panacea. Here’s Why It’s Not Working*, FAMS. AGAINST MANDATORY MINIMUMS 2, <http://www.prison-policy.org/scans/famm/Primer.pdf> (last visited Feb. 5, 2017).

will hear.¹⁶⁰ Second, “[i]t is inherently unsound to assume that all offenses within a given category must necessarily be aggravated to the same high level of seriousness, or will be uniformly devoid of mitigating circumstances.”¹⁶¹

Furthermore, mandatory sentences do nothing to contribute to the goals of rehabilitation or reintegration.¹⁶² This concern is even more pronounced when the offender is under the age of eighteen because of the elevated focus on rehabilitation placed on the sentencing of juvenile offenders.¹⁶³ Due to the heightened need for individual considerations and flexibility when sentencing juveniles, the proposed system will eliminate mandatory minimum sentences.

In addition to these general sentencing guidelines, Missouri should implement an age-as-a-proxy-for-culpability model. Under this model, the largest sentence reductions are given to the youngest offenders.¹⁶⁴ This makes good sense considering the younger the offender, the more likely he or she is to (1) be less culpable, (2) embody the typical immaturities of youth, and (3) be capable of change.¹⁶⁵ This model is “based on a sliding scale of diminished responsibility,”¹⁶⁶ which is consistent with the diminished culpability and heightened capacity for change considerations in *Roper, Graham, and Miller*.

Using the age groups in the Model Penal Code – under fourteen, under sixteen, and under eighteen¹⁶⁷ – Missouri should implement the following scheme:

1. First degree murder offenders under the age of fourteen shall not receive a sentence longer than twenty years;
2. First degree murder offenders between the ages of fourteen and sixteen shall not receive a sentence longer than twenty-five years; and
3. First degree murder offenders between the ages of sixteen and eighteen shall not receive a sentence longer than thirty years.¹⁶⁸

160. MODEL PENAL CODE: SENTENCING § 6.06 cmt. *d*.

161. *Id.*

162. Lindsey E. Krause, *One Size Does Not Fit All: The Need for a Complete Abolition of Mandatory Minimum Sentences for Juveniles in Response to Roper, Graham, and Miller*, 33 LAW & INEQ. 481, 503 (2015).

163. *Id.*

164. Feld, *supra* note 132, at 141.

165. *Id.*

166. *Id.*

167. MODEL PENAL CODE: SENTENCING § 6.11A(g) (AM. LAW INST., Tentative Draft No. 2, 2011).

168. Under this sentencing scheme, juvenile offenders between the ages of sixteen and eighteen (the group of offenders likely to be the most mature, culpable, and least likely to reform) will receive, at a minimum, the equivalent of a life sentence of an adult, with the possibility of a longer sentence based on an evaluation of factors that will be disused below. This is a reasonable compromise for taking LWOP off the table.

4. Additionally, juvenile first degree murder offenders are continuously eligible for parole review on a bi-yearly basis.

The parole review option provides juveniles with the incentive to be on their best behavior while in prison.¹⁶⁹ The bi-yearly review sends juveniles the message that it is never too late to change, even if they were not granted relief at their first parole hearing. It also “recognizes that adolescents can generally be expected to change more rapidly in the immediate post-offense years, and to a greater absolute degree.”¹⁷⁰

When Missouri courts are making the determination as to how many years a juvenile should serve between the maximum and minimum options listed above, there are many factors the courts need to consider. RSMO § 565.033.2 sets out a list of the factors that Missouri courts should consider when determining how many years, within the above-proposed maximums and minimums, an offender should serve.¹⁷¹ Those factors include: nature of the circumstances of the offense; likelihood for rehabilitation; defendant’s background, including the environment of one’s home, family, and community; degree of the defendant’s culpability in light of his or her age and role in the offense (including intellectual capacity as well as mental and emotional health); extent of participation in the offense; effect of familial or peer pressures; and prior criminal history.¹⁷²

Furthermore, this method tempers the common criticism that some juvenile offenders should, in fact, be tried as adults because they have the mental capacities of adults. Proponents of this argue that, for every less culpable juvenile offender saved from LWOP by these reforms, there will be a more culpable juvenile offender who will not receive the punishment he or she deserves.¹⁷³ However, this criticism is flawed because even if an individual under the age of eighteen has the mental capacities of an adult, individuals under eighteen are still developing their personalities, commitments, and outlooks on life; further, they are still more susceptible to group pressures.¹⁷⁴

A sentencing method such as this holds juveniles accountable and balances the risk that these offenders pose to the community while still providing them with a “meaningful opportunity to obtain release.”¹⁷⁵ Under the proposed sentencing scheme, all juveniles will be able to obtain parole at some point in their lives, which will hopefully motivate them to reform while they are incarcerated.

169. MODEL PENAL CODE: SENTENCING § 6.11A rep. n.a.

170. *Id.* § 6.11A cmt. h.

171. MO. ANN. STAT. § 565.033.2 (West 2017).

172. *Id.*

173. Peter A. Weir, Opinion, *Some Juvenile Killers Deserve Adult Justice*, DENVER POST (Nov. 19, 2013, 9:26 AM), <http://www.denverpost.com/2013/11/19/some-juvenile-killers-deserve-adult-justice/> (last updated Apr. 29, 2016, 1:33 AM).

174. Mary Beckman, *Crime, Culpability and the Adolescent Brain*, DEATH PENALTY INFO. CTR. (July 30, 2004), <http://www.deathpenaltyinfo.org/node/1225>.

175. Feld, *supra* note 132, at 135.

iii. Policy Rationale for Banning LWOP and Adopting the Proposed Sentencing Scheme

The elimination of LWOP for juvenile offenders and the proposed sentencing scheme set out above creates noticeably more lenient sentencing standards than are currently in place in Missouri under RSMO §§ 558.047, 565.033, and 565.034.¹⁷⁶ This section provides policy considerations for why this drastic change is warranted, supported by current research in psychology and criminology.¹⁷⁷

Studies of brain development from adolescence to adulthood have led to various conclusions regarding the blameworthiness of juveniles.¹⁷⁸ Researchers know that brain tissue, crucial for the insulation of brain circuitry as well as its precise and efficient operation, continues to change and grow until a person's early twenties.¹⁷⁹ Studies also reveal that the frontal lobe, responsible for reasoning, is not fully developed in adolescents.¹⁸⁰ The frontal lobe undergoes more changes during adolescence than during any other stage of life.¹⁸¹ Furthermore, the frontal lobe is the last part of the brain to develop.¹⁸² This "means that even as they become fully capable in other areas, adolescents cannot reason as well as adults: '[m]aturation, particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning.'"¹⁸³ Dr. Deborah Yurgelun-Todd of Harvard Medical School has concluded that adolescents often rely on the emotional parts of their brain rather than the frontal lobe when making decisions.¹⁸⁴ She explained that teenagers more often act based on a "gut response," as opposed to evaluating the consequences of what they are doing.¹⁸⁵ Moreover, during adolescent years, the body undergoes dramatic hormonal and emotional changes, and in young boys, specifically, one of those hormones is testosterone, which is closely associated with aggression.¹⁸⁶ For

176. See notes 68–75 and accompanying text.

177. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c(1)–(2) (AM. LAW INST., Tentative Draft No. 2, 2011).

178. *Juvenile Life Without Parole Fact Sheet*, *supra* note 126.

179. *Cruel and Unusual Punishment*, *supra* note 155, at 2.

180. *Id.*

181. Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859–60 (1999).

182. *Id.*

183. *Cruel and Unusual Punishment*, *supra* note 155, at 2 (alteration in original) (quoting Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8819 (2001)).

184. Interview: *Deborah Yurgelun-Todd*, PBS FRONTLINE (2002), <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> (last visited Apr. 9, 2017).

185. *Id.*

186. *Cruel and Unusual Punishment*, *supra* note 155, at 2.

all of these reasons, the degree of personal culpability is different for juvenile offenders than it is for adult offenders.

Additionally, “[m]any believe that adolescents are more responsive to rehabilitative sanctions than adult offenders. While the evidence for this proposition is mixed, it is clear that some rehabilitative programs are effective for some juvenile offenders.”¹⁸⁷ A national survey from 2011 conducted by a research firm¹⁸⁸ concluded that society thinks it has a greater moral obligation to attempt to rehabilitate juvenile offenders, and, furthermore, “that the benefits of doubt concerning the efficacy of treatment should normally be resolved in favor of offenders under 18.”¹⁸⁹

Studies have also shown that a great majority of juvenile offenders will voluntarily desist from criminal activity without intervention from the legal system.¹⁹⁰ Therefore, the legal system should refrain from incarcerating juveniles for long periods of time so as not to disrupt a juvenile’s normal aging progression toward desistance.¹⁹¹ Furthermore, a significant minority of juvenile offenders commit serious crimes at high rates: “Age-crime curves [provide evidence that] peak years of criminal involvement are in the late teens and early 20s. [O]nly [about] 6 or 8 percent[] [of juvenile offenders] go on to become ‘chronic’ or ‘persistent’ offenders who commit outsized numbers of serious crimes.”¹⁹² Lastly, there is no support for the proposition that increased punishment severity correlates with more effective deterrence for any age group, with the effect on juvenile offenders being especially remote.¹⁹³ It is highly unlikely that juvenile offenders know the law and the serious consequences of committing specific crimes.¹⁹⁴ Even if they do know, juvenile offenders are more likely to be susceptible to peer pressures even when they are aware of the consequences.¹⁹⁵

Therefore, due to the decreased blameworthiness, higher potential for rehabilitation, decreased need for harm prevention, and lack of impact deterrence has on juvenile offenders, it is thoroughly justified that Missouri implement

187. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c(2) (AM. LAW INST., Tentative Draft No. 2, 2011).

188. GBA Strategies is a company that offers expertise in survey research; its 2011 survey result found that 89% of Americans strongly favor rehabilitation and treatment approaches such as counseling education, treatment, restitution, and community service. See Liz Ryan, *Youth in the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUST. 12 (Oct. 2011), http://www.campaignforyouthjustice.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf.

189. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c(2).

190. See Mulvey, *supra* note 124.

191. John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 17 (2001).

192. MODEL PENAL CODE: SENTENCING § 6.11A cmt. c(4).

193. *Position Statement 58*, *supra* note 115.

194. *Five Things About Deterrence*, NAT’L INST. JUST. (June 6, 2016), <http://nij.gov/five-things/pages/deterrence.aspx>.

195. Mulvey, *supra* note 124.

this more lenient sentencing structure that eliminates LWOP for juvenile offenders and imposes maximum sentences of twenty, twenty-five, and thirty years, respectively, based on the offenders' ages.

B. The “Montgomery Problem”: What Should Missouri’s Procedure Be for Resentencing Juveniles Who Received Mandatory LWOP Sentences Pre-Miller?

In January 2016, the Supreme Court decided in *Montgomery* that *Miller*'s prohibition on mandatory LWOP sentences for juvenile offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review.¹⁹⁶ Currently in Missouri, RSMO § 558.047 requires that a juvenile sentenced to LWOP prior to August 28, 2016, be eligible for parole after serving twenty-five years.¹⁹⁷ The statute also requires that a juvenile sentenced after August 28, 2016, to any term of imprisonment other than LWOP, be eligible for a parole hearing after serving twenty-five years.¹⁹⁸ However, as discussed above, this decision was made in fewer than five weeks and without much debate or consideration.¹⁹⁹

Resentencing can be done in two different ways, but unfortunately, the *Montgomery* decision provided states with little guidance on which to choose in resentencing the 2100 juvenile offenders currently serving mandatory LWOP sentences across the country.²⁰⁰ The Court advised: “A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”²⁰¹ The court did not write “shall” or “must”; it wrote “may.”²⁰² This raises the question: should resentencing be done through the parole board or through a resentencing hearing? The next section will examine the pros and cons of both parole and resentencing hearings, followed by a suggestion as to what the Missouri legislature should do.

1. Resentencing Hearings

The decisions in *Montgomery* and *Miller* held mandatory LWOP sentences are unconstitutional for juvenile offenders convicted of first degree murder.²⁰³ Therefore, “[w]hen a sentence of punishment is found to be void or

196. *Montgomery v. Louisiana*, 136 S. Ct. 718, 731–32 (2016).

197. MO. ANN. STAT. § 558.047.1(1) (West 2017).

198. *Id.* § 558.047.1(2).

199. *See supra* notes 76–80 and accompanying text.

200. *See generally Montgomery*, 136 S. Ct. 718.

201. *Id.* at 736.

202. *Id.*

203. *Id.*; *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

illegal, it will be committed back to the trial court for declaring a new sentence.²⁰⁴ Technically, this means that all juvenile offenders convicted of mandatory LWOP sentences prior to *Miller* need to be resentenced. However, there are drawbacks to the resentencing process, namely that it is time consuming and expensive.²⁰⁵ It is arguably a waste of judicial resources to re-litigate the sentencing phase for these individuals, who have already eaten up the time of over-taxed judges, prosecutors, and public defenders.

Another problem with a resentencing hearing is that the decision of the new sentence is determined by one individual – the judge.²⁰⁶ With this decision being made by a single person, the likelihood for personal bias is greater.²⁰⁷ Judges are not experts in adolescent development or the relationship between developmental science and juvenile crime and thus lack the competency to determine if each particular juvenile offender is ready for release or should continue to serve a specific amount of time.²⁰⁸ This is not to argue that judges should never be able to sentence juveniles – it is only to point out that the consequences of judicial inexperience are especially dangerous when it comes to LWOP juvenile sentencing. Moreover, the availability of evidence and witnesses available to testify will be greatly diminished in some cases, since some of these crimes happened decades ago.²⁰⁹

However, there are also benefits when an individual receives a resentencing hearing – two important ones being the right to counsel and the right to appeal the decision reached at the resentencing hearing.²¹⁰

2. Parole Hearings

Likely due to the time and cost of the proceedings, the impact all these new cases would have on the already back-logged court system, and the concern that the decision is made by one individual, the Court in *Montgomery* explicitly mentioned that states can use parole hearings, instead of resentencing

204. *Resentence Law and Legal Definition*, USLEGAL, <http://definitions.uslegal.com/r/resentence/> (last visited Feb. 5, 2017).

205. Claire Glass, *How States Are Dealing with Unconstitutional Life Sentences for Juvenile Offenders*, FORDHAM URB. L.J.: CITY SQUARE (Mar. 28, 2016), <http://urban-lawjournal.com/how-states-are-dealing-with-unconstitutional-life-sentences-for-juvenile-offenders/>.

206. Rovner, *Slow to Act*, *supra* note 41.

207. See generally Jon'a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M. L. REV. 107 (1996).

208. See generally Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, SENT'G PROJECT 29 (Mar. 2012), <http://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.

209. Glass, *supra* note 205.

210. See generally Stephen K. Harper, *Resentencing Juveniles Convicted of Homicide Post-Miller*, NAT'L ASS'N DEF. LAWS., <https://www.nacdl.org/Champion.aspx?id=32657> (last visited Feb. 5, 2017).

hearings, to determine the fate of the offenders mandatorily sentenced to LWOP.²¹¹

The parole system provides some benefits not provided by a resentencing hearing. First, the parole system is quicker than a court proceeding, and a board, not just one individual, makes the decision, so the likelihood of personal bias is minimized.²¹² Second, consideration is often given to a wider set of factors.²¹³ For example, in Missouri, “[a]t [a] hearing the [Parole] Board will review the offender’s institutional conduct and adjustment, programs the offender has completed, programs the offender needs to complete and any other issues the Board thinks is relevant.”²¹⁴

However, just as with the resentencing structure, there are drawbacks to the parole system. State parole board authorities are appointed by the governor.²¹⁵ Because these board members are appointed, they are typically “politically well-connected and come from law enforcement, rather than social science or advocacy, backgrounds.”²¹⁶ In Missouri, the seven-member parole board is composed of individuals of “recognized integrity and honor, known to possess education and ability in decision making through career experience and other qualifications for the successful performance of their official duties.”²¹⁷ There are no specific educational requirements for an individual to be a member of the parole board in Missouri.²¹⁸

Another problem is that, while parole boards are required to consider a variety of factors – often set out in state statutes – there is nothing requiring them to give equal weight to all of those factors.²¹⁹ For example, studies of parole decision-making have concluded that the “most influential factor in parole release decisions” is the crime leading to commitment.²²⁰ The biggest factor considered is not the individual offender or any of his personal characteristics but the severity of the initial crime committed.²²¹ A Colorado study found that “[p]arole board members . . . determine if the inmate’s time served is commensurate with what they perceive as adequate punishment,” basically meaning that, at times, parole board members take matters into their own hands when

211. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

212. *Victim Services Parole Hearings*, MO. DEP’T CORRECTIONS, http://doc.mo.gov/OD/DD/OVS_Parole_Hearings.php (last visited Feb. 5, 2017).

213. *Procedures Governing the Granting of Paroles and Conditional Releases*, MO. DEP’T CORRECTIONS BOARD PROB. & PAROLE (Jan. 1, 2017), <http://doc.mo.gov/Documents/prob/Blue-Book.pdf>.

214. *Victim Services Parole Hearings*, *supra* note 212.

215. MO. REV. STAT. § 217.665.1 (Cum. Supp. 2013).

216. Cohen, *supra* note 1, at 1072.

217. MO. REV. STAT. § 217.665.2.

218. *Id.* § 217.665.1.

219. Cohen, *supra* note 1, at 1040.

220. *Id.* at 1074 (quoting Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 17 (2007)).

221. *Id.* at 1074–75.

deciding which factors to emphasize and which to ignore, with the goal of imposing the punishment they see as subjectively appropriate.²²² Studies have also concluded that the behavior of offenders while in prison is “significantly associated with release decisions,” but these studies have revealed that prison misconduct – as opposed to good behavior – is the most influential factor in determining release.²²³ Effectively, parole is often denied when an inmate has a disciplinary violation, but good behavior in prison and involvement in programming does not equivalently increase a person’s chance of release.²²⁴

In addition to the above-mentioned concerns, the judicial system neglects to provide any sort of meaningful review to inmates who have been denied parole.²²⁵ The leading Supreme Court case on this issue, *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, held that “there is no constitutional right to parole release, [as] there is no liberty interest in the mere possibility of parole. Instead, courts must examine the relevant statutory language to determine whether such an interest has been created and, if so, what due process protections attach to it.”²²⁶ Under that instruction, lower courts have consistently regarded parole decisions as an exercise of administrative discretion, meaning it is reviewable under an “abuse of discretion” standard, if it is reviewable at all.²²⁷ This ultimately means that “the combination of highly subjective decisional standards and limited reviewability[, if any at all,] affords parole board members virtual carte blanche to deny release for almost any reason, as long as they mouth the correct statutory language in doing so.”²²⁸

The problems of the parole system generally are exacerbated when the inmate was under the age of eighteen at the time of the commission of the crime.²²⁹ Numerous factors that the parole decision-making process is centered around are increasingly problematic for such inmates when parole board members fail to recognize and take into account the age and developmental status at the time of commitment.²³⁰ This is because, when juvenile offenders enter prison, they “bear[] the hallmarks of developmental immaturity.”²³¹ Not only are they impulsive, prone to risk-taking, and more susceptible to peer pressure, they also are “extraordinarily vulnerable to abuse at the hands of guards and other inmates.”²³² The combination of these factors often leads to frequent

222. *Id.* at 1075 (first alteration in original) (quoting Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROB. 3, 5 (2000)).

223. *Id.* (quoting *Caplan*, *supra* note 220, at 16).

224. *Id.*

225. *Id.* at 1076.

226. *Id.* at 1077; *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 12 (1979).

227. Cohen, *supra* note 1, at 1077 (citing N.J. STAT. ANN. § 30:4–123.53 (West 2017)).

228. *Id.*

229. *Id.* at 1078.

230. *Id.*

231. *Id.*

232. *Id.*

emotional, and likely violent, outbursts.²³³ These violations give rise to punishments, which are later considered at parole hearings and comprise part of the evidence that parole boards can use to deny parole.²³⁴ Another factor is that since these inmates enter prison before even turning eighteen, they “have not yet established a foothold in the adult world,” and, therefore have fewer contacts and employment opportunities in the outside world. For this reason, parole boards tend to view them as high risk, another factor used to support a denial of parole.²³⁵

Ultimately, the parole system provides a solution to one of the obvious problems of the resentencing scheme but, as evidenced by the discussion in this section, presents its own problems.

3. Suggestion for Missouri: Parole and Resentencing Hearings Hybrid Model

In order to comport with the holdings in *Montgomery* and *Miller*, Missouri should create a new, separate parole board to decide the fate of its eighty-four juvenile offenders sentenced to mandatory LWOP sentences. This newly created parole board should follow a combination of the resentencing structure and the parole system, creating a hybrid system that draws on the positive aspects of each and eliminates, as much as possible, the drawbacks of each.

This board will resemble a parole hearing to the extent that there is a board that the inmate will appear before. All the benefits of the parole system that were discussed above – the quicker and cheaper process, the decision being made by more than one person, and the consideration given to a wider number of factors – will continue to be assets of the new parole board system. However, the requirements to be a parole board member, the actions to be considered by the board, and the review of decisions made by the board will be fundamentally different than the current parole board system. The hybrid model will combat the criticism that resentencing wastes time and judicial resources, as this new hybrid board will not draw resources from the traditional judicial system. Furthermore, traditional parole criticisms, including (1) lack of proper decisional review process, (2) lack of representation for the inmate, and (3) the subjectivity and opportunity for manipulation by the parole board will be mitigated by this approach as well.

The first aspect of the hybrid model is the educational and background requirements of the members of the parole board. The members of the new parole board will be hearing cases that solely involve inmates who have been convicted as minors. Therefore, these board members must have expertise in adolescent development, as well as an understanding of the relationship between developmental science and juvenile offending. This requirement comports with the findings in *Roper*, *Graham*, and *Miller* and supports the notion

233. *Id.*

234. *Id.* at 1078–79.

235. *Id.* at 1079.

that the impulsivity, different levels of risk aversion, and greater receptivity to peer influence of juveniles should lead them to be treated fundamentally different than adults in the judicial system.

For instance, a parole board with this proper training will be better equipped to understand the effect that a juvenile's vulnerability to guards and other inmates may have on his or her emotional "breaking point," which would in turn explain why a juvenile offender may have numerous infractions before he or she becomes twenty-one, followed by fewer infractions after the age of twenty-one, as the offender becomes better able to control his or her emotions with age.²³⁶ The expert board members will account for the fact that, as mentioned above, inmates who were convicted prior to turning eighteen will have fewer contacts on the outside and fewer potential employment opportunities, which means that the board will not automatically deny parole based on those factors.²³⁷

Parole board members with the proper developmental training will also understand that "crime is contextual," and the "circumstances surrounding an offense, such as the participation of multiple perpetrators, stressors on the offender, or the relationship of the victim to the offender, are highly relevant to the determination of just deserts and, possibly, one's potential for rehabilitation."²³⁸

In addition to the background requirements, the new parole board will have a set of guidelines they will follow when sentencing these juvenile offenders; those guidelines will be similar to the guidelines a court would follow under the new resentencing structure discussed previously. Basically, when sentencing a juvenile first degree murder offender, blameworthiness and offender rehabilitation will be given more weight and consideration than the gravity of the offense, harm to the victim, deterrence, and incapacitation.

This hybrid system also allows the inmates to have counsel for their parole hearings if they so choose. Consider the needs of the inmates in question here. These individuals were sent to prison before they were eighteen, and they likely do not have the communication or education skills to represent themselves before the parole board alone.²³⁹ This means that these individuals are unable to effectively advocate for their release. Indeed, the "[t]ranscripts from these hearings reveal . . . the utter disregard the Board often has for inmates who attempt to advocate for themselves and to articulate their sense of remorse and readiness for release."²⁴⁰ Counsel is especially necessary in the context of the pre-*Miller* juvenile inmates, as they are being resentenced due to the fact that their constitutional rights have already been violated by the imposition of an LWOP sentence.²⁴¹

236. *Id.* at 1078–79.

237. *Id.* at 1079.

238. *Id.* at 1080.

239. *Id.* at 1032, 1079.

240. *Id.* at 1041.

241. *Id.* at 1033–34.

Another characteristic of the hybrid system tempers one of the biggest problems in the parole system: how malleable the outcome is in the hands of the parole board members. This malleability is due to the fact that the board members are not required to give equal weight to all the factors they consider in determining parole eligibility, which results in parole board members having the ability to subjectively determine if they feel the inmate's time is an adequate punishment. And although discretion cannot be eliminated altogether, this system will reduce the amount of discretion afforded to the parole board members.

As discussed above, the crime committed is the single biggest deciding factor in granting parole. Under this system, there would be a specific amount of weight given to each factor considered in determining the sentence these inmates sentenced to mandatory LWOP will have to serve. What exactly those proportions would be is a discussion beyond the scope of this Note, but a determination such as this needs to be made to ensure that these inmates are afforded a "meaningful opportunity to obtain release."²⁴²

However, the structure of how much weight each element should be given carries no meaning if the parole board members are not held accountable for their decisions. Therefore, the hybrid structure will also allow inmates to appeal their decisions to the court system under a deferential standard of review. The deferential standard of review gives deference to the parole board (which is comprised of experts in the field of adolescent development); yet it still provides inmates with the right to appeal the parole board's decision, ensuring that the board's decisions do not go unchecked.²⁴³ Currently in Missouri, the transcripts from parole hearings are not available to the public.²⁴⁴ However, under this new model, the courts will need access to these transcripts when an offender appeals a decision by the parole board.²⁴⁵ The option of appeal will incentivize parole board members to justly make sentencing determinations that give inmates who have already been denied their constitutional rights a meaningful opportunity for release. Allowing these inmates to appeal the decision of the parole board to the regular judicial system seems to be a fair compromise. The alternative option is to address all eighty-four cases under the resentencing system, which would require all the inmates to go before the judiciary to be resentenced.²⁴⁶ At least under the hybrid model, only the appeals of parole decisions would be heard by the court.

Finally, the hybrid system will encompass a presumption of release after an inmate has served thirty years. Pursuant to the discussion in Part III, under the suggested sentencing scheme, thirty years is the maximum sentence an individual can receive, and, therefore, any individual who has served thirty years

242. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

243. Cohen, *supra* note 1, at 1088.

244. David A. Lieb, *Missouri Parole Board Works Under Shroud of Secrecy*, ST. LOUIS POST-DISPATCH (Mar. 13, 2011), http://www.stltoday.com/news/state-and-regional/missouri/missouri-parole-board-works-under-shroud-of-secrecy/article_7c9beecf-3f36-574d-b436-430390ab9a38.html.

245. *Id.*

246. *See supra* note 80 and accompanying text.

will be presumed eligible for release. However, a showing of either bad behavior while in prison or a likelihood that the offender is still a danger to the community can defeat that presumption.²⁴⁷ The presumption of release will also assist with efficiency concerns, as offenders who have already served thirty years will not have to go through a lengthy parole hearing if there is no evidence that runs contrary to the presumption of release.

This new proposed system is not without flaws. There will still be a strain on judicial resources when a sentence is appealed, and the creation of the parole board of adolescent development experts will undoubtedly require time and effort. However, the various other aspects of the proposed system, namely the make-up of the new parole board, the opportunity to have counsel at parole hearings, the right to appeal, and the presumption of release after serving thirty years, address a number of major concerns surrounding these uniquely situated inmates.

V. CONCLUSION

The two trends of Supreme Court cases show the Court has consistently held that (1) children should be treated differently than adults in the criminal justice system, and (2) mandatory death sentences are unconstitutional. These two trends of cases have led to the decisions in *Miller* and *Montgomery*, which have in turn led to the two issues discussed in this Note.

In May of 2016, SB 590 was passed, enacting RSMO §§ 558.047, 565.033, and 565.034 addressing both the *Miller* and the *Montgomery* decisions.²⁴⁸ Currently in Missouri, a person who was under eighteen years of age at the time of the crime may be sentenced to either (1) LWOP, (2) life with the eligibility for parole, or (3) a term of imprisonment of at least thirty years but no more than forty years.²⁴⁹ Additionally, any person sentenced to LWOP for the crime of first degree murder committed as a juvenile prior to August 28, 2016, is eligible for a parole hearing after serving twenty-five years.²⁵⁰ Although these statutes bring Missouri into compliance with the Constitution, they are neither the most informed nor the best option available.

Addressing these two issues is difficult. It requires ensuring that juvenile offenders are punished accordingly so that the families of the victims, and the public in general, feel that justice has been served and that the offenders no longer pose a risk to society. At the same time, it must take into consideration the fact that the juvenile offender was not fully developed physically, mentally, or emotionally and deserves a chance at rehabilitation.

This Note suggests that Missouri reform its legislation to balance both of these concerns: (1) Missouri should abolish LWOP as a punishment for juvenile offenders and adopt an age-as-proxy sentencing scheme, as discussed in

247. Cohen, *supra* note 1, at 1087.

248. See *supra* Part IV.

249. MO. ANN. STAT. § 565.033.1 (West 2017).

250. *Id.* § 558.047.1.

Part III, for the sentencing of future juvenile offenders and (2) adopt the hybrid parole/resentencing scheme outlined in Part IV for the resentencing of the juveniles who received mandatory LWOP sentences prior to the *Miller* decision. Both of these suggested solutions hold juveniles responsible for their actions, while still giving them the hope that one day they can live as free individuals. After all, “[a] young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.”²⁵¹

251. *Graham v. Florida*, 560 U.S. 48, 79 (2010).