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State v. Bassett: Washington Courts Can No Longer Sentence Juveniles to Die in Prison

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INTRODUCTION

In *State v. Bassett*, the Washington Supreme Court held that the practice of sentencing juveniles to life in prison without the possibility of parole violates Washington State's constitution because it constitutes cruel punishment.[1] Washington's article I, section 14, differs from the Eighth Amendment by banning "cruel" punishment, as opposed to the Eighth Amendment's prohibition on "cruel and unusual" punishment.[2] The *Bassett* court's holding applied to the only juvenile group that was still subject to life without parole (LWOP) sentences—juvenile offenders who committed aggravated first-degree murder when they were sixteen or seventeen years old. A week earlier, the Washington Supreme Court had decided *State v. Gregory*,[3] unanimously holding that sentencing any defendant to the death penalty violates the same provision of Washington's constitution.[4] In *Gregory*, every justice signed onto the majority's opinion. Conversely, the *Bassett* court was closely split in a 5-4 decision.

This Article will argue that *Bassett*'s split results largely from the majority and the dissent's disagreement about which test to use when deciding challenges to juvenile sentencing: the *Fain* "proportionality test,"[5] or the federally employed "categorical bar" test. The *Bassett* majority deviated from its own framework, the *Fain* proportionality test, which evaluates (1) the nature of the offense; (2) the legislative purpose behind the

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1 State v. Bassett, 428 P.3d 343 (Wash. 2018). [hereinafter *Bassett II*].
2 *Compare* WASH. CONST. art. I, § 14 *with* U.S. CONST. amend. XIII.
3 State v. Gregory, 427 P.3d 621 (Wash. 2018).
4 WASH. CONST. art. I, §14.
5 State v. Fain, 617 P.2d 720 (Wash. 1980).

statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction.[6] Instead, the *Bassett* court applied the categorical bar test, which was largely used by the United States Supreme Court when deciding the constitutionality of juvenile punishment laws.[7] The categorical bar test considers (1) whether there is objective indicia of a national consensus against the sentencing practice at issue, and (2) the court's own independent judgment based on "'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the [cruel punishment provision's] text, history . . . and purpose.'"[8] The *Fain* test considers whether a particular sentence is fair and proportionate as applied to an individual offender, while the categorical bar test assesses a class of offenders as a whole and determines whether a particular punishment can ever be constitutional as applied to the class.[9]

Part I of this Article will describe *Bassett*'s posture and the court's holding that article I, section 14 is more protective than its federal counterpart and prohibits juvenile LWOP sentences. Part II will discuss the United States Supreme Court's recent holdings announcing that juvenile offenders are less culpable than adults and thus less deserving of punishment. Part III offers potential explanations for the *Bassett* court's departure from its traditional test and discuss the disagreement between the majority and dissent. The Article concludes by highlighting *Bassett*'s impact on trial judges who are tasked with the important role of sentencing juvenile offenders.

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[6] *Id.* at 726.

[7] *See* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787 (2016).

[8] The second prong, the exercise of independent judgment, "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals." *Bassett*, 428 at 351 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

[9] *Bassett II*, 428 at 346.

I. THE *BASSETT* DECISION

Facts and Procedural Posture

Brian Bassett was sixteen when he killed his mother, father, and younger brother in their home. At the time, Bassett was homeless because he had been kicked out by his parents, who had recently denied his request to move back in with his family.[10] Another juvenile, McDonald, assisted Bassett in the crime and had originally confessed to the murder of Bassett's brother; later, McDonald claimed that Bassett was solely responsible for his brother's death.[11] After a jury convicted Bassett of three counts of aggravated murder, the trial judge sentenced him to three consecutive terms of life in prison, without the possibility of parole. At his sentencing hearing, the judge commented that Bassett was "a walking advertisement" for the death penalty.[12] In 1996, the sentence Bassett received was mandatory under state law.[13] However, the practice of sentencing juveniles pursuant to a mandatory scheme has since been overturned in Washington.[14]

Washington enacted its "*Miller*-fix" statute in response to the United States Supreme Court's decision in *Miller v. Alabama*.[15] *Miller* held that when sentencing juveniles convicted of homicide to LWOP, the sentencing court must consider several youth-based mitigating factors in its decision and that a failure to consider these factors violates the Eighth Amendment and constitutes cruel and unusual punishment.[16] With the hopes of parole eligibility, Bassett, at thirty-five years old, sought resentencing pursuant to

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[10] *Id.* at 351.
[11] State v. Bassett, 394 P.3d 430, 433 (Wash. Ct. App. 2017) [hereinafter *Bassett I*]; *See* State v. McDonald, 953 P.2d 470 (Wash. Ct. App. 1998).
[12] *Bassett II*, 428 P.3d at 346 (summarizing trial court judgment and sentence).
[13] *Id.*
[14] WASH. REV. CODE § 10.95.030 (2018) *invalidated by Bassett*, 428 at 343.
[15] Miller v. Alabama, 567 U.S. 460 (2012).
[16] *Id.* at 480 (holding the sentencing body must "take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

Washington's *Miller*-fix statute, codified at Revised Code of Washington (RCW) 10.95.030.[17] The *Miller*-fix statute required the court to consider youth-based mitigating factors "including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated."[18] The judge heard testimony of experts who described Bassett as a teenager.[19] A pediatric psychologist who had worked with Bassett before the murders testified to Bassett's low executive functioning skills at the time of the crime, including his inability to comprehend the consequences of his actions, his adjustment disorder diagnosis prior to the crime leading to maladaptive stress responses, and the immense trauma he felt while living on the streets after his parents banned him from their home.[20] Psychologists discussed his new ability to comprehend the gravity and reprehensive nature of his crimes by participating in family-systems therapy—and by simply maturing.[21] The State offered no evidence to refute Bassett's youth-based mitigating evidence, which Bassett argued demonstrated his diminished culpability.[22] Even when faced with Bassett's uncontroverted evidence and arguments, the judge upheld the original sentence: three consecutive life terms.[23]

Bassett appealed his resentencing to the Washington State Court of Appeals. One of his arguments was a facial challenge to the state's enacted

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[17] WASH. REV. CODE § 10.95.030(3)(b) (2018) *invalidated by Bassett*, 428 at 343.
[18] *Id.*
[19] *Bassett II*, 428 P.3d at 346–48.
[20] *Id.*
[21] Bassett also presented evidence of rehabilitation including having earned a GED, making the honor roll, being a mentor at the community college, and having participated in extensive family therapy. The judge concluded that Bassett's actions were less demonstrative of rehabilitation and more evidence that he was "doing things in prison to make his time more tolerable." *Id.* at 343. The Washington Supreme Court has held that rehabilitation evidence is irrelevant to a *Miller* resentencing and becomes pertinent only if an inmate is considered for parole. State v. Ramos, 387 P.3d 650, 665 (Wash. 2017).
[22] *Bassett II*, 428 P.3d at 347.
[23] *Id.*

Miller-fix statute.[24] Specifically, Bassett argued that the statute's allowance for the possibility of juvenile LWOP amounted to cruel punishment.[25] The court of appeals agreed with Bassett's facial challenge and held that the statute violated Article I, section 14.[26] In its reasoning, the court used a categorical bar analysis instead of its well-established test for challenges under the cruel punishment provision—the *Fain* test.[27] The United States Supreme Court had used a categorical bar analysis when considering challenges to juvenile sentencing laws by shelving so-called proportionality tests, and Iowa's highest court had also moved to a categorical bar test when interpreting state law juvenile punishment challenges in *State v. Sweet*.[28] The *Bassett* Court of Appeals opinion discussed *Sweet* at length, approving of its explicit adoption of the United States Supreme Court's categorical bar test.[29] The *Sweet* court cited United States Supreme Court cases as persuasive authority despite deciding the case solely on state constitutional grounds.[30] After Bassett's victory in the court of appeals, the State petitioned the Washington Supreme Court for review.[31] The State argued that the court of appeals should have applied the *Fain* proportionality test to evaluate sentences challenged under Article I, Section 14, not the categorical bar test. The court, in a 5-4 decision, ultimately disagreed.[32]

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[24] *Bassett*, 394 P.3d at 432.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 437.
[28] State v. Sweet, 879 N.W.2d 811 (Iowa 2016).
[29] *Bassett*, 394 P.3d at 438.
[30] The *Sweet* court held that its use of the United States Supreme Court's juvenile cases, its principles, reasoning, and its employment of the categorical bar analysis was permissible because federal decisions are "persuasive, but . . . certainly not binding" authority on matters of state criminal law that satisfy the federal constitutional floor. *Sweet*, 879 N.W.2d at 832.
[31] Brief for Petitioner at 20, State v. Bassett, 428 P.3d 343, 2017 (Wash. 2017) (No. 94556-0).
[32] *Id.*

Perhaps the court was anticipating a facial challenge. In 2017, the Washington Supreme Court reviewed the resentencing of Joel Ramos pursuant to the *Miller*-fix statute, and held that his resentencing hearing met minimal *federal* constitutional guidelines, but that it would not consider independent Washington constitutional grounds because the parties failed to brief the *Gunwall* factors.[33] The *Gunwall* factors, which are described in detail below, guide Washington courts' analyses of whether a state constitutional provision is more protective than its federal counterpart.[34] If, after a properly briefed *Gunwall* analysis, the court concludes that a state constitutional provision is more protective than its federal analogue, the court can examine the constitutionality of a challenged statute exclusively under the state constitution.[35] While unable to address a facial challenge in the absence of a *Gunwall* analysis, the *Ramos* court, in a unanimous decision, acknowledged Iowa's *Sweet* holding and that it did "not foreclose the possibility that this court may reach a similar conclusion in a future case, but the briefing here does not adequately explain why we must do so as a matter of Washington constitutional law."[36]

Washington's Ban on Cruel Punishment

Washington's Article I, section 14, unlike the Eighth Amendment, bans cruel punishment without the federally required showing that it is also "unusual."[37] In *Michigan v. Long,* the United States Supreme Court held that state supreme courts must take care to ground their decisions in state constitutional law or face review by the United States Supreme Court.[38] The United States Supreme Court assumes that a state's constitutional holding is

[33] State v. Ramos, 387 P.3d 650, 665 (Wash. 2017).
[34] *Id.* at 667. The *Gunwall* factors originated in State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986).
[35] *Bassett*, 428 P.3d at 350.
[36] *Ramos*, 387 P.3d at 668.
[37] *Compare* WASH. CONST. art. I, § 14 *with* U.S. CONST. amend. XIII.
[38] Michigan v. Long, 463 U.S. 1032 (1983).

based on the United States Constitution unless the state court expressly announces its reasoning is state law based.[39] The *Long* Court further provided that a state court must explain when it uses federal case law as non-binding authority in order to overcome the presumption that the issue was based on federal constitutional precedent and, therefore, subject to United States Supreme Court review.[40]

The *Bassett* court unambiguously decided the case under article I, section 14.[41] In reaching its holding, the *Bassett* court also followed *Miller* and its progeny by using neurological evidence as applied to an entire category — youthful offenders—and by employing the categorical bar test.[42] The *Long* Court did not foreclose this approach; in fact, it held that state court decisions that are grounded in state constitutional law would not be subject to federal review even when they rely on federal courts' analyses to reach their holdings.[43] As such, the *Bassett* court followed a line of United States Supreme Court juvenile punishment cases, adopting much of their reasoning, including the categorical bar approach. In adopting the United States Supreme Court's categorical bar test, the *Bassett* court rejected Washington's *Fain* proportionality test—much to the dissent's outrage.[44]

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[39] *Id.* at 1040–41 ("Accordingly, when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when [the] state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so . . . . *If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision*.") (emphasis added).

[40] *Id.*

[41] *Bassett II*, 428 P.3d at 349, 350.

[42] *Id.* at 355 (Sanders, J., dissenting).

[43] *Long*, 463 U.S. at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

[44] See *infra* Part II for a discussion of the majority's choice to use the categorical bar, not the *Fain* test.

Long was satisfied because the majority rooted its holding in Washington's constitution and stated that federal jurisprudence was persuasive but not dispositive.[45]Although the *Bassett* court protected itself from United States Supreme Court review, the majority imported federal case law and analysis to reach its ultimate holding. As discussed below, such an approach created a 5-4 split in the court's opinion.

In *Bassett*, the court stated that a *Gunwall*[46] analysis of article I, section 14 had almost always resulted in holding that the state provision provided greater protection than the Eighth Amendment.[47] Most of the Washington Supreme Court's cruel punishment cases that conducted a *Gunwall* analysis found increased protection.[48] A handful had held the opposite, demonstrating, according to the *Bassett* court, that a *Gunwall* analysis was necessary to resolve its "inconsistent precedent." The court also stated that the *Gunwall* analysis is dependent upon the challenged law and the specific facts of each case.[49] In other words, one *Gunwall* outcome does not foreclose the determination of a provision's protectiveness.[50]

The Gunwall Analysis

The Washington Supreme Court uses the non-exclusive *Gunwall* factors to guide the court and litigants when briefing state constitutional issues. Although the court's composition and policy preferences may change, in practice, the test remains in place to ensure some predictability as the make-

[45] *Long*, 463 U.S. at 3476.
[46] *Gunwall*, 720 P.2d at 811.
[47] *Bassett II*, 428 P.3d at 347.
[48] *Id.* at 349 (collecting cases where the Washington Supreme Court found increased protections under article I, section 14, including State v. Roberts, 14 P.3d 713 (Wash. 2000) and State v. Thorne, 921 P.2d 514 (Wash. 1996)).
[49] *Id.*
[50] *Id.* at 349 ("[E]ven where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications.") (quoting *Ramos*, 387 P.3d at 667).

up of the bench shifts.[51] Additionally, when judges are increasingly accused of and susceptible to judicial activism, the factors assist in deciding difficult constitutional policy issues more neutrally, or at least more predictably.[52] The factors used in a *Gunwall* analysis are (1) the state provision's language; (2) differences between the textual provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

The *Bassett* court analyzed article I, section 14 in the specific context of juveniles and LWOP sentences, discussing that the first three *Gunwall* factors pointed to increased protection, partly because Washington's framers chose to omit "and unusual" from the State's provision against cruel punishment.[53] As to the fourth factor, a discussion of existing state law, the court dismissed the State's arguments; the State asserted that because Washington's constitution is silent on juveniles, and that Washington had once executed children, that greater protection should not be afforded.[54] Instead, the court held the evolution of the legislature's and court's treatment of juveniles since statehood evidences a clear trend to treat children in criminal justice differently.[55]

Agreeing with *Bassett* that the fourth factor, preexisting state law, provided increased protection, the court named several cases demonstrating that Washington courts had previously applied United States Supreme Court reasoning for the principle that youths must be treated differently in criminal punishment contexts.[56] For example, in *O'Dell*, the Washington Supreme Court cited neurological and brain studies used in the United

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[51] *See* Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington State*, 21 SEATTLE U. L. REV. 1187, 1205 (1998).
[52] *Id.*
[53] *Bassett II*, 428 P.3d at 349.
[54] *Id.*
[55] *Id.*
[56] *Id.* ("This court has consistently applied the *Miller* principle that 'children are different'"); *See* State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015).

States Supreme Court's opinions on juvenile culpability, including *Roper v. Simmons*[57] and *Graham v. Florida*.[58] *Roper* held that the death penalty was cruel and unusual punishment as applied to juveniles. *Graham* held that sentencing non-homicide offenders to LWOP also constituted cruel and unusual punishment, violating the Eighth Amendment.[59] To further support the proposition that Washington has provided more protections for youth at sentencing, the *Bassett* court discussed the recent legislative abandonment of mandatory minimums for youth tried as adults, the expansion of parole eligibility, and eliminating LWOP for children under fifteen years old.[60] The fifth factor always points toward higher protection because of the inherent structural difference in the United States and state constitutions: while the federal constitution is a grant of limited power to the federal government by the people, Washington's state constitution is a limitation on the plenary power of the State.[61] According to the *Bassett* court, the sixth factor weighed in favor of local concern because, among other things, the state's laws already had trended toward "granting juveniles special sentencing protections when appropriate."[62] Washington State was the first to categorically enact juvenile sentencing reform, and while that effort has moved in both more and less and punitive directions over the past five

[57] Roper v. Simmons, 543 U.S. 551 (2005).
[58] Graham v. Florida, 560 U.S. 48, 68 (2010).
[59] *Bassett II*, 428 P.3d at 349.
[60] *Id.* at 350; *see also* WASH. REV. CODE §§ 9.94A.540(3); 10.95.030(3)(a)(i).
[61] Gunwall, 720 P.2d at 815 (Wash. 1986) ("As this court has often observed, the United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.") (emphasis in original).
[62] *Bassett*, 428 P.3d at 350.

decades,[63] scholars recognize the trend is away from harsher sentences for youth in Washington.[64]

Having decided that the *Gunwall* analysis resulted in a more protective state provision, what remained was for the *Bassett* court to apply a state constitutional test: Washington's familiar *Fain* proportionality test or the federally derived categorical bar analysis. And therein lies much of the disagreement between the dissent and the majority. In order to understand the dispute amongst the justices and to evaluate the majority's choice to adopt federal reasoning and the categorical bar test, a brief discussion of recent United States Supreme Court jurisprudence with respect to juvenile sentencing and punishment is warranted.

II. UNITED STATES SUPREME COURT JUVENILE SENTENCING DECISIONS

A Shift to Brain Science, Increased Protection, and the Categorical Bar Approach

Before *Miller*, the Supreme Court decided *Roper v. Simmons*[65] in 2005, holding that juvenile death sentences for crimes committed before an offender is eighteen years old violates the Eighth Amendment.[66] The *Roper* decision cemented the Court's treatment of children as inherently different

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[63] For a history of juvenile justice reform in Washington through the 1990s and arguments for increased reform, see Jeffery K. Day, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 PUGET SOUND L. REV. 399 (1992).

[64] *See generally* David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 131 (2001) (concluding that Washington residents' public opinion shapes what is acceptable in the state's sentencing practices: "Law has come to sentencing in Washington, and law evolves by public, not private decision making. Law's inevitable partner, politics, is a part of that process and inevitably means that there will be winners and losers, step by step, issue by issue.").

[65] Roper, 543 U.S. 551 at 569–70 (discussing three main areas of difference between adults and youths: (1) that as compared to adults, juveniles are more likely to exhibit reckless behavior; (2) that youths are more susceptible to negative influences; and (3) that youths' character is well-formed—science and experience demonstrate that their choices will improve as they mature into adults).

[66] *Id.* at 561.

based on society's evolving standards of decency that recognize youths have diminished culpability as a result of immaturity and transient characteristics.[67]

The United States Supreme Court had also moved away from a case-by-case analysis and increasingly employed the categorical bar analysis.[68] Although *Roper*'s holding was reasoned with a proportionality analysis, the *Graham* court explained that the rule flowing from the case *was* a categorical bar, because a rule allowing proportional analysis created the risk that courts would not sufficiently consider youth's diminished culpability.[69] The *Roper* court cited heavily to psychological and neurological studies supporting Roper's contention that youth cannot be punished consonantly with adults because their character is not fixed, and they possess a great capacity for change.[70]

In *Graham v. Florida*, the United States Supreme Court categorically barred juvenile sentences of LWOP for non-homicide crimes.[71] The Court reiterated *Roper*'s assessment of the inherent differences in juveniles and further focused on the biological differences in the changing adolescent brain.[72] The *Graham* court reasoned that when an entire class of persons is considered—in that case, youth who have committed non-homicide offenses—a proportionality analysis is not useful.[73] The *Graham* court announced that a proportionality test that "[compares] the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used

[67] Graham, 560 U.S. at 72 (2010) (discussing that *Roper* established the principle that children are less deserving of punishment).
[68] *Id.* at 95.
[69] *See* John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535 (2016).
[70] *Roper*, 543 U.S. at 569 (citing amici referencing scientific brain studies).
[71] *Graham*, 560 U.S. at 48.
[72] *Id.* at 68 ("[N]o recent data provide[s] reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").
[73] *Graham*, 560 U.S. at 61–62.

in cases that involved the categorical approach."[74] The *Graham* court's reasoning that juvenile LWOP sentences for non-homicide offenses constituted cruel and unusual punishment utilized medical and scientific data and its categorical bar approach, continuing to hold that as a class of offenders, youths cannot be sentenced as adults are sentenced. As such, United States Supreme Court jurisprudence leading up to *Miller* had largely relied on a categorical bar approach in juvenile sentencing cases. When the Court used the proportionality analysis in *Roper*, the holding resulted in a de facto categorical bar against the death penalty for all juveniles.[75]

Miller v. Alabama

Commentators noted that *Miller v. Alabama*[76] had been set up by the *Roper* and *Graham* holdings that children are constitutionally different when punishment is at issue, and that the United States Supreme Court was poised to find juvenile LWOP unconstitutional.[77] Although *Miller* did hold that the practice as to juveniles constituted cruel and unusual punishment in all but the most extreme cases, it used the proportionality analysis that stopped short of categorically barring juvenile LWOP in homicide cases for sixteen and seventeen year olds.[78] *Miller* held that juvenile LWOP would be unconstitutional in almost every case, and to protect against violating the Eighth Amendment, sentencing judges must consider whether the crime reflects the transient immaturity of youth or irreparable corruption.[79]

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[74] *Id.*
[75] *Roper*, 543 U.S. at 578.
[76] *Miller*, 567 U.S. 460.
[77] *See* Robert Chang, et al., *Evading Miller*, 39 SEATTLE U. L. REV. 85, 88 (2015) (categorizing *Miller* as the third case which demonstrates the Supreme Court has held recently that children may not be sentenced in lockstep with adults and that their youthful traits require special consideration and protection).
[78] *Miller*, 567 U.S. at 479 ("We think appropriate occasions for sentencing juveniles to this harshest possible penalty will be extremely uncommon.").
[79] Montgomery v. Louisiana, 136 S. Ct. 718, 732, 599 (2016). See Chang et al. for a list of the non-exhaustive factors announced in *Miller*:

Functionally, *Miller*'s holding sowed confusion and was applied inconsistently among state courts.[80] Some applied *Miller* retroactively, holding resentencing hearings for juveniles serving LWOP; others enacted a statutory fix—the so-called *Miller*-fix statutes; some proclaimed *Miller* was not retroactive; and some waited for further guidance on how to treat the juveniles already sentenced in their states.[81] One year after *Miller* was decided, the United States Supreme Court granted certiorari in the case of *Montgomery v. Louisiana* to decide whether *Miller* was intended to announce a retroactively applied substantive rule that required review and resentencing of final judgments.[82] In *Montgomery*, a youth challenged the Louisiana courts' refusal to resentence him after *Miller* was decided.[83] The *Montgomery* Court clarified that *Miller* announced a retroactive substantive rule, and while *Miller* did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*," it "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a

(1) "the character and record of the individual offender [and] the circumstances of the offense;" (2) "the background and mental and emotional development of a youthful defendant;" (3) a youth's "chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate the risks and consequences;" (4) "the family and home environment that surrounds" the youth, "and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;" (5) the circumstances surrounding the offense, "including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the youth; (6) whether the youth "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth"; for example, the youth's relative inability to deal with police and prosecutors or to assist his own attorney; (7) the youth's potential for rehabilitation given that most youth are prone to change and mature for the better. Chang et al., *supra* note 77, at 90–91 (collecting factors from *Miller*).

[80] *See* Chang et al., *supra* note 77 at 95 (discussing that states applied *Miller* in a variety of ways and that Washington was one of two states to enact a *Miller*-fix statute).

[81] *Id.* at 94.

[82] *Montgomery*, 136 S. Ct. at 732 (holding that *Miller* is a substantive rule because it "alters the range of conduct or the class of persons that the law punishes'" and that state courts are not free to decline to follow the holding, even as it applies to final judgments).

[83] *Id.*

particular penalty."[84] The *Montgomery* Court further clarified that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. . . . After *Miller*, it will be the rare juvenile offender who can receive that same sentence."[85]

Washington's Response to Miller

Washington had already interpreted *Miller* as retroactive and became one of the only two states whose legislature enacted a *Miller*-fix statute when *Ramos* and *Bassett* were decided.[86] Washington's *Miller*-fix statute required that all youths serving LWOP sentences for homicide committed at ages sixteen and seventeen have an individualized hearing to determine whether their original crime reflected permanent incorrigibility or transient immaturity.[87] As such, the *Miller*-fix statute required *Bassett*'s resentencing to account for youth-based mitigating factors including, but not limited to, Bassett's age at the time of the crime, his childhood and life experiences, how much responsibility Bassett could exercise, and his capacity for rehabilitation.[88] The judge at Bassett's resentencing hearing, which was required after enactment of the *Miller*-fix statute, again imposed LWOP on Bassett.[89] Accordingly, Bassett challenged the decision a variety of ways; the court of appeals only addressed Bassett's argument that the statute was unconstitutional on its face because it violated Washington's ban on cruel punishment.[90] It was on this facial challenge that the court of appeals

[84] *Id*. at 734 (quoting *Miller*, 567 U.S. at 483).
[85] *Id.*
[86] Arizona also had enacted a *Miller*-fix statute prior to *Montgomery*. *See* ARIZ. REV. STAT. § 13-716.
[87] WASH. REV. CODE § 10.95.030(3)(a)(ii) (2018) *invalidated by Bassett*, 428 P.3d 343.
[88] WASH. REV. CODE § 10.95.030(3)(b) (2018) *invalidated by Bassett*, 428 P.3d 343.
[89] *Bassett*, 428 P.3d at 347.
[90] *Bassett*, 394 P.3d at 432 ("In the published portion of this opinion . . . [w]e hold that under a categorical bar analysis, the statutory *Miller*-fix provision that allows 16- to 18-year-old offenders convicted of aggravated first degree murder to be sentenced to life without parole or early release violates article I, section 14 of the state constitution

ultimately sided with Bassett after conducting a categorical bar analysis.[91] As such, the Washington Supreme Court had its first chance to decide whether juvenile LWOP was unconstitutional post-*Miller* with the *Gunwall* briefing that it lacked in *Ramos*.

III. WHY DID *BASSETT*'S MAJORITY CHOOSE THE CATEGORICAL BAR TEST?

Fain did not Fit, and Other Possible Explanations

The majority's choice to adopt the court of appeals' categorical bar analysis may be explained in three ways: (1) that because the challenge was facial, the categorical bar test better fit the challenge that the statute was unconstitutional as applied to the category of juveniles; (2) that the parties' *Gunwall* briefing allowed the court to consider more protective state constitutional grounds that could provide categorically bar juvenile LWOP; and (3) that because the categorical bar analysis required the court to exercise its independent judicial judgment on juvenile LWOP in Washington, it empowered the majority to reach its desired policy outcome.

First, the court defended its choice to adopt the categorical bar analysis as a better fit for the facts of the *Bassett*'s case and his specific challenge.[92] The court analogized to its choice to adopt the categorical bar test to their decision in 1980 to adopt what became the *Fain* proportionality analysis from a nonbinding court.[93] The *Bassett* court stated the test that the Washington Supreme Court adopted in *Fain* was necessary because it fit the challenge "that Fain's sentence was cruel punishment because it was grossly disproportionate to his crimes."[94] The court stated that *Fain* is a test

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prohibiting cruel punishment. In the unpublished portion, we reject Bassett's remaining arguments.").

[91] *Id.*

[92] *Bassett II*, 428 P.3d at 352.

[93] *Id.* at 351.

[94] *Id.*

traditionally used for considering whether a sentence is disproportionate; Fain did not argue that the statute was unconstitutional to an entire category of defendants, only that his sentence was grossly disproportionate to his crime.[95] Similarly, in *Bassett*, the majority asserted that the categorical bar test "fits the challenge Bassett brings—that life without parole is a categorically unconstitutional sentence for juveniles—and the statute we are assessing."[96] The *Bassett* court pointed out that *Graham* had rejected a proportional analysis, which would consider "the severity of the penalty and the gravity of the crime" because the sentenced was challenged as applied to an "entire class of offenders."[97] As such, the *Bassett* court held that because the framework fails to consider youthful characteristics that apply to the entire category, the test should not be used.[98]

Accordingly, the majority held that using the *Fain* proportionality analysis did not fit the challenge that a punishment is unconstitutional for an entire category of offenders—in this case, juveniles—and that the Washington Supreme Court was "free to evolve" its constitutional analysis without disturbing its prior jurisprudence under the same provision.[99] In *Ramos*, the court had discussed that Iowa's Supreme Court—also a nonbinding decision much like the Fourth Circuit test the court adopted for *Fain*—had taken a categorical bar approach in holding all juvenile LWOP sentences were unconstitutional[100] and announced that it may consider a similar approach in the future.[101] Arguably, the *Ramos* decision invited an

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[95] *Id.* at 350.
[96] *Id.*
[97] *Graham*, 560 U.S. at 61 (2010).
[98] *Bassett*, 428 P.3d at 351.
[99] *Id.* at 355. The majority conducted a brief *Fain* analysis: "This test shows us that while the offense is serious, the punishment is extreme in comparison to the sentence other jurisdictions would impose and the sentence Washington would impose for other crimes. Even if we applied the *Fain* test to Bassett's categorical constitutional challenge, life without parole is a disproportionate sentence for juvenile offenders, and therefore, RCW 10.95.030(3)(a)(ii) is unconstitutional under article I, section 14.").
[100] *Sweet*, 879 N.W.2d at 834.
[101] *Ramos*, 387 P.3d at 665.

article I, section 14 categorical bar challenge to the *Miller*-fix statute—and juvenile LWOP sentences as a whole.

Second, until *Bassett*, the court did not have the occasion to analyze juvenile LWOP under the Washington constitution after *Miller* because the *Ramos* parties failed to brief the *Gunwall* factors for article I, section 14 specific to juveniles. Because Bassett's challenge gave the court the opportunity to evaluate statute's application to the entire category of juvenile offenders sentenced to LWOP, it allowed for the use of the categorical bar test and for consideration of whether it violated Washington constitution's cruel punishment prohibition. The court declared that evaluating the *Gunwall* factors was "the prudent starting point for this case," further demonstrating its desire to make its holding on Washington constitutional grounds.[102] The court had hinted that an independent state analysis might have found a different result in *Ramos* but lamented the failure of the parties to brief the factors—perhaps further evincing a desire to find juvenile LWOP violative of article I, section 14.[103] During its *Gunwall* analysis, the *Bassett* court, poised to discuss the issue under state law, held that the text, history, and Washington's recent jurisprudence with respect to juveniles, all pointed to increased protections under article I, section 14.[104] This holding left the *Bassett* court free to depart from *Miller*, which stopped short of a categorical bar.

Third, the court may have chosen to use a categorical bar analysis because it required "independent judicial evaluation" of the practice at issue—in this case, juvenile LWOP sentences and broad judicial discretion at resentencing hearings—clearing a path for the court to ban the practice altogether. The categorical bar test requires consideration of (1) whether other states had begun to invalidate a sentencing practice and (2) the court's

[102] *Bassett II*, 428 P.3d at 348.
[103] *Ramos*, 387 P.3d at 655.
[104] *Bassett II*, 428 P.3d at 349.

independent interpretation.[105] In considering the first prong of the categorical bar test, the *Bassett* majority acknowledged that juvenile sentencing state laws are rapidly recognizing lesser culpability and increased capacity for rehabilitation, resulting in less harsh punishments for youths.[106] The *Bassett* court quoted *Atkins*, a United States Supreme Court decision that using a categorical bar approach, held that sentencing people with intellectual disabilities to death was cruel and unusual punishment. "It is not so much the number of these States that is significant, but the consistency of the trend of the change."[107] The *Bassett* court found that since *Miller*, the number of states categorically barring juvenile LWOP rose from four to twenty, plus the District of Colombia.[108] Thus, the court held that the first prong of the categorical bar approach was satisfied and that "while this step is not dispositive, it weighs in favor of finding that sentencing juvenile offenders to life without parole is cruel punishment under article I, section 14."[109]

The second prong of the categorical bar approach allowed the majority to exercise its independent judgment about whether juvenile LWOP should be categorically barred in Washington. The *Bassett* court quoted from *Graham* to explain the second prong requires the court to consider "the culpability of the offenders at issue in light of their characteristics" with the severity of the punishment and whether the sentencing practice at issue "serves legitimate penological goals."[110] *Bassett*'s analysis under the second prong is largely adopted from the United States Supreme Court. While the dissent bemoans the majority's adoption of federal reasoning, the Washington Supreme Court had used such an approach in *O'Dell* and *Ramos* when it based its holding on the reasoning in *Miller*, *Roper*, and *Graham* to hold

[105] *Id.*
[106] *Id.* at 352.
[107] Atkins v. Virginia, 536 U.S. 304, 313 (2002).
[108] *Bassett II*, 428 P.3d at 352 (listing jurisdictions that ban juvenile LWOP).
[109] *Id.*
[110] *Bassett II*, 428 P.3d at 352 (quoting *Graham*, 560 U.S. at 67 (2010)).

that youths are less culpable due to their lower ability to weigh consequences, their heightened sensitivity to peer pressure, and their impulsive behavior, among other things.[111] The *Bassett* majority held that the punishment at issue is especially harsh for young people who will serve more years than adult offenders because they are younger when they enter prison; a life sentence for a fifty year old and a life sentence for a seventeen year old are not analogous.[112] Additionally, the court held that as youths mature and understand their crimes, they will face a life without hope—and what some have called a de facto death sentence.[113] Further, the retribution and deterrent penological goals are less effective with youths because they have lower culpability, and that retribution depends on culpability.[114] In other words, the goal of deterrence is harder to meet with juveniles; youths have a lessened ability to consider consequences, so deterrence by threat of future punishment is less effective.[115]

In *Gregory*,[116] all nine justices signed the opinion announcing that the death penalty violates Washington's ban on cruel punishment; when *Bassett* was decided on its heels, the split was somewhat puzzling.[117] The dissent's disagreement rests mainly with the majority's extension of *Miller*, which did not categorically bar juvenile LWOP and with the departure from "state precedent rejecting similar constitutional challenges and upholding judicial sentencing discretion."[118] The dissent argued that the *Miller*-fix statute complied with *Miller* because it required that the resentencing judge considers the factors contained within *Miller*—thus complying with the Eighth Amendment—and that the majority does not support its holding that

[111] *See Ramos*, 387 P.3d at 661; *O'Dell*, 365 P.3d at 359.
[112] *Bassett II*, 428 P.3d at 352 (quoting *Graham*, 560 U.S. at 70).
[113] *See* Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439 (2013).
[114] *Bassett II*, 428 P.3d at 353.
[115] *Id.*
[116] *Gregory*, 427 P.3d at 642.
[117] *Bassett II*, 428 P.3d at 341, 355.
[118] *Bassett II*, 428 P.3d at 355 (Sanders, J., dissenting).

article I, section 14 is violated.[119] Further, the dissent was frustrated with the majority's failure to use *Fain*, suggesting that the *Fain* test could have been harmonized with the *Miller* factors given that *Miller* did not create a categorical bar.[120]

The argument between the majority and the dissent hinges largely on their respective confidence in judges to enter sentences that are in compliance with both *Miller* and Washington's ban on cruel punishment. The majority argues that the judicial discretion allowed under Washington's *Miller*-fix statute is precisely the risk that Washington's constitution cannot tolerate—that sentencers will not adequately consider and apply the mitigating factors reflecting youth's lessened culpability and a high likelihood of changing for the better as they mature into adults.[121] The majority recognized that judicial discretion is ever-present in sentencing, but the risk for cruel punishment is too great when "even expert psychologists have [difficulty] determining whether a person is irreparably corrupt" and what hangs in the balance is whether youths will "live out the rest of their lives in prison or [have] a chance to return to society."[122]

People on both sides of the issue may see the explanation for the court's departure as simply that the Washington Supreme Court decided that juvenile LWOP is unconstitutional because they wanted to. Criticisms of the court's foray into issues that could or should have been decided by the legislature are not new—some decry the court's so-called "judicial activism."[123] While it is outside the scope of this Article, perhaps the court's choice to reject its precedential *Fain* test is best explained by a majority

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[119] *Id.* at 355–56.
[120] *Id.* at 356 (arguing the majority simply parroted the Court of Appeals' mistake "by divorcing the *Fain* analysis from *Miller*'s requirements, when we must respect both . . . . Properly understood, our *Fain* analysis does not fail to account for youth and its attendant characteristics, but instead folds these considerations into our constitutional review . . .").
[121] *Bassett II*, 428 P.3d at 354.
[122] *Id.*
[123] *See* Philip Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 704 (1999).

who wanted to find juvenile LWOP unconstitutional and chose a test that all but guaranteed that result.

IV. CONCLUSION

As the adage goes, "bad facts make bad law." In Bassett's case, it may be that "good facts made good law." The judge who sentenced Bassett acted in his discretion pursuant to the *Miller*-fix statute, but it cannot be guaranteed that he meaningfully considered the youth-based mitigating factors. The *Bassett* court held that his "resentencing hearing provides an illustration of the imprecise and subjective judgments a sentencing court could make" when determining whether a youth is irreparably corrupt and deserving of juvenile LWOP.[124] The mitigation evidence offered by the defense including the insecurity of homelessness at a young age, Bassett's inability to control his emotions, serious family conflict, and the diagnosis as a teen with an adjustment disorder went unchallenged by the State. Yet, the judge determined Bassett was likely "more mature" as a result of being homeless and unwelcome to move home with his family.[125]

If Bassett's case was an exemplar of the peril in allowing a judge to determine whether a youth is irreparably corrupt, then perhaps the *Miller*-fix statute could never ensure that juveniles would be treated differently. The allowance of discretion about a youth's sentence—a youth who at the time was likely immature and who will almost certainly change for the better—could easily result in the erroneous sentence to die in prison. The risk of this result, according to *Bassett*, is intolerable under Washington's cruel punishment provision and as such, juvenile LWOP sentences had to be categorically barred.

[124] *Id.* at 354.
[125] *Id.*