BANNING JUVENILE AND YOUNG ADULT LIFE WITHOUT PAROLE SENTENCES—WHAT SENTENCING REFORM SHOULD LOOK LIKE

IN RE MONSCHKE, 482 P.3D 276 (WASH. 2021).

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I. INTRODUCTION

In the case *In re Monschke*, the Washington Supreme Court became the first state to extend its ban on life without parole ("LWOP") for juveniles to include young adults ages eighteen to twenty.[1] This holding

* J.D. Candidate, May 2023, Rutgers Law School—Camden. This Comment is dedicated to the late Robin Roccia—The future's so bright, I hope you still got your shades on.

1. In re Monschke, 482 P.3d 276, 288 (Wash. 2021) (en banc); *see also* Gene Johnson, *Court Overturns Automatic Life Sentences for Young Killers*, SEATTLE TIMES (Mar. 11, 2021, 12:40 AM), https://www.seattletimes.com/seattle-news/washington-state-supreme-court-overturns-automatic-life-sentences-for-young-killers/.

was influenced largely from the case law that developed in Washington following the United States Supreme Court's holding in *Miller v. Alabama*.[2] The *Miller* court, in 2012, banned mandatory LWOP parole sentences for juvenile offenders and mandated that courts take certain factors—such as youthfulness and the lessened culpability of juveniles—into account during sentencing.[3] The *Monschke* court circumvented its typical course of action when a punishment is challenged as unconstitutional—the court declined to apply either a categorical bar test or proportionality test to determine if LWOP was cruel punishment under the state constitution.[4] Instead, the court pronounced that it previously determined that LWOP was cruel punishment under the state constitution for juveniles in a prior case, and therefore decided to extend the definition of "juvenile" to include young adults ages eighteen to twenty.[5] The *Monschke* court reasoned that this extension was required because the "rigid bright line" of eighteen-years-old for LWOP was an arbitrary cut off.[6]

This Comment seeks to analyze the discussion between the lead opinion and the dissent in regard to the court's decision not to apply the categorical bar test. The role that state precedent played in shaping the court's decision, as well as the Washington Supreme Court's repeated assertion that the Washington Constitution is more protective than the Eighth Amendment, is of particular importance because this Comment argues that the court's decision was correct based on the foundations set by prior court decisions. Ultimately, this Comment argues that Washington's expansion of the ban on LWOP for young adults is a monumental decision that will act as an example for other states to model when reforming juvenile and young adult sentencing practices.

II. STATEMENT OF THE CASE

At twenty years old, Dwayne Earl Bartholomew was convicted of aggravated first-degree murder in the state of Washington.[7] One day, Bartholomew told his brother that he was going to rob a laundromat and leave no witnesses behind.[8] Subsequently, he robbed a laundromat, took

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2. 567 U.S. 460 (2012).
3. *Id.* at 470–73.
4. *Monschke*, 482 P.3d at 280.
5. *Id.* at 280–81.
6. *Id.* at 283.
7. *Id.* at 277.
8. *Id.* (citing State v. Bartholomew, 654 P.2d 1170, 1174 (Wash. 1982) (en banc), *vacated*, 463 U.S. 1203 (1983), *adhered to on remand*, 683 P.2d 1079 (Wash. 1984)).

$237 from the cash drawer, and fatally shot the laundromat attendant.[9] In 1981, he was found guilty at trial.[10] Initially, Bartholomew was sentenced to death, however the Washington Supreme Court vacated his death sentence in 1982, and on remand, he was resentenced to LWOP.[11]

Similarly, at nineteen years old, Kurtis William Monschke was convicted of aggravated first-degree murder.[12] Monschke and his friends were members of a white supremacist group called "Volksfront."[13] On the day in question, Monschke and his friends decided to help a member of their group earn "'red [shoe]laces' —a symbol 'that the wearer had assaulted a member of a minority group.'"[14] Separate from Monschke, two members of Volksfront found a homeless man and "savagely beat [him] with . . . bats, rocks, and steel-toed boots."[15] The group then went and found Monschke who struck the homeless man ten to fifteen times with a bat while his friends continued to kick the man's head.[16] After twenty days on life support, the homeless man died in the hospital.[17] In 2003, Monschke was found guilty and sentenced to mandatory LWOP.[18]

Years after being convicted, petitioners Bartholomew and Monschke each filed a personal restraint petition ("PRP")[19] in the Washington Court of Appeals where they argued that mandatory LWOP is unconstitutionally cruel when applied to youthful defendants such as themselves.[20] When this case was before the court, under section 10.95.030 of the Washington Code, a sentence of LWOP was mandatory for defendants convicted of aggravated first-degree murder, unless they were age seventeen or younger.[21] Bartholomew and Monschke argued that the constitutional protections afforded to defendants age seventeen and younger by the United States Supreme Court in regard to mandatory

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (citing State v. Monschke, 135 P.3d 966, 972 (Wash. Ct. App. 2006)).
14. *Id.* (quoting *Monschke*, 135 P.3d at 971 (alteration in original)).
15. *Id.*
16. *Id.* at 277–78.
17. *Id.* at 278.
18. *Id.*
19. A PRP is an action "brought in the appellate courts of Washington to obtain collateral or postconviction relief from criminal judgements . . . and other forms of government restraint." *See* MICHAEL JOHNSTON ET AL., PRINCIPLES AND LEADING CASES ON PROCEDURES IN PERSONAL RESTRAINT PETITIONS 1 (2022), https://www.opd.wa.gov/documents/00937-2022_PRP-ProceduresMemo.pdf.
20. *Monschke*, 482 P.3d at 277.
21. WASH. REV. CODE §§ 10.95.030(1), (3)(a)(i)–(ii) (2021). The statute stated: "[A]ny person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole." *Id.* § 10.95.030(1).

LWOP sentences should also apply to defendants ages eighteen to twenty-one because developments in neuroscience make the cut off age of eighteen arbitrary.[22] The Washington Court of Appeals transferred both petitions to the Washington Supreme Court without ruling on the merits, and the supreme court consolidated the two petitions and granted both.[23]

III. BACKGROUND

A. *Cruel Punishment: State and Federal Constitutional Provisions*

Historically, state constitutions were the primary source of protection for individual rights and the rights of criminal defendants—the Federal Constitution was a secondary layer of protection against only actions of the federal government.[24] Therefore, in 1889, when delegates of the Washington Constitutional Convention met in Olympia to draft the Washington Constitution, their purpose and use of language differed in intent from that of the federal framers.[25]

Article I, section 14 of the Washington Constitution reads: "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."[26] By contrast, the Eighth Amendment of the Federal Constitution provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[27] Although the language of the two provisions are similar, the delegates of the Washington Constitutional Convention purposely left out the phrase "or unusual" from section 14.[28] The

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22. *Monschke*, 482 P.3d at 278.

23. *Id.*

24. *See* ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 3 (Alan G. Tarr ed. 2002); *see also* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. L. REV. 85, 85–90 (1985) (discussing the gradual incorporation of the Bill of Rights through the Fourteenth Amendment); *see, e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment right against self-incrimination); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment right against cruel and unusual punishments). To date, not all provisions of the Bill of Rights are incorporated. The most recent provision incorporated was the Eighth Amendment right against excessive fines in 2019. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).

25. UTTER & SPITZER, *supra* note 24, at 3–4.

26. WASH. CONST. art. 1, § 14.

27. U.S. CONST. amend. VIII.

28. UTTER & SPITZER, *supra* note 24, at 28. Delegates debated whether to include the "or unusual" provision because it was included in the 1857 Oregon Constitution and in William Lair Hill's draft Constitution for Washington. *Id.* One delegate advocated for the use of "unusual" because he was opposed to execution by electricity. *Id.* The chairman of

Washington Supreme Court has stated repeatedly that it treats the state provision as affording greater protection than the Eighth Amendment banning "cruel and unusual" punishment.[29]

The historical significance of state constitutions and the protections that they offer criminal defendants has arguably been lost in translation over the years. Currently, the Eighth Amendment encapsulates the baseline for legal protections afforded to criminal defendants against cruel and unusual punishment, and state constitutional provisions may offer greater protections for criminal defendants depending on the language of the state constitution and interpretive case law. The breadth of Washington's cruel punishment provision is now coming to the forefront because Washington courts have consistently held that state law expands well beyond the minimum requirements of the Federal Constitution. This is evidenced by the progression of Washington law regarding juvenile sentencing and its recent expansion to include individuals eighteen to twenty years old in the categorical ban on LWOP.[30]

B. Evolution of Juvenile Sentencing in Washington

In 2012, Washington's statutory scheme for sentencing juvenile offenders was impacted by the Supreme Court of the United States' holding in *Miller v. Alabama*. The *Miller* Court held that *mandatory* LWOP sentences for juveniles under eighteen constituted cruel and unusual punishment and were unconstitutional.[31] This holding led the Washington legislature to amend its sentencing requirements for aggravated murder and to enact legislation to ensure future compliance with *Miller* and to retroactively remedy previous *Miller* violations, these statutory changes are often referred to as the "*Miller*-fix" statutes.

The first *Miller*-fix statute was initially codified at section 10.95.030 of the Washington Code. Prior to the *Miller* holding, anyone convicted under Washington's aggravated murder statute was required to be

the committee responded that the word "cruel" was sufficient to encompass the concern and ultimately it was left out. *Id.*; *see also* OR. CONST. art. I, § 16; William Lair Hill, *A Constitution Adapted to the Coming State. Suggestions by Hon. W. Lair Hill. Main Features Considered in the Light of Modern Experience. Outline and Comment Together*, MORNING OREGONIAN, July 4, 1889, at 9, https://lib.law.uw.edu/waconst/Sources/Hill%20Constitution.pdf.

29. *See, e.g.*, State v. Fain, 617 P.2d 720, 723 (Wash. 1980) (en banc); State v. Manussier, 921 P.2d 473, 483–84 (Wash. 1996) (en banc); State v. Roberts, 14 P.3d 713, 733 (Wash. 2000) (en banc); State v. Bassett, 428 P.3d 343, 348 (Wash. 2018).

30. *In re* Monschke, 482 P.3d 276, 280–81 (Wash. 2021) (en banc).

31. Miller v. Alabama, 567 U.S. 460, 470 (2012).

sentenced to mandatory life without parole regardless of their age.[32] In 2014, subsection (3) was added to the statute stating that "mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*" must be taken into account when determining the minimum term of imprisonment when sentencing a juvenile convicted of aggravated murder.[33]

The second *Miller*-fix statute, also enacted in 2014, sought to provide a remedy for mandatory LWOP sentences issued prior to *Miller*'s holding.[34] This *Miller*-fix statute, section 9.94A.730 of the Washington Code, permits automatic parole eligibility after a juvenile serves the first twenty years of the individual's original sentence.[35] However, automatic parole eligibility does not mean automatic release. While there is a presumption of release under this *Miller*-fix statute, the Indeterminate Sentencing Review Board ("ISRB") still must determine whether the potential juvenile parolee "is more likely than not to commit a future crime if released."[36] If the juvenile is found to be "*not* more likely than not to commit a future crime," then the juvenile's release is ordered by the ISRB.[37]

A year after the *Miller*-fix statutes were implemented, the Washington Court of Appeals held in *State v. Ronquillo* that a functional life sentence cannot be mandatory without violating *Miller*.[38] In 1994, Brian Ronquillo, at sixteen years old, was sentenced to a mandatory 51.3 year sentence for one count of first-degree murder, two counts of attempted first-degree murder, and one count of second-degree assault while armed with a firearm.[39] The court of appeals noted that, "[a] sentence of 51.3 years is not necessarily a life sentence for a [sixteen]-year-old, but it is a very severe sentence."[40] Since Ronquillo would remain incarcerated until the age of sixty-eight, the court of appeals held that

32. WASH. REV. CODE § 10.95.030(1) (2012) ("[A]ny person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole.").

33. *Cf.* WASH. REV. CODE § 10.95.030(1) (2014) ("Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without the possibility of release or parole."); *see also id.* § 10.95.030(3)(b).

34. *Id.* § 9.94A.730.

35. *Id.* § 9.94A.730(1).

36. Maya L. Ramakrishnan, Comment, *Providing a Meaningful Opportunity for Release: A Proposal for Improving Washington's* Miller-*Fix*, 95 WASH. L. REV. 1053, 1078 (2020).

37. *Id.* at 1077.

38. State v. Ronquillo, 361 P.3d 779, 784 (Wash. Ct. App. 2015).

39. *Id.* at 781.

40. *Id.* at 784.

his mandatory term-of-years sentence, although not technically a life sentence, functioned as a de facto life sentence and was unconstitutional in light of *Miller*.[41] Further, the court emphasized that *Miller* applies to aggregate sentences.[42] Although Ronquillo was serving four separate sentences for crimes against four different victims, as opposed to a single lengthy sentence for one crime, the court held that *Miller* extends to aggregate sentencing for juveniles.[43] Ronquillo's case was remanded for a new sentencing hearing consistent with *Miller*.[44]

Two years later, in *State v. Houston-Sconiers*, the Washington Supreme Court affirmed the court of appeals' holding in *Ronquillo* and held that mandatory gun enhancements contributing to the de facto life sentence of a juvenile violates *Miller*.[45] In *Houston-Sconiers*, defendants Zyion Houston-Sconiers and Treson Roberts—seventeen and sixteen years old—faced sentences ranging from 41.75–45.25 years and 36.75–40.25 years, respectively.[46] Of those sentences, thirty-one years and twenty-six years were attributable to mandatory gun enhancements.[47] The Washington Supreme Court held that *Miller* applies anytime an adult court sentences a child and that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court."[48] The defendants' cases were remanded for resentencing in accordance with *Miller*.[49]

In 2018, the adequacy of the *Miller*-fix statutes were questioned before the Supreme Court of Washington. In *State v. Scott*, defendant Jai'Mar Scott attempted to challenge his seventy-five year sentence for first-degree murder that was imposed in 1990 when he was seventeen years old.[50] Scott sought a new sentencing hearing in light of *Miller* and the court's recent decision in *Houston-Sconiers* about de facto life sentences.[51] The court held that Scott's de facto life sentence was unconstitutional.[52] Nonetheless, the court denied granting Scott a new sentencing hearing because he could seek early release under section

41. *Id.*
42. *Id.* at 784–85.
43. *Id.*
44. *Id.* at 789.
45. State v. Houston-Sconiers, 391 P.3d 409, 414 (Wash. 2017) (en banc).
46. *Id.* at 413–14.
47. *Id.* at 414.
48. *Id.*
49. *Id.* at 426.
50. State v. Scott, 416 P.3d 1182, 1183 (Wash. 2018) (en banc).
51. *Id.* at 1186.
52. *Id.* at 1189.

9.94A.730 of the Washington Code—the retroactive *Miller*-fix statute.[53] The court relied on a recent United States Supreme Court case, *Montgomery v. Louisiana*, to support its denial of resentencing.[54] The *Montgomery* court held that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case. . . . A state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."[55]

In a concurring opinion to the *Scott* decision, Justice McCloud stated that "the adequacy of the statutory remedy available to Scott—[the retroactive *Miller*-fix statute]—remains an open question under Washington law."[56] Justice McCloud noted that while the *Miller*-fix statute at issue was adequate under the Federal Constitution's Eighth Amendment, "our own constitution and case law require more than the framework offered by [section] 9.94A.730."[57] Both substantive and procedural components are required for a *Miller* "fix" to be adequate under Washington law, argued Justice McCloud.[58] Substantively, mitigating factors that account for the diminished culpability of youth are considered, and procedurally, a sentencing court must take these mitigating factors into account—not a parole board.[59] Justice McCloud further noted that the Washington Supreme Court's holding in *State v. Fain*[60] that "the possibility of parole cannot be considered akin to a real resentencing under our state constitution" was relevant to her opinion.[61]

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53. *Id.*
54. *Id.* at 1187.
55. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).
56. State v. Scott, 416 P.3d 1182, 1190 (en banc) (McCloud, J., concurring).
57. *Id.* at 1191.
58. *Id.* at 1192–93.
59. *Id.* at 1193.
60. In *State v. Fain*, Fain was convicted of second-degree theft for passing a series of bad checks that totaled $408. 617 P.2d 720, 721–22 (Wash. 1980) (en banc). Fain was sentenced to life imprisonment under a habitual offender statute and challenged his sentence for being disproportionate to the nature of his crimes. *Id.* The court held that Fain's sentence was cruel punishment and violated article I, section 14 of the Washington Constitution. *Id.* at 728. The court stated that, "[i]t is clear to us that 'parole is simply an act of executive grace.'" *Id.* at 724 (quoting Rummel v. Estelle, 445 U.S. 263, 293 (1980) (Powell, J., dissenting)). Further, the court noted:

> A prisoner has no right to parole, which is merely a privilege granted by the administrative body. . . . [T]he foregoing statutory scheme reveal that Fain's chances of receiving parole have little to do with the crimes for which he was sentenced. Rather, his chances depend on his subsequent behavior in prison. Many forms of behavior, not criminal in the world outside the prison walls, may be grounds on which the parole board refuses to grant parole.

Id. at 724–25.

61. *Scott*, 416 P.3d at 1191 (McCloud, J., concurring).

Ultimately, the majority and concurring opinions agreed that *Scott* was not per se entitled to a resentencing hearing under *Miller*, *Montgomery*, or the Eighth Amendment, and he was directed to seek remedy with the ISRB; Scott's resentencing was denied.[62]

Later in 2018, there was another constitutional challenge of a *Miller*-fix statute before the Washington Supreme Court. In *State v. Bassett*, section 10.95.030(3) of the Washington Code was challenged on state constitutional grounds.[63] Defendant Brain Bassett was sentenced to three consecutive terms of LWOP for three counts of aggravated murder when he was sixteen years old.[64] Bassett was originally sentenced in 1996, but was granted a resentencing hearing in accordance with *Miller* in 2015.[65] At resentencing, the judge rejected Bassett's introduction of mitigating information and again imposed three consecutive LWOP sentences.[66] Bassett appealed his resentencing and argued that the *Miller*-fix statute violated the Washington Constitution because LWOP was "categorically a cruel punishment for juvenile offenders."[67] The court held that section 10.95.030(3)(a)(ii) of the Washington Code was unconstitutional under article I, section 14 of the Washington Constitution and that LWOP for juveniles constitutes cruel punishment.[68] Bassett's case was remanded for a second resentencing hearing in accordance with the court's new holding.[69]

Prior to the court's decision in *Bassett*, under Washington's *Miller*-fix statute, a LWOP sentence was permissible for a juvenile aggravated murder conviction, but it could not be mandatory. At the time this case was decided, section 10.95.030(3)(a)(ii) of the Washington Code stated that a juvenile, who is at least sixteen years old, but less than eighteen, convicted of aggravated murder "shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which

62. *Id.* at 1189 (majority opinion).
63. State v. Bassett, 428 P.3d 343, 345–48 (Wash. 2018).
64. *Id.* at 346.
65. *Id.*
66. *Id.* at 346–47. Bassett presented evidence from a pediatric psychologist who testified about his adjustment disorder, struggles to cope with homelessness at the time of his crimes, and about the effects of his strained relationship with his parents. *Id.* He also introduced evidence of emotional and behavioral maturity since the beginning of his incarceration, completion of stress and family violence courses, completion of his GED, community college transcripts, and letters evidencing that he served as a mentor to other men in prison. *Id.* at 347. The State did not rebut any of the evidence that Bassett presented. *Id.*
67. *Id.*
68. *Id.* at 355.
69. *Id.*

case the person will be ineligible for parole or early release."[70] Although this provision was held unconstitutional in 2018, it took the Washington legislature over four years to amend the unconstitutional statute.[71] The amended statute removed the provision denying the possibility of parole for sixteen and seventeen-year-olds convicted of aggravated first-degree murder.[72] While the amended statute is now in compliance with the holding in *Basset*, the amended statute runs afoul of *Monschke* because it does not extend the denial of the possibility of parole to defendant's eighteen, nineteen, and twenty years old.

C. *What is Cruel Punishment Under the Washington Constitution—the Fain Proportionality Test and the Bassett Categorical Bar Test*

In order for punishment to be considered cruel under the Washington Constitution, it must be "grossly disproportionate to the offense."[73] A punishment is considered grossly disproportionate if it "is clearly arbitrary and shocking to the sense of justice."[74] The traditional test used by Washington courts to determine if a punishment is grossly disproportionate and thus in violation of article I, section 14 is the *Fain* proportionality test. In *State v. Fain*, the court held that four factors are useful to analyze a constitutional challenge under the cruel punishment provision in order to determine whether a punishment is disproportionate to an underlying offense.[75] The factors are: (1) the nature of the offense; (2) the legislative purpose behind the criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment for other offenses in Washington.[76]

However, more recently, in *State v. Bassett*, the Washington Supreme Court adopted an alternative categorical bar test to use when determining whether a sentence is cruel punishment for a *class* of defendants across the board, specifically juveniles. The *Bassett* court noted that while *Fain* was the traditional test used to analyze whether a sentence is grossly disproportionate to an offense, "[the court was] not

70. WASH. REV. CODE § 10.95.030(3)(a)(ii) (2018).

71. *Id.*; *see Bassett*, 428 P.3d at 355 (holding that the state provision is unconstitutional).

72. WASH. REV. CODE § 10.95.030(2)(a) (2023).

73. State v. Smith, 610 P.2d 869, 879 (Wash. 1980) (en banc); *see also* State v. Fain, 617 P.2d 720, 731 (Wash. 1980) (en banc) (Rosellini, J., dissenting) ("Only if the punishment were grossly disproportionate to the offense would the court be justified in invalidating it as cruel and unusual . . . .").

74. *Smith*, 610 P.2d at 879.

75. *Fain*, 617 P.2d at 725–26.

76. *Id.* at 726.

bound to apply *Fain* to every cruel punishment claim under article I, section 14."[77] The court distinguished *Fain* and held that an alternative test is more appropriate to determine whether a sentence is "categorically unconstitutional based on the nature of [an] . . . offender class."[78] Alternatively, the categorical bar test considers: (1) whether there is a national consensus against the sentencing practice at issue; and (2) the court's own independent judgment based on consideration of the culpability of the group in light of their crimes and characteristics, along with the severity of the punishment and whether the sentencing practice serves legitimate penological goals.[79] The Washington Supreme Court affirmed the court of appeals' adoption of the categorical bar test which embraced the framework used by the United States Supreme Court.[80]

*D. Federal LWOP for Juveniles—*Miller v. Alabama

In 2012, the United States Supreme Court held in *Miller v. Alabama* that imposing mandatory LWOP sentences on juvenile offenders violates the Eighth Amendment.[81] The *Miller* Court declined to consider placing a categorical bar on LWOP for all juvenile offenders, specifically defendants charged with homicide because there may be a rare instance where a juvenile offender's crime "reflects irreparable corruption."[82] Instead, the Court concluded that individualized sentencing is mandatory and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[83]

In reaching this decision, the Court relied on a line of precedent emphasizing the importance of "proportionate punishment" in light of the "lesser culpability" of juvenile defendants.[84] The Court previously placed a categorical bar on the death penalty for all juvenile defendants; thus, making LWOP "the harshest possible penalty for juvenile offenders."[85]

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77. *Bassett*, 428 P.3d at 350.
78. *Id.*
79. *Id.* at 352 (citing Graham v. Florida, 560 U.S. 48, 67 (2010)).
80. *Id.* at 347.
81. Miller v. Alabama, 567 U.S. 460, 470 (2012).
82. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
83. *Id.* at 489. The *Miller* Court evaded consideration of a categorical ban on LWOP for juvenile defendants convicted of homicide. *Id.* at 479 (stating that "[b]ecause [this] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles").
84. *Id.* at 470.
85. *Id.* at 489; *see also Roper*, 543 U.S. at 578 (holding that LWOP sentences for juveniles who did not commit homicide violates the Eighth Amendment if imposed on offenders under eighteen because of three general differences between juveniles and

IV. THE COURT'S REASONING

In *In re Monschke*, the Washington Supreme Court vacated Bartholomew's and Monschke's mandatory LWOP sentences and ordered that each petitioner receive a new sentencing hearing.[86] The court held that LWOP sentences, mandatory or discretionary, for youthful defendants twenty years of age and younger violate the state constitution's cruel punishment clause.[87] In reliance on state precedent, particularly *Bassett* and *Houston-Sconiers*, the court reasoned that the protection against LWOP sentences for offenders age seventeen and younger extends to "juvenile offenders" that are eighteen, nineteen, and twenty years old because the differentiation between seventeen, eighteen, nineteen, and twenty is of little distinction in light of the notion that Washington courts are required to have complete discretion when sentencing juveniles, even when faced with mandatory statutory language.[88]

As a secondary matter regarding appellate procedure, there was disagreement between the lead and concurring opinions as to why the petitioners were exempt from the one-year time bar that exists for filing a PRP. Notwithstanding the disagreement, the court found that petitioners were not time barred from filing their PRPs.[89]

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adults). The three differences outlined in *Roper* were: (1) lack of maturity and underdeveloped sense of responsibility; (2) vulnerability to negative influences and outside pressure; and (3) that the character of a juvenile is not as well formed as that of an adult. *Roper*, 543 U.S. at 569–70; *see also* Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that LWOP sentences for juveniles who did not commit homicide violates the Eighth Amendment). In *Roper*, the Court characterized the death penalty as the most severe punishment permissible by law which "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). Similarly, in *Graham*, the Court asserted that LWOP is the second most severe punishment permissible by law and "is an especially harsh punishment for a juvenile," which fails to be justified by the various penological justifications for sentencing practices. *Graham*, 560 U.S. at 70–74.

86. *In re* Monschke, 482 P.3d 276, 288 (Wash. 2021) (en banc).

87. *Id.*

88. *Id.* at 287; *see also* State v. Bassett, 428 P.3d 343, 355 (Wash. 2018); State v. Houston-Sconiers, 391 P.3d 409, 426 (Wash. 2017) (en banc).

89. *Cf. Monschke*, 482 P.3d at 278–79, *and id.* at 288–89 (González, C.J., concurring). The lead opinion argued that the petitioners challenged the constitutionality of the aggravated murder statue as applied to them because they challenged the section of the statute that requires mandatory LWOP for all convictions. *Id.* at 278–79 (majority opinion); *see also* WASH. REV. CODE § 10.73.100(2) (2021). By contrast, the concurring opinion categorized subsection (2) as applying to substantive criminal statutes that have been found unconstitutional, not sentencing statutes which the concurrence argued that the petitioners challenged. *Monschke*, 482 P.3d at 288–89 (González, C.J., concurring); *see also* §

A. Lead Opinion

Writing for the lead opinion, Justice Gordon McCloud first addressed the court's decision not to apply both the categorical bar test used in *Bassett* or the proportionality test used in *Fain*.[90] The court stated that these tests are used to determine, in the first place, if a particular punishment is categorically cruel and in violation of article I, section 14 of the state constitution.[91] In this case, the court argued that it already recognized mandatory LWOP as unconstitutionally cruel when applied to youthful defendants in light of precedent from *Bassett* and *Miller*.[92] Thus, neither test needed to be reapplied because the petitioners asked them to consider if existing constitutional protections apply to an enlarged class of youthful defendants, not to determine if a new set of constitutional protections apply to a new class of persons.[93]

Bartholomew and Monschke argued that the protection against mandatory LWOP for juveniles should extend to them because they "were essentially juveniles in all but name at the time of their crimes."[94] The court accepted this argument and substantiated it on four grounds: (1) that constitutional protections for youthful criminal defendants have grown more protective over time; (2) that legislative line drawing does not circumvent what constitutes cruel punishment under the state constitution; (3) that the concept of "age of majority" is inherently and necessarily flexible; and (4) that no meaningful developmental difference exits between the brain of a seventeen-year-old and that of an eighteen-year-old.[95]

First, the lead opinion argued that constitutional protections for youthful defendants have grown more protective over time because at the time of the nation's founding, under the common law, it was "theoretically permit[table for] capital punishment to be imposed on anyone over the age of [seven]."[96] The court outlined the evolution of United States Supreme Court cases incrementally increasing the minimum age at which a criminal defendant could be sentenced to capital punishment.[97] In reliance on the timeline of "evolving standards of

10.73.100(6). The concurring opinion argued that "*O'Dell* is a significant change in the law that applies retroactively when material." *Monschke*, 482 P.3d at 289.

90. *Id.* at 280.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 281–86.
96. *Id.* at 281 (quoting Stanford v. Kentucky, 492 U.S. 361, 368 (1989)).
97. *Id.* at 281–82; *see also* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that imposition of death penalty on a fifteen-year-old convicted of murder is

decency that mark the progress of a maturing society," the court concluded that the constitutional jurisprudence regarding cruel and unusual punishment continues to shift over time and reasoned that its current decision was supported by and consistent with this notion.[98]

Second, the court declared that sometimes "bright statutory lines fail to comply with" constitutional protections.[99] The court analogized the statute that petitioners Bartholomew and Monschke were convicted under to a Florida statute that permitted the execution of an intellectually disabled man because his IQ was seventy-one and the cut off for impermissible execution was seventy.[100] The *Monschke* lead argued that section 10.95.030 of the Washington Code, which Monschke and Bartholomew were convicted under, set a flat cutoff line for determining a defendant's sentence akin to the impermissible Florida statute.[101] In reliance on this analogy, the *Monschke* lead rejected the use of "rigid bright line" cutoffs because such legislative determinations can still be found unconstitutional.[102]

Next, the lead explored the idea that the age of majority is inherently and necessarily flexible because, under Washington law, there are exceptions that extend the age of majority.[103] Throughout this discussion, the lead relied heavily on the fact that numerous criminal statutes and civil regulations draw a line between "adulthood" and "childhood" at various ages other than eighteen years old.[104] After providing examples, the lead concluded that the mentioned examples of age flexibility in Washington law were indicative of the "need for flexibility in defining the nebulous concept of 'adulthood' or 'majority'" because depending on the context of the law, an alternative standard may be necessary.[105]

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unconstitutional); *Stanford*, 492 U.S. at 380 (holding that death penalty is a permissible sentence for sixteen or seventeen-year-olds convicted of murder); Roper v. Simmons 543 U.S. 551, 578 (2005) (holding that imposition of death penalty on offenders under the age of eighteen is unconstitutional). The *Monschke* lead opinion also highlighted the evolution of federal constitutional protections afforded to intellectually disabled criminal defendants. *Monschke*, 482 P.3d at 282; *see also* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that execution of a "mentally retarded" person does not violate the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that death penalty is not a suitable punishment for a "mentally retarded" person and violates the Eighth Amendment).

98. *Monschke*, 482 P.3d at 282 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
99. *Id.* at 283.
100. *Id.* at 283; Hall v. Florida, 572 U.S. 701, 707 (2014).
101. *Monschke*, 482 P.3d at 283.
102. *Id.*
103. *See id.* at 283–84.
104. *Id.* at 284.
105. *Id.*

Therefore, the lead reasoned that its holding was consistent with the existing flexibility found under state law.[106]

Lastly, the lead substantiated its holding on the ground that no meaningful developmental differences exist between the brain of a seventeen-year-old and that of an eighteen-year-old.[107] The court relied on its previous holding in *State v. O'Dell*, that under Washington's Sentencing Reform Act of 1981, "age may well mitigate a defendant's culpability, even if that defendant is over the age of [eighteen]."[108] The scientific developments about youthfulness and brain development that compelled the court in *O'Dell*,[109] in addition to more recent studies provided by the petitioners,[110] persuaded the lead to conclude that brain development, both biological and psychological, continue into an individual's early twenties—which is well beyond the age of majority.[111] Therefore, a distinction for sentencing eighteen, nineteen, or twenty-year-olds, as opposed to seventeen-year-olds, to mandatory LWOP makes no constitutional difference if their brains have little difference.[112]

The State did not dispute Bartholomew and Monschke's arguments that brain development continues well into an individual's twenties; rather, the State argued that analyzing *individual* adolescent brains would be too difficult because the cited studies analyze brain development *generally* of all young individuals.[113] Thus, the State

106. *Id.*

107. *Id.*

108. *Id.* at 284–85 (quoting State v. O'Dell, 358 P.3d 359, 366 (2015) (en banc) (holding that an eighteen-year-old convicted ten days after their eighteenth birthday was entitled to new sentencing hearing because trial court failed to consider youth as a possible mitigating factor)). In *O'Dell*, the Supreme Court of Washington explained that when the Washington legislature enacted the Sentencing Reform Act of 1981, it lacked the benefit of psychological and neurological studies showing that brain development continues well into a person's twenties because its enaction predated the United States Supreme Court's decisions in *Roper*, *Graham*, and *Miller*. *See O'Dell*, 358 P.3d at 364.

109. *Id.* at 364 n.5 (citing Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 n.252 (2009); *Young Adult Development Project: Brian Changes*, MASS. INST. OF TECH., http://hr.mit.edu/static/worklife/youngadult/brain.html (last visited June 25, 2023); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANN. N.Y. ACAD. SCI. 77 (2004)).

110. *Monschke*, 482 P.3d at 285 (citing Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 582 (2015); Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 786 (2016); Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016)).

111. *Id.*

112. *Id.*

113. *Id.*

concluded that the legislature should make decisions about where to draw the line "because they will necessarily be arbitrary no matter where they are drawn."[114] The lead opinion rejected the State's rebuttal in its entirety and reasoned that, in light of the notion that all individuals and their brain development are different, that courts must have the discretion to consider attributes as they apply to each individual youthful offender.[115]

The lead concluded on the note that discretion in sentencing youthful offenders is required under article I, section 14 of the Washington Constitution because there is "no meaningful neurological bright line . . . between age [seventeen] and age [eighteen] or, as relevant here, between age [seventeen] on the one hand, and ages [nineteen] and [twenty] on the other hand."[116] Pointing to *Miller* and *Houston-Sconiers*, the court asserted that judges and sentencing courts must have the discretion to consider the "mitigating qualities of youth" outlined in these precedential cases.[117]

B. Concurring Opinion

Authored by Chief Justice González, the concurring opinion agreed with the lead that Bartholomew and Monschke were entitled to new sentencing hearings to determine whether their ages at the time of their crimes were mitigating factors justifying a "downward departure" from the standard sentence associated with the statute under which they were convicted.[118]

However, the Chief Justice rejected the lead opinion's analysis of the one-year time limitation for PRPs and found instead that a significant change in the law that was material to petitioners' sentences under *State v. O'Dell* is what provided grounds for petitioners to successfully bring their PRPs.[119]

C. Dissenting Opinion

In the dissenting opinion, Justice Owens remained adamant that Bartholomew and Monschke were not children at the time of their crimes but rather adults who, once they turned eighteen, were empowered with the privilege to make a number of life-altering decisions that they could

114. *Id.*
115. *Id.*
116. *Id.* at 287.
117. *Id.*
118. *Id.* at 288–89 (González, C.J., concurring).
119. *Id.*

not have made prior to their majority.[120] Additionally, the dissent noted that with the privilege to be considered an adult comes the responsibility of adulthood, which includes being held accountable for one's actions.[121]

Initially, the dissent pleaded that "[o]ur court is not a legislature, and it is insufficiently equipped to decide this issue."[122] To support this argument, the dissent asserted that "the legislature may have set the age of majority based on when an individual has *sufficient* brain development, experience, and legal autonomy to make important . . . decisions," including the decision of when to refrain from committing crime.[123] Further, the dissent classified the lead opinion's persistence on discretion to determine whether a LWOP sentence should be imposed on eighteen to twenty-year-olds as false optimism because in *Bassett*, the court invalidated LWOP sentences for juveniles based upon the "reasoning that courts are incapable of accurately making this determination."[124]

Next, the dissent entirely rejected the lead's argument that the petitioners fell under an exception to the one-year time bar for PCPs. Justice Owens argued that, based on the plain language of the statute, the lead opinion's reliance on an exception under subsection (2) was incorrect.[125] To support this assertion, Justice Owens distinguished *convictions* from *sentences*, pointing out that the petitioners were convicted of violating the aggravated murder statute and not convicted of violating a mandatory LWOP sentencing statute.[126] The dissent did not address the concurring opinion's argument that the exception to the one-year time bar fell under subsection (6).[127]

The bulk of the dissenting opinion focused on the lead's determination not to apply the categorical bar test outlined in *Bassett*. The dissent concluded that even if the lead had applied the test, it would have failed.[128]

In its application of *Bassett*, the dissent found that the first prong of the analysis failed because it could find no states that expressly exempted eighteen to twenty-year-olds from mandatory LWOP sentences

120. *Id.* at 289 (Owens, J., dissenting).
121. *Id.*
122. *Id.*
123. *Id.* at 290.
124. *Id.*
125. *Id.* at 291.
126. *Id.*
127. *See id.* at 289 (González, C.J., concurring).
128. *Id.* at 293–94 (Owens, J., dissenting).

through either the legislative or judicial process.[129] To support this argument, the dissent asserted that the lead attempted to "rewrite the national trend[s]."[130] The dissent rejected the lead's argument that there is any national trend carving out "rehabilitative space for 'young' or 'youthful' offenders as old as their [mid-twenties]," and argued that, even if such a broad statement were true, it is inadequate to satisfy *Bassett* because it is not a national trend specific to the *sentencing practice at issue*.[131] Rather, the dissent characterized it as a hopeful inclination in support of "treating young adults with the leniency of the juvenile system in limited circumstances."[132] The dissent further criticized the lead by stating that none of the cited examples apply to violent crimes such as murder, and that all of the examples given expressly reject such practices for homicide and related violent offenses.[133]

Next, the dissent analyzed the second prong of *Bassett*, arguing that Monschke and Bartholomew failed because the "petitioners are fundamentally different from juveniles," in which they could do all the things associated with turning eighteen including "get jobs, quit school, get married, form contracts, and drive cars."[134] The dissent argued that since Monschke and Bartholomew could do these adult activities when they committed their crimes, inherently they can face the consequences of their criminal actions.[135] Justice Owens stated that this is so because aggravated murder is "undoubtedly one of the most serious crimes on the books."[136] Therefore, the dissent argued that a LWOP sentence for Bartholomew and Monschke "serves the legitimate penological goals of retribution, deterrence, and incapacitation."[137]

Additionally, the dissent argued that the lead opinion side-stepped the *Bassett* analysis by classifying the case as an extension of existing protections for a class of offenders rather than as a new set of protections for a new class of offenders—young adults ages eighteen to twenty.[138] The dissent classified *Miller* as an expansion extending from "the rarest

129. *Id.* at 293. The first prong of *Bassett* to determine whether a punishment is categorically cruel as applied to a certain class of persons is to "(1) analyz[e] whether this punishment is barred by other states through their legislatures and judiciaries." *Id.* at 292.
130. *Id.* at 293.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 294. The second prong of Bassett requires the court to "exercis[e] [their] independent judgement in determining the culpability of the group when considering the crime and if the punishment serves legitimate penological goals." *Id.* at 292.
135. *Id.* at 294.
136. *Id.*
137. *Id.*
138. *Id.* at 292.

of juvenile offenders" to all juvenile offenders and classified *Bassett* as an expansion from the class identified in *Miller* to all offenders seventeen and under.[139] Thus, the dissent concluded that "even if petitioners are merely extending the class as the lead opinion claims, they do not get to create a new and less rigorous test. They must apply our precedent of 'extending' a class, which is *Bassett*."[140]

At end of the dissenting opinion, Justice Owens stated that the lead "far exceeds the confines of judicial restraint when it finds these authorities on its own accord and argues them on behalf of the petitioners."[141] Justice Owens contended that Bartholomew and Monschke failed to prove the unconstitutionality of their sentences *beyond a reasonable doubt*, as required when making a state constitutional challenge.[142] In light of this failure, the dissent asserted that the lead's discussion of national trends was inappropriate because the petitioners did not present the alleged trend to the court as evidence to support their claim for extending the categorical bar on LWOP to defendants eighteen to twenty years old.[143] Rather, the dissent attested that the lead found examples of a "trend" of its own accord in order to support the holding that the lead wanted.[144] The dissent concluded by arguing that the lead's decision to circumvent *Bassett* was twofold because not only did the petitioners fail to put forth the evidence necessary to support their claim, but even if they had provided the evidence that the lead relied on, that evidence would still have failed under *Bassett*.[145]

V. ANALYSIS

The court's decision in *Monschke* to extend the ban on LWOP to juveniles ages eighteen to twenty is one of the first of its kind. In response to *Miller*, only twenty-seven states have placed a categorical ban on

139. *Id.* at 292–93.

140. *Id.* at 293.

141. *Id.* at 294.

142. *Id.* Under Washington law, "[a] statute is presumed constitutional and the party challenging it has the burden to prove it is unconstitutional beyond a reasonable doubt." State v. Ward, 869 P.2d 1062, 1066 (Wash. 1994) (en banc); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 341–43 (2009) (discussing the burden that the presumption of constitutionality may cause in state constitutional claims); Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 RUTGERS U. L. REV. 1429, 1433 (2022) (arguing that unconstitutional beyond a reasonable doubt should be eliminated as a burden of proof for state constitutional claims).

143. *Monschke*, 482 P.3d at 294.

144. *Id.*

145. *Id.*

discretionary LWOP sentences for juveniles ages eighteen and under who are convicted of murder.[146] In 2020, the District of Columbia passed legislation that extended its ban on LWOP for juveniles up to the age of twenty-four.[147] It became effective on April 27, 2021.[148] The District of Columbia law went into full effect one month after *Monschke* was decided which has officially started the "affirmative trend" that the dissent rejects.

Although the lead opinion did not apply the *Bassett* categorical bar test, it touched on matters related to the first prong. The lead opinion relied on statutes from Colorado, the District of Columbia, Florida, Georgia, Michigan, South Carolina, and Vermont to support the notion that there is "objective indicia of a national consensus against the sentencing practice at issue."[149] These statutes, produced in footnote eight of the case, provide various definitions of youthful offenders between the ages of seventeen and twenty-four.[150] The dissent reads the first prong of *Bassett* too narrowly and insists that in order for the national trend to be adequate under *Bassett*, it must be about the *specific* sentencing practice at issue. The mere fact that these laws draw some kind of distinction between young people ages seventeen to twenty-four, and adults who are twenty-five and older, indicates that there is a national consensus that this age range of young people differs in some way from older adults. It suggests that the foundation for the *Monschke* court's ultimate holding was already set, and Washington is now able to build upon this foundation. Although some of the laws exclude violent offenses, the existing distinctions are still foundational for greater protections that will come later because as the "evolving standards of decency that mark the progress of a maturing society" continue to grow, so will the protections for sentencing juveniles and young adults.[151]

Notably, the dissent's literal interpretation of the first prong of *Bassett's* categorical bar test is counterintuitive because it limits the ability for Washington to be a leader in juvenile sentencing reform, which it evidently is. If Washington was required to wait until half of all states

146. *See* JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 1 (2023), https://www.sentencingproject.org/app/uploads/2023/04/Juvenile-Life-Without-Parole.pdf.

147. Omnibus Public Safety and Justice Amendment Act of 2020, D.C. Law 23-274, § 601 (codified as amended D.C. CODE § 24-403.03 (2021)).

148. 68 D.C. Reg. 004792 (May 7, 2021) (giving notice that the act took effect on April 27, 2021).

149. *See Monschke*, 482 P.3d at 280 n.8.

150. *Id.*

151. Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

adopted a practice in order to fulfill the first prong of *Bassett*, it would be entirely unreasonable since Washington law is far more protective than a majority of other states in other aspects of juvenile sentencing.[152] For example, Washington's treatment of de facto LWOP sentences as a violation of *Miller* is a minority opinion nationally. The United States Supreme Court has not yet held that de facto life sentences for juveniles violate the Federal Constitution because LWOP is still possible under the Eighth Amendment.[153] Only seven other states, aside from Washington, treat de facto LWOP parole sentences as a *Miller* violation—which is well below a majority of the states.[154] Furthermore, the Washington Supreme Court's holding in *State v. O'Dell* served as its own foundational case supporting the argument for Washington's ability to start a national trend.

In *O'Dell*, the court stated, "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned [eighteen]."[155] The concurring opinion recognized *O'Dell* as a monumental change in law which permitted Bartholomew and Monschke to successfully bring their PRPs before the court.[156] Perhaps the reason that the dissent evaded discussion of the concurring opinion's PRP rationale was because the dissent did not want to acknowledge that the foundation for a national trend in regard to the *specific* sentencing issue at stake had already been sown when its own court made an exception for an eighteen-year-old who committed a crime ten days after his eighteenth birthday.[157] *O'Dell* was decided in 2015, and the District of Columbia provision expanding protection for juveniles was first introduced in 2020; the trend might not be large-scale, but it is growing

152. *See, e.g.*, *Monschke*, 482 P.3d at 288; State v. Houston-Sconiers, 391 P.3d 409 (Wash. 2017) (en banc).

153. *Miller*, 567 U.S. at 482. Since *Miller*, the federal circuits are split as to whether de facto LWOP sentences violate the Eighth Amendment. *See* Hanna Shah, Note, *De Facto Life Sentences Trigger Juvenile-Specific Eighth Amendment Protections: Why* Bowling *was Wrongly Decided*, 30 B.U. PUB. INT. L.J. 215, 219 (2021) (stating that "the Third, Seventh, Ninth, and Tenth Circuits have determined that stacked sentences trigger Eighth Amendment protections and are the de facto equivalent of LWOP sentences").

154. *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery, *and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 195 (2017). The states that treat de facto LWOP as a violation of *Miller* are California, Connecticut, Illinois, Indiana, Iowa, New Jersey, Washington, and Wyoming. *Id.*

155. State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015) (en banc).

156. *See Monschke*, 482 P.3d at 284–85.

157. *O'Dell*, 358 P.3d at 360.

slowly.[158] For these reasons, if the lead were to have applied *Bassett*, it would have succeed in the first step of the analysis.

While the lead opinion did not expressly address the second prong of the *Bassett* analysis, it certainly exercised independent judgment to determine the culpability of juveniles ages eighteen to twenty years old, as well as considered whether LWOP as punishment for aggravated murder serves a legitimate penological goal for the relevant class of individuals. Each of the four major points made by the lead opinion—(1) that constitutional protections for youthful criminal defendants have grown more protective over time; (2) that legislative line drawing does not circumvent what constitutes cruel punishment under the state constitution; (3) that the concept of "age of majority" is inherently and necessarily flexible; and (4) that no meaningful developmental difference exits between the brain of a seventeen-year-old and that of an eighteen-year-old—support the argument that LWOP for youthful offenders does not serve a legitimate penological goal for individuals ages eighteen to twenty because of the similarities in development and culpability between juveniles under eighteen and young adults between eighteen and twenty.

The dissent's attempt to apply the second prong of *Bassett* was misguided because it seemingly relied on an antiquated school of thought that is contrary to the prior holdings of the Washington Supreme Court.[159] Justice Owens' assertion that since Bartholomew and Monschke were considered adults on paper they should spend the rest of their lives incarcerated because *you get what you get, and you don't get upset* fails to support any meaningful penological goal. The assumption that retribution, deterrence, and incapacitation reduce or eliminate crime, or hold people accountable for their actions in a worthwhile fashion, is lackluster; these are not effective penological goals as shown by the last sixty years of attempted criminal justice reform.

The first United States penitentiary was built in 1776 and located in Philadelphia, Pennsylvania.[160] From this time to the mid-1900s, rehabilitation was the primary penological goal of the United States

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158. *See id.*; *see also* D.C. CODE § 24-403.03 (2021).

159. *See, e.g.*, *O'Dell*, 358 P.3d at 366 (holding that eighteen-year-old offender convicted of raping twelve-year-old should be sentenced considering mitigating qualities of youthfulness); State v. Bassett, 428 P.3d 343, 346 (2018) (holding that LWOP was an unconstitutionally cruel punishment for a sixteen-year-old convicted of shooting his mother and father and then drowning his brother in the bathtub).

160. *See* KATHLEEN AUERHAHN, SELECTIVE INCAPACITATION AND PUBLIC POLICY: EVALUATING CALIFORNIA'S IMPRISONMENT CRISIS 27 (Austin T. Turk ed., 2003).

prison system.[161] From the 1960s to the late 1970s, "deterrence enjoyed a brief period of theoretical prominence in American criminology" but was ultimately rendered ineffective by a number of empirical studies.[162] Then in the 1980s, retribution emerged as a the primary penological justification for sentencing policies in light of increasing crime rates, political climate, and the War on Drugs call to "get tough on crime," among other things.[163] During this time period, punishment was justified because either the offender actively chose to commit crime, making him worthy of punishment, or because of a predisposition to commit crime, which also justified harsh punishment since there is little point in attempting to rehabilitate an offender compelled to commit crime.[164] Fast-forward to the 1990s, and incapacitation emerged as the dominant paradigm of criminal punishment which is in part evidenced by "Three Strikes" habitual-offender statutes.[165]

The events of the 1980s and 1990s brought significant attention to crimes committed by juveniles.[166] The term "super predator" was used to refer to young people who committed crime and were seen as having "no conscience, [and] no empathy."[167] The phrase "[a]dult time for adult crime" became a common mantra for advocates of tough-on-crime reform.[168] Between 1992 and 1999, forty-nine states and the District of Columbia implemented statutory changes making it easier for juveniles to be tried in adult courts which exposed them to mandatory minimums, truth in sentencing laws, and longer sentences in general.[169] These

161. *Id.* at 29. However, rehabilitation looked different in the early days of the United States prison system compared to now. *Id.* at 27–28 (describing the Pennsylvania "separate system" and the New York "silent system" which were introduced as rehabilitative alternatives to corporal and capital punishment).

162. *Id.* at 32; *see also* Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 91–93 (2013) (discussing the lack of empirical evidence to show that capital punishment successfully deters homicide).

163. AUERHAHN, *supra* note 160, at 33–34 ("When incarceration is the presumptively applied sanction for most crimes, the only way . . . to 'get tough on crime' is to increase sentence *severity*.").

164. *Id.* at 34. As Professor Kathleen Auerhahn puts it, "[t]his late twentieth-century combination of classical conceptions of free will with just a touch of Lombrosian positivism thus abandons all humanitarian pretense; punishment of the offender expresses only our rightful outrage at his very existence." *Id.*

165. *Id.* at 36.

166. *See* Ramakrishnan, *supra* note 36, at 1060–61.

167. *Id.* at 1061 (citing C-SPAN, *1996: Hillary Clinton on "Superpredators" (C-SPAN)*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=j0uCrA7ePno [https://perma.cc/R4CT-E28N]).

168. *Id.* (citing David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 665 (2002) (internal citation omitted)).

169. *Id.*

changes over the last sixty years have caused the prison population in the United States to grow exorbitantly. Considering that fewer than 350,000 people were incarcerated in 1972, and at the end of 2021, approximately 1,199,642 people remained incarcerated in the United States, mass incarceration is far from over.[170]

This short departure was intended to show that the over the past sixty years, sentencing policy that was rooted primarily in deterrence, retribution, and incapacitation have been successful in only one thing—raising the United States prison population.

Returning to the dissent in *Monschke*, the idea that Bartholomew and Monschke were adults at the time of their offenses, and should therefore pay the price, reeks of retribution and sounds quite similar to the mantra "[a]dult time for adult crime."[171] This is not to say that Bartholomew or Monschke's crimes were not serious, but rather that retribution as a sentencing justification—and particularly LWOP—precludes the idea of rehabilitation. It assumes that defendants must spend the rest of their lives incarcerated without even giving them a chance to learn from their mistakes. In light of mass incarceration, states have an interest in reducing or eliminating unnecessarily harsh prison sentences because it is economically desirable, but also because it humanizes young people that are incarcerated.

As the national trend continues to grow, and in consideration of the policy justifications that support Washington's holding in *Monschke*, the first and second prong of the *Bassett* analysis are necessarily intertwined because even when there is not an existing affirmative trend, Washington ought to be able to use its independent judgement to start a national trend, so long as it is not inconsistent with existing state precedent. The holdings of *Houston-Sconiers*, *Bassett*, and *O'Dell* showcase that Washington's decision was not at all out of left field. Rather, these important cases set the foundation in Washington so that existing protections could eventually be expanded for other youthful offenders and young adults.

The Washington Supreme Court has consistently held that its state constitution and cruel punishments clause are more protective than the Federal Constitution and the Eighth Amendment—even before *Miller*

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170. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2012); JACOB KANG-BROWN, VERA INSTITUTE OF JUSTICE, PEOPLE IN PRISON IN WINTER 2021–22, at 3 (2022), https://www.vera.org/downloads/publications/People_in_Prison_in_Winter_2021-22.pdf.

171. *See* Ramakrishnan, *supra* note 36, at 1061.

was decided.[172] For this reason, the dissents literal interpretation of the first prong of the categorical bar test runs counter to the line of cases that popped up after the *Miller*-fix statutes were enacted. The court's holdings in *Houston-Sconiers* and *Bassett* are far more protective for juveniles than *Miller*. Thus, the dissent's argument that the lead side-stepped the categorical bar analysis by expanding *Bassett*, which was already an expansion of *Miller*, is shotty because the dissent miscategorized *Miller*. The *Miller* court expressly declined to consider its holding a categorical ban on mandatory LWOP and instead categorized its holding as sentencing requirements.[173] Therefore, *Bassett* cannot be an extension of *Miller*'s alleged categorical nature because it was never a categorical ban in the first place. Rather, *Bassett* should be seen as its own independent adoption of a categorical ban on LWOP for all juvenile offenders. This reading of *Bassett* supports the lead's argument that *Monschke* is an extension of an existing class of protections because Monschke and Bartholomew were "juveniles in all but name at the time of their crimes."[174]

Based on the foregoing, it is obvious that the *Fain* test was inappropriate to apply in this case because it would not adequately evaluate the nature of a class of individuals. *Fain* is a test better suited to evaluate disproportionality on an individual basis because it focuses on the nature of a specific crime and the punishment in relation to that specific crime. By contrast, the *Bassett* test looks at the nature of a punishment as applied to a class of individuals because it focuses on wide scale concerns such as national trends and the court's independent judgement regarding punishment based upon the culpability of a class of defendants. Although the lead opinion did not functionally apply the *Basset* test, in form it addressed the two prongs. Ultimately, the court's assertion that it need not apply the *Basset* test because it previously determined that LWOP for juveniles is unconstitutional was the correct decision.

While the lead's holding is consistent with the caselaw that precedes it, it appears there is a disconnect between the Washington courts and the Washington legislature. In 2021, *Monschke* held that subsection (1)

172. *See* State v. Fain, 617 P.2d 720, 723 (Wash. 1980) (en banc); State v. Manussier, 921 P.2d 473, 483–84 (Wash. 1996) (en banc); State v. Roberts, 14 P.3d 713, 733 (Wash. 2000) (en banc).

173. Miller v. Alabama, 567 U.S. 460, 483 (2012). The *Miller* Court evaded consideration of a categorical ban on LWOP for juvenile defendants convicted of homicide. *Id.* at 479 (stating that "because [this] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles.").

174. *In re* Monschke, 482 P.3d 276, 280 (Wash. 2021) (en banc).

of section 10.95.030 of the Washington Code was unconstitutional. However, *Bassett* held, in 2018, that subsection (3)(a)(ii) of the same statute was unconstitutional. The legislature did not amend the unconstitutional *Basset* portion of the statute until 2023, and has yet to amend the statute to be in compliance with *Monschke*. This slow-moving change by the Washington legislature indicates that it may take some time, possibly years, for the statute to be amended again for compliance with the court's *Monschke* decision. Nonetheless, the court's initiative to expand juvenile sentencing protections indicates that the other *Miller*-fix statute, section 9.94A.730 of the Washington Code, will one day be deemed unconstitutional as well. Especially in light of Justice McCloud's concurrence in the *Scott* decision and authorship of the *Monschke* lead opinion.

Although the *Miller* decision caused the Washington legislature to enact the *Miller*-fix statutes, the legislature has failed to respond to the court's decision in *Monschke* despite remedying the statutory provision deemed unconstitutional in *Bassett* two years after the *Monschke* decision came down. The *Miller*-fix statutes may appear to have been a catalyst in creating change for how Washington sentences juveniles, but it was *Miller* itself and prior Washington court decisions that truly put Washington on its current trajectory. Washington courts have far exceeded the minimum requirements laid out in *Miller*, and now it is time for other states, and the United States Supreme Court, to catch up to Washington's sentencing policies.

VI. CONCLUSION

The holding in *Monschke* has set the official foundation for future changes in the sentencing of young adults. It is only a matter of time before other states begin to adopt changes similar to Washington's decision to extend its ban on LWOP for juveniles to include defendants up to the age of at least twenty. As mentioned before, the District of Columbia has already extended its ban on LWOP to include juveniles up to the age of twenty-four. This change occurred right around the same time as the *Monschke* decision, and optimistically is the start of an affirmative trend that will encourage more states will follow suit. Hopefully this monumental change will urge states that have not done so yet to ban, at a minimum, mandatory LWOP for all juveniles under eighteen and encourage other states to make changes similar to Washington and the District of Columbia when it comes to juvenile and young adult sentencing practices.