The Juvenile Death Penalty in Washington: A State Constitutional Analysis

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On February 6, 1990, a Kitsap county jury found Michael Monroe Furman guilty of aggravated first degree murder.[1] On March 6, 1990, the trial court sentenced Furman to death.[2] At the time of the murder, Furman was seventeen years and ten months old.[3] He was, therefore, a juvenile as defined by Washington statute.[4] Furman is the first juvenile to be sentenced to death in Washington since 1932, and his sentence is unique among all of the juvenile murder cases filed under the current statute.[5]

Furman's appeal is currently pending before the Washington State Supreme Court.[6] In that appeal, Furman asserts that the imposition of the death penalty for a crime committed while a juvenile is cruel punishment that violates Article 1, Section 14 of the Washington Constitution.[7] This Article argues that Furman should prevail.

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1. Clerk's Papers at 904-07, State v. Furman, No. 57003-5 (Wash. filed June 4, 1990). The clerk's papers and briefs filed in this case are available for inspection by contacting the Clerk of the Supreme Court in Olympia, Washington.

2. *Id.* at 1135. *See infra* notes 20-35 and accompanying text for a description of the statutory death penalty scheme in Washington.

3. Brief of Respondent at 10, State v. Furman, No. 57003-5 (Wash. filed June 4, 1990).

4. A "juvenile" is "any individual under the age of eighteen years." Wash. Rev. Code § 13.34.030(1) (1989). In this Article, "juvenile" refers to the age of the person at the time of the offense.

5. *See infra* notes 151-55 and accompanying text. The uniqueness of Furman's sentence is not changed by the fact that he was almost eighteen at the time of his offense. This Article argues that the Washington Supreme Court should draw a bright-line rule prohibiting the imposition of the death penalty on juveniles.

6. *See supra* note 1.

7. Article 1, Section 14, of the Washington Constitution provides that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Because the United States Supreme Court has indicated that the federal constitution does not bar the imposition of the death penalty on juveniles (*see infra* notes 14-20 and

The Washington Supreme Court should hold that Article 1, Section 14 bars the execution of juveniles for numerous reasons. First, the Washington State Constitution provides greater protection to juveniles than the United States Constitution.[8] Second, applying the death penalty to juveniles serves no valid legislative purpose because that penalty has no deterrent or retributive value.[9] Third, no legislative declaration expressly states that the death penalty should apply to juveniles. Absent such a declaration, the court should not abdicate its state constitutional responsibility to protect individuals. Fourth, in other jurisdictions and in foreign countries, the trend is to not apply the death penalty to juveniles.[10] Finally, as noted above, Furman's sentence is unique among recent juvenile murderers.[11]

This Article first briefly examines the United States Supreme Court cases dealing with the juvenile death penalty. Second, the Article describes the history and structure of Washington's death penalty statute. Third, the Article analyzes whether the state constitution's ban on cruel punishment prohibits the imposition of the death penalty on juveniles.

Such a state constitutional analysis necessarily requires examination of two issues. Because the U.S. Supreme Court has upheld the constitutionality of applying the death penalty to persons sixteen years or older, the threshold issue is whether the Washington Constitution provides greater protection to juveniles between sixteen and eighteen years of age. In analyzing this threshold issue, the Article applies the reasoning of *State v. Gunwall*[12] and concludes that Washington's Constitution does provide greater protection than its federal counterpart.

The second issue is whether the juvenile death penalty violates the Washington Constitution's ban on cruel punishment. Applying the four-part test enunciated in *State v.*

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accompanying text), Furman's argument focuses solely on the state constitutional issue.

8. *See infra* notes 46-81 and accompanying text.

9. *See infra* notes 94-118 and accompanying text.

10. *See infra* notes 122-41 and accompanying text.

11. *See infra* notes 149-54 and accompanying text.

12. 106 Wash. 2d 54, 720 P.2d 808 (1986). *See infra* text accompanying notes 41-42 for *Gunwall*'s six-factor test. In *Gunwall*, the Court held that the state constitution's privacy clause provides greater protection to an individual's right to privacy than does the Fourth Amendment to the federal constitution. 106 Wash. 2d at 64-67, 720 P.2d at 814-15.

Fain,[13] this Article concludes that the Washington Constitution's ban on cruel punishment prohibits the imposition of the death penalty on juveniles. Thus, the Washington Supreme Court should vacate Furman's death sentence.

I. THE FEDERAL CONSTITUTION AND THE JUVENILE DEATH PENALTY

The United States Supreme Court has twice addressed whether the Eighth Amendment[14] prohibits imposing the death penalty on juveniles. In *Thompson v. Oklahoma*,[15] a plurality of the Court held that the Eighth Amendment prohibits the execution of offenders who were under the age of sixteen at the time of the offense.[16] Justice O'Connor concurred on nonconstitutional grounds.[17] One year later, in *Stanford v. Kentucky*,[18] a different plurality held that the Eighth Amendment does not bar imposing the death penalty on offenders who were either sixteen- or seventeen-years-old at the time of the offense. Once again, Justice O'Connor concurred in the judgment.[19] Thus, the Supreme Court has indicated that the

13. 94 Wash. 2d 387, 617 P.2d 720 (1980). Fain was convicted of being a habitual criminal and was sentenced to life imprisonment on the basis of three convictions for minor, nonviolent property crimes. *Id.* at 402, 617 P.2d at 728. The court applied a four-part test to determine whether Fain's punishment violated the state constitution's ban on cruel punishment. *See infra* text at notes 81-82. The court held that Fain's punishment violated Article 1, Section 14 of the state constitution. 94 Wash. 2d at 402, 617 P.2d at 728.

14. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

15. 487 U.S. 815 (1988).

16. *Id.* A plurality of the Court, in an opinion by Justice Stevens, held that according to the "evolving standards of decency that mark the progress of a maturing society," the death penalty constituted cruel and unusual punishment when applied to persons under age sixteen. *Id.* at 821-33. In reaching its conclusions, the plurality examined state statutes and jury determinations. *Id.* The plurality also noted the opinions of professional organizations, common law nations, and other Western European nations. *Id.*

17. *Id.* at 848. Though she disagreed with the plurality's holding that the death penalty was unconstitutional as to juveniles below age sixteen, Justice O'Connor argued that state statutes that do not specify a minimum age should not be used to make fifteen-year-olds "death eligible," because the state legislatures' silence about the minimum age might indicate a failure to address the issue. *Id.* at 856-59. Thus, allowing application of the death penalty to juveniles below age sixteen might constitute "death by legislative oversight." *Id.*

18. 492 U.S. 361 (1989).

19. *Id.* A plurality of the Court, in an opinon by Justice Scalia, held that "evolving standards of decency" were not violated by imposition of the death penalty on juveniles aged sixteen or seventeen. In reaching its conclusions, the plurality noted that the juvenile death penalty would not have been considered cruel and unusual in

Eighth Amendment does not bar states from executing someone for an offense committed when the offender was sixteen years old or older.

II. THE WASHINGTON DEATH PENALTY STATUTE

In 1972, the United States Supreme Court invalidated most state death penalty statutes.[20] Shortly thereafter, the Washington State Supreme Court declared the Washington death penalty statute unconstitutional.[21] Over the course of the next decade, the Washington State Legislature failed in several attempts to enact a constitutional death penalty statute.[22] Finally in 1981, the legislature passed the current statute.[23]

The current statute permits the execution of anyone convicted of aggravated first degree murder. A person is guilty of aggravated first degree murder if he or she commits premeditated first degree murder,[24] and a jury finds the existence of one or more statutory aggravating circumstances.[25] If the State

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the eighteenth century. *Id.* at 365. The plurality also found unpersuasive the petitioners' proofs of the nation's "evolving standards," similar to those made in *Thompson*, that thirty-three of thirty-seven states that permit capital punishment preclude its application against sixteen- or seventeen-year-olds. *Id.* at 367-68. Finally, the plurality found unpersuasive the *Thompson*-like argument that juries' refusal to impose the juvenile death penalty indicated national consensus because such arguments were better directed to the legislature than to the Court. *Id.* at 373-74, 380. Justice O'Connor's concurrences in *Thompson* and *Stanford* are the swing votes in those two cases. *See infra* notes 129-31 and accompanying text for a discussion of her opinions.

20. Furman v. Georgia, 408 U.S. 238 (1972).

21. State v. Baker, 81 Wash. 2d 281, 501 P.2d 284 (1972).

22. *See generally* State v. Bartholomew, 98 Wash. 2d 173, 180-92, 654 P.2d 1170, 1175-80 (1982) (*Bartholomew* I), *vacated*, 463 U.S. 1203, *cert. denied*, 463 U.S. 1212 (1983); Leonie G. Hellwig, Comment, *The Death Penalty in Washington: An Historical Perspective*, 57 WASH. L. REV. 525 (1982) (discussing the history of the death penalty in Washington).

23. Act of May 14, 1981, 1981 Wash. Laws ch. 138 (codified as WASH. REV. CODE § 10.95 (1989)).

24. A person commits premeditated first degree murder when, while acting with premeditated intent to cause the death of another, he or she causes the death of any person. WASH. REV. CODE § 9A.32.030 (1989). Premeditation is the deliberate formation of and reflection upon the intent to cause the death of another. State v. Ollens, 107 Wash. 2d 848, 850, 733 P.2d 984, 986 (1987).

25. WASH. REV. CODE § 10.95.020 (1989). There are ten statutory aggravating factors:

> (1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;
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> (2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized

intends to seek the death penalty, it must file written notice of that intent within thirty days of arraignment.[26]

A trial in which the State seeks the death penalty is divided into two parts: the guilt phase and the penalty phase. The court first empanels a jury to determine whether the defendant is guilty of aggravated first degree murder.[27] If the jury finds the defendant guilty, the trial court then reconvenes the same jury to hear the special sentencing proceeding to determine the penalty.[28]

During the penalty phase, both the State and the defend-

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leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnapping in the first or second degree; or

(e) Arson in the first or second degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research or reporting activities of the victim.

Id. (footnote omitted).

26. *Id.* § 10.95.040.

27. As in all criminal proceedings, the defendant has a right to either plead guilty or waive a jury trial and be tried by the court. WASH. REV. CODE § 10.95.050 (1989). However, in every case under the current statute in which the State sought the death penalty, the defendant exercised his right to a jury trial.

28. WASH. REV. CODE § 10.95.050(3) (1989). If the defendant's guilt was determined by a bench trial or by a guilty plea, the trial court must impanel a jury to hear the sentencing phase of the trial. *Id.* § 10.95.050(4).

ant may make opening and closing arguments and present evidence.[29] After the State and the defendant rest, the statute requires the jury to answer the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[30] If the jury unanimously answers "yes," the court must sentence the defendant to death.[31] If the jury cannot reach a unanimous verdict, or if the jury unanimously answers "no," the court must sentence the defendant to life imprisonment without possibility of parole.[32]

Whenever a trial court sentences a defendant to death, the Washington Supreme Court conducts a mandatory review of the sentence.[33] The court must determine the following: 1) whether the evidence is sufficient to justify the jury's determination that there are not sufficient mitigating factors to merit leniency; 2) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases; and 3) whether the jury allowed passion or prejudice to influence its verdict.[34] If the court decides all three questions against the defendant, then the supreme court remands the case to the trial court for issuance of a death warrant.[35]

III. STATE CONSTITUTIONAL ANALYSIS

As noted above, the United States Supreme Court has held that the Eighth Amendment does not prohibit imposition of the death penalty on juveniles who were sixteen or seventeen at the time of the offense.[36] State constitutions may, however, provide greater protection to individual rights than corresponding federal constitutional provisions.[37]

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29. *Id.* § 10.95.060(2). In its case in chief, the State is limited to presenting evidence that relates to the statutory aggravating factors and evidence of the defendant's record of convictions. State v. Bartholomew, 101 Wash. 2d 631, 640-43, 683 P.2d 1079, 1085-87 (1984) (*Bartholomew* II). The State may also rebut any mitigating evidence that the defendant offers. 101 Wash. 2d at 642, 683 P.2d at 1087. The defendant may present any relevant mitigating evidence. *Id.*

30. WASH. REV. CODE § 10.95.060(4) (1989).

31. *Id.* §§ 10.95.060(4), 10.95.080(1).

32. *Id.* § 10.95.080(2).

33. *Id.* § 10.95.100.

34. *Id.* § 10.95.130(2).

35. *Id.* §§ 10.95.140(2), 10.95.160.

36. *See supra* notes 14-20 and accompanying text.

37. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that California court may interpret the California Constitution as providing greater

In *State v. Gunwall*,[38] the Washington Supreme Court sought to establish a principled basis for determining when courts should reject federal precedent in favor of an independent state constitutional interpretation.[39] In Washington, two stages of analysis must be completed by the court in determining whether the state constitution provides greater protections. First, the court must determine whether the Washington Constitution's protections against "cruel" punishment are broader than those against "cruel and unusual" punishment in the Eighth Amendment. If the court finds Washington's protections broader, it must then determine whether those protections are broad enough to prohibit the imposition of the juvenile death penalty. The following sections conclude that the Washington Constitution's protections are broad enough to preclude the juvenile death penalty.

A. The Gunwall *Analysis*

The majority in *Gunwall* criticized courts that simply "announce that their decision is based on the state constitution but do not further explain it."[40] To counter this tendency, the court identified six nonexclusive factors that Washington state courts must examine when deciding whether to interpret a state constitutional provision more expansively than its federal counterpart:[41]

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protection to leafleteers than does the First Amendment); Oregon v. Hass, 420 U.S. 714, 719 (1975) (holding that Oregon court may interpret Oregon Constitution as providing greater protection against unreasonable searches and seizures than does the Fourth Amendment); State v. Chrisman, 100 Wash. 2d 814, 817, 676 P.2d 419, 421 (1984) (Washington Constitution's privacy provision provides greater protection against unreasonable search and seizure than does the Fourth Amendment); Alderwood Assocs. v. Washington Environmental Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981) (Washington Constitution's free speech provision provides greater protection than does the First Amendment). *See generally* William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (encouraging state courts to interpret their constitutions more broadly in response to a perceived narrowing of federal constitutional protections).

38. 106 Wash. 2d 54, 60, 720 P.2d 808, 812 (1986).

39. *Id.* The issue in *Gunwall* was whether the use of a pen register (a device for the recording of phone numbers dialed from a specific telephone) violates the state constitutional right to privacy. The court first held that the state constitution's privacy clause provides greater protection to an individual's right to privacy than the Fourth Amendment to the federal constitution. *Id.* at 64-67, 720 P.2d at 814-15. The court then decided that the state constitution prohibits the warrantless use of a pen register. *Id.* at 68, 720 P.2d at 816.

40. *Id.* at 60, 720 P.2d at 812.

41. *Id.* at 61, 720 P.2d at 812.

1) the text of the state constitution;
2) the significant differences in the texts of parallel provisions of the federal and state constitutions;
3) the history of the state's constitutional and common law;
4) the pre-existing state law;
5) the significant differences in the structures of the federal and state constitutions; and
6) the presence or absence of particular state interests or local concerns.[42]

To determine whether a given state constitutional provision is more protective of individual rights than the federal constitution, the supreme court has consistently analyzed all six *Gunwall* factors.[43] Furthermore, the court has repeatedly refused to consider state constitutional issues absent sufficient briefing of the *Gunwall* factors.[44] The court's recurring references to all six factors indicate that a rejection of federal precedent is principled only when it follows an analysis of all the *Gunwall* criteria. The following section demonstrates that all six *Gunwall* factors support holding that Article 1, Section 14 of the Washington Constitution provides greater protection than does the Eighth Amendment.

B. Application of Gunwall *to Article 1, Section 14*[45]

The first *Gunwall* factor examines the textual language of the state constitution.[46] Article 1, Section 14 of the Wash-

42. *Id.* at 61-62, 720 P.2d at 812-13. The court's characterization of the six factors as "nonexclusive" leaves open the possibility that other factors might be considered in appropriate cases. To date, however, the court has not considered any other factors.

43. *See, e.g.*, State v. Boland, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (analyzing whether state constitution's privacy provision provides greater protection than does the Fourth Amendment); State v. Reece, 110 Wash. 2d 766, 757 P.2d 947 (1988) (examining whether state constitution's free speech section provides broader protection than does the First Amendment), *cert. denied*, 493 U.S. 812 (1989); State v. Schaaf, 109 Wash. 2d 1, 743 P.2d 240 (1987) (analyzing whether state constitutional right to a jury trial provides greater protection than the Sixth and Fourteenth Amendments).

44. *See, e.g., In re* Mota, 114 Wash. 2d 465, 472, 788 P.2d 538, 542 (1990); State v. Motherwell, 114 Wash. 2d 353, 368-69, 788 P.2d 1066, 1074 (1990).

45. It might be argued that the court does not need to engage in a *Gunwall* analysis of Article 1, Section 14. In State v. Fain, 94 Wash. 2d 387, 617 P.2d 720 (1980), a pre-*Gunwall* case, the court held that the state constitution's ban on cruel punishment *does* provide greater protection than the Eighth Amendment. Thus *Fain* may be dispositive of the issue. The court in *Fain*, however, did not engage in the extensive analysis that *Gunwall* requires. Therefore, the current court may find *Fain*'s reasoning unpersuasive. This section argues, however, that an analysis of the *Gunwall* factors leads to the same conclusion the court reached in *Fain*.

46. State v. Gunwall, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986).

ington Constitution provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Thus, in the context of juvenile death penalties, the focus of Article I, Section 14 is on whether the punishment is "cruel."

The second *Gunwall* factor asks whether any significant differences exist between parallel provisions of the state and federal constitutions.[47] Any differences may warrant reliance on the state provision.[48] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel *and unusual* punishments inflicted." The key difference between the state and federal provisions is that the state constitution prohibits cruel punishment while the federal constitution prohibits cruel *and* unusual punishment. In fact, the framers of the Washington Constitution specifically rejected an amendment to add the word "unusual" to Article 1, Section 14.[49]

This distinction favors interpreting Article 1, Section 14 independently from interpretations of the Eighth Amendment for two reasons. First, the framers' rejection of the Eighth Amendment language indicates an intent not to be bound by Eighth Amendment analysis.[50] Second, on its face the state constitutional language prohibits all cruel punishments. It therefore provides broader protection than the federal constitution, which prohibits only those punishments that are both cruel and unusual.[51] Thus, because state constitutional protections are broader, interpretations of the Eighth Amendment do not dictate the outcome in cases analyzing Article 1, Section 14.

The third *Gunwall* factor examines whether state constitutional and common law history reflect an intention to confer greater protection under the state constitution.[52] The court in *Gunwall* found it unnecessary to discuss the common law aspect of this factor.[53] Instead, the court noted that the framers had rejected a proposal to adopt language identical to that

47. *Id.*

48. *Id.*

49. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 501-02 (Beverly Paulik Rosenow ed. 1962).

50. *Fain*, 94 Wash. 2d at 393, 617 P.2d at 723.

51. Harmelin v. Michigan, 111 S. Ct. 2680, 2687 (1991).

52. *Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

53. *Id.* at 65, 720 P.2d at 814.

of the Fourth Amendment.[54] The court concluded that the framers' action supported interpreting the state constitution to provide greater protection than the Fourth Amendment.[55]

Similarly, as noted above, the framers also rejected language identical to the Eighth Amendment.[56] Under the reasoning of *Gunwall*, therefore, the history of Article 1, Section 14, indicates an intention to distinguish it from the Eighth Amendment.[57]

The fourth *Gunwall* factor addresses whether pre-existing state law, including statutory law, provides a basis for interpreting the state constitutional provision more expansively than its federal counterpart.[58] The court in *Gunwall* noted that pre-existing state law helps define the scope of a constitutional right.[59] In *Gunwall*, the issue was whether the use of a pen register violated the state constitutional right to privacy.[60] In analyzing that question, the court noted that Washington statutes provide greater protection of the privacy of telephone users than comparable federal statutes.[61] The court concluded that the stronger state statutory protections supported the court's resort to an independent state constitutional analysis of the privacy issue.[62]

Similarly, Washington death penalty statutes clearly provide greater protection than their federal counterparts with respect to proportionality review.[63] The purpose of porportionality review is to protect against the arbitrary imposition of death sentences.[64] Neither federal statutes nor the Eighth

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54. *Id.* at 65-66, 720 P.2d at 814-15.

55. *Id.* at 66, 720 P.2d at 815.

56. *See supra* note 50 and accompanying text.

57. In *Fain*, the court focused on that distinction and held that Article 1, Section 14 provides greater protection than the Eighth Amendment. State v. Fain, 94 Wash. 2d 387, 392-93, 617 P.2d 720, 723 (1980). *See supra* note 45. *See also* State v. Bartholomew, 101 Wash. 2d 631, 639-40, 683 P.2d 1079, 1085 (1984) (*Bartholomew* II) (holding that the state constitution's cruel punishment and due process clauses provide greater protection at capital sentencing than their federal counterparts).

58. State v. Gunwall, 106 Wash. 2d 54, 61-62, 720 P.2d 808, 812 (1986).

59. *Id.* at 62, 720 P.2d at 812.

60. *Id.* at 63, 720 P.2d at 813.

61. *Id.* at 66, 720 P.2d at 815.

62. *Id.*

63. *Compare e.g.* 21 U.S.C.A. § 848(q) (West Supp. 1991) (describing appellate review in federal death penalty case) *with* WASH. REV. CODE §§ 10.95.100-.130 (1989) (describing state court review).

64. State v. Harris, 106 Wash. 2d 784, 797, 725 P.2d 975, 982 (1986), *cert. denied*, 480 U.S. 940 (1987).

Amendment require proportionality analysis.[65] Washington statutes, however, do mandate such a review.[66] Therefore, Washington's statute provides broader protection against arbitrary sentencing than its federal counterpart. Following the reasoning in *Gunwall*, Washington's stronger statutory protection of an offender's right to proportionality review supports an independent interpretation of the state constitution.

Other pre-existing law also indicates that the court should look to the state constitution to decide whether the death penalty as applied to juveniles is cruel. For instance, the state legislature has established a juvenile court system[67] that provides substantial protection to juvenile offenders. One of the principle focuses of this system is the rehabilitation of juveniles.[68] This system also reflects the legislature's long-standing effort to avoid accusing and convicting juveniles of crimes.[69] Thus, pre-existing state law reveals this state's long history of protecting juveniles from harsh, adult penalties and supports a finding that the court should look to state law when evaluating the constitutionality of juvenile penalties.

The fifth *Gunwall* factor focuses on the differences in the structure and purpose of the state and federal constitutions.[70] State constitutions limit the otherwise plenary powers of state governments, while the federal constitution grants specific limited powers to the federal government.[71] The Washington Supreme Court has consistently concluded that this distinction between the two constitutions always favors independent state constitutional analysis.[72]

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65. Pulley v. Harris, 465 U.S. 37, 50-51 (1984).

66. WASH. REV. CODE § 10.95.130(2)(b) (1989). Perhaps because the statute requires proportionality review, the Washington Supreme Court has never decided whether the state constitution also mandates such a comparison. The court has, however, indicated that proportionality review is a part of Article 1, Section 14 analysis. State v. Fain, 94 Wash. 2d 387, 396, 617 P.2d 720, 725 (1980) ("[A] punishment clearly permissible for some crimes may be unconstitutionally disproportionate for others").

67. WASH. REV. CODE ch. 13.04 (1989).

68. State v. Schaaf, 109 Wash. 2d 1, 15, 743 P.2d 240, 247 (1987).

69. *Id.*

70. State v. Gunwall, 106 Wash. 2d 54, 66, 720 P.2d 808, 815 (1986).

71. *See e.g.*, State v. Reece, 110 Wash. 2d 766, 780, 757 P.2d 947, 955 (1988), *cert. denied*, 493 U.S. 812 (1989).

72. *See e.g.*, *id.* at 780, 757 P.2d at 955; *Gunwall*, 106 Wash. 2d at 66, 720 P.2d at 815. *See generally* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 497 (1984) (arguing for and explaining the broader scope of the Washington Declaration of Rights vis-a-vis the federal constitution).

Finally, the sixth *Gunwall* factor inquires whether the subject matter in question is of particular state interest or local concern.[73] In this case, the general question is whether the state constitution limits the state's ability to impose a particular punishment. To determine whether the cruel punishment clause prohibits a certain penalty, Washington courts look to contemporary standards of decency in Washington.[74] Deciding what punishment is in keeping with the contemporary standards of the people of Washington is certainly a matter of particular state concern.

More specifically, the question in the instant case is whether imposing the death penalty on juveniles is a matter of particular state interest. As discussed above,[75] the state's statutory juvenile justice system evidences the state's particular interest in the handling of juvenile offenders. The state's interest in its children is also reflected in other statutes. The legislature has passed laws to protect children from mistreatment[76] and to require parents to provide for their children.[77] Furthermore, the legislature specifically declared that "[t]he children of the state of Washington are the state's greatest resource."[78] It is clear that the welfare of juveniles is a matter of particular state interest. It follows, therefore, that the determination of what penalty to impose upon a juvenile for a criminal offense is a matter of particular state interest.

Under this sixth factor, Washington courts also examine whether there is a need for national uniformity on the issue in question.[79] Both the United States Supreme Court and the Washington Supreme Court have declared that there is no need for national uniformity in the handling of juvenile offenders.[80] Thus, this factor also favors an independent state constitutional interpretation.

This review of the *Gunwall* factors establishes that the Washington Supreme Court should interpret Article 1, Section 14 to provide greater protection than the Eighth Amendment.

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73. *Gunwall*, 106 Wash. 2d at 67, 720 P.2d at 815.

74. State v. Campbell, 103 Wash. 2d 1, 34, 691 P.2d 929, 947 (1984), *cert. denied*, 471 U.S. 1094 (1985).

75. *See supra* notes 67-69 and accompanying text.

76. WASH. REV. CODE ch. 26, 44 (1989).

77. *Id.* ch. 26.20.

78. 1985 Wash. Laws, ch. 259, § 1.

79. State v. Gunwall, 106 Wash. 2d 54, 62, 720 P.2d 808, 813 (1986).

80. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971); *accord* State v. Schaaf, 109 Wash. 2d 1, 16, 743 P.2d 240, 247 (1987).

The question then becomes whether the state constitution's broader protection prohibits the execution of juveniles. The following section concludes that it does.

C. Article 1, Section 14, and the Juvenile Death Penalty

In *State v. Fain*,[81] the Washington Supreme Court set out a four-part test for analyzing whether a punishment violates Article 1, Section 14. The court looks at the following: (1) the nature of the offense; (2) the legislative purpose behind imposition of the challenged punishment; (3) the punishment the offender would receive in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in Washington.[82] An analysis of these factors leads to the conclusion that Article 1, Section 14 prohibits the imposition of the death penalty on juveniles.

In a recent Article 1, Section 14 case, however, the court did not apply the *Fain* test. In *State v. Farmer*,[83] the court held that an exceptional sentence[84] does not violate the state constitution where the sentence is less than the maximum allowed under the statute.[85] The court noted that "only punishment which is grossly disproportionate to the gravity of the offense violates the state and federal constitutional guaranty against cruel and unusual punishment. 'A punishment is grossly disproportionate only if . . . the punishment is clearly arbitrary and shocking to the sense of justice.' "[86] The court in *Farmer* made no reference to *Fain*.[87]

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81. 94 Wash. 2d 387, 397, 617 P.2d 720, 726 (1980).

82. *Id.*; *accord* State v. Gibson, 16 Wash. App. 119, 125-26, 553 P.2d 131, 136 (1976).

83. 116 Wash. 2d 414, 434, 805 P.2d 200, 210 (1991).

84. Washington statutes establish a standard range of sentences for every crime. *See* WASH. REV. CODE §§ 9.94A.310-9.94A.370 (1989). The standard range includes a minimum and a maximum sentence. Any imposed sentence that goes outside the standard range is an exceptional sentence. *Id.* § 9.94A.390.

85. *Farmer*, 116 Wash. 2d at 434, 805 P.2d at 211. A jury convicted Farmer of two counts of sexual exploitation of a minor and two counts of patronizing a juvenile prostitute. *Id.* at 418-19, 805 P.2d at 202. The top end of the standard range for those convictions under Washington's sentencing guidelines is forty-one months. *Id.* at 434, 805 P.2d at 210. The trial court sentenced Farmer to an exceptional sentence of ninety months. The maximum sentence allowable, however, is 360 months. *Id.*

86. *Id.* at 433, 805 P.2d at 210 (quoting State v. Smith, 93 Wash. 2d 329, 344-45, 610 P.2d 869, 873, *cert. denied*, 449 U.S. 873 (1980) (citations omitted)).

87. *See also* State v. Massey, 60 Wash. App. 131, 803 P.2d 340, *rev. denied*, 115 Wash. 2d 1021 (1990) (analyzing Article 1, Section 14 claim with no reference to *Fain*); State v. Creekmore, 55 Wash. App. 852, 783 P.2d 1068 (1989), *rev. denied*, 114 Wash. 2d 1020 (1990) (analyzing Article 1, Section 14 claim with no reference to *Fain*). *But see* State v. Campbell, 103 Wash. 2d 32, 691 P.2d 929 (1984) (applying *Fain* test in death

One way to reconcile *Farmer* and *Fain* is to assume that a punishment that is not "clearly arbitrary and shocking to the sense of justice" can also never be found "cruel" under the *Fain* test. Perhaps the court's reliance in *Farmer* on a visceral test of what shocks the court's sense of justice is a recognition that "[m]ore than any other provision in the Constitution the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary."[88]

It may be true that the court's visceral reaction to a penalty is part of its cruel punishment analysis. Washington courts have repeatedly looked to see if a punishment shocks the conscience to determine whether that punishment violates the constitution. Those courts have not, however, given any guidance on when punishment shocks the conscience. As a result, this *Farmer* visceral test does not help future courts determine when a punishment is unconstitutionally cruel.

Fain, on the other hand, provides a principled method for determining whether a given sentence is unconstitutional. This more reasoned test better protects the offender from cruel punishments. The test also more effectively guards against judges' basing their decisions solely on emotional responses to particular punishments. As the court pointed out in *Fain*, it is important to use "objective standards" to minimize the possibility that judges' personal preferences will dictate the outcomes of cases.[89] Finally, the *Fain* test better recognizes that the supreme court should generally defer to the legislative power to prescribe punishments. Applying the *Fain* test assures that courts will base their decisions on principled, objective factors, instead of visceral, subjective ones. The Washington Supreme Court should, therefore, apply the *Fain* four-part test in analyzing whether the juvenile death penalty violates Article 1, Section 14.

1. Factor 1: Nature of the Offense

Under the *Fain* four-part test, the court first examines the nature of the offense.[90] The court clearly implies that this

penalty context), and Harris v. Kastama, 98 Wash. 2d 765, 769, 657 P.2d 1388, 1390, *cert. denied*, 464 U.S. 844 (1983) (applying *Fain* test in other sentencing context).

88. Naovarth v. State, 779 P.2d 944, 947 (Nev. 1989) (citations omitted).

89. State v. Fain, 94 Wash. 2d 387, 397, 617 P.2d 720, 725 (1980).

90. *Id.*

prong refers to the amount of harm the offender caused.[91] Thus, the focus of this factor is on the victim, not the defendant. A murderer causes the ultimate harm of death; therefore, no penalty is *per se* disproportionate to the harm caused.[92]

2. Factor 2: Legislative Purpose Behind the Penalty

The second *Fain* factor analyzes whether a penalty serves the legislative purposes behind that penalty's enactment.[93] The two societal purposes most often cited as supporting the death penalty are retribution and deterrence.[94] This section first argues that, because juveniles are less culpable for their crimes than are adults, the penalty serves no retributive purpose. This section then argues that, because juveniles are incapable of making the type of cost-benefit analysis necessary to support the general deterrence theory, the penalty serves no deterrent purpose. Therefore, neither legislative goal supports imposing the death penalty on juveniles, and the death penalty is *per se* disproportionate as applied to them.

According to the United States Supreme Court, retribution is a permissible goal of the death penalty because it is "an expression of society's moral outrage at particularly offensive conduct."[95] Retribution justifies the death penalty, however, only where it is warranted by the "personal responsibility and moral guilt" of the offender.[96] Or, to put it another way, the death penalty is disproportionate if it is more punishment than the offender deserves.[97]

Thus, in *Enmund v. Florida*,[98] the Supreme Court vacated the death penalty for an accomplice who neither killed nor intended to kill.[99] The Court reasoned that the accomplice was less culpable, and therefore, the death penalty did not "mea-

91. *Id.* at 398, 617 P.2d at 726.

92. *Campbell*, 103 Wash. 2d at 31, 691 P.2d at 946. As I argue below, however, the death penalty is per se disproportionate when applied to juveniles because of factors related to the culpability of juvenile offenders. *See infra* notes 95-118 and accompanying text.

93. *Fain*, 94 Wash. 2d at 397, 617 P.2d at 726.

94. Thompson v. Oklahoma, 487 U.S. 815, 836 (1988); Enmund v. Florida, 458 U.S. 782, 798 (1982); Gregg v. Georgia, 428 U.S. 153, 183 (1976); Victor L. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 CLEV. ST. L. REV. 363, 390 (1986).

95. *Gregg*, 428 U.S. at 183.

96. *Enmund*, 458 U.S. at 801.

97. Coker v. Georgia, 433 U.S. 584, 592 (1977).

98. *Enmund*, 458 U.S. at 801.

99. *Id.*

surably contribute to the retributive end of ensuring that the criminal gets his just deserts."[100]

Similarly, in *Ford v. Wainwright*,[101] the Supreme Court held that the Eighth Amendment bars the execution of someone who is insane at the time of execution. The Court reasoned that imposing the death penalty on the insane serves no retributive purpose because the crimes of the insane are of a different "moral quality."[102] Implicit in the Court's reasoning is the concept that the insane are less culpable than the sane.

Juveniles are also less culpable for their crimes.[103] Therefore, under the reasoning of *Enmund* and *Ford*, imposing the death penalty on juveniles does not further the goal of retribution. As a result, the death penalty is disproportionate to the juveniles' crimes. Because a disproportionate punishment is always "cruel,"[104] executing juveniles violates Article 1, Section 14.

Juveniles are less culpable for their crimes for several reasons. First, juveniles are less mature both in their ability to make sound judgments and in their moral development.[105] Second, juveniles are less able to control their conduct and to recognize the consequences of their acts.[106] Third, juveniles are "in a developmental stage characterized by defiance of authority and conducive to criminal activity."[107] By restricting a juvenile's right to vote,[108] to serve on a jury,[109] or to marry without parental consent, Washington statutes implicitly recognize the difference in maturity levels between adults and juveniles.[110]

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100. *Id.*

101. 477 U.S. 399 (1986).

102. *Id.* at 408.

103. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988). *See also* Streib, *supra* note 94, at 392; Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 786-87 (1986); Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 673 (1983); Helene B. Greenwald, Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1493 (1983).

104. Harmelin v. Michigan, 111 S. Ct. 2680, 2687 (1991).

105. Greenwald, *supra* note 103, at 1493.

106. *Id.*

107. *Id.* at 1494. This stage usually passes when offenders reach their early twenties. *Id.*

108. WASH. CONST. art. VI, § 1 (amended by WASH. CONST. amend. 63).

109. WASH. REV. CODE § 2.36.070 (1989).

110. *Id.* § 26.04.210.

As the Supreme Court recognized in *Thompson v. Oklahoma*, such statutes are relevant in determining the scope of the Eighth Amendment as applied to juveniles.[111] Justice O'Connor's concurrence noted that "[t]he special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many purposes are also relevant to the Eighth Amendment proportionality analysis."[112]

The above factors lead to the conclusion that juveniles are less culpable for their crimes.[113] This conclusion is not meant to make light of the severity of some juvenile crimes. Instead, it merely acknowledges that juveniles have less capacity to control their conduct and to think in long-range terms than do adults. Because juvenile offenders are less culpable, imposing the death penalty on them serves no retributive purpose.[114]

Execution of juveniles also serves no general deterrence purpose.[115] This is so for two reasons. First, a juvenile is unlikely to make the type of cost-benefit analysis that is necessary for deterrence to work.[116] Second, even if the juvenile did engage in such analysis, "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century."[117]

Consequently, imposing the death penalty on juveniles does not further the goals of retribution and deterrence and, therefore, serves no valid societal purpose.[118] Because the execution of juveniles serves no valid societal purpose, the analysis under the second *Fain* factor leads to the conclusion that Arti-

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111. Thompson v. Oklahoma, 487 U.S. 815, 824-25 (1988) (plurality opinion of Stevens, J., with Blackmun, Brennan and Marshall, JJ., concurring); *id.* at 854 (O'Connor, J., concurring).

112. *Id.* at 854. In determining the appropriateness of imposing the death penalty on juveniles, it seems particularly relevant that, lacking a right to vote or sit on a jury, juveniles are unable to participate in the political or judicial processes that ultimately determine whether the death penalty should apply to them.

113. *Id.* at 835 (plurality opinion of Stevens, J.).

114. *Id.* at 836-37; *see also* Naovarth v. State, 779 P.2d 944, 948 (Nev. 1989) (holding life imprisonment without parole serves no retributive purpose as applied to thirteen-year-old offender).

115. *Thompson*, 487 U.S. at 837-38; Streib, *supra* note 94, at 394-95; Vanore, *supra* note 103, at 788-89; Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOK. L. REV. 767, 779-81 (1987).

116. *Thompson*, 487 U.S. at 837-38.

117. *Id.*

118. *See* Streib, *supra* note 94, at 392; Vanore, *supra* note 103, at 786-87; Hartman, *supra* note 103, at 673; Greenwald, *supra* note 103, at 1493; Homan, *supra* note 115, at 779-81.

cle 1, Section 14 forbids the imposition of the death penalty on juveniles.

The court in *Fain*, however, did not expressly examine this second factor.[119] Instead, the court warned that this factor should be "employed with caution" and that courts should give the "greatest possible deference" to legislative determinations of appropriate penalties for criminal acts.[120] In regard to juvenile death sentences, however, that warning is inapplicable because the legislature has not spoken on the application of the death penalty for juvenile offenders.

The Washington death penalty statute sets no minimum age for imposition of the death penalty. The legislative history of that statute contains no discussion of its possible application to juveniles. Thus, there is no indication that the legislature specifically determined that imposing the death penalty on juveniles serves any societal purpose. Without such an indication, there is no legislative determination to which the court should defer.

Furthermore, in spite of the *Fain* court's warning regarding deference to the legislature, the seriousness of imposing the death penalty requires the court to examine whether the penalty furthers any permissible societal goal. As the United States Supreme Court noted: "Unless the death penalty when applied to those in [defendant's] position contributes measurably to [retribution or deterrence], it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."[121]

Thus, the Washington court must examine the relationship between the punishment and the goals that punishment is intended to promote. Imposing the death penalty on juveniles does not further the state's goals of retribution and deterrence. Therefore, that penalty is unconstitutional under the second *Fain* factor.

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119. State v. Fain, 94 Wash. 2d 387, 401-02 n.7, 617 P.2d 720, 728 n.7 (1980).

120. *Id.*

121. Enmund v. Florida, 458 U.S. 782, 798 (1982) (citing Coker v. Georgia, 433 U.S. at 592); *see also* Furman v. Georgia, 408 U.S. 238, 331 (1972) (Marshall, J., concurring) (holding that a punishment is excessive if it serves no valid legislative purpose); Vanore, *supra* note 103, at 783 (arguing that a punishment is excessive if it fails to make a measurable contribution to penological goals).

3. Factor 3: Punishment That the Offender Would Receive in Other Jurisdictions

The third *Fain* factor examines the punishment an offender would receive in other jurisdictions for a similar offense. This factor is somewhat problematic. Presumably, the goal of a separate state constitutional analysis under Article 1, Section 14 is to determine the standards of the people of Washington. The actions of legislatures in other states seem irrelevant to that question. Nonetheless, the court has consistently looked at other states' punishments for guidance when analyzing Article 1, Section 14.[122] In keeping with precedent, therefore, examining how other states punish juvenile murderers must be part of the Article 1, Section 14 analysis.

Determining what penalty a juvenile would face in another jurisdiction is difficult. For instance, eighteen states provide for the death penalty but make no reference in their statutes to whether the penalty applies to juveniles.[123] In addition, there is no clear Supreme Court mandate on the applicability of the penalty in those states. However, a plurality in *Stanford v. Kentucky* determined that a juvenile could face the death penalty in those jurisdictions.[124] The plurality reasoned that each of those eighteen states had statutes allowing juveniles to be tried as adults, and therefore, juveniles in those states could face the full range of adult penalties.[125]

The plurality's reasoning in *Stanford* is unsound. There is no evidence that the state legislatures in question specifically considered whether the death penalty should apply to juveniles. As one court noted, "[t]he imposition of capital punishment can occur only pursuant to an affirmative and conscious decision 'by a democratically elected legislature,'[126] and surely not through inadvertence. . . . Failure on our part to insist on some indicia of such an exercise [of legislative judgment] would . . . 'authorize death by legislative oversight.' "[127]

That a state statute provides for trying some juveniles as adults does not demonstrate the legislature's affirmative deci-

122. *See* State v. Campbell, 103 Wash. 2d 1, 32, 691 P.2d 929, 940 (1984); State v. Fain, 94 Wash. 2d 387, 399, 617 P.2d 720, 726 (1980).

123. Stanford v. Kentucky, 492 U.S. 361, 385 (1989) (Brennan, J., dissenting).

124. *Id.* at 372.

125. *Id.* at 371 n.3.

126. State v. Bey, 548 A.2d 846, 875 (N.J. 1988) (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976)).

127. *Bey*, 548 A.2d at 875.

sion to extend the death penalty to them. As Justice O'Connor recognized,

> there is a considerable risk that [the legislature] either did not realize that [its] actions would have the effect of rendering [juvenile] defendants death-eligible or did not give the question the serious consideration that would have been exemplified by the explicit choice of some minimum age for death-eligibility.[128]

The Washington Supreme Court should adopt the reasoning set forth in Justice O'Connor's concurrence in *Thompson* and reiterated by the four dissenters in *Stanford*.[129] That rationale recognizes that the death penalty should be imposed only where evidence clearly shows that the legislature engaged in "the serious and calm reflection that ought to precede any decision of such gravity and finality."[130] Only in this way can the court assure that juveniles are not subjected to the death penalty through legislative oversight.

Under the reasoning of the plurality in *Thompson*, a juvenile cannot face the death penalty in twenty-six states, nor the District of Columbia. Fourteen states and the District of Columbia prohibit capital punishment altogether.[131] Twelve states that allow the death penalty prohibit its imposition on juveniles.[132] By contrast, only six states have established a minimum age of either sixteen or seventeen for the imposition of the death penalty.[133] Thus, only six jurisdictions specifically allow the execution of juveniles, while twenty-seven prohibit

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128. Thompson v. Oklahoma, 487 U.S. 815, 857 (1988). *See also* State v. Stone, 535 So. 2d 362, 364-65 (La. 1988) (finding that statute permitting trial of juvenile in criminal court did not demonstrate a "conscious, deliberate decision" by the legislature to impose death penalty on defendant).

129. *See* Stanford v. Kentucky, 492 U.S. 361, 384-85 (1989); *See also Thompson*, 487 U.S. at 828-29 (plurality opinion arguing that the Court should only look at those states which have expressly established a minimum age in their death penalty statutes).

130. *Thompson*, 487 U.S. at 856 (O'Connor, J., concurring).

131. Those states are Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Thompson*, 487 U.S. at 826-28 n.25; *Stanford*, 492 U.S. at 384 n.1 (Brennan, J., dissenting).

132. Those states are California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Hampshire, New Mexico, Ohio, Oregon, and Tennessee. *Stanford*, 492 U.S. at 370 n.2.

133. Georgia (age seventeen), Indiana (age sixteen), Kentucky (age sixteen), Nevada (age sixteen), North Carolina (age seventeen), and Texas (age seventeen). *Thompson*, 487 U.S. at 829-30 n.30.

such punishment.[134]

Furthermore, the recent trend among the states is to exclude juveniles from death penalty statutes. Between 1981 and 1987, five states passed death penalty statutes that forbid capital punishment for juveniles.[135]

In considering the punishment a juvenile would receive in other jurisdictions, the court should look at more than just other states' statutes. Any analysis of this factor should also examine the frequency with which juries in those jurisdictions actually impose the death penalty on juveniles. Nationally, of more than 14,000 legal executions between 1642 and 1983, only 287 people were executed for crimes committed when they were under the age of eighteen.[136] From 1983 to 1986, the overall death row population increased by forty-two percent, while the death row juvenile population *decreased* by sixteen percent.[137] Juveniles committed over nine percent of all murders between 1973 and 1983, yet they received only two-to-three percent of all death sentences.[138] Thus, the trend nationwide is toward forbidding the imposition of the death penalty on juveniles.

While the court in *Fain* did not examine foreign law in determining what penalty an offender would face in other jurisdictions, it is worth noting that the vast majority of countries prohibit the imposition of the death penalty on juveniles.[139] From 1980 to 1986, Amnesty International

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134. Eighteen of the remaining states have statutes that provide for the death penalty but do not indicate whether that penalty applies to juveniles. For the reasons discussed earlier, those statutes do not provide guidance as to the acceptability of the juvenile death penalty. *See supra* notes 126-30 and accompanying text. The nineteenth state, South Dakota, statutorily provides for the death penalty but has sentenced no one to death since the United States Supreme Court decided Furman v. Georgia. *Stanford*, 492 U.S. at 384 n.1 (Brennan, J., dissenting). Thus, South Dakota is generally considered as having abandoned the death penalty. *Id.*

135. Those states are Colorado, Nebraska, New Jersey, Ohio, and Oregon. Homan, *supra* note 115, at 776 n.78.

136. Victor L. Streib, *Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 618-19 (1983).

137. Streib, *supra* note 94, at 384.

138. *Id.* at 384-87.

139. *See generally* Laura Dalton, Note, Stanford v. Kentucky *and* Wilkins v. Missouri: *A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161 (1990); Lisa K. Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty*, 57 U. CIN. L. REV. 245 (1988); Hartman, *supra* note 103.

The plurality in *Stanford* refused to consider foreign law. 492 U.S. at 369 n.1. ("[I]t

reported only eight people executed world-wide for crimes committed while juveniles: three of these occurred in the United States, two in Pakistan, and one each in Bangladesh, Barbados, and Rwanda.[140]

In sum, the Washington Supreme Court should hold that the third *Fain* factor prohibits the imposition of the death penalty on juveniles. In the United States Supreme Court, the four dissenters in *Stanford*, together with Justice O'Connor's concurrence in *Thompson*, have argued that courts should not allow the juvenile death penalty absent a specific legislative enactment. Furthermore, the great majority of legislatures in the United States that have specifically addressed the question have prohibited the juvenile death penalty. The vast majority of countries have determined likewise. Therefore, the court should hold that, in keeping with international standards of human decency, and with the trend in the United States, the Washington Constitution forbids the imposition of the death penalty on juveniles.

4. Factor 4: Punishment in Washington For Other Offenses

The fourth *Fain* factor examines the punishment meted

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is *American* conceptions of decency that are dispositive"). Earlier majority opinions of the Court, however, clearly considered foreign law in determining whether a punishment violates the Eighth Amendment. *See* Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977).

140. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 74 (1987). According to Amnesty International, the following jurisdictions have abolished the death penalty: Andorra, Australia, Austria, Cape Verde, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Kampuchea, Kiribati, Liechtenstein, Luxembourg, Marshall Islands, Micronesia, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Philippines, Portugal, Romania, San Marino, Sao Tome and Principe, Solomon Islands, Sweden, Tuvalu, Vanuatu, and Venezuela. Brief of Amici Curiae for Amnesty International and Amnesty USA, at Appendix A, State v. Furman, No. 57003-5 (Wash. filed June 4, 1990).

Additionally, the following jurisdictions retain the death penalty, but specifically prohibit its imposition on juveniles: Albania, Algeria, Angola, Anguilla, Antigua and Barbuda, Bahamas, Bahrain, Belize, Botswana, British Virgin Islands, Brunei Darussalam, Bulgaria, Burundi, Cameroon, Cayman Islands, Cote d'Ivoire, Cuba, Dominica, Egypt, Ethiopia, Greece, Grenada, Guinea, Guinea-Bissau, Indonesia, Iraq, Jamaica, Japan, Jordan, Kenya, Kuwait, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mongolia, Montserrat, Myanmar, Paraguay, Poland, Qatar, Rwanda, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, South Africa, Sudan, Suriname, Swaziland, Syria, Tanzania, Trinidad and Tobago, Tunisia, Turkey, Turks and Caicos Islands, U.S.S.R., United Arab Emirates, Viet Nam, Yugoslavia, and Zambia. Brief of Amici Curiae at Appendix H.

out in Washington for other offenses.[141] In *Fain*, the court employed this factor by comparing Fain's sentence with the statutory maximum penalties for other offenses.[142] The court concluded that the penalty imposed on *Fain* was greater than the penalty he would have received for more serious crimes.[143] Therefore, his sentence was "disproportionate" to his crime.[144]

In the death penalty context, however, this fourth *Fain* factor should have a different focus. Obviously, no crime is more serious than taking a life. Therefore, the *Fain* court's focus on the penalties imposed for different crimes would be inappropriate in the instant case. Instead, the court should examine the punishment meted out to other members of the defendant's class for similar crimes.

This inquiry is not the same as the proportionality review mandated by Revised Code of Washington section 10.95.130(2)(b). The statutorily mandated proportionality review requires the court to perform a "careful examination of the circumstances of the crimes and the defendants' personal characteristics."[145] Thus, the court's focus is on whether imposition of the death penalty on the offender *as an individual* violates the constitution. Put another way, the question in proportionality review is whether the penalty is disproportionate given the particular characteristics of the defendant and the crime.

In the context of this Article 1, Section 14 challenge to the death penalty, however, the focus is on the class of defendants. The question is whether imposition of the death penalty on *juveniles as a class* violates the constitution.

Thus, the court should look at what penalty is actually imposed on juveniles, rather than what punishment the statutes authorize. A legislatively authorized penalty may be so unacceptable to society that juries refuse to impose it. In that event, the reluctance to impose the penalty is more indicative of whether society accepts the penalty than is its legislative authorization.[146] Therefore, under this fourth factor, the court should examine jury sentences. This examination should determine whether the rarity of the death penalty's imposition

141. State v. Fain, 94 Wash. 2d 387, 401, 617 P.2d 720, 727 (1980).
142. *Id.*
143. *Id.*
144. *Id.* at 402, 617 P.2d at 728.
145. *In re Jeffries*, 114 Wash. 2d 485, 490, 789 P.2d 731, 736 (1990).
146. *See* Furman v. Georgia, 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring).

on a class of offenders creates an inference that such imposition is arbitrary, and therefore unconstitutional, with respect to that class.[147]

The examination of jury sentences is facilitated by Revised Code of Washington section 10.95.120.[148] This statute requires trial courts to submit reports to the Washington Supreme Court in all cases resulting in a conviction for aggravated first degree murder. As of July 22, 1991, there were 113 such reports on file in the Washington Supreme Court Clerk's office.[149]

From these reports, it is impossible to determine exactly how many cases involved defendants who were juveniles at the time of the offense because many of the reports do not list the birth date of the offender. Those reports that do list the offender's birth date reveal that seven juveniles have been convicted of aggravated first degree murder.[150] In three of those seven cases, the prosecutor sought the death penalty.[151] Furman's is the only case in which the jury imposed the death penalty.

Thus, Furman's sentence is unique among all the juveniles sentenced under the current statute. His sentence is also rare historically. The State of Washington has executed only three people for crimes committed while juveniles.[152] Washington's last juvenile execution occurred in 1932.[153]

The rarity with which prosecutors seek, and juries inflict, the death penalty on juveniles lends force to the argument that

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147. Thompson v. Oklahoma, 487 U.S. 815, 831 n.35 (1988) (plurality opinion); *id.* at 852 (O'Connor, J., concurring).

148. Enacted by 1981 Wash. Laws, ch. 138, § 12.

149. Those reports are available for public inspection by contacting the Clerk of the Supreme Court in Olympia, Washington.

150. State v. Furman, No. 57003-5 (Wash. filed June 4, 1990); State v. Stevenson, 55 Wash. App. 725, 780 P.2d 873 (1989); State v. Cummings, 44 Wash. App. 146, 721 P.2d 545 (1986); State v. Rice, No. 88-1-00427-2 (Yakima Cty. Super. Ct. filed Jan. 5, 1990); State v. McNeil, No. 88-1-00428-1 (Yakima Cty. Super. Ct. filed March 15, 1988); State v. Harris, No. 87-1-01354-7 (Pierce Cty. Super. Ct. filed June 12, 1987); State v. Massey, No. 87-1-01354-7 (Pierce Cty. Super. Ct. filed 1987). Additionally, in at least one case decided prior to the reporting requirement, a juvenile was convicted of aggravated first degree murder. State v. Forrester, 21 Wash. App. 855, 587 P.2d 179 (1978).

151. State v. Furman, No. 57003-5 (Wash. filed June 4, 1990); *Stevenson*, 55 Wash. App. at 725, 780 P.2d at 873; State v. Rice, No. 88-1-00427-2 (Yakima Cty. Super. Ct. filed Jan. 5, 1990). In a fourth case, that of Russell McNeil (Rice's co-defendant), the prosecutor filed a notice of intent to seek the death penalty but later withdrew the notice in exchange for a guilty plea.

152. VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 207-08 (1987).

153. *Id.*

execution of juveniles offends contemporary standards of decency in Washington. As Justice Scalia points out, however, this does not necessarily "establish the requisite proposition that the death sentence for offenders under eighteen is categorically unacceptable to prosecutors and juries."[154] Still, "[w]hen an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it."[155]

That inference is especially strong considering that capital juries are "death-qualified," and render a "distinctly weighted measure of contemporary standards."[156] This reluctance on the part of juries leads to the conclusion that the final *Fain* factor favors holding that Article 1, Section 14 prohibits the execution of juveniles.

IV. CONCLUSION

The Washington State Constitution prohibits the imposition of the death penalty on juveniles. First, under the *Gunwall* six-factor test, Article 1, Section 14 provides greater protection to offenders than does the Eighth Amendment of the U.S. Constitution. Second, under the four factors set out in *State v. Fain* for determining when a punishment is "cruel" within the meaning of the state constitution, Article 1, Section 14 prohibits the imposition of the death penalty on juveniles for several reasons.

The most important of those reasons is that imposing the death penalty on juveniles does not further any of the societal goals that justify the use of that penalty. Because juveniles are less culpable than adults for their crimes, imposing the death penalty on them serves no retributive purpose. That penalty also serves no deterrence purpose because juveniles are incapable of performing the type of cost-benefit analysis that makes deterrence work.

Additionally, a juvenile could receive the death penalty for a similar crime in only six other states. In Washington, the penalty is more severe than any penalty imposed on any juve-

154. Stanford v. Kentucky, 492 U.S. 361, 374 (1989) (plurality opinion).

155. Furman v. Georgia, 408 U.S. 238, 300 (1972) (Brennan, J., concurring). *See also* Thompson v. Oklahoma, 487 U.S. 815, 831 n.35 (1988) (plurality opinion); *id.* at 852 (O'Connor, J., concurring).

156. *Stanford*, 492 U.S. at 387 n.3 (Brennan, J., dissenting).

nile since 1932. Furthermore, the Washington legislature has not specifically considered whether the death penalty should apply to juveniles. Therefore, the court should hold unconstitutional the imposition of the death penalty on those who were juveniles at the time of their offense. To do otherwise would allow imposition of the death penalty by legislative oversight.

Ultimately, by allowing the state to execute juveniles without specific legislative authorization, the court would be abandoning its traditional role as protector of individual rights. There is no justification for the court to abandon that role because there is no specific legislative mandate to execute juveniles. The court must ensure that the state does not execute someone unless that execution is in accordance with a specific legislative mandate and that execution serves a valid societal purpose. Because executing juveniles meets neither of those requirements, Article 1, Section 14 of the Washington Constitution prohibits the execution of Michael Monroe Furman.