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INTRODUCTION

Washington's current sentencing scheme has long been afflicted by what Anatole France derided as the "magnificent equality" of the law,[1] which punishes the rich and the poor alike when they steal, beg, or sleep under bridges. Enacted and repeatedly made harsher in the 1980s and 1990s in response to political panics driven by the since-discredited juvenile superpredator theory, state laws require courts to disregard factors other than the seriousness of crimes and the prior convictions of those being sentenced, even when they are punishing crimes committed by youths.[2]

* Editor-in-Chief Emma Daniels must have first place in these acknowledgements. Her patient and gracious efforts in stitching together my tardy, thumb-typed increments of fewer than 6000 characters, together with innumerable corrections and elaborations, made this article possible. The editing—including the requests for further supporting authority—made it better. I thank Christopher Blackwell for recommending me to the journal, as well as Chelsea Moore and Jeremiah Bourgeois, along with the legislators, lawyers, judges, and reformers both within and outside the criminal legal system whose work for justice makes an article such as this worthwhile. I am deeply grateful for the many friends, educators, and advocates whose intelligence, generosity, courage, and perspicacity have sustained me, among them Dr. Rubin Carter, Ken Klonsky, Jeff Conner, Jason Flom, Tom Goldstein, Daniel Woofter, Lara Zarowsky, and the extraordinary David Kim. And, just as important in the context of this article, I would like to express my appreciation for those current and former prisoners given extreme sentences who continue every day to demonstrate with their humaneness the inappropriateness of those punishments.

[1] JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 546 (Geoffrey O'Brien ed., 18th ed. 2012).

[2] *See e.g.*, Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington*, ACLU OF WASH. (2020) (providing a comprehensive review of the Washington criminal sentencing system with discussion of possible reforms); *see also* Nick Straley, *Miller's Promise: Re-Evaluating Extreme*

Since Washington State law authorizes charging children as young as eight with crimes and allows juvenile courts to transfer children facing criminal charges to adult court—where they face the same sentences adults do—the state's sentences have long fallen with magnificent equality on the young and the old.[3] State courts summarily dismissed any claim that these sentences were cruel—even when a child was sentenced to die in prison for his role in a murder at age thirteen.[4] But U.S. Supreme Court rulings in *Roper v. Simmons*,[5] *Graham v. Florida*,[6] and *Miller v. Alabama*[7] changed matters.[8] Courts began to accept that "juveniles have diminished culpability and greater prospects for reform."[9] In recent years, the Washington Supreme Court has recognized that Washington's sentencing statutes may impose unconstitutionally cruel punishment on the young.[10] That recognition has resulted in a categorical bar on life-without-parole (LWOP) sentences for juveniles, a mandate for judges to consider youthfulness when

Criminal Sentences for Children, 89 WASH. L. REV. 963 (2014). Notably, where adults are concerned, Washington's total disregard for reform makes it an outlier even in mass-incarceration America: "While other sentencing schemes may permit or encourage consideration of rehabilitation upon resentencing, Washington's *present* scheme does not." State v. Wright, 493 P.3d 1220, 1225 (Wash. Ct. App. 2021) (distinguishing federal sentencing statutes that require consideration of all factors).

[3] State v. Furman, 858 P.2d 1092, 1102 (Wash. 1993) (discussing WASH. REV. CODE § 9A.04.050 and WASH. REV. CODE § 13.40.110).

[4] State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (rejecting premise that the age at which a crime was committed bears on whether the sentence imposed for it was unconstitutionally cruel).

[5] Roper v. Simmons, 543 U.S. 551 (2005).

[6] Graham v. Florida, 560 U.S. 48 (2010).

[7] Miller v. Alabama, 567 U.S. 460 (2012).

[8] But *cf.* Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy's Influence on the Supreme Court's Eighth Amendment Jurisprudence*, 128 YALE L. J. F. 743, 751 (2019) (arguing that it would be a mistake to regard the Supreme Court decisions as a "watershed development" given that they have not granted a prospect of relief to most).

[9] *Miller*, 567 U.S. at 471.

[10] *See* cases cited *infra* Part I(B).

imposing adult sentences, and proposals for legislative overhaul.[11] But an unexpected 5–4 decision from that court in *State v. Anderson,* grounded solely in Washington's state constitution, has reversed the move towards greater protection.[12] The legal upshot involves not just differences between the state and federal constitutional requirements, but also the high court's independent authority to interpret and apply the U.S. Constitution so long as U.S. Supreme Court holdings do not plainly override its interpretations.[13]

To anticipate the complicated bottom line: the *Anderson* decision means that judges may now strip young people of their substantive constitutional protection against lifelong imprisonment—a protection courts had so far considered categorical under the state constitution—by *finding* their crimes do not reflect certain "mitigating characteristics of youth" and also *declining to find* that the crimes do not reflect "irreparable corruption."[14]

Three prior leading cases from the Washington Supreme Court make *Anderson*'s outcome especially confounding. First, in *State v. Bassett* (hereinafter *Bassett I*), a five-justice majority held that Washington's Constitution categorically prohibits sentences imposing lifelong

[11] Look2Justice (look2justice.org), for which I organize, supports a number of relevant sentencing-reform bills, notably Second Chances for Teens and Young Adults (current HB 1325/SB 5451) and Retroactive Elimination of Juvenile Points (current HB 1324); *cf.* Maya L. Ramakrishnan, *Providing a Meaningful Opportunity for Release: A Proposal for Improving Washington's Miller-Fix*, 95 WASH. L. REV. 1053, 1055 (2020) (arguing that all sentences for juveniles should be shorter than twenty years).

[12] State v. Anderson, 516 P.3d 1213 (Wash. 2022); *see also* In re Pers. Restraint of Forcha-Williams, 520 P.3d 939, 953–54 (Wash. 2022) (insisting, in dicta, that judges may impose standard adult-range sentences on juveniles).

[13] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT § 79, at 686 (2016) ("State courts need not extend decisions of the U.S. Supreme Court beyond their precise holdings, express and necessarily implied.").

[14] State v. Anderson, 516 P.3d 1213, 1223, 1225 (Wash. 2022). As explained below, a finding that a teen's crime does not reflect the specified characteristics removes their state constitutional protection, while neglecting to enter the finding about whether the crime reflects irreparable corruption makes the federal constitutional protection unenforceable.

imprisonment on juveniles.[15] The *Bassett I* court reasoned that allowing judges to impose such sentences created a constitutionally intolerable risk that their fallible subjective judgments would leave teens who could mature and rehabilitate cruelly imprisoned for life.[16] Requiring, therefore, that all sentences for crimes committed by juveniles afford a meaningful opportunity for release, it invalidated the statute permitting courts to impose life-without-parole sentences on children under eighteen.[17] Then, when a divided panel of the Washington Court of Appeals decided that a sentencing judge who imposed a twenty-five-year minimum sentence consecutive with a 280-month sentence had nevertheless complied with the state's so-called "*Miller*-fix" statute in *State v. Gilbert* (hereinafter *Gilbert I*),[18] the Washington Supreme Court unanimously overturned that decision. In its reversal (hereinafter *Gilbert II*), the court held that judges have full discretion in *Miller* resentencings to reduce terms of imprisonment and impose concurrent sentences, notwithstanding the language of the resentencing statute, which appeared to authorize adjusting only sentences for aggravated murder.[19] The court held further that when deciding whether to impose a reduced sentence, judges must consider all the youth-related factors discussed in *Miller*, including "any factors suggesting the juvenile may be successfully rehabilitated"—effectively vindicating the extraordinary "dissently tome" penned by Judge Fearing in *Gilbert I*.[20] Ultimately, in *State v. Haag*, six justices ruled that a life sentence with a

[15] State v. Bassett, 428 P.3d 343 (Wash. 2018) [hereinafter *Bassett I*]; *see generally* Carrie Mount, State v. Bassett*: Washington Courts Can No Longer Sentence Juveniles to Die in Prison*, 18 SEATTLE J. FOR SOC. JUST. 395 (2020).
[16] *Bassett I*, 428 P.3d at 353–54.
[17] *Id.*
[18] State v. Gilbert, 2018 Wash. App. LEXIS 740, 2018 WL 1611833 (Wash. Ct. App. 2018) [hereinafter *Gilbert I*].
[19] State v. Gilbert, 438 P.3d 133, 136 (Wash. 2019) [hereinafter *Gilbert II*].
[20] *Gilbert I* at *23–101 (Fearing, J., dissenting). With its four appendices, including one detailing the tactics used by courts to evade *Miller*, Judge Fearing's dissent addresses the subject of cruel punishment with an altogether remarkable level of insight, learning, and humaneness.

mandatory minimum prison term of forty-six years imposed by the same statute also violated this meaningful-opportunity requirement because a minimum that long left no meaningful life beyond prison walls.[21]

Together, these holdings seemed to entail that Tonelli Anderson's sixty-one-year sentence without opportunity for early release, imposed for murders committed when he was seventeen, must be unconstitutionally cruel, too.[22] Indeed, after *Haag* was decided, every state appellate-court panel confronted with the question of whether juveniles could ever receive sentences effectively denying them a meaningful opportunity for release—even for multiple most-serious offenses—answered unanimously that *Haag* held they could not.[23] Thus, a Washington Court of Appeals panel relied on *Haag* to overturn the sixty-year minimum Bassett received on resentencing after *Bassett I*; likewise the Division Three panel in *State v. Gilbert* (hereinafter *Gilbert III*) vacated a forty-five-year minimum.[24] Yet the

[21] State v. Haag, 495 P.3d 241 (Wash. 2021). Much of WASH. REV. CODE § 10.95.030, the aggravated-murder statute, has been found unconstitutional. As written, it permits death sentences or lifelong sentences and (1) mandates LWOP for everyone eighteen or older who was not sentenced to death; (2) permits any minimum term over twenty-five years or explicit life without parole for sixteen- and seventeen-year-olds; and (3) assigns children under sixteen a twenty-five-year minimum term of imprisonment—a sentence that is in many comparable jurisdictions the most severe possible sentence for adults.

[22] WASH. REV. CODE 9.94A.730 was intended to afford juveniles a meaningful opportunity for release after twenty years, but its provisos except not only juveniles sentenced for aggravated murder or a third strike but also—and crucially for Anderson—anyone who commits any crime as an adult. Because he had already committed crimes as a young adult before being convicted for his juvenile offenses, Anderson cannot seek release under WASH. REV. CODE 9.94A.730, and the *Anderson* court refused on procedural grounds to consider his belated argument challenging the constitutionality of that exclusion.

[23] *See, e.g.*, State v. Boot, 2022 Wash. App. LEXIS 1096 (reversing a fifty-year minimum) and State v. Furman, 2022 Wash. App. LEXIS 1100 (reversing a forty-eight-year minimum).

[24] State v. Bassett, No. 53721-4-II, 2021 Wash. App. LEXIS 2483, at *6 [hereinafter *Bassett II*] ("Bassett's sixty-year sentence far exceeds the forty-six-year sentence addressed in *Haag*. Therefore, under *Haag* we hold that the trial court's sentence was unconstitutional.") (Bassett was ultimately resentenced to a twenty-eight-year minimum term); *State v. Gilbert*, No. 37121-2-III, 2021 Wash. App. LEXIS 2573, at *11, *review denied*, State v. Gilbert, 525 P.3d 148 (Wash. 2023) [hereinafter *Gilbert III*] ("[T]he

majority opinion in *Anderson* affirmed Anderson's sixty-one-year sentence without overruling the prior holdings.[25] By ignoring the unanimous appellate-court decisions interpreting and applying *Haag* and *Bassett I*, the *Anderson* majority avoided confronting the cognitive dissonance involved in its construal of those decisions. Justice Stephens, who authored the dissent in *Haag*, wrote the opinion for the *Anderson* majority, underscoring the distinct impression that the majority opinion aimed to "clarify" that precedent mainly by dissolving it.[26]

The court's affirmance drew national notice and extraordinary condemnation from the dissenting justices. Citing a study on how judicial elections affect decisions and noting that Washington's courts have repeatedly "decided that some disfavored group is not due the full protections our founding documents promise," Chief Justice González argued that the majority had not only "ignored the plain language of *Bassett* and *Haag*," but also overlooked the sentencing judge's abuse of discretion.[27] The *Anderson* opinion was issued in an election year dominated by incredible—and ultimately, as the results would suggest, unpersuasive—claims about crime and sentencing from some politicians. Justice Whitener, who wrote the majority opinion in *Haag* but joined the majority in *Anderson*, was up for her first election since being appointed to the court. Justice Yu's dissent, in which Justice Montoya-Lewis joined,

court's decision [in *Haag*] was not influenced by the quantity or quality of convictions for which the defendant was sentenced . . . [T]he court focused on the impact the sentence would have on the defendant."); *id.* at *11, n.4 ("[U]nder our state constitution, a sentence that amounts to life without parole for a juvenile offender is categorically prohibited."). Both cases, like Anderson's, involved more than one count of murder; unlike his, both included an aggravated-murder conviction—in Bassett's case, three. Granted, Washington Court of Appeals judges have no say unless they happen to sit with the Washington Supreme Court pro tem—but the unanimity among panels and judges is striking, and it is tempting to speculate that Division One is absent only because sentencing courts there chose not to impose unconstitutionally long minimum terms.

[25] State v. Anderson, 516 P.3d 1213, 1226 (Wash. 2022).

[26] *Id.* at 1220.

[27] *Id.* at 1228 (González, C.J., dissenting).

drew attention to the majority's failure to acknowledge that the recipients of the constitution's protection, Bassett and Haag, are white, whereas Anderson is Black. It pointed to the "false distinctions" made by the *Anderson* majority between the evidence presented at Bassett's and Haag's resentencing hearings, and the evidence presented at Anderson's, which the majority used to exclude Anderson from the class of juveniles Washington's constitution would protect.[28] Justice Yu concluded that the majority's "insupportable and indefensible" opinion would "'perpetrate injustice by [its] very existence' until it is one day rejected by jurists and lawmakers as a 'historical injustice[].'"[29] Both dissents highlighted the offense to stare decisis and the damage to the court's credibility that can ensue when courts attempt to modify precedent while claiming to clarify it.

To be sure, the majority's result is as uncongenial to social justice as its reasoning is inconsistent with stare decisis, in particular the principle that distinctions without differences afford no legitimate basis for evading a precedent's controlling ratio decidendi—a principle the Washington Supreme Court has defended in the past.[30] Some of the division in the court can surely be explained by differences in the justices' sensibilities. But this Article aims to show that clashing intuitions about outcomes need not control legal controversies, even exceptionally divisive ones. Instead, I argue that a modest objectivity—and recourse to evidence—can have force in disputes over constitutional law that are typically understood as battles

[28] *Id.* at 1236 (Yu, J., dissenting).

[29] *Id.* at 1237 (Yu, J., dissenting) (quoting State v. Towessnute, 197 Wn.2d 574, 575, 486 P.3d 111 (2021)).

[30] *See* GARNER ET AL., *supra* note 13, at 391 (quoting with approval DeElche v. Jacobsen, 622 P.2d 835, 840–41 (Wash. 1980)) ("We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none."). The word "difference" rather than "distinction" would align better with the familiar phrase "distinction without a difference" capturing the relevant observation that distinctions may be drawn in the absence of substantive differences.

over non-epistemic values.[31] To this end, I draw on the naturalized-epistemology approach that jurisprudents have described and applied to rules of evidence.[32] This Article adapts that approach for a different component of adjudication: assessing the legal procedures meant to fulfill the substantive constitutional promises to which all justices are at least nominally committed. In so doing, I focus on an aspect of the majority opinion that the dissents deplore, but do not analyze: its attempt, without compelling reason, to substantially revise—perhaps more aptly, to redact—the inquiry required when judges decide whether to impose lifelong imprisonment.

Part I of this Article describes the *Anderson* decision's impact on the prior body of constitutional law. It first provides needed background for understanding *Anderson* by distinguishing the relevant age-related protections: (1) those the U.S. Supreme Court recognized in the federal constitution's Eighth Amendment; (2) the additional protections that Washington's Supreme Court recognized in that amendment; and (3) the

[31] Jules Coleman and Brian Leiter introduced the concept "modest objectivity" in jurisprudence to describe the right conception of metaphysical objectivity for evaluating the legitimacy of judicial decisions. *See* Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 630–31 (1993); *cf. id.* at 559 (observing that modest objectivity is "presupposed by our legal practice of adjudication"). Legal judgments are on this account modestly objective when they are the judgments that would be reached under ideal epistemic conditions—they are the judgments fully informed, rational, unbiased, empathetic, and imaginative judges would reach. Leiter, on whose work I draw for the distinction between epistemic and non-epistemic values, characterizes epistemologically objective cognitive processes as those that either reliably yield accurate knowledge or are free of factors such as biases or non-epistemic normative agendas that generate inaccuracy. *See* BRIAN LEITER, LAW AND OBJECTIVITY, IN NATURALIZING JURISPRUDENCE 257, 261 (2007) ("Epistemic values or norms—for example, norms about when evidence warrants belief—must of course play a role . . . [T]he worry is about non-epistemic values or norms."); *id.* at 270 (listing conditions under which law could be considered "modestly" objective).

[32] *See* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001); *see also* GABRIEL BROUGHTON & BRIAN LEITER, THE NATURALIZED EPISTEMOLOGY APPROACH TO EVIDENCE, IN PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW (Dahlman, Stein, and Tuzet eds., 2021).

different, further protections the state high court found in Washington's own constitution, under which *Anderson* was decided. I discuss what the *Anderson* decision means for this body of constitutional law and for judges conducting sentencing and resentencing hearings.

Part II turns to assessing the *Anderson* decision and the constitutional decision it sets out. It begins by criticizing the reasons the majority offers for its decision. Then, it describes the naturalized-epistemology approach and how it can be adapted for the constitutional inquiry relevant here—as well as why it should be. I contrast the lack of procedural protections in *Miller* proceedings with those in place in death-penalty proceedings and when sentencing enhancements are at stake. I argue the reasoning in *Roper* and *Bassett I* exemplifies a naturalized-epistemology approach *sans la lettre*, demonstrating its practicality for constitutional law and appellate adjudication, generally. Finally, I assess how the *Anderson* majority's constitutional inquiry fares according to the pre-eminent veritistic criterion of reliably producing legal conclusions that reflect accurate knowledge.[33] The Article concludes that there is now a constitutional urgency for legislative reform.

I. THE *ANDERSON* DECISION, IN CONTEXT

To analyze what *Anderson* means, this part of the Article compares both the reasoning and the constitutional inquiry set out in the majority opinion with those found in *Bassett I* and *Haag*, as well as other state and federal decisions. Although the *Anderson* majority expressly states that its decision addresses no claim relating to the U.S. Constitution, it is critical to discuss the relevant federal constitutional protections, which are widely described as furnishing a floor upon which state constitutions may build higher

[33] *See* Alvin Goldman, *The Need for Social Epistemology*, *in* THE FUTURE FOR PHILOSOPHY 182, 203 (Brian Leiter, ed., 2004) ("When designing a system of legal adjudication, veritistic value is the prime value to be considered.").

protections, as Washington has.[34] For the Eighth Amendment's capacity to function as a floor is now doubtful.

The metaphor of the Eighth Amendment as a floor upon which state constitutions build involves two assumptions. The first assumption is that the floor is solid—that federal constitutional rights can effectively be vindicated in both state and federal courts. The second assumption implicit in the floor metaphor is that the strength of a constitutional protection can be measured along one dimension, as the height of floors in buildings can.

Neither assumption holds. The first assumption was initially undermined by the deference state-court decisions have commanded in federal *habeas corpus* proceedings, even when the decisions concern a federal right, since the Antiterrorism and Effective Death Penalty of 1996.[35] It was then specifically shredded in the Eighth Amendment context by *Jones v. Mississippi*, which declined to require that courts make the findings defendants would need to vindicate the right at stake.[36]

The second assumption, meanwhile, obscures how the protections work. Because cruel punishment is deemed to have as much to do with *who* is being punished as with *what* the punishment is, any protections from constitutional clauses barring it have at least two dimensions: (1) the class of individuals they protect; and (2) the severity of the punishments from which they protect. To those seeking a protection, the dimensions appear in obverse as the showings needed to obtain protection: respectively, what

[34] *E.g.*, David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 HARV. L. REV. F. 67, 69–70 (2022) ("Of course, state supreme courts regularly interpret their state constitutions as exceeding the floor set by the U.S. Constitution.") (discussing examples from Delaware, Iowa, Washington, California, and Massachusetts); William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (discussing the federal floor of protection).

[35] *See generally*, Stephen J. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on The Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015).

[36] Jones v. Mississippi, 141 S. Ct. 1307 (2021).

defendants must show (1) to establish they belong to the protected class and (2) to demonstrate their punishment is severe enough to fall within the proscribed scope. Importantly, the dimensions are independent. Although, until *Anderson*, Washington's constitution had been interpreted as providing greater protections along both dimensions, the crucial point for present purposes is that a constitutional protection could be deemed greater in the sense that it lowers the threshold at which punishments are considered intolerably cruel, and yet be less protective in the sense that fewer people qualify for its shield.

That is the difference *Anderson* makes. If *Jones* began resurrecting arbitrariness, to borrow the title of Kathryn E. Miller's comprehensive analysis of the decision, then the *Anderson* decision incarnated that arbitrariness in Washington.[37] By making it more difficult for defendants to show they belong to the class protected by the constitution and leaving the decision on whether they do to the sustainable discretion of a judge, *Anderson* makes it possible for defendants who belong to the class protected by the U.S. Constitution to be left unprotected by the state constitution. Such defendants will likely also be unable, after *Jones*, to vindicate their nominal right to federal constitutional protection.

The bottom line: federal cases provide the basis needed for seeing the difference *Anderson* makes to the inquiry into whether someone belongs to the protected class—an inquiry that the state courts had previously taken directly from federal cases.

A. The Eighth Amendment: Roper (2005) to Jones (2021)

In *Roper*, the U.S. Supreme Court held that the Eighth Amendment barred the death sentence for juveniles, raising the age of eligibility from

[37] Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. 1319 (2022) (arguing that *Jones v. Mississippi* made the arbitrary discretionary decisions of sentencing judges effectively unreviewable).

sixteen to eighteen.[38] The Court found that three characteristics made juveniles categorically less culpable: (1) their comparative "immaturity and irresponsibility"; (2) their susceptibility to negative influences and peer pressure; and (3) their "more transitory" personality traits.[39] The Court focused on the developmental characteristics of juveniles rather than on the characteristics of their crimes and found that "a greater possibility exists that a minor's character deficiencies will be reformed."[40] Crucially, it refused to allow discretionary death sentences because of the "unacceptable likelihood" that the nature of a crime would "overpower mitigating arguments based on youth."[41]

The Court's concern for youth in *Roper* could have been seen as solely focused on the death penalty, not sentences of imprisonment—even imprisonment until death. But then, in *Graham*, the Court broke new ground, recognizing that sentencing juveniles to lifelong imprisonment was exceptionally severe for the young.[42] It held that the Eighth Amendment requires states to give juveniles convicted of nonhomicide crimes "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and it "does forbid making the judgment at the outset that those offenders never will be fit to reenter society."[43] Its reasons echoed *Roper*: "juveniles are more capable of change than are adults" and their actions are less likely to be evidence of "'irretrievably depraved' character than are the actions of adults."[44] And, again, the Court rejected case-by-case discretionary impositions of life-without-parole sentences because it did not believe courts "could with sufficient accuracy distinguish

[38] Roper v. Simmons, 543 U.S. 551, 568 (2005).
[39] *Id.* at 569–70.
[40] *Id.* at 570.
[41] *Id.* at 573.
[42] Graham v. Florida, 560 U.S. 48, 70 (2010).
[43] *Id.* at 75.
[44] *Id.* at 68 (citing *Roper*, 543 U.S. at 70).

the few incorrigible juvenile offenders from the many that have the capacity for change."[45]

With *Miller*, the Court extended its reasoning to juveniles given mandatory life-without-parole sentences who *were* convicted of homicide, recognizing explicitly that "children are constitutionally different."[46] The Court reiterated the three exculpatory characteristics from *Roper*, reasoning that they both lessened culpability and enhanced the prospect for reform.[47] Sentencers had to be able to consider these "mitigating qualities of youth."[48] Of particular importance for understanding *Anderson*: in recapping its critique of mandatory lifelong prison sentences, the Court mentioned "immaturity, impetuosity, and failure to appreciate risks and consequences" as being "among" the "hallmark features" of youth that mandatory sentences preclude considering.[49] As we shall see, the *Anderson* majority would rework that desultory partial listing into the *sine qua non* of its constitutional inquiry. In *Miller* itself, however, the phrase has no such role. Far from being central to Miller, the mentioned trio simply exemplified features relevant to analyzing one particular factor. The Court's recap actually comprised five sentences, not one: consequently, courts, legal scholars, and even legislatures have generally understood the Court to have identified at least *five* distinct factors that sentencers must consider.[50]

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[45] *Id.* at 77.
[46] Miller v. Alabama, 567 U.S. 460, 471 (2012).
[47] *Id.* at 476.
[48] *Id.* at 477.
[49] *Id.* at 478.
[50] *See, e.g.*, Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 688–89 (2016) (enumerating five *Miller* factors, and placing immaturity, impetuosity, and failure to appreciate risks and consequences among the features relevant to the first factor); United States v. Grant, 9 F.4th 186, 209, n.2 (3d Cir. 2021) (Greenaway, J., concurring) (similarly listing five bulleted factors, but without enumerating them); United States v. McCain, 974 F.3d 506, 509–10 (4th Cir. 2020) (summarizing the factors without listing or enumerating). Some interpreters leave out the factor pertaining to the Court's concern for how youthful incompetencies can lead to juveniles being charged with more serious crimes than savvy adults would be for similar conduct: *cf.* United States v. Portillo, 981 F.3d 181, 183 (2d Cir. 2020) (omitting the

In an article criticizing inadequate judicial responses to *Miller*, the Korematsu Center for Law and Equality's executive director Robert S. Chang and his coauthors count seven *Miller* factors and note that the Court did not intend its list to be exhaustive.[51] Indeed, the Court specifically mentioned factors germane to Anderson, among them the influence of peer pressure and a dysfunctional environment. Moreover, the Court concluded its recap by emphasizing its overarching focus on the hope of reform: "And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."[52]

Crucially, despite acknowledging "the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption,'" the Court adduced that difficulty to forecast that occasions for imposing such sentences would rarely, if ever, be justified.[53] Of course, that very difficulty was the principal reason to bar the sentence categorically in *Roper* and *Graham*. And the Court ignored yet another reason it had already recognized for imposing a categorical bar: *Roper*'s reasoning from the death-penalty context that the brutal nature of a crime "would overpower mitigating arguments based on youth as a matter of course" applied a fortiori in the context of life-without-parole sentences for homicides, since

incompetency factor but still noting five distinct *Miller* factors by distinguishing between extent of participation in the offense and pressure from peers or family); WASH. REV. CODE § 10.95.030 (3)(b) (listing four factors by leaving out the incompetency factor).

[51] Robert S. Chang et al., *Evading Miller*, 39 SEATTLE U. L. REV. 85, 90–91 (2015) (enumerating seven *Miller* factors).

[52] *Miller*, 567 U.S. at 478; *see* Mary Marshall, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633 (2019), 1646–47 (arguing all five *Miller* factors are considered in service of predicting whether a juvenile is capable of rehabilitation).

[53] *Id.* at 479–80.

sentencers in such cases would tend to require more mitigation to grant relief from "mere" lifelong imprisonment than from execution.[54]

Finally, in *Montgomery v. Louisiana*, the Court held that *Miller* applied to the states retroactively.[55] It embodied a substantive rule because the Eighth Amendment barred lifelong imprisonment for all juveniles except the irreparably corrupt.[56] Those given lifelong imprisonment for crimes committed as juveniles "must be given the opportunity to show their crimes did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[57] It described *Miller* as requiring states to either create a parole process releasing those who demonstrate maturity and rehabilitation, or resentence those who demonstrate their crimes did not evince irreparable corruption to eventual release, imposing its procedural rule for the substantive end.[58]

David M. Shapiro and Monet Gonnerman contend that "*Montgomery* was the high-water mark of the Supreme Court's 'evolving standards of decency' jurisprudence."[59] In an important sense, that is true. The Court's clarion statement—"a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption"[60]—affected courts and legislatures nationwide. But *Montgomery* did not alter *Miller*'s evasion of the conclusion that only a categorical bar would eliminate the unacceptable risk of cruel punishment, nor did it effectively constrain the discretion judges had to nullify the substantive protection it announced. As Shapiro and Gonnerman point out, despite repeating what they describe as the permanent-incorrigibility rule

[54] Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 78–79 (2010).
[55] Montgomery v. Louisiana, 577 U.S. 190, 212 (2015).
[56] *Id.* at 208–09.
[57] *Id.* at 213.
[58] *Id.* at 212.
[59] Shapiro & Gonnerman, *supra* note 34, at 69.
[60] *Montgomery*, 577 U.S. at 195.

seven times, *Montgomery* still did not require a finding on incorrigibility—just a hearing in which youthfulness would be considered.[61] Without such a finding subject to meaningful appellate review, juveniles cannot show they fall under the substantive rule—that they are among the vast majority with a right to a meaningful opportunity to obtain release if they demonstrate maturity and rehabilitation. A "degree of procedure" so scant could hardly be expected to realize *Miller*'s substantive guarantee—and it did not.[62]

In 2021, *Jones* effectively made *Montgomery*'s clarion statement mere dictum, leaving the promise of *Miller*—of a substantive guarantee, a real Eighth Amendment right—empty.[63] Youth may "matter" procedurally, but *Jones* held that the Constitution requires neither findings nor an explanation for sentencing a juvenile to die in prison, leaving the decisions effectively unreviewable, subject to challenge on Eighth Amendment grounds only through claims that the sentence was disproportionate as applied to the juvenile.[64] With *Jones*, the statement, "[y]outh matters in sentencing," became a matter of pro forma procedure subject to a sentencer's untrammeled discretion.[65]

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[61] Shapiro & Gonnerman, *supra* note 34, at 67–68.

[62] *See Montgomery*, 577 U.S. at 211.

[63] U.S. v. Briones, 35 F.4th 1150, 1156 (9th Cir. 2021) (describing as dictum *Montgomery*'s statement that life without parole was an unconstitutional penalty for all but the permanently incorrigible. The panel's assertion here contradicts the accepted understanding of the difference between holdings and dicta: *Montgomery*'s finding that *Miller* had made a particular penalty unconstitutional for a particular class of defendant was absolutely necessary to its conclusion that *Miller* was substantive rather than procedural—and therefore retroactive.); *see* Jones v. Mississippi, 141 S. Ct. 1307, 1325 (2021) (Thomas, J., concurring) ("*Miller* could have been retroactive only if it were a 'watershed' rule of criminal procedure or a 'substantive' rule," and "Substantive rules include 'those that prohibit a certain category of punishments for a class of defendants [. . .]'"); *see generally* GARNER ET AL., *supra* note 13, § 4, 44, 46–53 (explaining that the distinction between holdings and dicta depends on whether the point was necessary to determining issue decided in case).

[64] Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2021).

[65] *Id.* at 1322.

And yet, because the *Jones* majority did not overrule any case, it remains open for courts to follow the dissent's advice and treat *Miller* and *Montgomery* as good law.[66] Rather than exploiting their discretion to evade them, "sentencers are thus bound to continue to apply these decisions faithfully."[67] On this construal, states are not free to deny a meaningful opportunity of release to juveniles if those juveniles' crimes have been found to reflect transient immaturity. Courts not only may find this at their own discretion, but they may also be required to enter such findings as a matter of state law. Moreover, since juveniles who demonstrate maturity and rehabilitation have *ipso facto* shown their crimes did reflect transient immaturity, the contest between transient immaturity and permanent incorrigibility remains the heart of the inquiry.[68]

B. Broader and Greater Protection: The Washington Supreme Court's Interpretation of the Eighth Amendment and Article I, § 14 of the Washington Constitution

The discordant federal cases on how youthfulness matters in sentencing render especially important both the independent authority of state high courts to interpret and apply the Federal Constitution and their preeminent authority to determine the meaning of their own state constitutions and laws.[69] After *Jones*, mature, rehabilitated prisoners who are serving sentences for offenses committed when they were juveniles cannot compel resentencing judges as a matter of federal constitutional duty, to make the reviewable finding they would need to vindicate their right to a meaningful

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[66] *Id.* at 1337 (Sotomayor, J., dissenting).
[67] *Id.*
[68] *Id.* at 1337, n.16. ("The point of *Miller* and *Montgomery* is that juveniles have the capacity to grow and mature, to rehabilitate.").
[69] *See generally* GARNER ET AL., *supra* note 13, § 77, 655 ("the state high court has the final say–and thus the final authority–over the interpretation of its own state's laws."), § 79, 679 (with a federal question, "state courts must follow any applicable U.S. Supreme Court decisions").

opportunity for release. Nor can recently convicted juveniles—about whom such a finding would necessarily be a prediction, however informed.

States, however, can act to fulfill the promise of *Montgomery* that *Jones* effectively emptied. The Court left it open for each state, through its high court's decision or legislature's act, to abjure the practice of sentencing people to die in prison without meaningful opportunity to obtain release for crimes committed when they were young—or, failing that, to require sentencers, as a matter of state constitutional or statutory law, to engage meaningfully with the test set out in *Miller* and *Montgomery*. And state high courts may, even when addressing claims under the Eighth Amendment, develop further constitutional doctrine—provided they do not contradict U.S. Supreme Court holdings. (Though such interpretations inevitably have the character of sandcastles before the Court's tides.)

In Washington, legislative enactments responding to *Miller* amounted to little more than minimal compliance with U.S. Supreme Court holdings.[70] But prior to *Anderson*, the Washington Supreme Court had consistently, albeit slowly and hesitantly, gone further. It developed a broader Eighth Amendment doctrine than the U.S. Supreme Court recognized, which accords every young person charged as an adult—not just those facing a lifetime in prison—the opportunity to be considered for a sentence below what the statutes for adults dictate.[71]

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[70] Second Substitute Senate Bill 5064, signed by Governor Inslee in 2014, amended WASH. REV. CODE § 10.95.030 and WASH. REV. CODE § 9.94A.730 to comply with *Miller*. While § 9.94A.730 affords parole eligibility after twenty years to those serving sentences for crimes committed as juveniles—subject to the provisos discussed *supra* note 14—§ 10.95.030 still permits explicit and de facto lifelong imprisonment for an aggravated murder committed by a sixteen- and seventeen-year-old. *See* GARNER ET AL., *supra* note 13 and, for extended discussion, Straley, *supra* note 2, at 995–1007.

[71] *See, e.g.*, State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017) (under the Eighth Amendment, judges must consider youth and exercise their "discretion to impose any sentence below the otherwise applicable SRA [Sentencing Reform Act] range and/or sentence enhancements"); In re Pers. Restraint of Ali, 474 P.3d 507, 518 (2020) (recognizing Houston-Sconiers as a significant and retroactive change in the law); In re

And under its authority to interpret the Washington Constitution, the Washington Supreme Court went further yet. First, it held in *Bassett I* that Washington's Constitution offers broader and greater protections against cruel punishment for young people, and on that basis, it struck down the Washington statute permitting judges to impose LWOP sentences on juveniles.[72] Then, consistent with the holding of broader constitutional protections, the court's *In re Personal Restraint of Monschke* decision extended the *Miller* protection to everyone under twenty-one.[73] And, not least, *Haag* held that *Bassett I*'s bar on life sentences for juveniles encompassed not only literal life, but also a minimum term of forty-six years, too.

Most relevant to the *Anderson* majority's take on the constitutional inquiry—*Bassett I* and *Haag* aside—is *State v. Delbosque*, which provided guidance to resentencing courts on what *Miller* hearings require.[74] Citing both *Roper* and *Miller*, Justice Yu's majority opinion in *Delbosque* found that resentencers abuse their discretion if they focus on characteristics of the crime rather than on whether the person who committed it had since been rehabilitated.[75] The Court held "resentencing courts must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole"[76]—acknowledging the point that rehabilitation as an adult shows that a crime committed during youth reflected transient immaturity rather than permanent incorrigibility.[77] Thus,

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Pers. Restraint of Domingo-Cornelio, 474 P.3d 524, 531 (Wash. 2020) (recognizing the same).

[72] *Bassett I*, 428 P.3d 343, 355 (Wash. 2018).

[73] Matter of Monschke, 482 P.3d 276, 288 (Wash. 2021).

[74] State v. Delbosque, 456 P.3d 806, 818–19 (Wash. 2020).

[75] *Id.* at 815.

[76] *Id.*

[77] *See, e.g.*, U.S. v. Pete, 819 F.3d 1121, 1143 (9th Cir. 2016). Even before *Montgomery*, the Ninth Circuit Court of Appeals stated "the critical question under *Miller* was [the defendant's] capacity to change after he committed the crime"; *see also* U.S. v. Briones, 929 F.3d 1057, 1067 (9th Cir. 2019), *judgement vacated by* U.S. v. Briones, 141 S. Ct. 2589 (2021), (holding that evidence of the "capacity for change" is key to determining

the subsequent decision in *Haag* requiring more "focus on rehabilitation that has occurred" than on retribution-entrenched preexisting constitutional jurisprudence that followed the U.S. Constitution's core focus, as set out in *Miller* and *Montgomery*, on capacity for change.[78]

Crucially, because *Haag* came down after *Jones*, it gave the Washington Supreme Court occasion to decide that case's effect on prior jurisprudence. Haag's sentencing judge explicitly determined that he was "not irretrievably depraved nor irreparably corrupt," per *Montgomery*.[79] Accordingly, the Washington Supreme Court held that under the U.S. Constitution, such a finding foreclosed the state's ability to deprive him of a meaningful opportunity to return to society.[80] The court painstakingly refuted the reading of *Jones* advocated by Justice Stephens, whose dissenting opinion argued that the majority's "understanding—that the Eighth Amendment categorically bars LWOP sentences for juvenile offenders capable of rehabilitation—is no longer good law."[81] For Justice Stephens,

> that reading of Jones creates the *absurd* consequence that the Eighth Amendment forbids LWOP sentences for some juvenile offenders (namely, those lucky enough to make explicit findings on the record) but not for others. It cannot be that juvenile offenders lose the Eighth Amendment's protection merely because a judge decides not to make a finding that is not constitutionally required.[82]

Of course, on the reading Justice Stephens considered less absurd, no juvenile ever had an Eighth Amendment protection to lose, except what a

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whether a defendant is permanently incorrigible, and "whether a defendant has changed is surely key evidence especially pertinent to a *Miller* analysis").

[78] State v. Anderson, 516 P.3d 1213, 1230 (Wash. 2022) (citing State v. Haag, 495 P.3d 241, 247 (Wash. 2021)).

[79] *Haag*, 495 P.3d at 243 (citing the Verbatim Report of Proceedings).

[80] *Id.* at 246.

[81] *Id.* at 253 (Stephens, J., concurring in part, dissenting in part).

[82] *Id.* at 255, n.6.

sentencing hearing before a judge with unfettered discretion might chance to afford.[83]

The *Haag* majority addressed the asymmetry Justice Stephens noted by holding that state precedent requires sentencers to focus on rehabilitation and to determine the "measure of rehabilitation" of those whom they resentence.[84] Since rehabilitation refutes irreparable corruption, these holdings sealed the breach in protection that *Jones* opened: state courts must, as a matter of state law, necessarily resolve whether the person being sentenced is irreparably corrupt. The *Haag* opinion acknowledged that *Jones* permitted courts to sentence juveniles to lifelong imprisonment without entering a finding of permanent incorrigibility, but did not disturb the established law that it was impermissible for juveniles whose crimes did not reflect such incorrigibility to be given such sentences.[85]

And all justices concurred that Haag's judge abused his discretion by overemphasizing retribution through the imposition of a forty-six-year minimum, despite finding that Haag was not irreparably corrupt.[86] Most important for state courts after *Jones*, the court emphasized that its conclusion that *Miller* hearings "must therefore be forward looking, focusing on rehabilitation rather than on the past" flowed from its independent authority rather than from the U.S. Supreme Court.[87] "[W]e clarify that it is this court's interpretation of our state statutory scheme and our precedent that control here."[88] As Justice Stephens acknowledged in her dissent in *Haag*, the majority held that "a sentencing court's assessment of a juvenile offender's capacity for rehabilitation controls which sentences are permissible under article I, section 14 [of Washington's constitution]."[89]

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[83] *Id.* at 254–57.
[84] *Id.* at 247.
[85] *Id.* at 246, n.3.
[86] *Id.* at 243.
[87] *Id.* at 247.
[88] *Id.* at 247, n.4.
[89] *Id.* at 256 (Stephens, J., concurring in part, dissenting in part).

Indeed, because of *Monschke*, sentencing courts would also be assessing the capacity for rehabilitation not just of technical juveniles but also of older teenagers and twenty-year-olds.

Haag thus ensured, as a matter of independent state law, that whether a defendant is "capable of change" is the "key question" in *Miller* hearings.[90] A juvenile who is found capable must, under the Eighth Amendment, receive a sentence that affords a meaningful opportunity for release; under Washington's Constitution, an opportunity of release that comes when the defendant is sixty-three years old is not meaningful. With these holdings, the Washington Supreme Court ensured that every youth who demonstrates their capacity for rehabilitation can vindicate a minimum right to release at an early enough age to have some chance to build a meaningful adult life—*if* they can actually show accomplished maturity and rehabilitation by then.

For the *Haag* majority's remedy to be effective though, the inquiry required by the state constitution in its *Miller* hearings had to remain sufficiently congruent with the one described in *Montgomery* under the U.S. Constitution, which protects—as Justice Stephens acknowledged—every juvenile "capable of rehabilitation."[91] That is what makes the *Anderson* majority's attempt to alter the state's constitutional inquiry so significant. To be sure, its remarks on the inquiry are pure *gratis dicta*. Since the majority affirmed the sentencing court's inquiry in finding that *Anderson*'s crimes did not reflect, in the language of *Montgomery*, "transient immaturity," the majority opinion's views on how the inquiry should be framed in future inquiries were ancillary to its decision and thus nonbinding.[92] But a high court's *dicta* is persuasive authority—and it seems especially likely to be persuasive when the high court presents itself as

[90] *Id.* at 248.
[91] *Id.* at 253 (Stephens, J., concurring in part, dissenting in part).
[92] State v. Anderson, 516 P.3d 1213, 1221, n.8 (Wash. 2022); *see* GARNER ET AL., *supra* note 13, § 27, 243, 244 ("dicta of the high court of a state may carry greater weight than holdings of the lower courts, though the lower courts 'are not bound to follow a higher court's dictum.'").

taking an opportunity to "capture" (in the majority's perhaps only-too-apt expression) the constitutional inquiry. This is all the more likely to be true when the court's suggested revisions promise to free a sentencer's exercise of discretion from appellate scrutiny.[93]

C. The Anderson *Majority's Proposed Alterations to Washington's Constitutional Inquiry*

The four changes the *Anderson* majority would make to Washington's *Miller* inquiry can now be concisely summarized:

(1) Whereas *Delbosque* and *Haag*, consistent with *Montgomery*, required meaningful consideration of every factor mentioned in *Miller* that might make a sentence of imprisonment until death cruel, the *Anderson* majority restricts the inquiry to whether three specific youthful features relevant to only one *Miller* factor—immaturity, impetuosity, and failure to appreciate risks and consequences—are reflected in the crime(s) committed.[94]

(2) Whereas *Delbosque* and *Haag* held, consistent with the line *Miller* drew between those whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption, that a youth's "capacity for rehabilitation controls which sentences are permissible under article I, section 14," the *Anderson* majority now claims that what controls is whether the crimes themselves "reflect those mitigating youthful characteristics."[95]

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[93] *Anderson*, 516 P.3d at 1215.

[94] *Compare* State v. Delbosque, 456 P.3d 806, 815–16 (Wash. 2020) *with Anderson*, 516 P.3d at 1226.

[95] *Compare Anderson*, 516 P.3d at 1215 *with Haag*, 495 P.3d at 256 (Stephens, J., concurring in part, dissenting in part) (acknowledging majority's holding).

(3) Whereas *Delbosque* and *Haag* explicitly held that resentencing courts "must" consider rehabilitation, the *Anderson* majority substitutes "can" for "must"—without acknowledging the alteration.[96]

(4) Whereas *Haag* held, following *Miller* and *Montgomery*, that the "key" question under the Washington State Constitution was a youth's capacity for change, the *Anderson* majority posits that the "central" question is "whether and to what extent" a youth's mitigating characteristics "affected the commission of their crime(s)," adding further that "how, if at all" a young person was influenced by their youth in committing a crime is "not a binary question."[97]

The upshot: prior holdings established that a youth who showed a capacity for rehabilitation sufficiently demonstrated that their crime reflected transient immaturity and gained the guarantee from both the U.S. Constitution and the state constitution of a meaningful opportunity for release. In contrast, the *Anderson* majority would hold that if the crime(s) did not reflect youthful characteristics, even actually proven rehabilitation would be irrelevant—and the Washington State Constitution would not prevent the youth from being sentenced to die in prison.[98]

Thus, the inquiry *Anderson* proposes into whether a youth's crime or crimes "reflect youthful immaturity, impetuosity, or failure to appreciate risks and consequences"—a formula heretofore unseen in prior decisions, but repeated eleven times in the *Anderson* majority's opinion—greatly increases the burden on those seeking constitutional protection.[99] Indeed, it eliminates all but what is generally considered the first *Miller* factor. And

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[96] *Compare Anderson*, 516 P.3d at 1223 (inaccurately citing *Delbosque* for proposition that evidence at resentencings "can also include" rehabilitation) *with Haag*, 495 P.3d at 228 (citing *Delbosque*, 456 P.3d at 815) (quoting holding that resentencing courts "must" consider rehabilitation).

[97] *Compare Anderson*, 516 P.3d at 1221, n.8, *with Haag*, 495 P.3d at 228 *(*citing *Delbosque*, 456 P.3d at 815).

[98] *Anderson*, 516 P.3d at 1215.

[99] *Id.*

though the majority asserts its novel question is nonbinary,[100] the answer—constitutional protection from cruel punishment, or not—remains very clearly binary. By shrinking the class of young people who qualify, the *Anderson* majority excludes from state-constitutional protection many youths whom the inquiry in *Delbosque* and *Haag*, as well as in *Miller* and *Montgomery*, did protect.

To be sure, the *Anderson* majority's stated basis for its decision limits the precedential weight the proposed reframing of the inquiry can have, even as *dicta*. The opinion rests on the ground that Anderson's evidence of rehabilitation was "limited" in comparison to Haag's, who had been deemed a low risk to reoffend by multiple experts.[101] Accordingly, the decision did not squarely confront—and thus cannot displace—the settled prior holdings that demonstrated rehabilitation must be determinative. Moreover, two aspects of the greater and broader state-constitutional protections are unaffected. Under *Bassett I*, the Washington Constitution continues to forbid any explicit life-without-parole sentence for juveniles, and the part of the only state statute that specifies such a sentence for juveniles remains struck down.[102] Meanwhile, *Haag*'s holding that a forty-six-year minimum term is too long to leave a youth a meaningful opportunity for release also remains intact.[103] Although the court did not specify when consideration for release must come for those convicted of crimes committed as youths, it appears it should happen in their forties at latest, given how much incarceration in youth diminishes lifespan.[104]

Still, the *Anderson* majority ignored *Haag*'s categorical bar on denying a meaningful opportunity for release to those convicted for offenses committed as juveniles. And its *dicta* would undermine the holdings that

[100] *Id.* at 1221, n.8.
[101] *Id.* at 1226.
[102] *Bassett I*, 428 P.3d 343, 356, n.1 (Wash. 2018).
[103] State v. Haag, 495 P.3d 241, 253 (Wash. 2021) (Stephens, J., concurring in part, dissenting in part).
[104] *Id.* at 251.

capacity for rehabilitation controls whether a youth receives state constitutional protection. On *Anderson*'s novel rewriting of the previously well-established constitutional inquiry, no matter how young defendants may have been, no matter how capable of rehabilitation (or actually rehabilitated!) they are, if the sentencer sustainably does not regard their crimes as quite immature, impetuous, or reckless *enough*, any numerical term of imprisonment may be imposed, even one that denies them a meaningful opportunity for release as effectively as would literal life imprisonment without parole. Of course, if such juveniles have not committed a homicide crime, such sentences would contravene the supposedly less protective U.S. Constitution under *Graham*.[105] And *Anderson* effectively invites sentencers, when making their call on a sentence, to neglect entering a finding on what both the U.S. Constitution and the state constitution had hitherto held to be the key issue, capacity for rehabilitation—a finding that controls whether the U.S. Constitution prohibits life sentences under *Montgomery* and whether the state constitution prohibits *de facto* lifelong imprisonment under *Haag*.

The practical consequences of this approach can be seen for Anderson himself. Justice Stephens acknowledged in her dissent that, after *Haag*, "capacity for rehabilitation controls which sentences are permissible under article I, section 14."[106] But the majority opinion she wrote for *Anderson* showed how the new analysis could evade that control: the opinion had only to conclude that Anderson's rehabilitation evidence was not "voluminous and uncontroverted" before turning to the crimes to justify excluding Anderson from constitutional protection.[107] Chief Justice González observed in his dissent that "[t]he trial court made no finding as to

[105] Graham v. Florida, 560 U.S. 48, 82 (2010).
[106] *Haag*, 495 P.3d at 253 (Stephens, J., concurring in part, dissenting in part); accord *id.* at 257 (noting the decision will ensure that those resentenced for crimes committed in youth "will be resentenced in light of their evidence of rehabilitation").
[107] *Anderson*, 516 P.3d at 1226.

Anderson's rehabilitation under *Haag* because *Haag* had not yet been announced."[108] But according to the standard of decency announced by the *Anderson* majority, the risk that a judge's subjective and imprecise judgments will leave someone imprisoned in violation of the constitution even when their crimes actually reflected a transient immaturity that has been overcome is acceptable, because imprisoning those who have demonstrated maturity and rehabilitation until death for crimes they committed as teens is, on this view, just not cruel enough.

II. ASSESSING *ANDERSON*: TOWARDS A NATURALIZED-EPISTEMOLOGY APPROACH

This part of the Article turns from contextualizing the *Anderson* majority opinion to the more invidious task of evaluating the *Anderson* majority opinion. The purpose here, however, is not primarily to measure it according to some particular conception of justice, however compelling or ascendant. If constitutional rulings by high courts are no more than superlegislative enactments made without regard for at least potentially controlling and distinctively legal reasons, then evaluation would be beside the point. High court decisions may be celebrated or denounced according to taste.

Seeing high-court decisions on constitutional matters that way may often be justified, of course.[109] After all, in such cases statute and precedent, the usual sources of legitimate—and at least minimally objective—legal authority leave much undetermined. A constitution's admonition to ban cruel punishment requires a court to exercise considerable independent judgment about what is cruel. And prior judicial precedent obviously cannot

[108] *Anderson*, 516 P.3d at 1230 (González, C.J., dissenting).

[109] *See* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L. J. 1601, 1609 (2015) (arguing that in many cases precedent is "a feeble constraint" on the U.S. Supreme Court because it can interpret precedent "strictly" or "loosely" to reach a desired result).

speak to "the evolving standards of decency that mark the progress of a maturing society" that are—ironically enough, by a long-accepted precedent—authoritative in such determinations.[110] Thus, *stare decisis* applies less strictly. Prior opinions may be overruled, in particular when harmful and wrong—as indeed may be said of the high-court precedents that left thousands dying in prison for crimes committed as children, long after they achieved maturity and rehabilitation.[111] But, as *Anderson* demonstrates, when a court appears sharply and narrowly divided by basic intuitions about what is cruel, the result can seem an impasse.

The assessment here is meant to demonstrate how controversies over the procedures for realizing constitutional protections can be made more objective. Substituting objective evidence for subjective intuitions has obvious value in constitutional disputes: the spectacle of clashing intuitions, no less than the rewriting of prior cases, undermines the "actual and perceived integrity of the judicial process," to borrow Justice Yu's expression in her dissent.[112] The naturalized-epistemology approach provides a practical framework for using empirical evidence to improve the reliability of the methods judges use when adjudicating claims—in the *Anderson* context, when determining the procedures and inquiries needed to fulfill a constitutional imperative.

A. The Anderson *Majority's Reasons*

Before discussing the naturalized-epistemology approach further, the majority's reasons—and what they omit—merit attention. They exemplify

[110] Trop v. Dulles, 356 U.S. 86, 101 (1958); GARNER ET AL., *supra* note 13, § 40, 352 ("stare decisis applies less rigidly in constitutional cases"); Alleyne v. United States, 570 U.S. 99, 116, n.5 (2013) ("The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").
[111] *Anderson*, 516 P.3d at 1230 (González, C.J., dissenting) (overruling precedent requires showing that it is incorrect and harmful, citing State v. Pierce, 455 P.3d 647 (Wash. 2020)).
[112] *Id.* at 1235 (Yu, J., dissenting) (citations omitted).

how the distinctive legal practice of distinguishing cases can lead to disregard for both reasons that genuinely justify a decision and evidence that bears on whether the reasoning offered is sound. The significant argumentative work needed to distinguish prior precedent tends to displace genuine justifications, even though the mere existence of distinctions between cases cannot justify ignoring sound principles from prior precedents.

1. Objections to the Constitutional Bar

The majority opinion focuses mainly on arguing that its decision is not controlled by *Haag*'s precedent. As both the Introduction and Part I have made clear, that argument is indeed, as Justice Yu describes it, "unsupportable and indefensible":[113] for *Haag* did hold that *Bassett*'s prohibition of literal LWOP sentences extended to a forty-six-year minimum sentence, and under the law of judicial precedent, the majority had to show that the prior decision was both incorrect and harmful to overrule it.[114] Instead, the majority offers three arguments for creatively misreading *Haag*'s constitutional bar—none show error or harm.

First, the majority argues that term-of-years sentences differ from literal life without parole (even, presumably, when they exceed lifespan) because (1) they are not inherently harsher for juvenile offenders ("indeed, juveniles will be released at a younger age"), and (2) "the recognition that any term-of-years sentence may be a *de facto* life sentence for some offenders, depending on their age, is not related to any unique characteristics of juveniles."[115]

Reason (1) suggests a disconnection not only from social science but also the realities of life plain to every person of rudimentary empathy and

[113] *Id.* at 1233 (Yu, J., dissenting).
[114] *Id.* at 1229 (González, C.J., dissenting); *cf.* GARNER ET AL., *supra* note 13, § 47, 396 (reasons for overruling).
[115] *Anderson*, 516 P.3d at 1222.

imagination: any significant term of imprisonment is, of course, actually much harsher on young people, both because they are more vulnerable in prison and because the years they lose are so developmentally critical.[116] Extreme sentences will be destructive to everyone. But those imprisoned later in life have had time to complete their education, develop social connections, start a family, and achieve career goals. They face their imprisonment buoyed, in a way that no teenagers are, by those adult attainments. By contrast, those released after spending their youth and most of their adulthood in prison will struggle in the remaining years to build a meaningful life. They lose their prime years for having children; women are especially vulnerable in this regard due to the brevity of their reproductive years. A distinguished Washington Court of Appeals jurist, Judge Bjorgen, put the matter memorably: they lose the "richest years for experience and for growth, the years with the time and the means to find one's footing, the

[116] Elizabeth Scott et al., *Bringing Science to Law and Policy: Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J. L. AND POL'Y 13, 56–61 (2018) (discussing adolescence as a formative period "during which an individual's experience can shape the trajectory of his or her future life," noting that "the heightened malleability of the adolescent brain . . . makes it vulnerable to toxic experiences," and concluding that prison's "toxic developmental settings" are likely to be "particularly damaging at this stage of life"); *see* Straley, *supra* note 2, at 986, n.142 ("Entering prison at a young age is particularly dangerous. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults.") (citing JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT 11 (2006)). Explicitly acknowledging that "transferring youth and young adults to the adult criminal justice system is not effective in reducing criminal behavior" and that those who are transferred "are more likely to recidivate than their counterparts in juvenile facilities," Washington's legislature recently amended the law to postpone until age twenty-five (the age at which brain development is mostly complete) the transfer from youth detention facilities to adult prisons of those serving sentences for crimes committed when they were juveniles. H.B. 1646, 66th Leg., Reg. Sess., Ch. 322 (Wash. 2019). *See also* WASH. REV. CODE § 72.01.410 (providing that juveniles convicted of adult felonies may remain in juvenile detention facilities until they turn twenty-five if the Department of Corrections approves). But we may reasonably doubt that juvenile prisons are much less ruinous than adult prisons.

years with the most scope to shape one's future."[117] Early prison thus devastates far more powerfully than an identical sentence would later. Perhaps most notable here is the majority's apparent reliance on *a priori* conjecture about harshness, to the neglect of evidence that would be relevant to assessing it. Indeed, the only factor discussed by the majority—age at release—is a *non sequitur* when considered without regard to the age incarceration began.

Reason (2), meanwhile, appears to evade the well-established basis for added constitutional protections when sentencing the young. Surely greater capacity for change and lesser moral culpability are the two decisive "unique characteristics" of juveniles that relate to any sentences expected to deny people the opportunity for release, based solely on crimes they committed when they were young.[118] What makes such sentences constitutionally unacceptable is the recognition that these characteristics nearly always render such sentences cruel as applied to juveniles and that judges cannot reliably determine the rare instances when they might not be.

Second, it argues that *Bassett I* accepted that "judicial discretion generally provides the necessary protection against cruel punishment."[119] But that argument fails to acknowledge that *Bassett I* specifically excluded cases when a sentence effectively removes the opportunity for release.[120] That much discretion is precisely what *Bassett I* categorically prohibits.

Finally, the majority argues that *Bassett I* "recognized that an LWOP sentence could be permissible for juveniles whose crimes reflect irreparable corruption" and presumably, then, so too could a term of forty-six

[117] State v. Houston-Sconiers, 191 Wn. App. 436, 453 (2015), *aff'd in part, rev'd in part*, 188 Wn.2d 1 (2017); *see also* Straley, *supra* note 2, at 986, n.142; *cf.* State v. Gilbert, No. 33794-4-III, 2018 Wash. App. LEXIS 740 (Ct. App. 2018) (Fearing, J., dissenting).
[118] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 477, n.7.
[119] *Anderson*, 516 P.3d at 1222.
[120] *Bassett I*, 428 P.3d 343, 353–54 (Wash. 2018).

years[121]—neglecting that the court in *Bassett I* held that this theoretical permissibility could not justify ever actually imposing such sentences.[122] Its *ratio decidendi* (the reason for deciding) was precisely that the discretionary decisions involved are too unreliable.[123] Notably, the *Anderson* majority offers no reason whatsoever to suppose that discretionary judgments about those facing death in prison from term-of-years sentences are any more accurate than they are when defendants face literal LWOP—and that is the only reason the distinction could matter for the categorical bar.

2. Criticisms of the Constitutional Inquiry

The *Anderson* majority's argument for revisiting the constitutional inquiry, meanwhile, simply asserts that the U.S. Supreme Court's explanations in *Miller* and *Montgomery* of the line to be drawn between most juveniles whose crimes reflect transient immaturity and the rare juveniles whose crimes reflect irreparable corruption uses terms that "echo archaic notions"—and "wrongly suggests a juvenile offender's innate character determines the constitutionality of their punishment."[124]

As a preliminary matter, since the Court reserves to itself the prerogative to conclude that any of its prior decisions were wrong, the expression, "wrongly suggests," in the *Anderson* majority opinion must be construed here to mean that the majority believes the language inadvertently conveys the wrong impression, not that the majority considers the Court's method for determining the constitutionality of punishments wrong.[125] In this instance, however, a logical analysis of the Court's opinions leaves no doubt that it is the *Anderson* majority that has the wrong impression. The

[121] *Anderson*, 516 P.3d at 1224.
[122] *Bassett I*, 428 P.3d at 355.
[123] *Id.* at 354.
[124] *Anderson*, 516 P.3d at 1221, n.8.
[125] *Id.*

inquiry is indeed determined by the character of defendants—specifically, whether they exhibit that incapacity for change denoted by the expression "irreparable corruption"—and crimes are simply relevant evidence for that determination, not the focus. Were the *Anderson* majority correct that the inquiry really concerns whether the crimes, rather than the defendants, exhibit the mitigating qualities of youth (an especially strange idea indeed when only the most serious crimes result in *Miller* hearings), then rehabilitation would be irrelevant. But the contrary has long been recognized as true. The Court in *Montgomery* explicitly identified conduct since imprisonment as evidence relevant in *Miller* hearings to show rehabilitation.[126] Indeed, the same opinion, which commanded a six-justice majority, describes the view that even those who committed heinous crimes in youth are capable of change as *Miller*'s "central intuition." It could hardly have done so if change were irrelevant to *Miller* inquiries. Even the *Anderson* majority itself recognized Haag's current low risk of reoffending as a reason for extending state constitutional protections to him. The Court's opinions leave no doubt that the majority is mistaken: the Court was interested in the crimes only insofar as they could establish irreparable corruption. Indeed, the *Anderson* majority goes so far as to indicate discomfort with the "pejorative" quality of the Court's language—as if readers will fail to notice that the Court's superlatives meant to ensure that "all but the rarest" of defendants would be spared the cruel fate of dying in prison for crimes committed in youth, whereas the *Anderson* majority's anodyne language means to consign more to suffering that fate.[127] And,

[126] Montgomery v. Louisiana, 577 U.S. 190, 213 (2016). Justice Alito's dissent in *Miller*, which Justice Scalia joined, effectively concedes that "only the risk that these offenders will kill again" justifies LWOP sentences for juveniles, but argues legislatures are free to pass laws on the basis of their judgment about that risk. Miller v. Alabama, 567 U.S. 460, 515 (2012) (Alito, J., dissenting).

[127] *Compare Montgomery*, 577 U.S. at 195 (declaring LWOP unconstitutional for all but the rarest of juveniles, whose crimes demonstrated irreparable corruption) with *Anderson*, 516 P.3d at 1226 (declaring constitutional protections did not apply because

most relevant here, the majority omits considering whether the inquiry it proposes really admits of principled adjudication on the basis of objective evidence—or instead invites the exercise of unfettered arbitrary discretion.

Finally, as already discussed extensively, in both *Delbosque* and *Haag*, the Washington Supreme Court recognized that the key question on resentencing was a forward-looking assessment of rehabilitation, again underscoring that character is key to the constitutional inquiry.[128]

B. Applying Naturalized Epistemology to High-Court Constitutional Adjudication

Naturalized epistemology refers to a general philosophical project, most associated with philosopher W.V.O. Quine, that aims to develop a theoretical understanding of knowledge that is continuous with—if not wholly dissolved by—the methods of successful empirical sciences.[129] As a philosophical enterprise, it may seem far removed from the practice of law. But, as Ronald J. Allen and Brian Leiter demonstrate in *Naturalized Epistemology and the Law of Evidence*, normative social epistemology—the branch of naturalized epistemology that investigates social practices to determine how to reliably generate knowledge—provides "the most appropriate theoretical framework for the study of evidence, as it does for virtually any intellectual enterprise concerned with the empirical adequacy of its theories and the truth-generating capacity of its methodologies."[130] That claim may seem sweeping, but Allen and Leiter's application of the

defendant had not proven three hallmarks features of youthfulness were reflected in his crimes).

[128] State v. Delbosque, 456 P.3d 806, 815 (Wash. 2020); State v. Haag, 495 P.3d 241, 248 (Wash. 2021).

[129] *See, e.g.*, W.V.O. QUINE, EPISTEMOLOGY NATURALIZED IN ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69, 83 (1969) (arguing for the "reciprocal containment, though containment in different senses" of epistemology in natural science and vice versa). Note that although Quine eschewed the notion of knowledge for the technology of truth-seeking, his views accommodate reliabilist accounts of knowledge; *see* Alex Orenstein, Nature, know thyself *in* W.V. QUINE, ch. 8, 173, 186–87 (2002).

[130] Allen & Leiter, *supra* note 32, at 1493.

framework to the rules of evidence is illuminating. They assess the merits of rules of evidence that govern the admissibility of evidence in trials with juries, such as demeanor and character (to take two examples that can matter in the sentencing), and examine what empirical support there is for thinking such evidence would reliably improve the accuracy of court findings.[131] Such an approach has a particular—and largely unexplored—relevance for high courts when they determine how to fulfill constitutional promises.

Allen and Leiter use two criteria for assessing the rules of evidence they examine: (1) whether applying a given rule reliably leads jurors to the truth about a disputed fact; and (2) whether judges can reliably apply it.[132] In both cases, they reject the kind of armchair theorizing that has characterized the development of the common law, turning instead to available social-scientific evidence.

This approach foregrounds issues often neglected in judicial reasoning. The kinds of questions Allen and Leiter ask about rules of evidence can be productively adapted to the procedures devised by high courts to secure constitutional rights. What reason is there to think that a given legal inquiry will be settled by objective facts? Assuming such facts exist, what procedures make it likely that judges will reliably find them? What standard of appellate review would be required for consistency and reliability in such determinations? And if the judicial process remains imperfect, are the consequences that follow from the findings judges reach appropriately proportioned to the confidence we can expect to have in them?

While such questions may be beyond the ken of trial and intermediate appellate courts, they are just as certainly within the sphere of high courts, which have the power to define the analytic and evidentiary procedures judges follow, together with the standards of review that apply on appeal.

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[131] *See id.*
[132] *Id.* at 1499.

That power carries with it a responsibility to regulate the inquiries in ways that promote objectivity and accuracy. The responsibility weighs especially heavy in *Miller* sentencings. Such sentencings may irrevocably send someone to die in prison for their conduct in youth; only death-penalty proceedings have comparable stakes.[133] But none of the safeguards considered necessary for assuring reliability when imposing the death penalty have yet been deemed necessary for *Miller* sentencings. The contrast is stark. Prior to the recent abolition of capital punishment in Washington,[134] a unanimous jury had to make the decision to impose death by execution, and the state constitution mandated stringent procedural safeguards in the special sentencing proceeding leading to that decision: notably, the rules of evidence were applied strictly to the prosecution's case for aggravating factors, while the defense presented its case for mitigation under a more liberal rule admitting any relevant evidence.[135]

Despite the comparable stakes in *Miller* proceedings, a judge alone decides whether to impose death by imprisonment, and those decisions do not receive the special scrutiny that sentences of execution do. Although the Washington Supreme Court acknowledged in *State v. Ramos* that a *Miller* proceeding "is not an ordinary sentencing proceeding," that acknowledgment has yet to result in significant departures from the ordinary.[136] Washington Evidence Rule 1101(c)(3) states the rules of evidence need not be applied to sentencing proceedings, and the court has accordingly held that sentencing judges may generally consider a wide

[133] Graham v. Florida, 560 U.S. 48, 69 (2010) (recognizing that life-without-parole sentences for juveniles "share some characteristics with death sentences that are shared by no other sentences"); Miller v. Alabama, 567 U.S. 460, 462 (2012) (recognizing the same).
[134] S.B. 5087, 68th Leg., Reg. Sess. (Wash. 2023).
[135] State v. Bartholomew, 683 P.2d 1079, 1085–86 (Wash. 1984) (holding that Washington's constitution requires that the rules of evidence apply to aggravating evidence presented in death-penalty proceedings but not to mitigating evidence).
[136] State v. Ramos, 387 P.3d 650, 662 (Wash. 2017).

range of evidence, including hearsay—not only from defendants, as they do in capital sentencing proceedings, but also from prosecutors.[137]

This judicial complacence about *Miller* proceedings contrasts not only with the conspicuous vigilance courts display in capital-sentencing procedures, but also with the U.S. Supreme Court's zeal in recent Sixth Amendment cases to reject any use of judicial findings to satisfy statutory requirements that increase the punishment a defendant faces. In *Blakely v. Washington*, the Court deemed that a qualitative finding of "deliberate cruelty" that made a defendant's sentence more severe could not be entered by a judge: it required jury determination beyond a reasonable doubt.[138] Then, in *Alleyne v. United States*, the Court overruled a prior decision and held that such determination is also required for any fact other than a prior conviction that increases the minimum statutory punishment—not just for facts increasing the maximum sentence a defendant faces.[139] Nonetheless, some courts have tried to distinguish facts that implicate the right to trial by jury from qualitative determinations that call for judgment on weighed factors, which supposedly do not. But in *Hurst v. Florida*, the Court treated the determination that mitigating circumstances were insufficient to outweigh aggravating circumstances in a death-penalty sentencing context as a finding that a jury had to make—either independently rejecting this distinction or at least approving Florida's rejection of it.[140]

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[137] State v. Strauss, 832 P.2d 78, 86–87 (Wash. 1992) (holding that the rules of evidence do not apply to sentencing proceedings strictly, and so judges may consider any "reliable" evidence); *see also* State v. Deskins, 322 P.3d 780, 787 (Wash. 2014).

[138] Blakely v. Washington, 542 U.S. 296, 305 (2004).

[139] Alleyne v. United States, 570 U.S. 99, 103 (2013); *see also* Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000).

[140] Hurst v. Florida, 577 U.S. 92, 100 (2016). For full discussion, *see* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 502 (2019) (arguing "it is possible" to read *Hurst* as eliminating the distinction between factual and other findings that increase punishment); *id.* at 515 (arguing that reading *Hurst* this way promotes conceptual coherence in Sixth Amendment doctrine). Justice Scalia was characteristically direct about the breadth of the principle: "all facts essential to the imposition of the level of punishment that the defendant receives—

To be sure, the Court noted in *Alleyne* that its decision did not mean that all facts bearing on a judge's exercise of sentencing discretion must be found by a jury, and it approved the traditional leeway judges have had to impose sentences within limits set by statute.[141] But treating a *Miller* proceeding as an "ordinary" sentencing proceeding exempt from the Sixth Amendment creates other problems, quite apart from the notable incongruity of extending more substantial protections to adults who face the imposition of minor sentencing penalties on the basis of objective facts than to youths who face death by imprisonment under adult statutes on the basis of a judge's subjective discretionary decision about them.

Indeed, categorizing *Miller* proceedings as ordinary sentencings requires ignoring (1) the judicial recognition that the penalty at stake resembles the death penalty as no other sentence does, (2) the absence of any real difference between the qualitative judgment made in *Miller* proceedings and those made in *Hurst* and *Blakely*, and (3) the indistinguishable constitutional interest in ensuring that all findings that make punishments more severe are reliably found beyond a reasonable doubt by juries. True, the findings by judges that were found unconstitutional in the Sixth Amendment cases fulfilled legislative enactments specifying grounds for further punishment, whereas *Miller* proceedings impose a constitutional limit on legislative enactments that would have imposed cruel punishment without them. But this distinction between these judge-made findings captures no substantive difference, for constitutional provisions are themselves legislative enactments. In both cases, legislative authority grounds the imperative; in either context, a quantum of punishment depends on judgment of evidence. The holding that one constitutional provision *mandates* a proceeding that another provision of the very same constitution

whether the sentence calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

[141] *Alleyne*, 570 U.S. at 116–117.

would *forbid* if that proceeding had been imposed by statute brings out the current procedural regime's incoherence, since it suggests legislators violate the constitution if they pass a statute ordering the same proceeding the constitution requires. To bring the point out sharply: *Anderson*'s proposed constitutional rule requiring a judge alone to find affirmatively that a defendant's crimes did not reflect the mitigating characteristics of youth before imposing LWOP would, enacted in statute, seem to violate the Sixth Amendment. Of course, so would the formulations in *Miller*, *Montgomery*, *Delbosque*, and *Haag*—though by insisting on a stringent criterion for imposing the most severe permissible punishment, at least these articulations of the *Miller* test institute a safeguard that approaches those implied by the Sixth Amendment.[142]

For the foreseeable future, however, the Court seems unlikely to extend *Hurst*'s elaboration of Sixth Amendment constitutional doctrine into the *Miller* context.[143] *Jones* proves the Court's willingness to permit *Miller* proceedings to remain what they are now: contests in a judicial wilderness beyond the Sixth Amendment's reach, where neither party bears a burden of proof, no rules of evidence apply, the nature of the inquiry itself is sometimes disputed, and the outcomes receive only limited, deferential appellate review under the abuse-of-discretion standard, on the ground that

[142] *See* Hessick & Berry, *supra* note 140, at 517–20 (discussing the potential application of the Sixth Amendment to Miller proceedings). The authors note that the prosecution has yet to be required to disprove affirmative defenses beyond a reasonable doubt, even though that line of cases is at odds with *Apprendi* and its progeny. *Id.* at 499. The Court has in fact continued to approve forcing defendants to prove such defenses by a preponderance of the evidence. *See, e.g.*, Smith v. United States, 568 U.S. 106, 110 (2013) (holding that the conspirator asserting withdrawal from conspiracy bears the burden of proof). Nancy J. King and Susan R. Klein aptly describe such labels as a means for the government to circumvent the procedural safeguards in the Constitution. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1468–69. Regardless, the issue in *Miller* proceedings resembles the weighing of factors in *Hurst* far more closely than an affirmative defense such as withdrawal.

[143] *See, e.g.*, Miller, *supra* note 37, at 1369 (agreeing with scholars Carol and Jordan Steiker about the Court's reluctance to apply the Sixth Amendment to *Miller* proceedings).

all the issues are at least nominally factual. Nonetheless, *Jones* also emphasizes the freedom states have to fashion more rigorous protections for young people on their own, whether by legislative or judicial action. Justice Kavanaugh's opinion for the majority specifically notes that the available options include categorically prohibiting LWOP sentences, requiring added factual findings before imposing them, and instituting more rigorous appellate review when they are imposed.[144] He even cites Circuit Judge Jeffrey Sutton's book, *51 Imperfect Solutions*.[145] This call for reinvigorating state constitutional protection takes up an argument advanced decades ago by Justice Brennan—though he of course criticized the Court's retreat in the name of federalism from the duty of defending the rights of disfavored minorities.[146]

State high courts that accept this invitation, as Washington's has, face two distinct but related issues for which a naturalized-epistemology approach has relevance: (1) judging whether the state constitution's ban on cruel punishment may be violated absent additional protections (call it the Risk Issue) and (2) assessing the effectiveness of the protective measures the court could feasibly order (call it the Remedy Issue). But, with some exceptions, courts have looked to precedents rather than evidence in addressing the issues, and while the holding that the state constitution protects young people more strongly than the U.S. Constitution is well established in Washington, that has not entailed systemic overhaul. Instead,

[144] Jones v. Mississippi, 141 S. Ct. 1307, 1323 (2021).
[145] *Id.*; *see also* Jeffrey Sutton, *State Constitutional Law Steps Out of the Shadows: What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687 (2011).
[146] Brennan, *supra* note 34, at 550 (discussing the federal floor of protection). For a thoughtful survey of the potential for state constitutional action in this context, *see* Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023). And for trenchant doubts about relying on state constitutions, *cf.* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853 (2022) (arguing that state constitutions cannot provide the counter majoritarian protection of the rights of disfavored minorities that the U.S. Constitution can).

as *State v. Ramos* made clear, the court requires particularized showings of risk before ordering any deviations from the status quo.[147] Petitioners must show that a specific practice or procedure creates "an unacceptable risk" that a substantive constitutional rule will be violated—the substantive rule here being that those whose crimes in youth reflected a transient immaturity rather than irreparable corruption must have a meaningful opportunity to return to society.[148]

What counts as a sufficient showing of unacceptable risk remains unclear. Wary of appearing to tread on legislative prerogatives, state courts have decided cases in ways that avoid confronting either the Risk Issue or the Remedy Issue. In *Ramos*, despite acknowledging the "logical appeal" of requiring proof from the state that a defendant belongs to the exceptional class of irreparably corrupt persons who may be sentenced to die in prison, the court declined to reach whether the state constitution mandated this allocation of proof or, as amici argued, barred LWOP sentences for juveniles altogether, on the basis that neither appellant nor amici had adequately briefed the issue under the court's precedents on independent constitutional analysis.[149] Similarly, when asked to consider the degree of process necessary to avert substantive violations of the cruel-punishment clause in *State v. Gregg*, the majority refused to perform due-process analysis for the appellant's claim that the prosecution should bear the burden of showing the propriety of an adult sentence for a juvenile crime,

[147] State v. Ramos, 387 P.3d 650, 668 (Wash. 2017) (parties must "explain why enhanced protections are appropriate in specific applications").

[148] *See, e.g.*, *id.* at 662–63 (quoting the U.S. Constitution's "unacceptable risk" standard from Hall v. Florida, 572 U.S. 701, 704 (2014), which invalidated Florida's method for determining intellectual disability in capital cases); Matter of Monschke, 482 P.3d 276, 286 (Wash. 2021) (holding that mandatory LWOP for those over eighteen but under twenty-one did create an unacceptable risk of cruel LWOP sentences under the state constitution).

[149] *Ramos*, 387 P.3d at 663, 667–68 (declining to conduct independent constitutional analysis without specific arguments for enhanced protections under the criteria set out in State v. Gunwall, 720 P.2d 808 (Wash. 1986)).

reasoning that although due-process analysis did offer a framework for analyzing that claim, the appellant had disavowed that he was "bringing a due process claim."[150]

The *Ramos* court, notably, glossed the questions it did consider under the U.S. Constitution as "what procedures are necessary to give full effect to *Miller*'s substantive holding" and whether any current procedures created an unacceptable risk of violating that substantive holding.[151] Those questions, however, are logically equivalent: more protective procedures could only be necessary if current procedures were unacceptably risky, while current procedures could, conversely, only be unacceptably risky if more protections were necessary. And the *Ramos* court actually resolved the questions through precedent alone, combining the non sequitur that *Miller* had not mandated further protection with the conclusory assertion that the appellant had not shown an unacceptable risk—an assertion supported solely with the observation that courts do make defendants bear the burden of proving by a preponderance that they are too intellectually disabled to be executed.[152] The court did not mention that allocating the burden to a defendant to show exceptional intellectual disability accords with the longstanding principle that the party seeking an exception to the general rule must show their case is exceptional.[153] That very principle requires the opposite allocation of burden in *Miller* proceedings, since death in prison is permissible only for the rarest, irreparably corrupt exceptions to the general rule that the young are capable of change. By focusing on a surface similarity—both proceedings do concern whether a punishment is constitutional—the court neglected the underlying difference between them that matters under the governing legal principle: namely, in a proceeding

[150] State v. Gregg, 474 P.3d 539, 542 (Wash. 2020) (rejecting burden-shifting claim because it would "rewrite" the relevant statutes, the appellant offered no "helpful framework" for the analysis, and the appellant disavowed the due-process claim).
[151] *Ramos*, 387 P.3d at 662.
[152] *Id.* at 663–64.
[153] *See Gilbert I*, 2018 Wash. App. LEXIS 740, at *66 (Wash. Ct. App. 2018).

concerning whether execution is unconstitutional on grounds of intellectual disability, the defendant is the party claiming an exception, whereas in a *Miller* proceeding concerning the constitutionality of imposing imprisonment until death on a youth, the prosecution is.[154]

To some extent, courts can avoid such errors by carefully scrutinizing and articulating the relevant legal rules in the cases they consider. But a more fundamental—and less tractable—problem plagues arguments from analogy, which include the arguments from disanalogy by which courts distinguish cases. As Brian Larson observes in the survey of past studies with which he prefaces his recent analysis of analogical reasoning, while its champions consider such reasoning to be law's own distinctive method, the criteria they offer for judging instances of such reasoning fail to secure even modestly objective judgments.[155] Other defenders of analogical reasoning ("mystics," Larson calls them, adopting Scott Brewer's term in his seminal article) all but eschew method: they "do not explain how to discipline it" and instead celebrate the ineffable faculty practitioners use to recognize cases as relevantly similar, which they regard as the essence of lawyerly judgment.[156] Larson proposes using dialogical argumentative schemas from

[154] Such decisions of course also constitute significant evidence for the Legal Realist contention that legal principles play little if any role in judicial decisions. *See* Brian Leiter, *Explanation and Legal Theory*, 82 IOWA L. REV. 905, 908–09 (1997). Depending on the soundness of the principle, that might be good or bad: the gravamen of the argument here is that courts sometimes appear to decide cases without considering the relevant evidence for and against the rules that might govern their decisions, and that is certainly unlikely to be good.

[155] Brian N. Larson, *Law's Enterprise: Argumentation Schemes and Legal Analogy*, 87 U. CIN. L. REV. 663, 670 (2018) (arguing that previous theoretical studies of analogical reasoning "do not offer a means for someone outside the head of the legal reasoner to assess the quality of the reasoning."). *See, e.g.*, Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); *see also* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1995).

[156] Larson, *supra* note 155, at 665 and n.8; *accord* Ruggero, J. Aldisert et al., *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1, 18 (2007) (claiming "art . . . enters the picture" to determine whether cases are relevantly similar).

informal logic to supply the desired discipline. Although this theoretical innovation helpfully illuminates the problem by providing a set of criteria (exclusive criteria, or so Larson argues) for assessing arguments from legal analogy, it cannot resolve it: for Larson's set includes the very criteria—relevance and similarity—that prove most recalcitrant to figuring in a theory of adjudication that would support even modestly objective judgments.[157]

Realist critics base their skepticism about whether analogical reasoning has much method in it not only on the inextricable role relevance judgments have in any theoretical accounts of it, but also on the difference between judicial reasoning and judicial writing. Skeptical realists consider reasoning by analogy a feature of how judges justify their opinions, not how they decide the cases: according to Judge Posner, "a surface phenomenon [that] belongs not to legal thought, but legal rhetoric."[158] Moreover, as Posner also suggests, this rhetorical tactic serves judicial concealment rather than candor: by allowing judges to "get away with not stating a rule at all," analogical reasoning justifies departures from the "rules, doctrines, principles, and policies" of prior cases without disclosing what considerations really decided the case.[159]

Unfortunately, Posner attends more to excusing his colleagues for adopting this rhetorical strategy than to considering the vices it engenders. He suggests that analogical reasoning in judicial opinions exists to disarm

[157] Larson, *supra* note 155, at 703 (listing the author's exhaustive set of critical questions for determining whether an argument by legal analogy will succeed). These criteria are just as vulnerable as Brewer's to the charge that they fall short of an explicit theory of the relevance judgments that do the real work in analogical reasoning. *See* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L. J. 253, 271–72, n.76 (pointing out that the "significant rational constraints" on the process of analogizing and disanalogizing cases in Brewer's account still do not amount to a rational explication of judgments of relevance).

[158] Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006) (reviewing LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005)).

[159] *Id.* at 765, 774.

critics. It represents an elaborate, disingenuous performance of diffidence. The performance is needed because although judges must perforce legislate when there is no governing rule, courts are not "supposed to" promulgate rules that "have the 'feel' of legislation:" they lack "the full democratic legitimacy of a legislature."[160] (Here, Posner offers a version of the familiar populist condemnation of judges who supposedly legislate from the bench.) Although he thinks opinions could be more candid without harm to judicial legitimacy, he charitably ascribes the judiciary's penchant for avoiding disclosure of their actual (non-analogical) reasoning to prudence.[161] By claiming to be bound by precedent, judges avoid the shackles that giving clearly articulated policy reasons for their decisions could create, while legitimating their authority to a public that mostly fails to grasp how flexible a constraint precedent is.

There is insight in this recent picture of adjudication—particularly in its insistence on sharply distinguishing reason from rhetoric. But certain assumptions and omissions render this picture just as much an elaborately rhetorical production in defense of contemporary adjudication as the judicial opinions it would describe. Cases such as *Anderson* and *Ramos* highlight how the flattering—or at least extenuating—gloss Posner places on the judicial adoption of analogical reasoning as a rhetorical strategy fails to acknowledge its pernicious effects. After all, transparency—in the specific form of public opinions that disclose the reasoning of judicial actors—is widely touted as one of the judiciary's signal institutional virtues. Posner's claim that "it is naive to expect any public document to be entirely candid" is true, to be sure, just as it would be naive to expect public servants to be *entirely* competent.[162] But this claim only dodges the real

[160] *Id.* at 773.
[161] *Id.* at 768 (arguing that judges purposely exaggerate the difference between adjudication and legislation "so that legal decisions will be more acceptable to the laity"); *id.* at 773 (concluding that reasoning by analogy is a "method of cautious, incremental judicial legislating").
[162] *Id.* at 768.

issue, which is whether it is necessary—or wise—for courts to preserve their legitimacy by issuing opinions that deliberately and systematically misrepresent the reasoning they use to decide cases.

The evidence suggests otherwise. First, judicial legitimacy is not now and never has been seriously imperiled. As a historical matter, caution can hardly have been the original basis for analogical reasoning from cases: courts relied on precedents well before there was, or could have been, any challenge to their legitimacy on democratic grounds. Meanwhile, the contemporary concern about "legislating from the bench" remains something of a partisan hobbyhorse.[163] Indeed, research suggests that the U.S. Supreme Court's legitimacy was not damaged by public awareness that the Justices rely on their own extralegal views to make policy judgments when they decide cases.[164]

Thinking that courts lack the "full democratic legitimacy" needed to make rules reflects a failure to understand what sustains the particular kind of legitimacy the judiciary enjoys.[165] Not only does Posner fail to specify who exactly supposes this—one suspects it is a small though vocal political faction—but he also fails to offer any credible reason to think courts are less legitimate rulemakers than any other governmental institution. The imprimatur of electoral selection has never been the mainstay of judicial

[163] Jane S. Schachter, *Interpretation in the States: Polarization, Nationalization, and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1311, 1326–27 (observing the phrase's partisan coding in recent elections).

[164] James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. AND SOC'Y REV. 195, 213–14 (2011) (finding that the Court's legitimacy had not been undermined by public awareness that ideology did influence the Justices' decisions, likely due to the perception that judges exercised their discretion in a "principled" rather than "strategic" way). It is, of course, possible that some members of the public really do perceive the mystifications of analogical reasoning as more "principled" than genuinely principled reasoning from available evidence, but it is the proponents of mystification who bear the burden for making that counterintuitive case.

[165] For a recent nuanced discussion of evidence bearing on this point, *see* Schachter, *supra* note 163 (noting evidence that electing judges can harm legitimacy, even though respondents who agreed with the decisions of a court perceived it as more legitimate).

legitimacy. While many state judiciaries, including Washington's, are elected, others are not; the evidence does not show that appointed judges, state or federal, have much less legitimacy in consequence.[166] For many citizens, appointees may have more: the expectation that independent judges will protect the rights of unpopular minorities against the efforts of a majority to violate them has long been a key bulwark of the judiciary's distinctive brand of legitimacy, which may have its most important—and underdiscussed—source in perceptions of the judiciary's cognitive competence. After all, most (though not all) proponents of democracy accept judicial review of legislative enactments even though such review makes the judiciary's ruling about whether a statute violates a constitutional provision authoritative over the legislature. Perhaps the most convincing argument for such countermajoritarian authority is that the question of which branch should govern in a given sphere is instrumental. Institutional competence matters, and different institutions vary in their competence to govern different areas of civic life: constitutions generally reflect the judgment that courts, not legislatures, are better instruments for fulfilling broadly stated provisions protecting disfavored minorities, such as those barring cruel punishment—and the evidence so far vindicates that judgment.[167] Washington State's history supports the view that electoral democracy does not always protect the fundamental values most citizens in democracies claim to support.[168]

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[166] *Id.* at 1332 (reviewing conflicting evidence).

[167] *See, e.g.*, Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1199 (2012) (arguing that judicial review's institutional features make it the right mechanism for protecting rights). For doubts about whether the federal judiciary actually is sufficiently independent, *see* Aziz Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055 (2020).

[168] *See* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. Online 711, 778–81 (2020) (criticizing Vanessa Barker's claims both that Washington State is less punitive and that democratic participation explains why); *id.* at 809–10 (advocating an evidence-based approach to determining what institutional designs will achieve criminal justice outcomes "consistent with democratic values"). Marx, of course, gave the classic explanation for why democratic voting does not suffice

Granted, these considerations cannot gainsay the point that courts may face accusations that they are imposing a countermajoritarian policy "preference" when they do their duty and make policies that fulfill constitutional promises.[169] But a naturalized-epistemology approach has great practical value for jurists in this situation: normative social epistemology offers a way to demonstrate that a policy determination has been based not on idiosyncratic non-epistemic values, about which there is intractable disagreement, but rather on epistemic values (specifically, those undergirding scientific methodologies) about which there is substantial consensus.[170] By focusing exclusively on the evidentiary support for the

for government or law in the interest of the majority—namely the ideological distortion of the public's understanding of what would best serve their interests. For a fresh account of ideology that brings the Marxian analysis to bear on the alternatives to positivism in legal theory, *see* Brian Leiter, *Jurisprudence and (Its) History: Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1183–84 (2015) (explaining that ideology involves both a mistaken belief about what is in the general interest and a misunderstanding of how that mistaken belief came about); *id.* at 1195 (showing how Dworkin's non-positivist account of law functions as an ideological apologetic for the status quo). For the general argument that the competence principle (the principle that citizens have a right against being significantly harmed by the incompetence of decision makers) undermines the notion that the merely democratic legitimacy arising from a procedural norm such as universal suffrage suffices for genuine legitimacy, *see* JASON BRENNAN, AGAINST DEMOCRACY 156–57 (2016).

[169] Legal scholarship can reproduce this misleading trope. *See, e.g.*, Mount, *supra* note 15, at 410 (observing that one explanation for the *Bassett I* court's choice of the categorical bar analysis rather than the proportionality test set out in State v. Fain, 617 P.2d 720 (Wash. 2018) was that it enabled reaching "the desired policy outcome"); *id*. at 413 (explaining that the categorical bar test requires a court to exercise "independent judgment" about the disputed punishment);*id.* at 415–16 (suggesting that the court's decision may perhaps be "best explained" as the choice of "a test that all but guaranteed" finding juvenile LWOP unconstitutional). Exercising independent judgment could only "guarantee" a categorical ban in the sense that the punishment in question is so indefensible that even the justice advocating for deference to the legislature's judgment on the issue appears reluctant to defend it. *See* State v. Haag, 495 P.3d 241, 255 (Wash. 2021) (Stephens, J., concurring in part and dissenting in part) (suggesting that she "might prefer *Montgomery*'s interpretation of *Miller* to *Jones*'s as a matter of policy").

[170] Epistemic values, unlike non-epistemic ones, exhibit such convergence because of their practical value in delivering the results that science makes possible. For further discussion, *see* Brian Leiter, *Normativity for Naturalists* 64, 75 (U. of Chi. Pub. L. & Legal Theory Working Paper No. 527, 2015) (explaining the radical difference between

rationales behind decisions, naturalized epistemology offers a sharp corrective to analogical reasoning's penchant for drifting into a casuistic search for distinctions and similarities. And while this careful scrutiny of the rules, doctrines, principles, and policies that should really be decisive would serve candor and rigor in any case, the approach is especially apt for deciding what procedures will protect the constitutional rights high courts are responsible for upholding, because the demands of the constitutional imperative trump precedent in that context.[171]

Besides the lack of the asserted need to maintain legitimacy through disingenuous rhetoric, there are other grounds for resisting the picture Posner presents. As a threshold matter, analogical reasoning in opinions is unlikely to be as purely or universally a rhetorical strategy as he suggests.[172] Most decisively, however, regardless of whether judges use anagogical reasoning rhetorically or think of it (as some theorists appear to) as a distinctively legal form of reasoning, reliance on it has corrosive effects on the institutional competence so important to judicial legitimacy. For the most important virtue that the transparency afforded by opinions has for courts is permitting informed argument and criticism. When opinions contain misleading information about the kinds of evidence and argument judges consider decisive, advocates, legal scholars, and higher courts cannot effectively understand or review the decisions, much less seek to guide their legal reasoning, which is the responsibility of higher courts, in particular. Nor can courts then expect that the evidence and arguments

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the degree of practical constraint reality places on epistemic values and non-epistemic ones).

[171] *See supra* note 116 and accompanying text.

[172] One is that Posner is an unusual judge. Perhaps all judges and legal practitioners really are rhetorically sophisticated and self-conscious Realists like him. But the continuing controversies over both how analogical reasoning should be understood and how lawyers should be taught suggest otherwise. Even if those legal scholars whom Larson labels "mystics" and those who think art comes in when judging whether cases are relevantly similar are being disingenuous—and that seems doubtful—it would be credulous to suppose all their students see past the subterfuge.

presented to them by counsel will focus on what is relevant to their decisions—and that is indispensable for the effective functioning of the adversarial system.

While legal practitioners may generally lack explicit awareness of both normative social epistemology and its implications for approaching legal questions—and the rhetoric of court opinions has little place for technical terms from philosophy—the decisions by the U.S. Supreme Court in *Roper* and the Washington Supreme Court in both *Bassett I* and *Haag* show that courts already understand how empirical evidence can help resolve contested legal issues in an objective way. What proved decisive in *Roper* and *Bassett I* was the conclusion that sentencers could not accurately make proleptic judgments about the capacity of teenagers to rehabilitate.[173] In particular, the Court in *Roper* (upon which the *Basset I* court relied) reached that conclusion in light of the evidence that expert psychologists could not make such judgments reliably themselves. In *Haag*, meanwhile, the court assessed the implications of the challenged forty-six-year minimum sentence by considering empirical evidence about the diminished life span of incarcerated people, as well as the practical consequences of such a sentence.[174] Notably, because the empirical evidence is all on one side of these questions, the dissenters offered in reply only arguments about precedents and deference.

These rulings, however, merely scratch the surface of the available mines of evidence relevant to both the Risk Issue and the Remedy Issue. With regard to the Risk Issue—specifically, the risk that *Miller* proceedings will erroneously condemn those who have matured and rehabilitated or who could—it is now evident that some significant number of judges conclude that many or even a majority of the defendants they sentence are the rarest of children, since they have been imposing LWOP sentences on juveniles at

[173] Roper v. Simmons, 543 U.S. 551, 573–74 (2005); *Bassett I*, 394 P.3d at 445.
[174] State v. Haag, 495 P.3d 241, 250–51 (Wash. 2021).

remarkable rates: in Mississippi, more than 25% of *Miller* proceedings imposed LWOP, and in Louisiana, more than 57% did.[175] Due to the worldwide consensus against LWOP and juvenile LWOP in particular, as well as the growing consensus within the United States against juvenile LWOP, abundant data exist concerning the real rate at which adults who committed crimes in youth actually turn out to be any kind of candidate for this label.[176] Analyses drawing on statistics from a range of sources suggest those rates are an order of magnitude or two lower than the rates at which judges impose LWOP, at least in Mississippi and Louisiana—implying that at least nine out of ten recipients of LWOP in those two states do not merit

[175] *See* Jones v. Mississippi, 141 S. Ct. 1307, 1333–34 (Sotomayor, J., dissenting) (contrasting Mississippi and Louisiana with Pennsylvania, where state courts had required proof beyond reasonable doubt of incorrigibility).

[176] The United Nations Convention on the Rights of the Child, art. 37(a), 1577 U.N.T.S. 3, ratified by every country except the United States, requires nations ensure LWOP not be imposed for offenses committed by persons under eighteen; Twenty-five states have legislatively repealed juvenile LWOP. Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 552 (2022). Nine others have no one serving such a sentence. Miller, *supra* note 37, at 1355 n. 216. The high courts of Iowa and NJ have held that de facto life sentences violate their state constitutions, and the NJ Supreme Court held that juveniles must be eligible for release after twenty years. Smith et al., at 576. With regard to LWOP generally, some 200,000 people are serving de facto or literal LWOP sentences in the United States, a quarter without any possibility of release. *Id.* at 594–95. Such sentences are effectively nonexistent elsewhere. *See* Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315, 349–53 (2021) (discussing the European Court of Human Rights cases Vinter v. United Kingdom, 2013-III Eur. Ct. H. R. 317, requiring European states to have a mechanism to release substantially rehabilitated prisoners from life sentences in prison, and Hutchinson v. United Kingdom, App. No. 57592/08 (2017), finding the United Kingdom's judicially reviewable clemency process an adequate mechanism); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 952 n.64 (2016) (analyzing Vinter); William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L. J. 1051, 1073–74 (2015) (noting the consensus against the use of LWOP sentences even in cases of genocide and crimes against humanity). The Supreme Court of Canada, meanwhile, recently struck down a statute creating death-in-prison sentences through consecutive periods of parole ineligibility as unconstitutional. R. v. Bissonnette, 2022 SCC 23, ¶ 2–9.

such a sentence.[177] Studies specifically focusing on prisoners released as a result of *Miller*—those juveniles who presumably demonstrated maturity and rehabilitation—have shown effectively negligible recidivism in that group.[178]

It remains, of course, possible to argue that the level of risk suggested by the data is acceptable. The quantitative evidence, however, can usefully make concrete just how much risk of cruel punishment a practice creates. Prohibitions of cruel punishment carry more force than, say, the principle expressed in the Blackstone ratio rating each wrongful conviction more than ten times worse than the acquittal of a guilty party.[179] Blackstone's ratio may animate the reasonable-doubt standard now incorporated into due process and other constitutional provisions specifying particular defendant rights (e.g., to trial by jury and against self-incrimination) that, in theory, favor acquittal, but its influence comes from being an underlying rationale, or a boast—and even so, it falls well short of banning wrongful convictions.[180] By contrast, cruel-punishment clauses are explicit and

[177] *See* J.J. Prescott et al. *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1695–96 (2020) (finding that older people released after being convicted of a violent crime in their youth posed significantly less risk of committing a homicide than younger people released after committing a nonviolent crime); *id.* at 1697 (concluding that policies releasing people who committed crimes "in their youth and who have already served many years, pose minimal risk to public safety").

[178] Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141, 145 (2022) (discussing evidence showing juveniles convicted of homicide and released as adults have very low rates of recidivism and likely pose little threat to society); *id.* at 155–56 and n. 109–112 (discussing studies showing that there were only seven arrests and two relatively minor convictions from the 402 juvenile lifers released from four different jurisdictions after *Miller* resentencings—the two convictions being for contempt and third-degree robbery).

[179] 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1798). For wide-ranging discussions, *see* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997); Daniel Pi et al., *Quantifying Reasonable Doubt*, 72 RUTGERS U. L. REV. 455 (2020), 479–80 (discussing evidence that jurors do not understand the unquantified reasonable-doubt instructions that courts require them to be given).

[180] For trenchant doubts that the American legal system effectively protects innocent defendants, *see* Alex Kozinski, *Preface: Criminal Law 2.0*, 103 GEO. L. J. iii (2015) (discussing reasons to doubt the justice system favors defendants); *id.* at xli–xlii (urging

categorical. They do not suggest that cruel punishment is more than ten times worse than a just or lenient punishment, nor that when there is a reasonable doubt that a punishment may be cruel, it should not be imposed.[181] Instead, like most such provisions, article I, section 14 of the Washington State Constitution flatly forbids inflicting cruel punishment. It arguably brooks no risk, since only the total prohibition of a punishment that could be cruel can assure that it will not occur.

Turning, then, to the Remedy Issue, available evidence makes it doubtful that the additional procedural safeguards legal scholars have suggested to improve *Miller* proceedings—short of an outright ban on LWOP sentences—would actually fulfill the promise made by constitutional provisions banning cruel punishment.[182] Such safeguards range from applying Sixth Amendment standards to the prosecution's case for LWOP to the kind of eligibility requirements that exist in death-penalty sentencings.[183] But a widely cited review of convictions proven wrongful by DNA shows that full appellate review and the panoply of procedural

repeal of AEDPA because it is a "cruel, unjust, and unnecessary" law requiring federal judges to stand silent even when it appears state courts have convicted innocent defendants).

[181] Although state courts, including the Washington Supreme Court, sometimes say they will not strike down a statute unless it is unconstitutional beyond a reasonable doubt, this formulation has been devastatingly criticized. *See, e.g.*, Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt,"* 74 RUTGERS U. L. REV. 1429 (2022).

[182] On this point, there is something of a consensus: *see, e.g.*, Hannah Duncan, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole*, 131 YALE L. J. 1936 (2022); Juliet Liu, *Closing the Door on Permanent Incorrigibility: Juvenile Life without Parole after Jones v. Mississippi*, 91 FORDHAM L. REV. ONLINE 1033 (2022); Alice Roechman Hoesterey, *Juvenile (In)Justice: 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 (2017); Richard Zhao, *Second Chances: Why Michigan Should Categorically Prohibit the Sentence of Juvenile Life Without Parole*, 55 U. MICH. J.L. REFORM 691 (2022).

[183] *See, e.g.*, Miller, *supra* note 37, at 1355–56 (offering three procedural safeguards but acknowledging abolition of LWOP is "the first and best solution").

requirements designed to protect innocent defendants failed to identify these defendants: their cases were no more likely to be reversed than any other.[184] And because there is no analogue in *Miller* proceedings for exonerating DNA evidence that can, in at least some fortunate cases, show that a particular verdict was certainly wrong, the condemnations that issue in *Miller* proceedings cannot be so compellingly exposed. These considerations tell against a recent proposal to extend different evidentiary presumptions on LWOP sentences through the entire range of ages: the authors overestimate the protection that burden of proof can provide.[185]

Returning to the *Anderson* decision may help bring out why procedural improvements to *Miller* proceedings seem unlikely to ensure reliable outcomes and how the questions that normative social epistemology prompts can have a practical impact. To mention one point not discussed by either dissent, the *Anderson* majority taxes Anderson for failing to desist from crime after "he received extensive treatment and opportunities for rehabilitation" in juvenile custody.[186] But it is unclear what evidence, if any, supports such a characterization of juvenile custody, which those in the know more often describe as a gladiator school. In many respects, "imprecise and subjective" (*Bassett I*'s description)[187] understates the arbitrariness of the judgments that sentencing hearings invite judges to make. But the Washington Supreme Court knows that juvenile detention harms children, having been presented with a report in 2021 discussing

[184] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 127–28 (2008) (finding no significant difference between the reversal rate for defendants proven innocent and those not known to be innocent).
[185] David L. Faigman & Kelsey Geiser, *Using Burdens of Proof to Allocate the Risk of Error When Assessing Developmental Maturity of Youthful Offenders*, 63 WM. AND MARY L. REV. 1289, 1312 (2022) (proposing that the burden of proof and the party bearing it in *Miller* proceedings could shift along a spectrum from under eighteen to over twenty-six).
[186] State v. Anderson, 516 P.3d 1213, 1216 (Wash. 2022).
[187] *Bassett I*, 428 P.3d at 354.

exactly that.[188] Indeed, the court acknowledged in a recent opinion, "Courts do not incarcerate children because it is good for them."[189] Still, the *Anderson* majority opinion did not question the sentencing court's inference. Indeed, it even misdescribes the sentencing court as discussing each of the *Miller* "factors" when referring to consideration of only the three hallmark features of the first *Miller* factor, namely age and its attendant characteristics.[190] All the other *Miller* factors that might have supported Anderson's claim vanish. Anderson's older codefendant, Porshay Austin, the person who actually carried out one of the shootings for which Anderson was sentenced, received a deal from the state that released him a decade ago.[191] Yet the court did not consider whether that deal controverted the conclusion that Anderson's crime established he was a rare youth whose incapacity for rehabilitation permitted denying him any opportunity to demonstrate it later.

Looking at the different outcomes for Bassett, Haag, and Gilbert, it is tempting to speculate that the unavailability of a life sentence with a minimum term may have worked to Anderson's detriment. Courts may be more willing to impose reasonable minimum terms of imprisonment in the context of a life sentence that carries some assurance that release will be conditioned on a showing that the defendant is unlikely to commit another

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[188] Task Force 2.0 Juvenile Justice Subcommittee, *Race in Washington's Juvenile Legal System: 2021 Report to the Washington Supreme Court*, 57 GONZ. L. REV. 635, 673–74 (2021) (describing the extraordinary harms imprisonment causes young people); *see also* Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 859–63 nn.64–65 (2022) (describing the harm incarceration inflicts on juveniles and the success of alternative approaches).

[189] State v. J.W.M., 524 P.3d 596, 610 (Wash. 2023).

[190] *Anderson*, 516 P.3d at 1225.

[191] Sara Jean Green, *Supreme Court Upholds 61-Year Sentence in Washington Murders Committed When Defendant Was 17*, THE CHRONICLE (Sept. 11, 2022), https://www.chronline.com/stories/supreme-court-upholds-61-year-sentence-in-washington-murders-committed-when-defendant-was-17,299638 [https://perma.cc/7ZMK-J5KB].

crime.[192] But the larger lesson is surely that the guidance from higher courts may provide little effective constraint on sentencing judges, and judgments that seem arbitrary are the result.

And at a still more fundamental level, the premises of the *Anderson* majority's proposed inquiry invite empirical investigation. Does transient immaturity only dispose youths to commit crimes that reflect youthful characteristics, or does it cause temporary involvement by youth in crimes of all kinds?[193] Surely data ought to inform the answer, not armchair intuitions.[194] The only objection to that can be that evidence never informed the use of the sentencing practice in question at all.

CONCLUSION

The *Anderson* decision does more than simply walk back previously established constitutional bars on sentencing teens to die in prison. It reads Washington's constitutional protections as applying only to those convicted of "youthful" crimes—those who, even under Washington's draconian sentencing laws, rarely need such protection. On the *Anderson* majority's construal, they would not apply to most of the young people who actually

[192] Although WASH. REV. CODE § 10.95.030(3)(f) contains a nominal presumption of release absent evidence showing a likelihood that a new crime will be committed, the initial denial of release to Jeremiah Bourgeois despite his extraordinary record of achievement during incarceration suggests that can be misleading. *See* In re Pers. Restraint of Bourgeois, No. 79887-1-I, 2021 Wash. App. LEXIS 1918, *2–4, 2021 WL 3291764 (Wash. Ct. App. 2021).

[193] Relatedly, desire for objectivity drives Jane Stapleton's effort to persuade legal practitioners to use "involvement" as the causal concept in law. *See* JANE STAPLETON, CAUSATION IN THE LAW, *in* THE OXFORD HANDBOOK OF CAUSATION 744, 748 (Helen Beebee et al. eds., 2009).

[194] Data is not necessary, of course. *See* Eve Brensike Primus, *Incorporating Social Science into Criminal Defense Practice*, 44 CHAMPION 40 (2020) (noting that courts have "shown more willingness to incorporate social science data into their decisionmaking on criminal justice issues"). In *The Winter's Tale*, Shakespeare has an old shepherd explore the things that none but the "boil'd brains of nineteen and two-and-twenty." WILLIAM SHAKESPEARE, THE WINTER'S TALE, act 3, sc. 3, l. 70. "I would there were no age between ten and three-and-twenty, or that youth would sleep out the rest." *Id.* at l. 65.

need them—those convicted of serious crimes. In what, in another context, might be aptly described as a bravura move, the majority thus proposes to embed, within the very constitutional inquiry meant to protect rehabilitated people from death in prison for crimes they committed as youths, the specific ideology—"Adult Time for Adult Crime"—whose cruel legislative ramifications, in Washington and beyond, had prompted the emergence of constitutional protections from the High Court in the first instance. Ultimately, *Anderson* underscores the need for Washington's legislature to embrace second-chance parole reforms that would eliminate "a grave risk"—now, a certainty—"that many are being held in violation of the Constitution."[195]

[195] Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).